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MIRANDA'S APPLICATION TO THE EXPANDING *TERRY* STOP

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INTRODUCTION

In *Miranda v. Arizona*,[1] the Supreme Court interpreted the Fifth Amendment privilege against self-incrimination by holding that police may not interrogate a person taken into custody without first reading to the suspect their now-familiar *Miranda* rights.[2] The question of what constitutes "police custody" is particularly vexing in the context of "*Terry* stops:" warrantless searches and seizures based upon reasonable suspicion, limited in scope, to determine whether a person is armed or in the midst of criminal activity.[3] As the lawful scope of a *Terry* stop has expanded beyond its narrow and limited genesis in *Terry v. Ohio*,[4] federal circuits have been unable to reach a consensus regarding whether a lawful *Terry* stop may constitute *Miranda* custody.[5] The First and Fourth Circuits hold that a suspect is not in *Miranda* custody if the *Terry* stop was lawful, i.e. reasonable.[6] Conversely, the Second, Seventh, Eighth, Ninth, and Tenth Circuits hold that the reasonableness of a *Terry* stop is irrelevant as to *Miranda* custody; if the circumstances of a

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] *Id.* at 444.

[3] Terry v. Ohio, 392 U.S. 1, 27–31 (1968).

[4] *See infra* Part I(B).

[5] *E.g.*, United States v. Newton, 369 F.3d 659, 673 (2d Cir. 2004).

[6] *E.g.*, United States v. Leshuk, 65 F.3d 1105, 1110 (4th Cir. 1995).

Terry stop meet the threshold of *Miranda* custody, then *Miranda* warnings are required before the suspect of a *Terry* stop may be interrogated.[7]

This note argues that the determination of whether a suspect is in "*Miranda* custody" does not turn on the legality of the *Terry* stop. Part I will review *Terry v. Ohio* and present the dramatic expansion of the scope of a *Terry* stop.[8] Part II will review *Miranda v. Arizona* and explain how courts have neglected to clarify the definition of *Miranda* custody.[9] Part III will survey the circuit split regarding *Miranda*'s application to a *Terry* stop.[10] Part IV will argue for the Second Circuit's independent approach, and finally Part V will evaluate documented criticisms of this proposal.[11]

I. *TERRY V. OHIO*

A. "Stop and Frisks:" An Exception to Probable Cause

Under the Fourth Amendment,[12] warrantless searches and seizures are presumed unreasonable.[13] However, the Supreme Court has created several exceptions to the presumptive warrant requirement.[14]

The Warren Court sanctioned one such exception in *Terry v.*

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[7] *Newton*, 369 F.3d at 673.

[8] *See infra* Part I.

[9] *See infra* Part II.

[10] *See infra* Part III.

[11] *See infra* Part IV; Part V.

[12] U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .").

[13] Katz v. United States, 389 U.S. 347, 357 (1967).

[14] *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (permitting a warrantless entry of a home when police have an objectively reasonable basis for believing that a person within the home is seriously injured or threatened with injury); United States v. Watson, 423 U.S. 411, 414 (1976) (permitting a public arrest in the absence of a warrant); Warden v. Hayden, 387 U.S. 294, 310 (1967) (permitting a warrantless search that is justified when officers are in "hot pursuit").

Ohio.[15] "Where a police officer observes . . . conduct which leads him reasonably to conclude . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others . . . to conduct" a search reasonably related in scope to the initial justification for the search.[16] In *Terry*, a police officer observed two pedestrians, Terry and Chilton, conducting "elaborately casual and oft-repeated reconnaissance" in front of a store window.[17] The officer approached the two pedestrians, along with a third man with whom they were meeting, identified himself as a police officer, patted down the outside of Terry's clothing, and found a .38-caliber revolver.[18] He discovered another revolver in Chilton's overcoat pocket.[19] After disarming the men, Chilton and Terry were formally charged with carrying concealed weapons.[20]

The issue presented to the Warren Court was whether "in all the circumstances of this on-the-street encounter, [Terry's] right to personal security was violated by an unreasonable search and seizure."[21] The Court analyzed the reasonableness of the search by balancing the government's interest in law enforcement and public safety with the "nature and quality of the intrusion on individual rights."[22]

First, the Court "emphatically"[23] rejected the notion that a "stop and frisk" did not implicate the Fourth Amendment.[24]

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[15] Terry v. Ohio, 392 U.S. 1, 30 (1968).

[16] *Id.* at 30.

[17] *Id.* at 6.

[18] *Id.* at 7.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 9.

[22] *Id.* at 24.

[23] *Id.* at 16.

[24] *Id.*

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English

Second, the Court considered the societal importance of permitting police officers to investigate their suspicions of criminal or dangerous activity with less than probable cause.[25] Chief Justice Warren noted that while law enforcement has an interest in effective crime prevention and detection,[26] there is an additional, more "immediate interest" concerning a police officer's safety and assurance that he is not dealing with an armed individual.[27] Thus, the Court agreed that police officers must be afforded an effective tool to protect themselves and the public in situations where they may lack probable cause for a search or arrest.[28]

Finally, the Court balanced the needs of law enforcement and public safety against the intrusion of privacy.[29] Chief Justice Warren acknowledged that "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."[30] Regardless, the proper compromise between the competing interests of law enforcement and civil rights permitted a narrow exception to the Fourth Amendment's probable cause requirement.[31] The Court stressed that "[t]he sole justification" of a *Terry* stop is the "protection of the police officer and others nearby . . . ."[32]

> language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless . . . is a petty indignity.

Id.

[25] *Id.* at 22.

[26] *Id.*

[27] *Id.* at 23.

[28] *Id.* at 24.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 29.

[32] *Id.*

B. The Expansion of Terry

The permissible degree of intrusion during a "stop and frisk" has significantly expanded since 1968.[33] In *Terry*, the Court permitted a "carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault [the police officer]."[34] Early cases following *Terry* interpreted this rule narrowly, hesitant to stray too far from this limited exception to the probable cause requirement.[35] In *United States v. Strickler*, for example, because police officers encircled the defendant in his car with their weapons raised,[36] the Ninth Circuit found it impossible to "equate [this] armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the 'brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information' . . . ."[37] Accordingly, the *Terry* stop was unreasonable.[38]

In *United States v. McLemure*, the Tenth Circuit rejected the government's argument that an officer acted reasonably when he drew his weapon, forced the defendant to lie face down, and conducted a pat down.[39] Construing *Terry* narrowly, the court

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[33] *See* United States v. Chaidez, 919 F.2d 1193, 1198 (7th Cir. 1990).

[34] *Terry*, 392 U.S. at 30.

[35] *See* United States v. O'Looney, 544 F.2d 385, 390 (9th Cir. 1976) (finding a Terry stop valid, in part because of the absence of drawn weapons, handcuffs, force, and threats thereof); *see also* United States v. McLemure, 573 F.2d 1154 (10th Cir. 1978); United States v. Strickler, 490 F.2d 378 (9th Cir. 1974).

