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When Terry Met Miranda: Two Constitutional Doctrines Collide

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WHEN *TERRY* MET *MIRANDA*: TWO CONSTITUTIONAL DOCTRINES COLLIDE

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INTRODUCTION

IN the 1984 case of *Berkemer v. McCarty*,[1] the United States Supreme Court stated that *Miranda* warnings[2] are not required during *Terry* stops[3] or other investigatory detentions analogous to *Terry* stops.[4] This statement made perfect sense at the time. Legal scholars knew that *Miranda* and the Fifth Amendment[5] were not implicated until the police placed a suspect in "custody," which the Supreme Court had defined as when a suspect's freedom of action is curtailed to a "degree associated with a formal arrest."[6] Likewise, at the time *Berkemer* was decided, Fourth Amendment[7] principles were clear that investigatory detentions of suspects made without probable cause under the auspices of *Terry* had to be brief, less intrusive than a formal arrest, and "substantially less 'police dominated' " than the type of police-citizen encounters at issue in *Miranda*.[8] Thus, no crossover be-

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1. 468 U.S. 420 (1984).

2. Although the intricacies of the *Miranda* doctrine will be developed in part I, "*Miranda* warnings" are recitations of a suspect's constitutional rights, including the right to remain silent and the right to counsel, which must be administered before a police officer can interrogate a suspect who is in police "custody." *See* Miranda v. Arizona, 384 U.S. 436 (1966); *see also infra* notes 14-64 and accompanying text.

3. Terry v. Ohio, 392 U.S. 1 (1968). A *Terry* stop is a "brief investigatory detention" discussed *infra* part II.

4. *Berkemer*, 468 U.S. at 440.

5. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

6. California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam).

7. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

8. Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (citation omitted).

tween the two doctrines existed. Because *Miranda* warnings were not required until a detention became or resembled an arrest, and a *Terry* stop was a Fourth Amendment detention that was substantially less intrusive than an arrest, *Miranda* warnings were not required during a *Terry* stop.

In a series of cases in the late 1980s and early 1990s, however, the lower federal courts, without guidance from the Supreme Court, dramatically expanded the level of force that police officers may use in certain *Terry* encounters.[9] Thus, it is no longer uncommon for police officers executing *Terry* stops to employ highly intrusive, "arrest-like" measures of force such as handcuffs or drawn weapons.[10] Under Fifth Amendment case law, these types of force are often considered to place a suspect in police "custody" and thereby necessitate *Miranda* warnings.[11] As a result, the recent expansion of *Terry* has, perhaps unknowingly, caused two important constitutional doctrines to clash. Many factual scenarios exist where a proper application of Fifth Amendment case law would mandate that *Miranda* warnings be administered because the suspect is in "custody"; yet, in the same scenario, an application of Fourth Amendment case law and the *Berkemer* decision would dictate that *Miranda* warnings are not necessary because the encounter is a mere *Terry* stop.

This catch-22 raises several questions that will have to be answered by the federal courts: Should *Berkemer* allow the Fourth Amendment to, in effect, trump the Fifth Amendment and nullify *Miranda*, even if *Miranda* would be applicable under pure Fifth Amendment analysis? Is *Berkemer* distinguishable now that Fourth Amendment law has changed? Has the expansion of *Terry* gone too far and confused an area of law that previously was clear and manageable to police officers? Should *Miranda* warnings now be required in some *Terry* situations? In 1993, the United States Court of Appeals for the Tenth Circuit was the first court to attempt to answer some of these questions in *United States v. Perdue*.[12] The Tenth Circuit distinguished *Berkemer* and explicitly held that *Miranda* warnings are mandatory in some highly intrusive *Terry* encounters.[13] The Tenth Circuit, however, had at least two other possible methods of resolving this conflict at its disposal, and the other federal courts, including the Supreme Court, will eventually have to decide the controversy for themselves.

This Article explores the conflict created by *Berkemer* and the recent expansion of *Terry* and attempts to answer some of the questions that the federal courts now face. Part I provides a brief overview of the *Miranda* doctrine, and answers the question: At what point during

9. *See infra* notes 98-126 and accompanying text.
10. *See infra* notes 98-126 and accompanying text.
11. *See infra* note 33 and accompanying text.
12. 8 F.3d 1455 (10th Cir. 1993).
13. *Id.* at 1465-66.

a police-citizen encounter are *Miranda* warnings required? Part II explores the Fourth Amendment and *Terry* and tracks the changes that *Terry* has gone through in recent years. This part also discusses *Terry's* relationship to *Miranda* at various points as *Terry* has evolved. Part III outlines the three options that the federal courts may invoke to resolve this conflict, compares the pros and cons of each option, and sets forth the author's view of what is the best course for courts to take in harmonizing several competing interests.

I. A BRIEF OVERVIEW OF *MIRANDA* AND THE FIFTH AMENDMENT

The *Miranda* doctrine is the one element that has remained relatively constant through the years. The *Miranda* opinion established the now familiar principle that, before engaging a suspect in "custodial interrogation,"[14] law enforcement officials must inform the suspect that he has a right to remain silent, that his statements may be used against him at trial, and that he may have retained or appointed counsel present during the interrogation.[15] The *Miranda* safeguards were designed to counteract the inherently compelling and intimidating pressures of police custodial interrogation and to create an environment where a suspect can freely and knowingly invoke his constitutional rights if he so desires.[16] The Supreme Court employed the exclusionary rule as a means of deterring police officers from ignoring the mandates of *Miranda*: If the police do not disclose to a suspect his rights before the interrogation begins, the prosecution may not use the suspect's subsequent incriminating statements against him during its case-in-chief at trial.[17] Because the *Miranda* warnings are not triggered until a police officer subjects a person to "custodial interrogation," the operative words in evolving *Miranda* jurisprudence have become "custody" and "interrogation." Most subsequent interpretations of *Miranda* by the Supreme Court and the other federal courts have simply been attempts to clarify and further define these two terms.[18]

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14. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

15. *Id.*; *see also* Office of Legal Policy, Department of Justice, *"Truth in Criminal Justice Series": The Law of Pretrial Interrogation*, 22 U. Mich. J.L. Ref. 437, 488 (1989) (discussing obligations that *Miranda* places on police officers); David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 Ohio St. L.J. 805, 806 (1992) (same).

16. *Miranda*, 384 U.S. at 467; *see also* Wollin, *supra* note 15, at 806-07 (explaining that *Miranda* warnings were designed to counteract compelling pressures of custodial interrogation).

17. *Miranda*, 384 U.S. at 444.

18. *See* Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 Chi.-Kent L. Rev. 127, 138 n.76 (discussing fact that "post-*Miranda* cases dwell on the definitions of custody and interrogation"); Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and* Miranda's *Concept of Custody*, 1993 U. Ill. L. Rev. 379, 380 (same).

A. *"Custody"*

The first definition of "custody" was set forth in *Miranda.* In that case, the suspect was arrested at his home, transported to the Phoenix police station in a cruiser, and then questioned by police officers in an isolated interrogation room.[19] The suspect signed a written confession after two hours of interrogation, and the arresting officers later admitted that they did not inform the suspect of his constitutional rights before they elicited his confession.[20] Holding the confession inadmissible and proffering the two-pronged "custodial interrogation" test as the method to determine when the prophylactic safeguards must be administered, the Supreme Court ruled that a person has been taken into police custody whenever he "has been . . . deprived of his freedom of action in any significant way."[21] Because this definition was vague and provided little guidance to the lower courts, the Supreme Court attempted to clarify it in subsequent cases.

In *California v. Beheler*,[22] the Court for the first time appeared to connect *Miranda* and the Fifth Amendment to Fourth Amendment concepts.[23] In *Beheler*, the suspect voluntarily called the police and informed them that he had aided and abetted a murder.[24] Later that day, he voluntarily agreed to accompany the police to the police station and submit to questioning, at which time he once again affirmed that he had been involved in a murder.[25] Before going to the station, the police informed him that he was not under arrest, and they did not administer *Miranda* warnings.[26] After being convicted, he appealed all the way to the Supreme Court, arguing that he was in police custody at the time of the interrogation; therefore, his confession was admitted into evidence at trial in violation of *Miranda.* In its holding, the Court reiterated the relevant language in *Miranda*, and then stated that "the ultimate inquiry [when determining whether a suspect has been placed in custody] is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[27] The Court then held that the suspect was not in custody, and thus no *Miranda* violation had occurred, because he voluntarily cooperated without any police coercion and the police did not restrain his freedom of action in a manner "associated with formal

19. *See* Miranda v. Arizona, 384 U.S. 436, 491 (1966). *Miranda* actually consisted of several consolidated cases raising the same issue, each with slightly different factual circumstances. Because all of the cases were similar factually, I use only Mr. Miranda's situation for illustrative purposes.
20. *Id.* at 491-92.
21. *Id.* at 444.
22. 463 U.S. 1121 (1983) (per curiam).
23. *See* Williamson, *supra* note 18, at 381.
24. *Beheler*, 463 U.S. at 1122.
25. *Id.*
26. *Id.*
27. *Id.* at 1125 (citation omitted).

arrest."[28] "Arrest," as will be discussed in the next section, is a term of art which, under technical Fourth Amendment jurisprudence, refers to the level of physical force that police may use to restrain a suspect if they have probable cause to believe that the suspect has committed a crime.[29] Thus, *Beheler* appeared to make the Fifth Amendment parallel to the Fourth Amendment—a suspect would not be considered in "custody," and therefore *Miranda* would not be triggered, until the level of police force or intimidation could be considered an arrest for purposes of the Fourth Amendment.

The Court's most recent significant pronouncement on the "custody" definition came in *Berkemer v. McCarty*,[30] which established an objective test for determining whether a suspect "was subjected to restraints comparable to those associated with a formal arrest."[31] According to the *Berkemer* Court, it is irrelevant whether the suspect personally felt restrained or believed that he was under arrest; rather, the only relevant inquiry is "how a *reasonable man* in the suspect's position would have understood his situation."[32] In construing these standards, courts almost universally have held that when police officers use handcuffs, point their guns at a suspect, or place a suspect in a cruiser, they have rendered him in "custody" for purposes of *Miranda*.[33]

28. *Id.* at 1125.

29. *See infra* part II.

30. 468 U.S. 420 (1984).

31. *Id.* at 441.

32. *Id.* at 442 (emphasis added).

33. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655 (1984) (holding that a suspect surrounded by police officers and in handcuffs was in custody); United States v. Perdue, 8 F.3d 1455, 1464-65 (10th Cir. 1993) (holding that a suspect questioned at gunpoint was in custody and thus *Miranda* warnings were required before interrogation); Fleming v. Collins, 917 F.2d 850, 853 (5th Cir. 1990) (same); United States v. Fazio, 914 F.2d 950, 955 (7th Cir. 1990) (holding that a suspect was not in custody because there was no evidence that he was handcuffed or held at gunpoint); United States v. Glenna, 878 F.2d 967, 970-71 (7th Cir. 1989) (discussing lower court's finding that a suspect in handcuffs is "manifestly" in custody, although ultimately holding that no *Miranda* violation existed because no interrogation occurred); United States v. Brady, 819 F.2d 884, 887 (9th Cir. 1987) (holding that use of handcuffs and pointing guns placed a suspect in custody), *cert. denied*, 484 U.S. 1068 (1988); United States v. Blum, 614 F.2d 537, 540 (6th Cir. 1980) (holding that placing a suspect in a police cruiser rendered him in custody); United States v. Baumwald, 720 F. Supp. 226, 235 (D. Me. 1989) (holding that a suspect was not in custody in part because officers did not draw their guns); United States v. Corral-Corral, 702 F. Supp. 1539, 1545 (D. Wyo. 1988) (holding that placing a suspect in a ditch in handcuffs rendered him in custody), *rev'd on other grounds*, 899 F.2d 927 (10th Cir. 1990); United States v. Guarino, 629 F. Supp. 320, 324-25 (D. Conn. 1986) (holding that a suspect whose hands were handcuffed behind his back and who was surrounded by armed agents would reasonably consider himself in custody); *see also* Daniel Yeager, *Rethinking Custodial Interrogation*, 28 Am. Crim. L. Rev. 1 (1990) (arguing that drawn weapons and handcuffs are two indicia of actual custody).

B. *"Interrogation"*

Once a suspect is in police custody, *Miranda* warnings are only necessary before the police subject him to "interrogation."[34] Thus, the second prong of the *Miranda* inquiry is devoted to determining what sort of questions constitute interrogation. The *Miranda* opinion itself provided little guidance, defining the term simply as "questioning initiated by law enforcement officers."[35] Subsequent cases have made clear, however, that many police investigatory tactics that fall short of direct questioning can be considered tantamount to interrogation. The Supreme Court's opinion in *Rhode Island v. Innis*[36] provides a case in point.

In *Innis*, a police officer was on a routine patrol when he spotted and arrested a man who had previously been identified as the assailant in a robbery that was linked to a recent murder.[37] Upon being read his *Miranda* rights, the suspect stated that he wanted to speak with a lawyer.[38] En route to the police station, one of the two police officers accompanying the suspect initiated a conversation with his fellow officer as they drove past the area where the recent murder had occurred.[39] The content of the conversation was that someone had recently been murdered nearby and that the officers were still searching for the missing gun that they believed had been hidden by the murderer.[40] The officers desperately wanted to find the gun and shells because a school for handicapped children was located nearby, and they feared that the children might find the gun and hurt themselves.[41] After one of the officers stated that "it would be too bad if [a little handicapped girl] . . . pick[ed] up the gun, [and] maybe kill[ed] herself,"[42] the suspect interrupted the conversation and announced that he would show the officers where he had hidden the gun.[43] He then led the officers to a place where the gun was hidden under some rocks, stating that he "wanted to get the gun out of the way because of the kids in the area in the school."[44]

The suspect subsequently was convicted of murder based on this evidence. The verdict was set aside by the Rhode Island Supreme Court, however, which held that the police officers had "interrogated" the suspect after he had invoked his right to counsel because their

34. Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).
35. *Id.* at 444.
36. 446 U.S. 291 (1980).
37. *Id.* at 293-94.
38. *Id.* at 294.
39. *Id.* at 294-95.
40. *Id.*
41. *Id.*
42. *Id.* at 295.
43. *Id.*
44. *Id.*

conversation had subjected him to "subtle coercion."[45] The United States Supreme Court reinstated the conviction, holding that "subtle compulsion" is not necessarily equivalent to "interrogation."[46] Despite its holding, the Court made clear that investigatory tactics that fall short of direct questioning may still be considered interrogation in some instances. The Court then proffered the modern definition that has become boilerplate language in most *Miranda* cases: "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[47] The Court was persuaded that interrogation had not occurred because the officers could not reasonably have anticipated that their "offhand" remarks would suddenly move the suspect to make incriminating statements.[48] The officers were not aware that the suspect was "peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children."[49] Nor did they know that the suspect "was unusually disoriented or upset at the time of his arrest."[50] Therefore, the conversation was not behavior that they should have known was "reasonably likely to elicit an incriminating response."[51]

The facts of *Brewer v. Williams*[52] offer a good backdrop against which to test the boundaries of the *Innis* standard.[53] In *Brewer*, a suspect who had been arrested for the abduction and possible murder of a ten-year-old girl was being transported by police from Davenport, Iowa, to Des Moines, where the abduction occurred.[54] Prior to leaving with the police officers, the suspect's attorney advised him not to make any statements to the police officers.[55] The suspect's attorney also obtained an agreement from the officers that they would not interrogate him during the drive.[56]

45. *Id.* at 296 (citing State v. Innis, 391 A.2d 1158 (R.I. 1978)).
46. *Id.* at 303.
47. *Id.* at 301 (footnote omitted).
48. *Id.* at 303.
49. *Id.* at 302.
50. *Id.* at 303.
51. *Id.* at 301.
52. 430 U.S. 387 (1977).
53. The *Brewer* case involved the question of whether the suspect was interrogated in violation of his Sixth Amendment right to counsel, not his Fifth Amendment *Miranda* rights. *Id.* at 397-98. Although the Supreme Court later stated in its *Innis* opinion that the definitions of "interrogation" in the Sixth Amendment and Fifth Amendment contexts are not necessarily interchangeable, Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980), the *Brewer* opinion nevertheless has become a guidepost in the Fifth Amendment context, and its facts are particularly good for a discussion of the *Innis* standard.
54. *Brewer*, 430 U.S. at 391.
55. *Id.*
56. *Id.* at 392.

During the 160-mile trip to Des Moines, though, one of the officers, who knew that the suspect was a former mental patient and was deeply religious, initiated the following monologue:

> I want to give you something to think about while we're traveling down the road.... Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.[57]

The suspect then asked the officer why he thought that the girl's body lay somewhere on the route to Des Moines, and the officer promptly responded that he knew the body was near the town of Mitchellville, although the officer in reality possessed no such knowledge. The officer stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."[58] Shortly before the cruiser reached the town of Mitchellville, the suspect informed the officers that he would direct them to the girl's body. The officers soon found the body in the place where the suspect claimed he had left it.[59] Based on the evidence elicited by the officer's "Christian burial speech," the suspect was convicted of first-degree murder.[60]

Without significant discussion, the Supreme Court overturned the conviction, holding that the suspect had been interrogated in violation of his Sixth Amendment right to counsel—even though no direct questioning occurred and the police officer had requested that the suspect not respond. In so holding, the Court did not elaborate on its operative definition of interrogation, but simply indicated in a conclusory manner that it had occurred.[61] Again, the Court has emphasized that the definition of interrogation in the Sixth Amendment and Fifth Amendment contexts are not necessarily the same,[62] and because *Brewer* is a Sixth Amendment case, it provides no precedential value towards the *Innis* standard. But the facts of *Brewer* significantly

57. *Id.* at 392-93.
58. *Id.* at 393.
59. *Id.*
60. *Id.* at 394 (citing State v. Williams, 182 N.W.2d 396, 402 (Iowa 1970)).
61. *Id.* at 400.
62. *See* Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980).

depart from the facts of *Innis* in such a way that, if it had addressed the issue, the Court in *Brewer* could have found that interrogation had occurred for purposes of the Fifth Amendment and *Miranda*. Specifically, in *Brewer* the police officer spoke directly to the suspect, while in *Innis* the police officers merely spoke between themselves. Also, in *Brewer* the officer knew that the suspect was deeply religious and might be susceptible to the "Christian burial speech," while in *Innis* the Court found that the officers had no similar knowledge of the suspect's weaknesses. With these differences, the officer in *Brewer* arguably should have known that his "Christian burial speech" was reasonably likely to elicit an incriminating response, and was, therefore, tantamount to interrogation under the Fifth Amendment.

To summarize the *Miranda* doctrine, the prophylactic safeguards are not required until the police engage a suspect in "custodial interrogation." "Custody" refers to the level of police force or intimidation that restricts a suspect's freedom of action in a "significant way," and to a "degree associated with formal arrest."[63] This determination is objective; that is, courts attempt to measure how a reasonable person in the suspect's position would have felt. "Interrogation" is direct questioning or any other words or actions by the police that they should know are "reasonably likely to elicit an incriminating response from the suspect."[64]

II. THE EVOLUTION OF *TERRY* AND ITS RELATIONSHIP THROUGH TIME WITH *MIRANDA*

Terry v. Ohio[65] established the principle that a police officer may use a limited amount of force[66] to "seize" a person, classified by the Court as a "brief investigatory detention," without probable cause that the person has committed or is in the process of committing a crime.[67] To effectuate a brief investigatory detention, which has become known as a "*Terry* stop," an officer must have "reasonable suspicion" that criminal activity is afoot.[68] "Reasonable suspicion" is a quantum of knowledge and suspicion that is less than "probable

63. *See supra* notes 5, 19-33 and accompanying text.

64. *See supra* notes 47, 51 and accompanying text.

65. 392 U.S. 1 (1968).

66. The word "force" refers to police conduct that intrudes on a person's privacy or freedom, such as touching, frisking, demanding that the person "freeze" and raise his arms, handcuffing, drawing weapons, pointing weapons, placing the person in a police cruiser, making the person lie on the ground, etc. The question of how much and what types of force police may use during a *Terry* stop, as *Terry* has changed through the years, is the central theme of this section of the Article.

67. *Terry*, 392 U.S. at 21.

68. *Id.* at 30. For a general overview of the *Terry* doctrine, see George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 Duke L.J. 849, 855-57; Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of* Terry v. Ohio, 34 How. L.J. 567 (1991); Karen S. Kovach, Note, *Search and Seizure: Sliding Scale Used to Determine Reasonableness Eroded*

cause," the level of suspicion required to make a full-scale Fourth Amendment arrest.[69] If, during a *Terry* stop, an officer uses a level of force that exceeds the maximum level permissible for such an encounter, the detention becomes an "arrest" that is unlawful unless the officer not only had reasonable suspicion but also had probable cause.[70] This imaginary line, representing the amount of force where a *Terry* stop becomes an arrest, has changed positions through the years as the federal courts have expanded *Terry*.[71]

A. *The Amount of Force Permissible: Early Terry*

The *Terry* opinion clearly establishes that *Terry* stops may involve only a minimal show of force. In that case, a police officer, who had reasonable suspicion (but not probable cause) that an armed robbery was about to take place, approached the suspects on a city sidewalk, identified himself as a police officer, and asked for their names. When one of the suspects, Mr. Terry, mumbled inaudibly in response, the officer grabbed him, spun him around, and proceeded to "pat down" the outside of his clothing. Upon feeling a gun in the pocket of Terry's coat, he ordered the suspects to enter a nearby store and place their hands high against the wall. On the way into the store, the officer removed Terry's coat containing the pistol. The officer then frisked the other two men and found a revolver on one of them. The officer later testified at the suppression hearing that he patted down their

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Probable Cause in United States v. Chaidez, 919 F.2d 1193 (7th Cir. 1990), 60 U. Cin. L. Rev. 857, 860-63 (1992).

69. Police officers have "reasonable suspicion" when they can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). In contrast, "[p]robable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Draper v. United States, 358 U.S. 307, 313 (1959) (citation and internal quotation omitted); *see generally* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659 (1994) (discussing the difference between "reasonable suspicion" and "probable cause"). The difference between reasonable suspicion and probable cause, as with many other aspects of the *Terry* doctrine, is irrelevant for purposes of this Article.

70. United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975). As one commentator describes:

> A forcible detention that exceeds what reasonably can be characterized as a "temporary" detention—that is, a detention that lasts longer than is necessary to effectuate the purposes of the seizure or one in which the investigative techniques employed during the detention are not the 'least intrusive' means reasonably available to verify or dispel the officers' suspicions in a short period of time—constitutes an arrest and must be supported by probable cause.

Williamson, *supra* note 18, at 383.

71. United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993) (discussing the expansion of *Terry* in the federal courts).

clothing only to determine whether they carried weapons, and he did not put his hands inside their clothing until after he felt a gun.[72]

After being found guilty of carrying concealed weapons, Terry appealed, contending that the frisk was a Fourth Amendment arrest that was not supported by probable cause. The Supreme Court affirmed the conviction and, in the process, carved out a new category of police "seizures," which could be made on reasonable suspicion rather than probable cause. The Court made clear, however, that because these *Terry* stops required a quantum of suspicion less than probable cause and thus represented a greater threat to the public's privacy, they had to be substantially less intrusive than full-scale arrests. Emphasizing that the *Terry* exception to the probable cause requirement must be "narrowly drawn,"[73] the Court strictly confined its holding to authorize only a stop and a "carefully limited search of the outer clothing of [a suspect] in an attempt to discover weapons which might be used to assault" an officer or passerby.[74] In street vernacular, this was called a "stop-and-frisk."[75]

Through the 1970s, most federal courts agreed that the *Terry* exception was very limited in terms of permissible force and that handcuffs, displays of weapons, time-consuming detentions, the placing of suspects in police cars, and other such intrusions that exceeded a mere stop-and-frisk were measures of force inappropriate for *Terry* stops.[76] For example, in 1974 in *United States v. Strickler*,[77] the Ninth Circuit held that the police had surpassed the bounds of a *Terry* stop when they surrounded a suspect's car and, with weapons drawn, ordered the occupants of the car to raise their hands above their heads.[78] The court stated: "[W]e simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands" with a brief and nonintrusive *Terry* stop.[79] Similarly, the Tenth Circuit in 1978 held in *United States v. McLemore*[80] that an otherwise valid *Terry* stop was converted into an arrest when the police ordered a suspect at gunpoint to put down the box he was holding, step over to a nearby plane, and place his hands against the side of the plane.[81] These two cases are typical of *Terry*-type cases through the 1970s when courts almost uniformly agreed that any police conduct

72. *Terry*, 392 U.S. at 7.
73. *Id.* at 27.
74. *Id.* at 30.
75. *Id.* at 10.
76. United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993) (discussing the recent "multifaceted expansion of *Terry*" to include indicia of force such as handcuffs and weapons which previously had been considered appropriate only for arrests); *see also infra* note 82.
77. 490 F.2d 378 (9th Cir. 1974).
78. *Id.* at 380.
79. *Id.*
80. 573 F.2d 1154 (10th Cir. 1978).
81. *Id.* at 1157.

that restricted a suspect's "liberty of movement" beyond a stop-and-frisk immediately elevated a *Terry* encounter to an arrest.[82] Indeed, one federal court even held that merely commanding a suspect "not to move" and to "get up against the wall" exceeded the narrowly defined limits of *Terry*—even though the arresting officers apparently did not draw their guns, touch the suspect, or use any physical force.[83]

During this era the federal courts were beginning to equate the Fourth Amendment concept of "arrest" with the *Miranda* concept of "custody."[84] In other words, courts believed that at the moment the amount of force used by police officers turned a *Terry* stop into a Fourth Amendment arrest, the suspect was in custody under the Fifth Amendment, and *Miranda* warnings became necessary.[85] As long as the level of force remained in the *Terry* realm, however, the suspect was not in custody, and *Miranda* warnings were not required.[86] Thus, it came as no surprise in 1984 when the *Berkemer* Court stated that *Miranda* warnings are not applicable to *Terry* stops.[87] In *Berkemer*, the suspect, Mr. Berkemer, was pulled over on an interstate highway for weaving in and out of a traffic lane. After approaching the vehicle, the officer asked Berkemer to get out of his car. The officer then noticed that Berkemer was having difficulty standing and asked him whether he had been using any intoxicants—a question that undoubt-

82. *See, e.g.*, United States v. Strickler, 490 F.2d 378, 380 (9th Cir. 1974) ("The restriction of Strickler's 'liberty of movement' was complete when he was encircled by police and confronted with official orders made at gunpoint.") (citations omitted); Moran v. United States, 404 F.2d 663, 666 (10th Cir. 1968) ("If a suspect is interrupted and his liberty of movement restricted by the arresting officers, then [an] arrest is complete."); *see also* United States v. O'Looney, 544 F.2d 385, 388 (9th Cir.) (holding that a *Terry* stop was valid in part because "[t]here were no drawn weapons, no evidence of handcuffs, no overt force and no threats"), *cert. denied*, 429 U.S. 1023 (1976); United States v. Anderson, 533 F.2d 1210, 1213-14 (D.C. Cir. 1976) (applying the probable cause standard to an encounter where police told a suspect to freeze and placed him in handcuffs); United States v. Whitlock, 418 F. Supp. 138, 142-43 (E.D. Mich. 1976) (finding that handcuffs and pointed guns turned detention into arrest), *aff'd*, 556 F.2d 583 (6th Cir. 1977). *But cf.* United States v. Richards, 500 F.2d 1025, 1028-29 (9th Cir. 1974) (holding that use of a pointed gun was permissible in a *Terry* stop where the officer first requested information without pointing the gun, and some show of force was the only way to stop the fleeing suspect from escaping), *cert. denied*, 420 U.S. 924 (1975).

83. *Moran*, 404 F.2d at 666.

84. For example, in United States v. White, 648 F.2d 29 (D.C. Cir.), *cert. denied*, 454 U.S. 924 (1981), the D.C. Circuit expressly equated the two terms, holding that "[w]hether there has been an *arrest* turns on whether there has been an imposition of *custody*." *Id.* at 33-34 (emphasis added) (citing Bailey v. United States, 389 F.2d 305, 314 (D.C. Cir. 1967) (Leventhal, J., concurring)). Similarly, in United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1979), the Ninth Circuit substituted the Fifth Amendment phrase "custodial interrogation" for the Fourth Amendment term "arrest," holding that "[t]he fundamental issue here is the line of demarcation between a *Terry* 'stop' requiring only reasonable suspicion, and . . . 'custodial interrogation' . . . requiring probable cause." *Id.* at 1287 n.2.

85. *See supra* notes 22-29, 84 and accompanying text.

86. *See supra* notes 22-29, 84 and accompanying text.

87. Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

edly was "reasonably likely to elicit an incriminating response."[88] Berkemer promptly replied that "he had consumed two beers and had smoked several joints of marijuana a short time before."[89]

After being convicted of driving under the influence of drugs, Berkemer appealed on Fifth Amendment grounds, claiming that he had been interrogated while in police custody without first having been read his *Miranda* rights.[90] The Supreme Court considered two facts to be of particular importance:

> First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he will most likely be allowed to continue on his way.[91]

Second, the Court was compelled by the fact that traffic stops usually occur in public where the scrutiny of passersby reduces the chance that police officers will use illegitimate means to elicit incriminating statements.[92] Noting that "the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself,"[93] the Court analogized a traffic stop to a *Terry* stop.[94] It then summarized the *Terry* doctrine in a manner consistent with views of the time—*Terry* stops were brief, limited, and noncoercive.[95] Accordingly, the Court held:

> The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.[96]

The message was clear. Because *Terry* stops were minor intrusions that did not threaten a suspect's ability to invoke his constitutional rights or place him in "custody," *Miranda* was simply inapplicable. The Supreme Court therefore affirmed the admission of Berkemer's statements made during the traffic stop. This view accorded with the

88. Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnote omitted).
89. *Berkemer*, 468 U.S. at 423.
90. *Id.* at 424-25.
91. *Id.* at 437.
92. *Id.* at 438.
93. *Id.* at 438-39 (citation omitted).
94. *Id.* at 439.
95. *Id.* at 439-40.
96. *Id.* at 440.

opinions of most of the lower federal courts that considered the issue during the era preceding *Terry's* expansion.[97]

B. *The Amount of Force Permissible: The Recent Expansion of Terry*

Beginning around the time that the *Berkemer* decision was handed down, and gaining steam in the early 1990s, the federal courts dramatically expanded the level of force permissible during *Terry* stops.[98] This expansion has not been uniform or clean-cut, and has left *Terry* jurisprudence in a state of semi-confusion. Although it is difficult to succinctly summarize where this trend has left the line that divides a *Terry* stop from an arrest, many highly intrusive forms of force such as handcuffs, pointed guns, and the placing of suspects in cruisers—measures of force that used to be prohibited during *Terry* stops—are now routine.[99]

At least nine of the federal courts of appeals have now authorized the use of handcuffs during *Terry* stops.[100] The Seventh Circuit decision in *United States v. Tilmon*[101] is illustrative. In *Tilmon*, police officers had reasonable suspicion (but not probable cause), premised on

97. *See, e.g.*, United States v. McGauley, 786 F.2d 888, 890-91 (8th Cir. 1986) (holding that no *Miranda* warnings were necessary for persons detained for a *Terry* stop); United States v. Streifel, 781 F.2d 953, 959 (1st Cir. 1986) (same); United States v. Jones, 543 F.2d 1171, 1173 (5th Cir. 1976) (stating that *Miranda* warnings are not necessary during *Terry*-type traffic stops), *cert. denied*, 430 U.S. 957 (1977); United States v. Hickman, 523 F.2d 323, 326-27 (9th Cir. 1975) (holding that questioning during a *Terry* stop did not require *Miranda* warnings), *cert. denied*, 423 U.S. 1050 (1976).