[36] *Strickler*, 490 F.2d 378–79. The Ninth Circuit concluded that "[t]he restriction of Strickler's 'liberty of movement' was complete when he was encircled by police and confronted with official orders made at gunpoint . . . [n]o significant, new restraint was added when Officer Ripley, a few moments later, handcuffed Strickler and formally pronounced him 'under arrest.'" *Id.* at 380 (internal citations omitted).

[37] *Id.*

[38] *Id.*

[39] United States v. McLemure, 573 F.2d 1154, 1156 (10th Cir. 1978).

concluded the *Terry* stop was unreasonable.[40] Similarly, the defendant in *Dunaway v. New York* [41] was transported against his will to the local police station and held in an interrogation room where he was not free to leave.[42] The Court held the police conduct exceeded the brief detention authorized by *Terry* because "in contrast to the brief and narrowly circumscribed intrusions involved in those cases, the detention of petitioner was in important respects indistinguishable from a traditional arrest."[43]

More recently, however, the permissible degree of intrusion permitted during a *Terry* stop has expanded far beyond the "stop and frisk" originally upheld by the Supreme Court,[44] presumably as courts responded to rising violent crime.[45] In *Florida v. Royer*,[46] the Court acknowledged, "the predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect,"[47] but opened the door to *Terry*'s expansion by explaining in dicta that "the scope of the intrusion will vary" with the circumstances of each case.[48] In *United*

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[40] *Id.*

[41] Dunaway v. New York, 442 U.S. 200 (1979).

[42] *Id.* at 202–03.

[43] *Id.*

[44] The cases discussed in this section are not intended to be exhaustive, but merely describe the willingness of courts to permit increasingly coercive police conduct during *Terry* stops.

[45] "The number of police officers killed annually in the line of duty has tripled since *Terry* was decided; the number of those assaulted and wounded has risen by a factor of twenty." United States v. Micheletti, 13 F.3d 838, 844 (5th Cir. 1994).

[46] Florida v. Royer, 460 U.S. 491 (1983). In *Royer*, the defendant purchased an airline ticket under an assumed name. He was questioned by police officers and his suitcases were searched. Royer moved to suppress the evidence obtained by the search of his suitcases. The Court ultimately determined that the detainment and search of Royer exceeded the legal scope of an investigative stop, and the evidence was suppressed. *Id.* at 493–501.

[47] *Id.* at 500.

[48] *Id.*

States v. Perdue,[49] police officers approached the defendant's car with their weapons drawn and ordered the defendant to step out and lie facedown on the ground.[50] Then, the police allegedly handcuffed the defendant and questioned him.[51] The Tenth Circuit concluded that while the officers' warrantless seizure of Perdue "border[ed] on an illegal arrest," it was nonetheless a reasonable *Terry* stop because the intrusion was justified by the potentially dangerous circumstances of the encounter.[52]

In *United States v. Quinn*,[53] police parked their cars behind the defendant's vehicle, blocked his exit, and questioned him for twenty minutes until more officers arrived with drug-sniffing dogs.[54] The court concluded that the *Terry* stop was lawful and saw "no way that the agents could have greatly shortened their inquiry if they were to 'confirm or dispel their suspicions' meaningfully."[55] Additionally, the *Quinn* court observed the emerging patchwork of law regarding the lawfulness of *Terry* stops:

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[49] United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993).

[50] *Id.* at 1458–59.

[51] *Id.*

[52] *Id.* at 1462 ("It was not unreasonable under the circumstances for the officers to execute the *Terry* stop with their weapons drawn. While *Terry* stops generally must be fairly nonintrusive [sic], 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.' United States v. Merritt, 695 F.2d 1263, 1273 (10th Cir. 1982). Similarly, other circuits have held that police officers may draw their weapons without transforming an otherwise valid *Terry* stop into an arrest. *See, e.g.*, United States v. Alvarez, 899 F.2d 833, 838 (9th Cir. 1990); United States v. Taylor, 857 F.2d 210, 214 (4th Cir. 1988); United States v. Serna-Barreto, 842 F.2d 965, 968 (7th Cir. 1988); United States v. Jones, 759 F.2d 633, 638 (8th Cir. 1985); United States v. Jackson, 652 F.2d 244, 249 (2d Cir. 1981).") (internal citations omitted). "The Fourth Amendment does not require that officers unnecessarily risk their lives when encountering a suspect whom they reasonably believe to be armed and dangerous." *Id.* at 1463.

[53] United States v. Quinn, 815 F.2d 153 (1st Cir. 1987).

[54] *Id.* at 155–56.

[55] *Id.* at 158.

> [a]dmittedly, *Terry*, *Dunaway*, *Royer*, and *Place*,[56] considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest . . . . But our cases impose no rigid time limitation on Terry stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," . . . we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.[57]

Thus, *Quinn* acknowledged the increasing deference given to law enforcement in their administration of a *Terry* stop.

A year later, in *United States v. Serna-Barreto*, Judge Posner, writing for the Seventh Circuit, deemed a *Terry* stop valid when the investigating officer "pointed his gun at . . . [the defendant] . . . [and] ordered her out of the car."[58] The court upheld the stop, in large part because "many drug traffickers are armed and they sometimes shoot policemen"[59] and because the defendant "testified that she was not scared by the gun."[60] Similarly, in *United States v. Greene*[61] and *United States v. Hardnett*,[62] the Ninth and Sixth Circuits, respectively, deemed a

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[56] United States v. Place, 462 U.S. 696 (1983).

[57] *Quinn*, 815 F.2d at 159 (footnotes citing cases mentioned therein added).

[58] United States v. Serna-Barreto, 842 F.2d 965, 967 (7th Cir. 1988).

[59] *Id.* at 967.

[60] *Id.* at 968.

> Although subjective belief is not determinative on whether an ostensible stop is actually an arrest, Serna-Barreto's testimony is strong evidence in an otherwise sketchy record that, if Officer Dailey did in fact point his gun at her, he did so in a manner that protected him without unduly threatening her.

Id.

[61] United States v. Greene, 783 F.2d 1364 (9th Cir. 1986).

[62] United States v. Hardnett, 804 F.2d 353 (6th Cir. 1986).

warrantless investigative stop valid under *Terry* even though the officer's weapons were drawn.[63]

The Seventh Circuit's reasoning in *United States v. Tilmon*[64] best illustrates the scope of the expansion of *Terry*.[65] In *Tilmon*, police were looking for a suspected bank robber.[66] A police officer spotted the vehicle described in the radio dispatch and called for back-up units; he noted the driver "'slid down in the drivers seat' as the police car approached . . . ."[67] Next,

> the police cars activated their flashing lights and Tilmon pulled over. Over a loud speaker, Tilmon was informed . . . that he should get out of the car with his hands up and lie face down on the shoulder of the road. Tilmon immediately complied. (According to Officer Klanderman, some of the weapons were pointed at Tilmon, and some were pointed at his car.) After he lay down as directed, Tilmon was handcuffed and placed in a squad car. A shotgun was pointed at Tilmon's head while he was handcuffed, searched and seated in the squad car . . . . At the scene of the highway stop, Tilmon's car had been effectively blocked. There were at least five squad cars abreast of and behind his car, and another police car stopped one-quarter mile ahead of Tilmon's car on the shoulder of the road . . . . Officer Klanderman testified that drawing weapons was standard procedure for a felony stop "for the safety of the officers and any other persons that may be in the area."[68]

In rejecting Tilmon's argument that the warrantless stop was so forceful as to constitute a de facto arrest, and thus a violation

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[63] *See Greene*, 783 F.2d at 1367; *Hardnett*, 804 F.2d at 357.