98. United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994) ("In the recent past, the . . . 'permissible scope of the intrusion [under the *Terry* doctrine has] expanded beyond [its] original contours.' ") (quoting United States v. Chaidez, 919 F.2d 1193, 1198 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2861 (1991)); United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993) (discussing this trend); Williams, *supra* note 68 (discussing the expansion of *Terry*); *see also infra* notes 100-28.

99. *See infra* notes 100-28.

100. *See, e.g.*, United States v. Smith, 3 F.3d 1088, 1095 (7th Cir. 1993) (holding that handcuffing does not necessarily turn a stop into an arrest); United States v. Merkley, 988 F.2d 1062, 1064 (10th Cir. 1993) (holding that handcuffing is reasonable without probable cause where there is a possibility of danger); United States v. Saffeels, 982 F.2d 1199, 1206 (8th Cir. 1992) (holding handcuffing to be a reasonable precaution during an investigative stop), *vacated on other grounds*, 114 S. Ct. 41 (1993); United States v. Williams, No. 91-3097, 1992 U.S. App. LEXIS 25808 (D.C. Cir. Oct. 6, 1992) (unpublished opinion); United States v. Esieke, 940 F.2d 29, 36 (2d Cir.) (holding that handcuffs and leg irons during border detention does not violate the Fourth Amendment), *cert. denied*, 112 S. Ct. 610 (1991); United States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989) (holding handcuffing reasonable during a stop to protect the officer and to prevent flight); United States v. Hemphill, 767 F.2d 922 (6th Cir.) (holding that handcuffing of suspects known to be armed and dangerous did not convert a stop into an arrest), *cert. denied*, 474 U.S. 982 (1985); United States v. Kapperman, 764 F.2d 786, 790 n.4 (11th Cir. 1985) (holding that handcuffing does not automatically convert a *Terry* stop into a *de facto* arrest); United States v. Taylor, 716 F.2d 701, 709 (9th Cir. 1983) (holding that handcuffing where a suspect disobeyed an order to raise his hands and made hand movements did not convert a stop into an arrest).

101. 19 F.3d 1221 (7th Cir. 1994).

information received from police radio dispatches, to stop Mr. Tilmon's car to investigate a bank robbery that had just occurred. After pulling him over, the officers informed Tilmon over a loudspeaker that he should get out of his car with his hands up and lie face down on the shoulder of the road. He immediately complied. Several police cruisers were then strategically situated around Tilmon's automobile, effectively blocking it in. After Tilmon was in the lying-prone position, several officers approached him with weapons drawn (some guns were pointed at Tilmon while others were pointed at his car), handcuffed him, and placed him in one of the police cruisers.[102]

In trying to determine whether this show of force was within the permissible bounds of a *Terry* stop, the Seventh Circuit began its analysis by noting that "[f]or better or for worse," *Terry* had expanded beyond its "original contours" in the recent past.[103] The court also stated that, because the distinction between a *Terry* stop and a [de facto] arrest is "subtle" and "perhaps tenuous," there is no "litmus-paper test for determining when a seizure exceeds the bounds of [a *Terry*] stop."[104] Then, without significant discussion, the court held that the entire seizure, including the use of handcuffs, was reasonable.[105] In this respect, the court merely stated: "Neither does handcuffing in all circumstances transform a stop into an arrest. In fact, handcuffing—once [considered] highly problematic—is becoming quite acceptable in the context of a *Terry* analysis."[106]

Similarly, brandishing weapons—and even holding suspects at gunpoint—have become commonplace during *Terry* stops. At least six circuits have approved such shows of force in recent years.[107] In *Tilmon*, the police officers not only pointed guns at the suspect as they approached him, but they placed a shotgun against his head while they

102. *Id.* at 1223.

103. *Id.* at 1224.

104. *Id.* (citing Florida v. Royer, 460 U.S. 491, 506 (1983)).

105. *Id.* at 1226.

106. *Id.* at 1228 (footnote omitted).

107. *See, e.g.*, United States v. Alvarez, 899 F.2d 833, 838-89 (9th Cir. 1990) (holding that forcing the defendant out of his vehicle at gunpoint "did not convert the investigative stop into an arrest"), *cert. denied*, 498 U.S. 1024 (1991); United States v. Taylor, 857 F.2d 210, 214 (4th Cir. 1988) (explaining that forcing the defendant out of his vehicle at gunpoint was a "valid precautionary measure designed to afford a degree of protection to the investigating officer"); United States v. Serna-Barreto, 842 F.2d 965, 967-68 (7th Cir. 1988) (noting that an officer acted reasonably in pointing his gun at the defendant during a stop); United States v. Jones, 759 F.2d 633, 638-41 (8th Cir.) (holding that officers' removal of their guns from their holsters was reasonable), *cert. denied*, 474 U.S. 837 (1985); United States v. Merritt, 695 F.2d 1263, 1273 (10th Cir. 1982) (noting that the police were "justified in holding shotguns on the suspects during the course of the stop"), *cert. denied*, 461 U.S. 916 (1983); United States v. Jackson, 652 F.2d 244, 249 (2d Cir.) (holding that it was not unreasonable for a police officer to draw his gun when he approached a vehicle whose driver was suspected to be an escaped and armed bank robber), *cert. denied*, 454 U.S. 1057 (1981).

handcuffed him and removed him to a cruiser.[108] In upholding this conduct as appropriate for a *Terry* stop, the Seventh Circuit stated:

> 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 [*Terry*] stops.[109]

In *United States v. Hardnett*,[110] the Sixth Circuit faced a similar question. In that case, police officers effectuated a *Terry* stop by approaching Mr. Hardnett's car with their guns drawn and ordering him and the other passengers out of the car at gunpoint.[111] Hardnett claimed that the highly intrusive use of guns elevated the stop to an arrest unsupported by probable cause. In affirming the district court's denial of his suppression motion, the Sixth Circuit held:

> The question of whether an investigative stop crosses the line and becomes an arrest has spawned much judicial discussion .... Looking at all the circumstances surrounding the seizure of Hardnett, we do not find that the officers' conduct was so intrusive as to constitute an arrest. We recognize that the officers' show of force—approaching Hardnett's car with their guns drawn and ordering the occupants out of the car at gunpoint—was highly intrusive and under some circumstances would certainly be tantamount to an arrest. However, the mere use or display of force in making a stop will not necessarily convert a stop into an arrest. Where the display or use of arms is viewed as "reasonably necessary for the protection of the officers," the courts have generally upheld investigative stops made at gunpoint. That is, if the surrounding circumstances give rise to a justifiable fear for personal safety, a seizure effectuated with weapons drawn may properly be considered an investigative stop.
>
> We believe that the use of arms in the present case was reasonably necessary under the circumstances. The officers were acting in a situation which justified a fear for personal safety. The officers had been told . . . that the occupants of the car . . . were armed. Therefore, when the officers approached the car, it was reasonable for them to display their weapons for their own protection. Under these circumstances, the use of arms did not convert the . . . stop into an arrest.[112]

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108. United States v. Tilmon, 19 F.3d 1221, 1223 (7th Cir. 1994).

109. *Id.* at 1227 (citing United States v. Serna-Barreto, 842 F.2d 965, 968 (7th Cir. 1988)).

110. 804 F.2d 353 (6th Cir. 1986), *cert.denied*, 479 U.S. 1097 (1987).

111. *Id.* at 355.

112. *Id.* at 356-57 (citations omitted).

The Sixth Circuit's analysis in *Hardnett* is a perfect example of what I will call the "two-tiered" model, the model that several circuits have adopted when expanding *Terry*. Under this approach, if an officer does not have a reasonable belief that he may be harmed when he approaches a suspect, traditional *Terry* analysis applies and the use of handcuffs and weapons is unlawful. If the officer reasonably believes that the suspect is armed and dangerous, however, he may use a heightened level of force that includes weapons and handcuffs to neutralize the suspect before the investigation begins. Thus, in jurisdictions that take this approach, two types of *Terry* stops exist depending on how dangerous the situation appears to the officer. In *Hardnett*, the Sixth Circuit recognized that the officers' use of guns could have elevated the stop into an unlawful arrest if the circumstances had been different;[113] it was the sole fact that the officers had been informed over the police dispatch that the suspects were armed and dangerous that compelled the court's conclusion that the use of guns was reasonable.[114]

Similarly, the Tenth Circuit adopted the two-tiered model in *United States v. Perdue*.[115] In approving the officers' display of guns during a *Terry* stop, the court stated:

> It was not unreasonable under the circumstances for the officers to execute the *Terry* stop with their weapons drawn. While *Terry* stops generally must be fairly nonintrusive, officers may take necessary steps to protect themselves if the circumstances reasonably warrant such measures. "[T]he use of guns in connection with a stop is permissible where the police reasonably believe [the weapons] are necessary for their protection."[116]

The Tenth Circuit went on to approve the officers' placing of Mr. Perdue in the lying-prone position at gunpoint, stating:

> We believe that the officers were also justified in ordering Mr. Perdue out of the car and onto the ground as a means of neutralizing the potential danger. Directing the suspect to lie on the ground provided the officers with a better view of the suspect and prevented him from obtaining weapons which might have been in the car or on his person. As discussed earlier, the officers had reason to be concerned for their safety and thus could take reasonable steps to protect themselves.[117]

The Tenth Circuit's summary in *Perdue* clearly embraced the two-tiered model:

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113. *Id.* at 357.