[64] United States v. Tilmon, 19 F.3d 1221 (7th Cir. 1993).

[65] *Id. Tilmon* has been cited as recently as April 11, 2008, specifically for its proposition that if found to be justified, requiring a suspect to lie face down while being handcuffed and/or briefly detained in an officer's squad car does not convert a *Terry* stop into an arrest. Jewett v. Anders, 521 F.3d 818, 825–26 (7th Cir. 2008).

[66] *Tilmon*, 19 F.3d at 1223.

[67] *Id.*

[68] *Id.*

of the Fourth Amendment, the court recited the elements of a valid *Terry* stop:

> [t]he reasonableness of an investigatory stop may be determined by examining: (1) whether the police were aware of specific and articulable facts giving rise to reasonable suspicion; and (2) whether the degree of intrusion was reasonably related to the known facts. In other words, the issue is whether the police conduct—given their suspicions and the surrounding circumstances—was reasonable.[69]

The court concluded that the "police justifiably held a reasonable suspicion that the car and its driver were involved in a bank robbery."[70] Moreover, it found that based on the circumstances of this particular matter—specifically that the suspect was thought to be an armed felon—the scope of the intrusion was reasonable.[71] The court emphasized the risks posed to law enforcement, particularly in a "felony stop:"[72]

> [w]hen effecting a *Terry* stop . . . police officers must make a quick decision about how to protect themselves and others from possible danger. They are not necessarily required to "adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter." A court in its assessment "should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing."[73]

Thus, "[t]o require an officer to risk his life in order to make an investigatory stop would run contrary to the intent of *Terry v. Ohio*."[74] Finally, the *Tilmon* court took notice of *Terry's* expansion:

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[69] *Id.* at 1224 (citing Terry v. Ohio, 392 U.S. 1, 19–20 (1968)).

[70] *Id.* at 1225.

[71] *Id.* at 1227.

[72] *Id.* at 1225–26.

[73] *Id.* at 1225 (citations omitted).

[74] *Id.* at 1226 (citing United States v. Maslanka, 501 F.2d 208, 213 n.10 (5th Cir. 1974)).

> [i]n the recent past, the "permissible reasons for a stop and search and the permissible scope of the intrusion [under the *Terry* doctrine] have expanded beyond their original contours." The last decade "has witnessed a multifaceted expansion of *Terry*," including the "trend granting officers greater latitude in using force in order to 'neutralize' potentially dangerous suspects during an investigatory detention." *For better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention*.[75]

The court's language makes clear that the justifications for the stark departure from *Terry's* narrow holding are the same as the policy considerations that encouraged its advancement in the first place. The increase in violent crime, gun violence, America's war on illegal drugs, and criminal sophistication since 1968 has enhanced the dangers associated with law enforcement.[76] Once the Supreme Court permitted an exception to the probable cause requirement, lower courts that evaluated the legality of officers' actions on a case-by-case basis felt compelled to maximize the tools officers had to protect their safety.[77]

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[75] *Id.* at 1224–25 (citations omitted) (emphasis added).

[76] "The number of police officers killed annually in the line of duty has tripled since *Terry* was decided; the numbers of those assaulted and wounded have risen by a factor of twenty." United States v. Michelletti, 13 F.3d 838, 844 (5th Cir. 1994).

[77] In sum, in 1963, Officer McFadden stopped a person he reasonably believed to be preparing for a robbery and frisked his outer clothing for the presence of a weapon that could serve to harm the police officer or the public. Terry v. Ohio, 392 U.S. 1, 7, 23, 28 (1968). In 1992, Spencer Ray Tilmon was surrounded by five police cars and numerous police officers whose arms were drawn, laid down on the ground on an interstate highway, handcuffed while a shotgun was pointed at his head, and placed in a squad car during the search of his car. United States v. Tilmon, 19 F.3d 1221, 1223 (7th Cir. 1994). Both courts found the officers had the requisite specific and articulable facts to support reasonable suspicion of the defendants' propensity for crime or imposition of public danger, and both courts

II. *MIRANDA V. ARIZONA*: PROTECTING THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. Miranda v. Arizona

Two years before *Terry*, the Warren Court addressed the Fifth Amendment privilege against self-incrimination[78] in *Miranda v. Arizona*.[79] In the consolidated cases decided in *Miranda*, police questioned a suspect in custody at the precinct for an extended period of time, eventually eliciting a confession.[80] The Court set out to decide the trial admissibility of statements obtained from questioning which shared certain "salient features [including] incommunicado interrogation of individuals in a police-dominated atmosphere [that] result[ed] in self-incriminating statements without full warnings of constitutional rights."[81]

The Warren Court sought to ensure that suspects' Fifth Amendment privilege against self-incrimination was adequately protected during the course of custodial interrogation.[82] *Miranda* responded to the coercive nature that a police-dominated environment has on the will of a suspect in custody;[83] that is, when police conduct psychologically coercive in-custody interrogation techniques, procedural safeguards must be employed to offset their effect. First, the Court reiterated that the Fifth Amendment privilege is available "outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way

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concluded that the intrusiveness of the subsequent search was reasonable under the circumstances and sufficiently limited in scope. *See Terry*, 392 U.S. at 30; *Tilmon*, 19 F.3d at 1225, 1228.

[78] U.S. CONST. amend. V ("No person shall be compelled in any criminal case to be a witness against himself . . . .").

[79] Miranda v. Arizona, 384 U.S. 436, 439 (1966).

[80] *Id.* at 440.

[81] *Id.* at 445.

[82] *Id.* at 439.

[83] *See id.* at 443.

from being compelled to incriminate themselves."[84] Second, the court emphasized that "an understanding of the nature and setting of this in-custody interrogation is essential" to the Court's holding.[85] In light of the one-sided nature of police interrogation and the value of the privilege against self-incrimination,[86] the Court held that the "prosecution may not use statements, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[87] These required procedural safeguards must inform the defendant that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney."[88] Accordingly, *Miranda* warnings are required when the subject is (1) in police custody and (2) interrogated by the police.[89] The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[90] Subsequent lower courts have struggled to identify the appropriate threshold of custody and interrogation that triggers *Miranda*.

1. Miranda *Custody*

The Supreme Court specifically addressed whether an

[84] *Id.* at 467.