114. *Id.*

115. 8 F.3d 1455 (10th Cir. 1993). The facts of *Perdue* are discussed *infra* notes 131-36 and accompanying text.

116. *Id.* at 1462 (quoting United States v. Merritt, 695 F.2d 1263, 1273 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983)).

117. *Id.* at 1463 (citations omitted).

> In short, the officers conducted a reasonable *Terry* stop. Although bordering on an illegal arrest, the precautionary measures of force employed by the officers were reasonable under the circumstances. . . . [However,] the force used against Mr. Perdue would have constituted an arrest were it not for the fact that the officers had knowledge that Mr. Perdue could be armed and dangerous.[118]

In addition to the Sixth and Tenth Circuits, the Seventh,[119] Ninth,[120] and D.C.[121] Circuits have endorsed some form of the two-tiered approach. The Second Circuit, on the other hand, recently adopted a multifactor test to distinguish *Terry* stops from arrests.[122] This test considers the amount of force used by the police, the need for such force, the extent to which the suspect's freedom was restrained, the number of officers involved in the detention, whether the officers had knowledge that the suspect was armed, the duration of the detention, the physical treatment of the suspect, and whether handcuffs were employed.[123]

In sum, while it is clear that the *Terry* stop has expanded far beyond its original contours, no universal, disciplined method exists for measuring when such a stop is converted into an arrest. Even courts that have adopted some form of the two-tiered model differ in regard to how narrowly they limit the circumstances under which highly intrusive, "arrest-like" *Terry* stops are lawful. For example, the Tenth Circuit has made clear that officers may use handcuffs and weapons during a *Terry* stop only if they have reasonable suspicion that the suspect is armed and dangerous.[124] Under Tenth Circuit case law, therefore, the prosecution has the burden of submitting sufficient evidence to support a finding that the officers were reasonably justified in fearing an armed attack; if such evidence is not submitted, then traditional *Terry* analysis applies and arrest-like measures of force, such as handcuffs and drawn weapons, are unlawful.[125] The Seventh Circuit, on the other hand, recently authorized the use of handcuffs during a *Terry* stop in a case in which the officers had absolutely no

118. *Id.* at 1463-65.

119. United States v. Tilmon, 19 F.3d 1221, 1226 (7th Cir. 1994) (holding that officers may use heightened force during *Terry* stops if "circumstances give rise to a justifiable fear for personal safety").

120. United States v. Greene, 783 F.2d 1364, 1367-68 (9th Cir.) (holding that officers may use force during *Terry* stops, such as drawn guns, if they reasonably fear for their safety), *cert. denied*, 476 U.S. 1185 (1986).

121. United States v. White, 648 F.2d 29, 34-35 (D.C. Cir.) (allowing display of weapons if the suspect poses a threat to the officers), *cert. denied*, 454 U.S. 924 (1981).

122. United States v. Perea, 986 F.2d 633, 645 (2d Cir. 1993) (adopting the multifactor test).

123. *Id.* at 645.

124. United States v. Perdue, 8 F.3d 1455, 1462-65 (10th Cir. 1993).

125. United States v. Melendez-Garcia, 28 F.3d 1046, 1052-53 (10th Cir. 1994).

knowledge or reasonable suspicion that the suspects were armed and dangerous.[126]

The bottom line is that, despite the inconsistencies and confusion that pervade modern *Terry* analysis, *Terry* stops—as a whole—have become much more intrusive than they were just a few years ago. It is commonplace for these investigatory detentions to involve handcuffs, drawn weapons, the lying-prone position, the removing of suspects to police cruisers, and other forms of force that used to be appropriate only for full-scale arrests. Thus, with its recent expansion, *Terry's* conflict with the *Miranda* doctrine is clear. Under pure *Miranda* jurisprudence, warnings are required whenever a suspect is interrogated in police "custody."[127] The use of handcuffs, drawn weapons, and the placing of suspects in cruisers are all generally considered to render a suspect in "custody," thereby necessitating *Miranda* warnings.[128] On the other hand, *Terry* stops now often involve these same indicia of force, but the law has been clear and well-settled that *Miranda* warnings are not required during *Terry* stops. Which rule controls now that the recent expansion of *Terry* has changed the dynamics of the equation?

III. THREE OPTIONS

The value of any judicially imposed rule of criminal procedure can be measured by balancing two countervailing factors: 1) the extent to which the rule protects the privacy interests and civil liberties embodied in the Bill of Rights; and 2) the extent to which, on the other hand, the rule frustrates or undermines legitimate law enforcement efforts.[129] A third theme that resonates through criminal procedure jurisprudence is the simplicity of the rule; that is, courts ask whether police officers could reasonably be expected to understand the rule and apply it accurately and consistently in the heat of the moment.[130] Thus, along with other variables, such as the extent to which it accu-

126. United States v. Smith, 3 F.3d 1088, 1095-96 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 733 (1994).

127. *See supra* notes 19-33 and accompanying text.

128. *See supra* notes 19-33 and accompanying text.

129. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 441 (1984) (discussing the balance between privacy interests and law enforcement efforts); Terry v. Ohio, 392 U.S. 1, 24 (1968) (same); *see also* Herbert L. Packer, The Limits of the Criminal Sanction 149-204 (1968) (discussing countervailing factors in criminal procedure jurisprudence); John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 Yale L.J. 359 (1970) (same).

130. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227 (1984) (discussing the Supreme Court's trend toward "bright-line" criminal procedure rules); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307 (1982) (same); *see also Berkemer*, 468 U.S. at 431-32 (discussing the need to avoid "Byzantine" rules); Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (discussing the need for simplicity).

rately follows precedent, each of the three options that follow can be measured in terms of: 1) how well it protects civil liberties and enforces the Constitution; 2) how effectively it does so without substantially undermining law enforcement efforts; and 3) whether it avoids extreme complexity so that police officers can realistically be expected to apply it accurately in real world situations.

A. *Option One: Miranda Inapplicable to All Terry Encounters*

Although its decision was ultimately reversed by the Tenth Circuit, the United States District Court for the District of Kansas held in *United States v. Perdue* that *Miranda* warnings are not required even during the newly created, "arrest-like" *Terry* stops.[131] This was a case of first impression because even though numerous courts in the past had held that *Miranda* warnings are not implicated during *Terry* stops, no court had yet addressed that issue specifically in light of the recent expansion of *Terry*.[132] Even though the district court's decision was reversed in pertinent part by the Tenth Circuit, which held that *Miranda* warnings can be implicated in some highly intrusive *Terry* situations, other federal courts that face the issue may consider the district court's analysis in *Perdue* a viable option. In *Perdue*, police officers executed a search warrant at a rural location in Kansas after aerial surveillance revealed that marijuana was being grown on the property. Two helicopters, several police cruisers, and more than twenty officers were involved in the search. The officers not only found marijuana, but they also discovered loaded weapons in a shed on the property. The information concerning the weapons was transmitted by radio to two officers stationed at the outside perimeter of the property next to a dirt road that led to the area where the search was being conducted. After receiving this information, the two officers witnessed a car approaching them on the dirt road. They became suspicious; because the location was so remote, it was reasonable to assume that the occupants of the car might be visiting the property under investigation. The two officers became even more suspicious when the driver of the car suddenly turned his car around and attempted to leave after the swarm of officers and helicopters surrounding the shed came into his line of vision.[133]

The two officers then quickly positioned themselves on the dirt road, with their guns drawn and aimed at the occupants of the car, in an attempt to block the car from leaving the property. The car promptly stopped, and the officers then ordered the two passengers,

131. United States v. Perdue, No. 91-40052-01, 1992 U.S. Dist. LEXIS 8508, at *5-7 (D. Kan. May 1, 1992) (unpublished), *rev'd in part*, 8 F.3d 1455, 1461 (10th Cir. 1993).

132. *See Perdue*, 8 F.3d at 1461 (pointing out that the *Perdue* case raised novel and "unique questions concerning the subtle interplay between *Terry* [and] *Miranda*" after the expansion of *Terry*).

133. *Id.* at 1458.

Mr. Perdue and his fiancee, at gunpoint to exit the car with their hands up and to lie face down on the dirt road. Perdue immediately complied, but his fiancee could not because she was nearly nine months pregnant. One of the officers stood over Perdue with his gun drawn while Perdue was lying face down in the dirt and asked him what he was doing on the property. Perdue responded that he was there to "check on his stuff."[134] The officer asked, "What stuff?" and Perdue conveniently replied: "The marijuana that I know that you guys found in the shed."[135] The officer then asked whose marijuana it was, and Perdue repeated that it was his and his fiancee's. It was not until after this interview was completed that the officers read Perdue his *Miranda* rights.[136]

At trial, Perdue moved to suppress the statements he made while lying on the dirt road, contending that they were elicited during custodial interrogation without the safeguards required by *Miranda v. Arizona*.[137] In holding the confession admissible, the district court began by determining that the officers had properly executed a valid *Terry* stop.[138] The court found that the officers had reasonable suspicion based on the location and movements of the automobile, and that, consonant with the recent expansion of *Terry*, the pointing of guns and other such shows of force did not elevate the stop into a Fourth Amendment arrest, especially since the officers had specific knowledge that the owners of the marijuana could be armed and dangerous.[139] The court held, without significant discussion, that no violation of *Miranda* occurred because the encounter was a mere *Terry* stop and not an arrest.[140] The district court did not perform a separate *Miranda* inquiry to determine whether Perdue was in "custody" or whether he had been "interrogated," apparently finding it unnecessary to engage in such analyses once a determination has been made that the encounter was a mere *Terry* stop. Yet, as the Tenth Circuit later pointed out, one cannot seriously dispute the fact that under pure Fifth Amendment and *Miranda* case law, Perdue was in police custody while lying on the ground at gunpoint, and the questions asked him amounted to interrogation because they were "reasonably

134. *Id.* at 1459.

135. *Id.*

136. *Id.*

137. 384 U.S. 436, 444 (1966).

138. United States v. Perdue, No. 91-40052-01, 1992 U.S. Dist. LEXIS 8508, at *5-7 (D. Kan. May 1, 1992) (unpublished), *rev'd in part*, 8 F.3d 1455 (10th Cir. 1993).