[85] *Id.* at 445. The Court commented on the history of physically abusive interrogation tactics, but stressed that coercion can be mental as well as physical. *See id.* at 446, 449. In the Court's own words, the compulsion directed towards suspects stems from the individual being "swept from familiar surroundings," being "surrounded by antagonistic forces," and being "subject to techniques intended to subjugate the individual to the will of his examiner." *Id.* at 457, 461.

[86] *Id.* at 468.

[87] *Id.* at 444.

[88] *Id.*

[89] *Id.*

[90] *Id.* The Court did not articulate with further specificity factors indicative of custodial interrogation.

arrestee was in sufficient custody as to warrant *Miranda* warnings in *Orozco v. Texas*.[91] Justice Black rejected the state's argument that since the suspect was in familiar surroundings (his bedroom), *Miranda* did not apply.[92] Instead, the Court laid down a bright-line rule: if a person is arrested, he is in custody for purposes of *Miranda*.[93]

In *California v. Beheler*,[94] the suspect agreed to accompany police officers to the police station for questioning.[95] The suspect was informed he was *not* under arrest. He left, unrestrained, after the questioning.[96] The Court stated:

> although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving of Miranda protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest . . . [b]ut we have explicitly recognized that Miranda warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."[97]

Accordingly, the Court found that Beheler was not in custody for *Miranda* purposes, forcefully explaining, "it is beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action. Indeed,

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[91] Orozco v. Texas, 394 U.S. 324 (1969).

[92] *Id.* at 326.

[93] *Id.* at 326–27. Justice White's dissent expressed disdain that the custody requirement of *Miranda* was "dilute[d]." *Id.* at 330. Relying on the language in *Miranda* that focused on the extremes and coerciveness of *in-house* custodial interrogations, Justice White argued that *Miranda* and the policies underlying it were not meant to reach beyond the police station and criticized the majority for assuming, without discussion, that it did so. *Id.* at 329.

[94] California v. Beheler, 463 U.S. 1121 (1983).

[95] *Id.* at 1122.

[96] *Id.*

[97] *Id.* at 1125.

Beheler's freedom was not restricted in any way whatsoever."[98]

The Supreme Court's next significant decision regarding *Miranda* custody came in *Berkemer v. McCarty*.[99] In this case, an Ohio state highway patrolman stopped a suspect weaving in and out of a highway lane.[100] At the scene of the traffic stop, the officer asked the suspect if he had been using intoxicants and the suspect replied that he had "consumed two beers and had smoked several joints of marijuana . . . ."[101] The suspect was arrested and later sought to have those statements suppressed on the grounds that he was not first read his *Miranda* rights at the scene of the traffic stop before his arrest.[102] The Court held that "roadside questioning of a motorist detained pursuant to a routine traffic stop" was not "custodial interrogation."[103] The Court acknowledged that a usual traffic stop is analogous to a *Terry* stop and the nature of these detentions (*Terry* stops) "explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*."[104] The Court concluded, "fidelity to the doctrine announced in *Miranda*[105] requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated."[106]

In *United States v. Brown*,[107] the Eighth Circuit suggested six indicia for determining whether a suspect is in custody for *Miranda* purposes:

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[98] *Id.* at 1123.

[99] Berkemer v. McCarty, 468 U.S. 420 (1984).

[100] *Id.* at 423.

[101] *Id.*

[102] *See id.* at 424.

[103] *Id.* at 435. *Berkemer* also established an objective test to determine whether a suspect was "subjected to treatment that renders him 'in custody:'" the "relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 440, 442.

[104] *Id.* at 440.

[105] *Id.* at 437. Specifically, the Court was referring to the phrase "deprived of his freedom of action in a significant way." *Id.* at 428.

[106] *Id.* at 437.

[107] United States v. Brown, 990 F.2d 397 (8th Cir. 1993).

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official request to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the termination of the questioning.[108]

Even if a person is in custody, however, he or she must still be "interrogated" in order to trigger *Miranda*.[109]

2. Miranda *Interrogation*

Miranda defined interrogation as "questioning initiated by law enforcement officers,"[110] but the Court has maintained that investigatory tactics other than direct questioning can be "interrogation." In *Rhode Island v. Innis*,[111] the Court held that "the 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."[112]

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[108] *Id.* at 399. "The presence of the first three indicia tends to mitigate the existence of custody at the time of questioning" while the "presence of the last three indicia aggravate the existence of custody." *Id.*

[109] *See* Alston v. Redman, 34 F.3d 1237, 1244 (3d Cir. 1994).

[110] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[111] Rhode Island v. Innis, 446 U.S. 291 (1980).

[112] *Id.* at 301.

III. THE CIRCUITS' SPLIT OVER *MIRANDA*'S APPLICABILITY TO *TERRY* STOPS

Terry's expansion to permit increasingly coercive searches and seizures[113] has caught up to *Miranda*. The First and Fourth Circuits reason that if the *Terry* stop is lawful under the Fourth Amendment, then the suspect is not in *Miranda* custody.[114] Conversely, the Second, Seventh, Eighth, Ninth, and Tenth Circuits consider the Fourth and Fifth Amendment questions separately, holding that a *Terry* stop may be lawful under the Fourth Amendment, but may still rise to a degree of intrusion that constitutes *Miranda* custody.[115]

A. The First and Fourth Circuits' Categorical Approach

The First and Fourth Circuits extend the holding of *Berkemer* from traffic stops to all lawful *Terry* stops, holding that if a *Terry* stop based upon reasonable suspicion is lawful at inception and in scope, then the suspect is not in *Miranda* custody.[116] In other words, they apply a categorical rule that only if a *Terry* stop rises to the level of a de facto arrest, and thus is no longer a lawful *Terry* stop, would *Miranda* warnings be required.

In *United States v. Trueber*,[117] for example, police officers garnered reasonable suspicion that Trueber was smuggling drugs.[118] Officers spoke with Trueber for ten-to-fifteen minutes

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[113] *See supra* Part I(B).

[114] United States v. Trueber, 238 F.3d 79 (1st Cir. 2001); United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995).

[115] In *United States v. Artiles–Martin*, Judge Hodges noted that "[t]he First [and] Fourth . . . Circuits hold that so-called *Terry* reasonableness means *Miranda* warnings are not required, even if the stop was coercive . . . [while] the Second, Seventh, Ninth and Tenth Circuits hold that a coercive *Terry* stop requires warnings but still is deemed a valid *Terry* stop." United States v. Artiles–Martin, No. 5:08-cr-14-Oc-10GRJ, 2008 WL 2600787, *11 n.38 (M.D. Fla. June 30, 2008).

[116] *Trueber*, 238 F.3d 79; *Leshuk*, 65 F.3d 1105.

[117] *Trueber*, 238 F.3d 79.

[118] *Id.* at 82.

after pulling his truck over, and then for approximately one hour and twenty minutes further at his motel room.[119] Agents kept Trueber under constant surveillance.[120] Trueber was then arrested.[121] The lower court suppressed all statements made by Trueber before his arrest, reasoning that "for purposes of *Miranda*, Trueber was in custody when questioned and, therefore, all statements violated *Miranda* and should be suppressed."[122]

On appeal, the First Circuit concurred with *Berkemer* that "routine traffic stops are more analogous to a *Terry* stop than to a formal arrest, and, therefore, are not custodial for purposes of *Miranda*."[123] The court concluded that "the investigatory stop was justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place . . . [w]hat occurred was thus a permissible *Terry* stop."[124] Since "[n]othing the agents did or said sufficed to convert the investigatory stop into an arrest requiring the administration of *Miranda* warnings," the statements' suppression was overturned.[125] *Trueber*'s focus, on whether the stop was lawful *or* whether it exceeded the scope of a *Terry* stop to become a de facto arrest thus requiring *Miranda* warnings,[126] suggests that only upon the latter circumstance, and never upon the former, would *Miranda* warnings be required.[127]

The Fourth Circuit also applies a categorical rule with regard to *Miranda*'s applicability to *Terry* stops. In *United States v.*

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[119] *Id.* at 84–85.

[120] *Id.*

[121] *Id.* at 87.

[122] *Id.* at 91.

[123] *Id.* at 92 (citing Berkemer v. McCarty, 468 U.S. 420, 440 (1984)).

[124] *Id.* at 95 (internal quotation marks and citation omitted).

[125] *Id.*

[126] *Id.*

[127] A lower court in the First Circuit appears to have deviated from *Trueber*'s holding. In *United States v. Massaro*, the district court asserted that the First Circuit would recognize that "even during a lawful *Terry* stop, the restraint of a suspect can amount to a formal arrest." United States v. Massaro, 560 F. Supp. 2d 96, 105 (D. Mass. 2008).

Leshuk,[128] a turkey hunter uncovered marijuana growing in the woods.[129] He alerted the police, and deputy sheriffs found the two defendants nearby with two backpacks and a brown plastic garbage bag in their possession.[130] The deputies ordered the defendants to raise their hands, frisked them, and "determined they were not armed."[131] The deputies then asked several questions that the defendants answered.[132] On appeal, Leshuk argued that his statements made during the deputies' questioning at the scene, before his arrest, "should be suppressed because the deputies improperly interrogated him without administering warnings pursuant to *Miranda*."[133] The *Leshuk* court found that the officers' conduct did not exceed the scope of a lawful *Terry* stop.[134] The court distinguished a *Terry* stop from a custodial interrogation by noting that a *Terry* stop "must last no longer than necessary to verify or dispel the officer's suspicion."[135]

In sum, the First and Fourth Circuits have adopted a categorical rule that extends *Berkemer's* holding: if the *Terry* stop was lawful, then the suspect was not in *Miranda* custody. However, not all circuits agree with this approach.

B. The Second, Seventh, Eighth, Ninth, and Tenth Circuits' Independent Approach

These circuits reason that because a lawful *Terry* stop may include behavior commensurate with a formal arrest, a detainee of a lawful *Terry* stop, that is, a stop that does not rise to the level of a de facto arrest, may still be entitled to *Miranda* warnings.

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[128] United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995).
[129] *Id.* at 1106–07.
[130] *Id.*
[131] *Id.* at 1107.
[132] *Id.*
[133] *Id.* at 1108.
[134] *Id.* at 1110.
[135] *Id.* at 1109.

1. Second Circuit

In *United States v. Newton*,[136] three parole officers and three police officers arrived at the Wrights' apartment upon word that the Wrights' son, Newton, had threatened to kill the Wrights.[137] The officers handcuffed Newton without advising him of his *Miranda* rights, explaining that it was for his and the officers' safety, and that he was not under arrest.[138] Newton thereafter told the police that he had a gun in his apartment and where it was.[139] On appeal to the Second Circuit, Newton asserted that his responses to inquiries from the officers ought to have been suppressed because his restraint rose to a degree consistent with that of formal custody but was not preceded by *Miranda* warnings.[140]

The court rejected the categorical approach of the First and Fourth Circuit—that "where an investigatory stop is reasonable under the Fourth Amendment, the seized suspect is not 'in custody' for purposes of *Miranda*."[141] Rather, the Second Circuit found that Fourth Amendment reasonableness is not the standard for resolving *Miranda* custody challenges.[142] In other words, "whether a 'stop' was permissible under *Terry v. Ohio* . . . is irrelevant to the *Miranda* analysis. *Terry* is an 'exception' to the Fourth Amendment probable cause requirement, not to the Fifth Amendment protections against self-incrimination."[143] Instead, the Second Circuit asked whether a "reasonable person in defendant's position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest."[144] Facts the court deemed relevant included:

(1) the length of time involved in the stop; (2) its public

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[136] United States v. Newton, 369 F.3d 659 (2d Cir. 2004).

[137] *Id.* at 663.

[138] *Id.*

[139] *Id.* at 663–64.

[140] *Id.* at 668.

[141] *Id.* at 673 (citing *Trueber* and *Leshuk*).

[142] *Id.*

[143] *Id.*

[144] *Id.* (citing United States v. Ali, 69 F.3d 1467, 1472 (2d Cir. 1995)).

> or private setting; (3) the number of participating law enforcement officers; (4) the risk of danger presented by the person stopped; and (5) the display or use of physical force against the person stopped, including firearms, handcuffs, and leg irons.[145]

The court's willingness to extend *Miranda* protections to lawful *Terry* stops did not invalidate the lawfulness of the *Terry* stop: "the Fourth Amendment permits the officer to take 'necessary measures . . . to neutralize the threat' without converting a reasonable stop into a de facto arrest."[146] Accordingly, the *Terry* stop was reasonable under the Fourth Amendment, but "nevertheless placed him in custody for purposes of *Miranda*."[147]

2. Seventh Circuit

United States v. Smith[148] considered whether a suspect detained and handcuffed during a *Terry* stop should have been read *Miranda* warnings.[149] The court explained, "[t]he purpose of permitting a temporary detention without probable cause or a warrant is to protect police officers and the general public . . . [but] [t]he purpose of the *Miranda* rule, however, is

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[145] *Id.* at 674.

[146] *Id.* This is consistent with the Second Circuit's decision in *United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir. 1995):

> *Terry* is an "exception" to the Fourth Amendment probable cause requirement, not to the Fifth Amendment protections against self-incrimination . . . . The fact that the seizure and search of a suspect comports with the Fourth Amendment under *Terry* simply does not determine whether the suspect's contemporaneous oral admissions may be used against him or her at trial.

[147] *Id.* at 677. However, since these statements fell within the public safety exception to *Miranda*, under *New York v. Quarles*, 467 U.S. 649 (1984), the court did not err in refusing to suppress Newton's statements. United States v. Newton, 369 F.3d 659, 677 (2d Cir. 2004).

[148] United States v. Smith, 3 F.3d 1088 (7th Cir. 1993).