139. *Id.* The government conceded at trial and on appeal that probable cause was lacking, and therefore, the Fourth Amendment issues revolved solely around *Terry*-type analysis. *See Perdue*, 8 F.3d at 1462. As the facts of *Perdue* indicate, the government could have made a strong argument that probable cause existed, and therefore, that a full-scale arrest was lawful.

140. *Perdue*, 1992 U.S. Dist. LEXIS 8508, at *6-7.

likely to elicit an incriminating response."[141] But the district court's succinct decision made clear that, in its view, only when a *Terry* stop becomes an arrest must a suspect be "Mirandized"—regardless of whether the result would be the same under pure Fifth Amendment "custody" and "interrogation" analyses.[142]

Although this view suffers from some major analytical flaws given the very recent expansion of *Terry*,[143] it is understandable how the federal district court in *Perdue* could have arrived at its position given the current state of criminal procedure jurisprudence. At the time that the district court faced the issue in 1992, it was widely accepted, and, in fact, it was considered common knowledge, that *Miranda* was simply not implicated during *Terry* stops.[144] Tenth Circuit case law, which the federal district court in Kansas was bound to follow, appeared to be clear on that point.[145] Even the Supreme Court as recently as 1984 in *Berkemer v. McCarty* had stated that *Terry* stops are not "subject to the dictates of *Miranda*."[146]

Consider also the Supreme Court's language in *California v. Beheler* indicating that *Miranda* warnings are not required until a suspect has been restrained to a "degree associated with formal arrest."[147] It could be argued that this language connects *Miranda* to the Fourth Amendment and sets forth an analytical structure where *Miranda* is not triggered until an encounter leaves the *Terry* realm and becomes a full-scale Fourth Amendment arrest. In other words, because *Miranda* warnings, according to *Beheler*, are not implicated until a detention resembles a Fourth Amendment arrest—and because *Terry* stops, by definition, fall short of Fourth Amendment arrests—*Miranda* warnings are not implicated during *Terry* stops. Thus, under this option, the question of whether *Miranda* has been triggered hinges primarily upon Fourth Amendment analysis; that is, whether the detention is classified as a *Terry* stop or an arrest under Fourth Amendment doctrine.

Of the three factors discussed in the introduction to this section, this first option serves two of them well—the rule is rather easy for police officers to follow, and it does not undermine law enforcement efforts by placing undue burdens on police investigative activities. On the other hand, privacy and civil rights suffer greatly under this option. As the facts of *Perdue* and the holding of the Kansas district court

141. *Perdue*, 8 F.3d at 1464-65 (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

142. *Perdue*, 1992 U.S. Dist. LEXIS 8508, at *5-7.

143. The analytical flaws inherent in this view will be discussed in part III.B.

144. *See supra* notes 95-97 and accompanying text.

145. *See, e.g.*, United States v. Adams, Nos. 92-6001, 92-6221, 1992 U.S. App. LEXIS 25791, at *5-6 (10th Cir. Oct. 5, 1992) (holding that *Miranda* warnings are not necessary during *Terry* stops).

146. Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

147. California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam).

clearly illustrate, if the view becomes widely adopted that *Miranda* is never implicated during *Terry* stops—even during the new, "arrest-like" stops—then the chance that police officers will interrogate suspects at gunpoint without probable cause and without administering the counteracting *Miranda* safeguards is greatly increased. Indeed, in *Perdue*, the suspect was interrogated in the lying-prone position at gunpoint without probable cause, but the district court's holding and analysis explicitly authorized this type of police conduct. Because the use of handcuffs and the placing of suspects in police cruisers also recently have become accepted during *Terry* stops,[148] officers also will have broad authority to use these forms of force to elicit confessions during *Terry* stops from suspects who may not be aware of their constitutional rights. Additional problems with this approach will be discussed in the following sections.

B. *Option Two: Miranda Applicable to Terry Stops That Become Custodial*

The second alternative is reflected in the Tenth Circuit's opinion in *United States v. Perdue*.[149] On appeal from the Kansas district court, the Tenth Circuit reversed Mr. Perdue's conviction by holding that his incriminating statements were elicited without the required safeguards of *Miranda*—despite the fact that the interrogation occurred during a valid *Terry* stop.[150] The primary analytical distinction between this option and the first option concerns the constitutional doctrine that controls the timing of when *Miranda* is triggered; option one relies on Fourth Amendment jurisprudence (*i.e.*, the *Terry* stop/arrest dichotomy), while option two performs Fourth and Fifth Amendment analyses separately and applies the Fifth Amendment definitions of "custody" and "interrogation."

In reversing Perdue's conviction, the Tenth Circuit began its constitutional analysis by scrutinizing the encounter under the Fourth Amendment.[151] The government conceded that the officers on the scene could not have effectuated a full-scale arrest because they did not have probable cause that the driver of the car owned the marijuana; therefore, the only issue was whether the officers properly executed a valid *Terry* stop.[152] Citing the recent expansion of *Terry*, the Tenth Circuit agreed with the lower court that the officers' use of guns and their placing of Perdue face down in the dirt did not convert the encounter into an arrest.[153] Proffering the "two-tiered" ap-

148. *See supra* notes 100-28 and accompanying text.
149. 8 F.3d 1455 (10th Cir. 1993).
150. *Id.* at 1467.
151. For a discussion of the facts of *Perdue*, see the text accompanying notes 131-36.
152. *Perdue*, 8 F.3d at 1462. In this respect, the court found that the officers did have the requisite reasonable suspicion to make a *Terry* stop. *Id.*
153. *Id.* at 1463.

proach,[154] the court noted that the officers stationed at the perimeter of the property had been informed that loaded guns were found in the shed, and therefore, it was reasonable for them to use a heightened level of force to "neutralize" any suspects that they encountered on the property.[155] As a result, the court found that the officers had constitutionally administered a valid *Terry* stop.

Unlike the district court, however, the Tenth Circuit did not believe that the constitutional inquiry ended with the Fourth Amendment. Because the district court had allowed Fourth Amendment doctrine to control not only the *Terry* stop/arrest distinction, but also the separate issue of when the Fifth Amendment is invoked, the Tenth Circuit criticized it for "merg[ing] several distinct constitutional inquiries into one."[156] Before the Tenth Circuit could turn to analyze the facts under Fifth Amendment case law, however, it had to square its analysis with existing precedent and the Supreme Court's language in *Berkemer*,[157] both of which dictated that *Miranda* warnings are simply not required during *Terry* stops.[158] The Tenth Circuit distinguished those earlier holdings as emanating from an era when *Terry* stops were far less intrusive than they are today. The court recognized that in *Berkemer*—the opinion holding that *Miranda* warnings are not required during *Terry* stops—the Supreme Court was speaking only in terms of the brief, noncoercive *Terry* stops typical of that time.[159] In other words, existing precedent on the subject was, for the most part, outdated:

> The traditional view, consistent with the district court's conclusion, is that *Miranda* warnings are simply not implicated in the context of a valid *Terry* stop. . . . This view has prevailed because the typical police-citizen encounter envisioned by the [Supreme] Court in *Terry* usually involves no more than a very brief detention without the aid of weapons or handcuffs, a few questions relating to identity and the suspicious circumstances, and an atmosphere that is "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda*."
>
> Thus, historically, the maximum level of force permissible in a standard *Terry* stop fell short of placing the suspect in "custody" for purposes of triggering *Miranda*.[160]

The court recognized that "[t]he last decade . . . has witnessed a multifaceted expansion of *Terry*," particularly in terms of the amount of force police officers are allowed to use during such detentions.[161]

154. *See supra* note 118 and accompanying text.
155. *Perdue*, 8 F.3d at 1462-63.
156. *Id.* at 1461.
157. Berkemer v. McCarty, 468 U.S. 420, 421 (1984).
158. *See supra* notes 90-97 and accompanying text.
159. United States v. Perdue, 8 F.3d 1455, 1464-66 (10th Cir. 1993).
160. *Id.* at 1464 (citations omitted).
161. *Id.*

Given this expansion, "[o]ne cannot ignore the conclusion" that a suspect subjected to a *Terry* stop where guns, handcuffs, or other such forms of force are used is in the type of " 'custodial' situation envisioned by *Miranda* and its progeny."[162]

Concerning the Supreme Court's language in *California v. Beheler*,[163] which indicated that *Miranda* warnings are not required until a suspect's freedom of action is curtailed to a "degree associated with a formal arrest,"[164] the Tenth Circuit noted that the pointed guns and other measures of force used by the officers in *Perdue* were uses of force that traditionally have been associated with the concept of "arrest."[165] Thus, in the context of the time at which it was decided, the *Beheler* Court's reference to certain types of force that could trigger *Miranda* because they restrained a suspect's freedom of action to a degree "associated with formal arrest" was probably to handcuffs, drawn weapons, the lying-prone position, and the placing of suspects in police cruisers. That those measures of force are now common in *Terry* stops does not change the fact that *Miranda* may be invoked when they are employed. Implicit in the Tenth Circuit's analysis in *Perdue*, therefore, is the idea that *Beheler* did not make the Fifth Amendment dependent on Fourth Amendment doctrine; rather, the Supreme Court in *Beheler* was simply making a convenient analogy to Fourth Amendment terminology because the concepts of "custody" and "arrest" happened to be roughly equivalent in that era.[166]

Although it suffers from some flaws that will be discussed shortly, the Tenth Circuit's analysis in *Perdue* has its strengths. First, it persuasively distinguishes *Berkemer v. McCarty*.[167] *Berkemer* was handed down when *Terry* stops were still considered brief, nonintrusive encounters.[168] In holding that *Terry* stops are not "subject to the dictates of *Miranda*," it is clear that the Supreme Court was envisioning a *Terry* stop as a brief encounter, without the use of handcuffs or weapons, where the officer merely frisks the suspect and/or asks him a few questions relating to his identity and the suspicious circumstances.[169] Its holding does not in any way stand for the proposition that *Miranda* is inapplicable to the type of *Terry* stop that occurred in *Perdue*—the *Berkemer* Court did not address that issue because the highly intrusive *Terry* stops that are common today did not exist then.

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162. *Id.*

163. 463 U.S. 1121 (1983) (per curiam).

164. *Id.* at 1125.