[149] *Id.* at 1094. "We will not substitute our judgment for that of the officers as to the best methods to investigate." *Id.* (quoting United States v. Boden, 854 F.2d 983, 993 (7th Cir. 1988)).

not to protect the police or the public . . . [but to] protect the fairness of the trial."[150] Thus, the court read *Berkemer* to stand for the proposition that *Miranda* rights may be triggered even if a defendant has not been subjected to an arrest or a de facto arrest.[151]

3. Eighth Circuit

In *United States v. Martinez*, a suspect was placed in handcuffs, patted down for weapons, detained, and interrogated about his possession of weapons and cash.[152] The court ruled that the encounter was a valid *Terry* stop, but nonetheless continued to analyze whether the suspect was in *Miranda* custody.[153] After rejecting the government's argument "that so long as the encounter remained a *Terry* stop, no *Miranda* warnings were required,"[154] the court "followed the Supreme Court's cue" and read *Berkemer* to imply that the dispositive consideration is not whether the encounter was a valid *Terry* stop, but what the circumstances of the stop were.[155] The court ultimately determined that the detainee, despite not being under arrest during the lawful *Terry* stop, was entitled to *Miranda* warnings.[156]

4. Ninth Circuit

In *United States v. Kim*,[157] the Ninth Circuit held that the lower court correctly suppressed the defendant's statements

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[150] *Id.* at 1097.

[151] *Id.*

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

[153] *Id.* at 908 ("Whether Martinez was 'in custody' for purposes of *Miranda* after being handcuffed during the *Terry* stop is a separate question from whether that handcuffing constituted an arrest for which probable cause was required.").

[154] *Id.* at 909 (emphasis added).

[155] *Id.*

[156] *Id.*

[157] United States v. Kim, 292 F.3d 969 (9th Cir. 2002).

during the course of a Terry stop because "under the totality of circumstances, a reasonable person in Kim's circumstances would not have felt free to leave," and therefore Kim was in *Miranda* custody.[158] The court ruled so, despite the fact the defendant was not under arrest, because "the circumstances during the questioning of the defendant warranted advising [her] of her rights."[159]

5. Tenth Circuit

In *United States v. Perdue*,[160] police conducting an investigative stop ordered the defendant and his fiancée to get out of their stopped car and lie face down.[161] The officers drew their guns as the defendant made various statements regarding marijuana in his vehicle.[162] The defendant appealed the district court's decision not to suppress his statements, challenging the lower court's conclusion that since he was interrogated during a valid *Terry* stop, *Miranda* warnings were not required.[163]

The *Perdue* court concluded that the district court "merged several distinct constitutional inquiries into one."[164] The court first held that the officer's investigative stop of Perdue was a valid *Terry* stop.[165] Next, the court acknowledged that *Miranda* rights might be implicated during a valid *Terry* stop because "[p]olice officers must make a choice—if they are going to take highly intrusive steps to protect themselves from danger, they must similarly provide protection to their suspects by advising

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[158] *Id.* at 978.

[159] *Id.* at 973.

[160] United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993).

[161] *Id.* at 1458.

[162] *Id.* at 1459.

[163] *Id.* at 1461.

[164] *Id.*

[165] *Id.* at 1463. The court concluded that under the circumstances, the use of drawing their weapons and displaying some force was reasonable. *Id.* at 1462. The court also noted that this conduct "border[ed] on an illegal arrest." *Id.*

them of their constitutional rights."[166] Because "[a] reasonable man in Mr. Perdue's position could not have misunderstood the fact that if he did not immediately cooperate, his life would be in danger . . . [and] [a]ny reasonable person in Mr. Perdue's position would have felt completely at the mercy of the police," Perdue was in *Miranda* custody.[167]

Thus, contrary to the categorical rule adopted by the First and Fourth Circuits, the above circuits have adopted an independent approach by which the Fourth and Fifth Amendment issues are analyzed separately.

IV. THE INDEPENDENT APPROACH HAS IT RIGHT

Ultimately, evaluating *Miranda* custody separately and distinctly from the legality of the underlying *Terry* stop best balances law enforcement interests with suspects' Fourth and Fifth Amendment rights. The First and Fourth Circuits' categorical rule that *Terry* detainees are not in *Miranda* custody ignores the extension of *Terry* stops from a simple stop-and-frisk to police seizures that include drawn weapons, limited force, interrogation, and detention.[168] As a result, their approach fails to recognize that these intrusive techniques approach precisely the sort of coercive atmosphere that sparked the need for *Miranda*'s prophylactic rule. Alternatively, the independent approach, adopted by the Second Circuit and others, supports the policy justifications behind *Terry* and *Miranda*. This approach, coupled with courts continuing their efforts to clarify what restraints constitute *Miranda* custody and applying the public safety exception promulgated in *New York v. Quarles*[169] to *Terry* stops, minimizes burdens on law enforcement.

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[166] *Id.* at 1465.

[167] *Id.* (quoting United States v. Berkemer, 468 U.S. 420, 438 (1984)).

[168] *See generally id.* at 1462.

[169] New York v. Quarles, 467 U.S. 649 (1984).

A. The Second Circuit's Approach Best Balances Suspects' Rights with Law Enforcement Interests

Newton's approach, shared by the Seventh, Eight, Ninth, and Tenth Circuits,[170] displays more sensible constitutional law by acknowledging and accepting the increasingly coercive nature of the *Terry* stop and applying distinct *Miranda* analysis without disturbing it.

First, an independent approach concedes that different values underlie *Terry* and *Miranda*. *Terry* values the balance between an individual's right to privacy against law enforcement's goal of public safety.[171] *Miranda* values a suspect's privilege against self-incrimination.[172] Just as a prophylactic rule protecting a person's Fifth Amendment privilege against self-incrimination is distinct from a person's Fourth Amendment right against unreasonable search and seizure, so too should *Miranda* custody analysis be distinct from Fourth Amendment reasonableness. Put simply, just because a *Terry* stop may be reasonable, the police officer's conduct may still (lawfully) rise to the level imagined by Chief Justice Warren in *Miranda*. To disregard the possible applicability of *Miranda* warnings to this type of *Terry* stop ignores the values that motivated *Miranda*.

Second, in *Miranda*, the Court held that warnings are not just applied to arrest custody, but also to custodial detentions that detain the suspect in any significant way.[173] While *Berkemer* held that routine traffic stops do not rise to the level of detention imagined by *Miranda*,[174] the facts of *Berkemer* are distinguishable from the ultra-coercive *Terry* stops described in *Newton* and *Perdue*. While these coercive *Terry* stops may still not constitute *de facto* arrests, their use of limited force, drawn weapons, handcuffs, and extended duration certainly resemble the compelling environment of an arrest more than a traffic stop.

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[170] *See supra* Part III(B).

[171] *Terry*, 392 at 23–28.

[172] Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[173] *Id.* at 444.

[174] Berkemer v. McCarty, 458 U.S., 420, 437–40 (1984).

Third, categorical denial of *Miranda* to *Terry* stops assumes, incorrectly, that all *Terry* stops are intrusions on personal liberty not worthy of the prophylactic protections of *Miranda*.[175] Just like not all arrests are the sort of police-dominated stationhouse interrogations imagined by *Miranda*, not all *Terry* stops are the minor intrusions on personal liberty imagined by *Terry*.