165. United States v. Perdue, 8 F.3d 1455, 1464-65 (10th Cir. 1993).

166. *Id.*; *see also* Williamson, *supra* note 18, at 381 (explaining that *Beheler* "specifically equated *Miranda's* concept of custody with the Fourth Amendment concept of arrest").

167. 468 U.S. 420 (1984).

168. As discussed *supra*, *Berkemer* was published in 1984, while the expansion of *Terry* occurred primarily in the late 1980s and early 1990s.

169. *See supra* notes 95-96, 159-61 and accompanying text.

The Tenth Circuit also did a better job of handling *Beheler*[170] than did the district court. As previously stated, at the time *Beheler* was decided, measures of force that restrained a suspect's freedom to a degree "associated with formal arrest" included handcuffs, the lying-prone position, placing suspects in police cruisers, and drawn weapons.[171] *Beheler* stands only for the proposition that the use of those measures of force is likely to trigger the need for *Miranda* warnings. Furthermore, as the Tenth Circuit pointed out, the idea that a court should look to Fourth Amendment doctrine to determine whether the Fifth Amendment and *Miranda* have been triggered defies logic. As the district court's opinion in *Perdue* illustrates, such a view in effect allows the Fourth Amendment to trump the Fifth Amendment; if no Fourth Amendment violation occurred, then a court does not perform Fifth Amendment analysis regardless of whether the Fifth Amendment was in fact violated. The Supreme Court has made clear, however, that *Miranda* is applicable whenever a suspect is subjected to "custodial interrogation" and that the warnings are necessary whenever the policies behind the *Miranda* doctrine mandate its application.[172] Thus, *Miranda* is controlled by the Fifth Amendment and the policies that support it, not by the Fourth Amendment.

In sum, the second option holds that *Miranda* warnings are necessary during *Terry* stops that become custodial in nature. This option better protects civil liberties than does the first option because it ensures that the Fifth Amendment is not neglected or "trumped" where it otherwise would apply. It also is truer to the spirit of the *Miranda* doctrine and deciphers the actual meaning of the controlling Supreme Court opinions more persuasively than does the first option.[173] In addition, requiring officers to recite the *Miranda* safeguards during certain *Terry* stops does not place an undue burden on investigative activities. Such a requirement is at most a minor inconvenience to police officers.[174]

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170. 463 U.S. 1121 (1983) (per curiam).

171. *See supra* notes 159-66 and accompanying text.

172. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 435-38 (1984) (stating that the *Miranda* doctrine is triggered when the policies supporting *Miranda* mandate its application); Williamson, *supra* note 18, at 387 (same); *see also* Wollin, *supra* note 15, at 823-25 (same).

173. A recent article criticizes *Perdue* for extending *Miranda*. *See* Recent Cases, *Criminal Law—Exclusionary Rule—Tenth Circuit Holds* Miranda *Warning Applicable to* Terry *Stops*, 107 Harv. L. Rev. 1831 (1994). It is clear, however, that the Tenth Circuit's opinion in *Perdue* did not expand the *Miranda* doctrine in any sense, but simply applied traditional Fifth Amendment analysis without allowing the Fourth Amendment to "trump" the Fifth Amendment. The author of *Tenth Circuit Holds* Miranda *Warning Applicable to* Terry *Stops* simply analyzed the conflict backwards. *Miranda* has not expanded into the *Terry* realm; rather, the problem has been caused by *Terry's* expansion into the *Miranda* realm. The *Perdue* opinion merely recognized *Terry's* expansion while retaining *Miranda* at its previous dimensions.

174. *But see id.* (arguing that *Perdue*'s requirement that police officers "Mirandize" suspects during *Terry* stops that become custodial places an undue burden on law

The major problem with this approach is its complexity, which the Tenth Circuit did not address in *Perdue*. Before the expansion of *Terry*, when the concepts of "arrest" and "custody" were considered roughly equivalent, the rule was rather easy to follow. Police officers knew that, as a general rule, *Miranda* warnings were not required during *Terry* stops, but the warnings had to be administered when an encounter escalated into a full-scale arrest. After *Perdue*, the scenario is not so easy. Not 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 *Terry* stop or a non-custodial *Terry* stop? Many more categories of encounters exist after *Perdue* which police officers will have to sort through while attempting to detain a suspect in a rapidly unfolding, potentially hostile situation. It remains to be seen whether the structure enunciated by the Tenth Circuit in *Perdue* will be manageable, or whether it will lead to more confusion, and ultimately, more convictions being reversed because of error by police officers.

C. *Option Three: Terry Returned to its Intended Contours*

Although it was apparently not considered by either the district court or the Tenth Circuit in *Perdue*, the third option is rather simple: Return the *Terry* doctrine to its pre-expansion dimensions, and thereby diffuse the tension that has recently been created between *Terry* and *Miranda*. Under this option, the resulting procedure would be easy for police officers and courts to manage: *Terry* stops would, once again, be brief, nonintrusive affairs, where police officers are prohibited from using any "arrest-like" measure of force that might trigger *Miranda*. Under this approach, *Miranda* would never be applicable during *Terry* stops because such encounters would, by definition, fall short of creating the requisite "custodial" situation.

For reasons that will become apparent as this section of the Article progresses, it is this author's view that *Terry* and *Miranda* never should have met. Therefore, this third option, which reverses the expansion of *Terry* and retracts it from the *Miranda* realm, offers the best solution to the conflict. As will be discussed below, *Terry's* expansion should be reversed because: 1) it is contrary to relevant Supreme Court authority, and 2) it has not been supported by persuasive or logical rationales.

First, *Terry's* recent expansion is inconsistent with Supreme Court precedent and should be overturned on this ground alone. Recall that

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enforcement efforts because it forces officers to choose between: 1) effectuating a *Terry* stop and providing *Miranda* warnings when the encounter becomes custodial; 2) not making the stop because the officers will be able to obtain only limited information from a suspect that has been "Mirandized"; or 3) making the stop and applying only minimal force so that the encounter does not implicate *Miranda*).

in *Terry v. Ohio*, the Supreme Court made very clear that such detentions had to be minimally intrusive.[175] The Court emphasized that the *Terry* exception to probable cause must be "narrowly drawn,"[176] and it accordingly authorized only a stop and a "carefully limited search of the outer clothing [of a suspect] in an attempt to discover weapons which might be used to assault" an officer or passerby.[177] As the *Terry* opinion and its subsequent interpretations by the lower federal courts made clear, handcuffs, pointed weapons, and other intrusive measures of force were clearly prohibited unless probable cause existed; the only types of *Terry* stops deemed permissible were stop-and-frisks and stops consisting of a few brief questions without the use of force.[178]

While many of the lower federal courts have suddenly strayed from this path in the past few years, the Supreme Court has consistently reaffirmed the principle that the *Terry* doctrine is a strict and narrow exception to the probable cause requirement. In *Dunaway v. New York*,[179] the Court summarized its important *Terry*-related holdings from 1967 through 1979:

> Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope. *Terry* itself involved only a limited, on-the-street frisk for weapons. Two subsequent cases which applied *Terry* also involved limited weapons frisks. *See* Adams v. Williams, 407 U.S. 143 (1972) (frisk for weapons on basis of reasonable suspicion); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (order to get out of car is permissible "*de minimis*" intrusion after car is lawfully detained for traffic violations; frisk for weapons justified after "bulge" observed in jacket). United States v. Brignoni-Ponce, 422 U.S. 873 (1975), applied *Terry* in the special context of roving border patrols stopping automobiles to check for illegal immigrants. The investigative stops usually consumed less than a minute and involved "a brief question or two." 422 U.S. at 880. The Court stated that "[b]ecause of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest."[180]

Thus, through 1979, the Supreme Court had continued to construe *Terry* narrowly and to uphold the constitutionality of *Terry* stops that consisted only of frisks or a few brief questions unaccompanied by the use of force.

In 1984, the Court revisited *Terry* in *Berkemer v. McCarty*,[181] the facts of which were set forth in part II of this Article.[182] In holding

175. Terry v. Ohio, 392 U.S. 1, 27 (1968).
176. *Id.*
177. *Id.* at 30.
178. *See supra* notes 65-83 and accompanying text.
179. 442 U.S. 200 (1979).
180. *Id.* at 210-11 (footnotes omitted).
181. 468 U.S. 420 (1984).
182. *See supra* notes 87-96 and accompanying text.

that *Miranda* warnings are not required during *Terry* stops or other detentions analogous to *Terry* stops, the Court made clear that it continued to envision *Terry* investigations as brief, nonintrusive affairs.[183] Indeed, it was what the Court described as the "nonthreatening" and "noncoercive" nature of *Terry* stops that prompted it to hold that "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*."[184] In addition, although the Supreme Court did not face *Terry*-related issues often during the 1980s, individual Justices reminded the lower courts from time to time in dicta that the exception must remain limited and narrowly drawn.[185] For example, in *Florida v. Royer*,[186] where the Court construed what it called the "limited exception" created by *Terry*,[187] Justice Brennan stated in a concurring opinion:

> The scope of a *Terry*-type "investigative" stop and any attendant search must be extremely limited or the *Terry* exception would "swallow the general rule that Fourth Amendment seizures [and searches] are 'reasonable' only if based on probable cause . . . . In my view, any suggestion that the *Terry* reasonable-suspicion standard justifies anything but the briefest of detentions or the most limited searches finds no support in the *Terry* line of cases.[188]

Even as late as 1993, while the lower federal courts were in the process of expanding *Terry* far beyond its original contours, the Supreme Court reaffirmed its belief that the *Terry* exception must be strictly construed. In *Minnesota v. Dickerson*,[189] a police officer executed a *Terry*-type stop-and-frisk on Mr. Dickerson who was suspected of carrying drugs. While patting Dickerson's outer clothing, the officer felt a small lump in his shirt pocket. The officer then moved the lump around through the clothing and determined that it might be a rock of crack cocaine. He then slid his hand inside of the suspect's shirt and retrieved a small plastic bag containing one-fifth of a gram of crack. In affirming the Minnesota Supreme Court's decision that Dickerson's conviction must be reversed, the United States Supreme Court held that the officer's conduct was too intrusive for a valid *Terry* stop.[190] The officer "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*" when he continued to feel and move the lump in Dickerson's shirt after concluding that it was

183. *Berkemer*, 468 U.S. at 439-40.

184. *Id.* at 440.

185. *See, e.g.*, United States v. Sharpe, 470 U.S. 675, 689 (1985) (Marshall, J., concurring) (holding that the *Terry* exception must be "narrowly drawn"); Florida v. Royer, 460 U.S. 491, 510-11 (1983) (Brennan, J., concurring) (arguing that the *Terry* reasonable suspicion standard only justifies "the briefest of detentions").

186. 460 U.S. 491 (1983).

187. *Id.* at 498.

188. *Id.* at 510-11 (Brennan, J., concurring) (footnote omitted).

189. 113 S. Ct. 2130 (1993).

190. *Id.* at 2138-39.

not a weapon.[191] Although this holding does not directly relate to the issue of whether guns, handcuffs, and other "arrest-like" measures of force may be used, the Court's broad language is instructive. The Court reminded the lower courts that *Terry* stops must be "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby," and that any intrusion beyond that point "is [not] valid under *Terry*."[192]

Considering the strong language in these cases, it is not surprising that the Supreme Court has never authorized the use of handcuffs, the holding of suspects at gunpoint, or any of the other "arrest-like" measures of force that have suddenly become popular during *Terry* stops.[193] While the Court has never directly ruled on these precise issues, dicta in several cases strongly suggests that such measures of force do not fit within the Court's definition of a valid *Terry* stop. For example, in *Michigan v. Summers*,[194] the Court stated that "every seizure having the essential attributes of a formal arrest[ ] is unreasonable unless it is supported by probable cause."[195] Although the *Summers* Court did not list what it considered to be the "attributes of a formal arrest," two years earlier, in *Dunaway*,[196] the Court had indicated that drawn guns and handcuffs were the "trappings of a technical formal arrest."[197] Thus, unless "trappings of an arrest" are not the same as "attributes of an arrest," *Dunaway* and *Summers* together indicate that drawn weapons and handcuffs are inappropriate absent probable cause, and thus, are unlawful during *Terry* stops.[198]

In addition, the Supreme Court stated in *Dunaway* that "custodial interrogation . . . intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards

191. *Id.* at 2138.

192. *Id.* at 2136.

193. The closest the Court has come in this respect was in United States v. Hensley, 469 U.S. 221 (1985), when it ruled that officers who had executed a *Terry*-type stop with their guns drawn but pointed skyward did not exceed the limited bounds of *Terry*. *Id.* at 224, 229.

194. 452 U.S. 692 (1981).

195. *Id.* at 700.

196. Dunaway v. New York, 442 U.S. 200, 215 (1979).

197. *Id.* at 215 n.17.

198. In addition, in United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993), the Tenth Circuit stated that drawn weapons and the lying-prone position were measures of force "associated with formal arrest." *Id.* at 1464. Therefore, if one applies the language of *Summers* to the facts of *Perdue*, the officers' conduct should have been considered unlawful because they did not have probable cause. As one commentator notes:

> *Terry* gave the government the right to make a temporary detention of a suspect on less than probable cause. Its progeny suggest, however, that if either the manner of effectuating the nonarrest detention or the investigative means employed during the period of nonarrest detention mirror those that lawfully could be employed only if a lawful arrest has occurred, the detention will be treated as a de facto arrest for Fourth Amendment purposes.

Williamson, *supra* note 18, at 403.

against illegal arrest."[199] This language suggests that when the level of force used by the police places a suspect in "custody," the encounter has become, by definition, a Fourth Amendment arrest that is illegal unless probable cause exists. As stated *supra*, handcuffs, pointed guns, and the placing of suspects in police cruisers are all generally considered to render a suspect in "custody."[200] Naturally, therefore, *Dunaway* stands for the proposition that these measures of force may not be used absent probable cause.[201]

Besides contravening the letter and spirit of the Supreme Court's teachings on the subject, the recent expansion of *Terry* has not been supported by persuasive rationale. The sole justification that the lower federal courts have offered in allowing police officers to use guns, handcuffs, and other such measures of force is "officer safety."[202] The argument, as illustrated in the Tenth Circuit's *Perdue* opinion, is that officers need to be able to use such forceful measures to "neutralize" dangerous suspects before *Terry* stops commence.[203]

The problem with this analysis is not that officer safety is unimportant; rather, the problem is that this argument, as a matter of Supreme Court precedent, cannot support any sort of intrusion beyond a mere stop-and-frisk. This conclusion is mandated by the *Terry* opinion.[204] In the *Terry* case, after finding that the officer reasonably feared that Mr. Terry and his companions were armed and dangerous,[205] the Supreme Court recognized 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."[206] The Court then stated:

> In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

199. *Dunaway*, 442 U.S. at 216.

200. *See supra* note 33 and accompanying text.

201. *See* Williamson, *supra* note 18, at 400 n.127 ("*Dunaway*, on the other hand, emphasized the intrusive nature of the objective pursued—custodial interrogation—as the factor that turned the detention into a de facto arrest.").

202. United States v. Perdue, 8 F.3d 1455, 1462-63 (10th Cir. 1993) (discussing the expansion of *Terry* by federal courts based solely on an "officer safety" rationale).

203. *Id.*

204. Terry v. Ohio, 392 U.S. 1, 23-27 (1968).

205. *Id.* at 28.

206. *Id.* at 23.

> We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.[207]

The Court then balanced the government's interest in police safety against the public's interest in remaining free from police harassment and reached a compromise: the "narrowly drawn" stop-and-frisk.[208] Therefore, the "officer safety" argument was fully considered by the Supreme Court in *Terry*, balanced against civil liberties interests, and deemed to support no more than a limited stop-and-frisk. The suggestion that officer safety is a new variable that authorizes intrusions above and beyond what was authorized in *Terry* is disingenuous and does not comport with precedent. When 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. As the probable cause requirement in the Fourth Amendment dictates,[209] in those situations, police officers should continue to investigate and keep an eye on the suspicious individual until either probable cause arises or their suspicion is dispelled.

In sum, the recent expansion of *Terry* is contrary to the letter and spirit of the Supreme Court's Fourth Amendment jurisprudence. The third option, therefore, resolves the conflict between *Terry* and *Miranda* by returning the *Terry* doctrine to its pre-expansion contours. One obvious advantage to this approach is that it is consistent with Supreme Court precedent in all respects, including *Terry*—something that cannot be said for the other two options. In addition, this option would be easy for police officers and courts to manage because it does not create a confusing, multilayered analysis as does the second option. It also does the best job of the three options of supporting civil liberties because not only are Fifth Amendment/*Miranda* interests preserved, but Fourth Amendment protections are recognized and allowed to perform their intended functions. Turning to the last factor, this option does not place an undue burden on law enforcement interests. One could argue that prohibiting officers from using highly intrusive types of force during *Terry* stops would impede their ability to detain suspects for investigation and thus, would frustrate law enforcement efforts. This rule, however, was in place for many years

207. *Id.* at 24-25.

208. *Id.* at 27-30.

209. *See supra* note 7. The Supreme Court has made clear that the probable cause requirement is the general rule under the Fourth Amendment. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 210 (1979) (discussing probable cause as necessary to make Fourth Amendment seizures reasonable).

prior to *Terry's* unprecedented expansion, and, according to the Supreme Court, it worked.[210] In any event, when compared to the Tenth Circuit's multilayered *Perdue* approach, this option's clarity and simplicity would, in the long run, result in fewer police mistakes and fewer convictions being overturned because of error. Any frustration of police investigatory tactics caused by reversing *Terry's* uncalled-for expansion would be counteracted by the efficiency and bright-line nature of the resulting rule.

CONCLUSION

In the past few years, the lower federal courts have dramatically increased the level of force that police officers may use during *Terry* stops. This trend has thrown Fifth Amendment jurisprudence into a state of confusion and has cast doubt on the traditional notion that *Miranda* warnings are not required during *Terry*-type detentions. There are three distinct options that the federal courts may invoke to resolve this controversy. The first is demonstrated by the Kansas District Court's analysis in *United States v. Perdue.* In that case, the court held that suspects do not have to be "Mirandized" during police detentions that fall short of Fourth Amendment arrests, regardless of whether the suspects are in "custody" or are "interrogated" by police.[211] Although this option creates an easy rule for police officers to follow and does not unduly burden law enforcement efforts, it substantially undermines civil liberty interests because it authorizes police officers to interrogate suspects in highly coercive scenarios without probable cause.

The second option is reflected in the Tenth Circuit's opinion in *Perdue*, which reversed the district court's opinion, and held that *Miranda* warnings are required in *Terry* stops that become custodial in nature.[212] While this approach avoids sacrificing civil liberties and deciphers the relevant Supreme Court cases more persuasively than the first option does, it creates a complex, multilayered structure that is contrary to the Supreme Court's insistence that criminal procedure rules remain simple and easy to follow.

Both of these options suffer from one additional flaw: their adherence to the trend of expanding *Terry* runs contrary to existing Fourth Amendment precedent. The Supreme Court has continually reaffirmed the principle that the *Terry* exception to the probable cause requirement is limited and must be narrowly drawn. The Court continues to envision *Terry* stops as nonintrusive police-citizen encounters

210. *See supra* notes 65-67, 175-201 and accompanying text. The Supreme Court has endorsed this rule in that it has continually reaffirmed it in both holdings and dicta.

211. United States v. Perdue, No. 91-40052-01, 1992 U.S. Dist. LEXIS 8508, at *5-7 (D. Kan. May 1, 1992) (unpublished), *rev'd in part*, 8 F.3d 1455, 1461 (10th Cir. 1993).

212. *Perdue*, 8 F.3d at 1464-65.

that do not escalate beyond a mere stop-and-frisk. Therefore, both the district court and the Tenth Circuit in *Perdue* failed to focus on the true cause of the problem: the misguided expansion of *Terry*. Instead of trying to bend the *Miranda* doctrine to fit the new "arrest-like" *Terry* stops, the courts should have more closely examined their Fourth Amendment analyses and asked, "Has the expansion of *Terry* been worth the confusion that it has caused?" and, more importantly, "Is the trend of expanding *Terry* consistent with Supreme Court precedent?"

Courts in the future should resolve the conflict by fixing what is broken: the *Terry* doctrine. The third option, therefore, negates the constitutional dilemma by returning *Terry* to its previous dimensions so that it no longer crosses into the *Miranda* realm. This option not only is true to the Supreme Court's teachings, but it champions civil liberties, creates an easy rule for police officers to apply, and avoids unduly burdening law enforcement efforts.