Fourth, Chief Justice Warren, in *Miranda*, failed to actually *define* "custody" as an "arrest."[176] In fact, he failed to define "custody" at all.[177] It is reasonable to conclude that the two were not intended by the Court to be synonymous. Analogously, just as *Miranda* was framed in the in-station police-dominated environment, *Miranda* warnings are now given to all arrests regardless of the degree of coerciveness of the environment. Since *Miranda* left the confines of the police station, it is not incongruous to argue it should leave the confines of a formal or de facto arrest.[178]

Finally, the *Berkemer* Court admitted that a bright-line rule stating *Miranda* does not apply until a suspect is officially placed under arrest would "enable the police to circumvent the constraints on custodial interrogations established by *Miranda*."[179] By denying *Miranda's* application to *Terry* stops, police may find incentive to put off an arrest until after they have finished questioning a detainee.

B. More Concretely Define the Scope of Miranda Custody

Courts applying the independent approach must clarify what restraints actually constitute *Miranda* custody in order to minimize the burdens on law enforcement that include over-complication and exclusion of evidence at trial. In *Newton*, the

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[175] 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, 409 (1993).

[176] *Miranda*, 384 U.S. 436.

[177] *Id.*

[178] *See generally* Williamson, *supra* note 175 (explaining the expansion of *Miranda* warnings beyond the traditional bounds of a formal arrest).

[179] *Berkemer*, 458 U.S. at 441.

Second Circuit noted the "difficulty of determining 'custody' for purposes of *Miranda* and the Supreme Court's lack of clear guidance on the issue."[180] At least one commentator has noted that when *Miranda* was decided, the legal terms "custody" and "arrest" meant roughly the same thing.[181] This is no longer the case,[182] in part due to exceptions to the warrant requirement and increasing ambiguity as to the role and permissible substance of a *Terry* stop. If a court accepts the proposition that *Miranda* custody can be achieved without an arrest, it is irresponsible to expect police officers to determine when to deliver *Miranda* warnings based on an admittedly vague standard, and then punish their incorrect judgment by excluding statements made during the encounters.

In *Miranda*, the Court stated specifically that an "understanding of the nature and setting of [an] in-custody interrogation is essential to" their decision.[183] Since the nature and setting of interrogations has changed,[184] so must the analysis of whether *Miranda* applies.

While the Second and Eighth Circuits have identified factors to determine whether *Miranda* custody was met,[185] these

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[180] United States v. Newton, 369 F.3d 659, 670 (2d Cir. 2004) (citing Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001)).

[181] Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 741 (1994).

[182] *Id.*

[183] Miranda v. Arizona, 384 U.S. 436, 445 (1966).

[184] *Supra* Part II(A)(i).

[185] *See Newton*, 369 F.3d at 674 ("Among the facts generally deemed relevant are (1) the length of time involved in the stop; (2) its public or private setting; (3) the number of participating law enforcement officers; (4) the risk of danger presented by the person stopped; and (5) the display or use of physical force against the person stopped, including firearms, handcuffs, and leg irons."); United States v. Brown, 990 F.2d 397, 399 (8th Cir. 1993) ("(1) [W]hether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official request to respond to questions; (4) whether strong arm tactics or deceptive stratagems were

multiple-factor analyses do little to assist the police officer engaging in a spontaneous and fast on-the-street encounter. Common sense suggests that police officers asked to rely on such a multiple-factor analysis would in fact be relying on intuition—where the cost of an officer's wrong intuition is exclusion,[186] a firmer standard, designed for the needs of police officers conducting rapidly developing investigative stops, is imperative.

C. The Application of Quarles' *Public Safety Exception to* Terry *Stops*

Quarles' public safety exception permits statements made to police, before the reading of *Miranda* warnings, to be included as evidence in an ensuing criminal trial so long as the questioning by the police was reasonably prompted by an immediate concern for the safety of the police or public.[187] Given this exception, *Miranda* warnings are only required during a *Terry* stop when police interrogation is targeted at gathering evidence, and not required before questions directed at resolving an immediate threat to public and officer safety. The public safety exception mitigates burdens on law enforcement, bolsters the policies that justify *Terry* stops, and balances the detainee's civil right to *Miranda* warnings against public and officer safety.

In *Quarles*, a woman told two police officers in Queens, New York, that she was just raped; she described the man and told the officers he had just entered a nearby supermarket and was armed.[188] An officer reached the suspect in the store, frisked him, and discovered an empty shoulder holster.[189] After

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employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning."). *See also supra* Part II(A)(i).

[186] Mapp v. Ohio, 367 U.S. 643, 660 (1961) (disallowing the admission of evidence seized pursuant to an unlawful search during the trial of the subject of the unlawful search).

[187] New York v. Quarles, 467 U.S. 649 (1984).

[188] *Id.* at 651–52.

[189] *Id.*

handcuffing him, the officer asked where the gun was—the suspect "nodded in the direction of some empty cartons and responded, 'the gun is over there.'"[190] The officer then placed the suspect under arrest and read him his *Miranda* rights.[191]

Quarles sought to have his statement, "the gun is over there," excluded from trial because the officer had not yet given him his *Miranda* warnings.[192] The Court noted that this case presented a situation where "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in Miranda,"[193] and thus established a "public safety" exception to *Miranda*.[194] The Court was largely persuaded by the realities of the encounter:[195] first, in apprehending the suspect, the officers were confronted with the immediate necessity of discovering the location of a hidden gun in a public place. The situation posed dangers to the public because an accomplice might use it, or a customer or employee may find it.[196] Second, the Court noted that if the police are "required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding."[197] The police officer "needed an answer to his question *not simply to make his case against Quarles* but to insure that further danger to the public did not result from the concealment of the gun in a public area."[198]

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[190] *Id.*

[191] *Id.*

[192] *See id.*

[193] *Id.* at 653.

[194] *Id.* at 655. The Court also clarified that the availability of this exception does not depend upon the individual motivations of the police. *Id.* at 656. "In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer." *Id.*

[195] *See id.* at 657.

[196] *Id.*

[197] *Id.*

[198] *Id.* (emphasis added).

Third, the Court recognized the importance of an easily workable rule "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[199] Finally, while admitting that the present exception muddied *Miranda's* bright-line rule, the Court concluded that this exception would not be difficult for police officers to apply because in each case police should be able to distinguish between questions necessary to secure personal or public safety and questions designed to elicit testimonial evidence.[200]

Thus, if *Terry* stops may rise to *Miranda* custody, then *Quarles*' public safety exception permits police to interrogate *Terry* detainees regarding immediate threats to public or officer safety without first delivering *Miranda* warnings. Since *Terry* stops are limited to resolving officers' reasonable suspicions that a suspect is dangerous or about to commit a crime, it is likely that *Miranda* warnings will be excepted under *Quarles* during most *Terry* stops. Indeed, the *Newton* court took such an approach, ruling that although the defendant was in custody during his interrogation, the questioning, which was directed to the recovery of a gun, fell within the *Quarles* public safety exception to *Miranda* and survived suppression.[201]

V. POSSIBLE CRITICISMS OF THE INDEPENDENT APPROACH

A. The Costs of Issuing Miranda *Warnings During a* Terry *Stop Outweigh the Benefits of the Prophylactic Rule*

Delivering *Miranda* warnings outside police station custodial interrogations can impose a significant cost and undermine effective law enforcement:[202]

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[199] *Id.* at 658 (citing Dunaway v. New York, 442 U.S. 200 (1979)).

[200] *Id.* at 658–59.

[201] United States v. Newton, 369 F.3d 659, 677 (2d. Cir. 2004) ("[A]lthough Newton was in custody at the time of the challenged interrogation, questioning preliminary to the officers' recovery of the charged firearm fell within the public safety exception to Miranda.").

[202] Note, *Custodial Engineering: Cleaning Up The Scope of* Miranda

> [t]he mere recital of a *Miranda* warning formalizes a police-civilian interaction, which "may discourage citizens from cooperating with the police" . . . the recital of the warning and the detainee's likely responses also delay an on-the-scene investigation, which may endanger the police and public . . . vague *Miranda* requirements jeopardize on-the-scene inquiries by causing uncertainty for the police officers who must administer the warning, the subject who receives it, and the courts that must review it . . . empirical evidence demonstrates that the *Terry* stop, frisk, and inquiry "should not be underestimated" as a deterrent to crime . . . it would threaten the unstructured and spontaneous nature of the *Terry* stop by formalizing the inquiry . . . it would block the proper execution of *Terry* by increasing the potential for unconstitutional delay during the brief stop . . . [all are] additional burdens on a *Terry* stop [that] would diminish its utility to law enforcement, and that result contradicts the recent efforts by courts to ensure that *Terry* stop, frisk, and inquiry remains a viable investigative option.[203]

The Warren Court recognized the burdens that law enforcement officials must bear,[204] but remained adamant that the privilege against self-incrimination demanded certain sacrifices.[205] Thus, as *Terry* stops increasingly resemble the type of intrusive conduct the *Miranda* Court deemed serious enough to warrant a prophylactic rule, society must accept the sacrifices *Miranda* requires in the context of a *Terry* stop. Moreover, *Quarles*' public safety exception mitigates these potential costs to safety by excepting questions directed towards resolving an immediate danger to public or officer safety. And while issuing

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Custody During Coercive Terry *Stops*, 108 HARV. L. REV. 665 (1995).

[203] *Id.* (emphasis added).

[204] Miranda v. Arizona, 384 U.S. 436, 481 (1966).

[205] *Id.* at 479. "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." *Id.* at 480, n.50 (citing Walter V. Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).

Miranda warnings to a suspect may result in a failure to obtain evidence that would otherwise be collected, this cost to society is tempered by the prevention of the coercive means by which that evidence would have been obtained.

B. Police Will Be Unable to Determine Whether They Have Placed a Suspect in Miranda *Custody*

Before the permissible scope of a *Terry* stop expanded, the concepts of "arrest" and "custody" were closely related and *Terry* stops looked nothing like the behavior that constituted *Miranda* custody.[206] Simply, officers knew *Miranda* warnings were not required during a lawful *Terry* stop. However, if *Miranda* applies to *Terry* stops, police officers must determine more than whether they have the requisite reasonable suspicion to conduct an investigative stop. In addition, they must consider whether the level of coerciveness with which they are conducting the search constitutes a custodial or non-custodial investigative stop for *Miranda* purposes, as well as whether their questions are directed at gathering evidence or resolving an immediate public safety suspicion.

While these additional requirements complicate the orchestration of a *Terry* stop, they are necessary to balance the privilege against self-incrimination against the safety of the public and police officers. The difficulty of determining *Miranda* custody could be answered more easily with firmer guidelines from courts.[207] Further, inquiry into the purpose of an officer's questioning will not significantly impose on law enforcement efforts. As the Court explained in *Quarles*, "[w]e think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."[208]

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[206] Williamson, s*upra* note 175.

[207] *See supra* Part IV(B).

[208] New York v. Quarles, 467 U.S. 649, 658–59 (1984).

C. Terry *Should Be Returned to Its Original Contours*

One commentator proposes resolving the Circuit split regarding the application of *Miranda* to *Terry* by returning "the *Terry* doctrine to its pre-expansion dimensions, and thereby diffus[ing] the tension that has recently been created between *Terry* and *Miranda*."[209] In short, the commentator argues that the best option to resolve the question of *Miranda* applicability to *Terry* is to reverse the expansion of *Terry* for two reasons: "(1) it is contrary to relevant Supreme Court authority, and (2) it has not been supported by persuasive or logical rationales."[210] Further "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."[211]

This argument does not attack the soundness of the circuits' differing views, but rather identifies a misstep by courts in permitting an environment to develop that is capable of fostering the present disagreement.[212] Although the simplicity of this approach is attractive, it ignores the *reason* that *Terry* expanded: an evolution of the type and rate of crime in this country since the Warren Court's decisions.[213] Regardless of the virtues of *Terry*'s expansion, courts must take steps to protect suspects Fifth Amendment rights.[214]

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[209] Godsey, *supra* note 181, at 741 (emphasis added).

[210] *Id.*

[211] *Id.* at 747.

[212] A response that fully addresses this argument is most appropriate for another case comment or article.

[213] United States v. Michelletti, 13 F.3d 838, 844 (5th Cir. 1994).

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

CONCLUSION

In August of 2008, the Attorney General of New Mexico filed a petition for certiorari to the United States Supreme Court requesting review of the New Mexico Court of Appeals' decision in *State v. Snell*,[215] which adopted the independent approach and required *Miranda* warnings be read to a suspect detained in a squad car at a *Terry* traffic stop.[216] The Court of Appeals stated that if a "motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda."[217] Challenging this decision, the Attorney General cited to the First and Fourth Circuit's approach in *Trueber* and *Leshuk* to support its position that New Mexico's high court misapplied *Berkemer* and *Miranda*.[218] The State's petition acknowledged that

> [c]ourts and commentators alike have struggled with the manner in which the concept of arrest intersects the Fourth and Fifth Amendments . . . . The question seemingly left open by *Berkemer,* and on which both federal and state courts disagree, is whether *Miranda* extends to investigative detentions in which police officers use a greater than normal level of force in response to safety or other law enforcement concerns without effecting a *de facto* arrest.[219]

The petition was denied on December 1, 2008,[220] and thus the question will continue to be reserved for states and lower courts.

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[215] New Mexico v. Snell, 166 P.2d 1106 (2007).

[216] *Id*. at 1111–12.

[217] *Snell*, 166 P.3d at 1111.

[218] Petition for Writ of Certiorari at 24, State v. Snell, 129 S. Ct. 626 (2008) (No. 08-196), *available at* 2008 WL 3833284.

[219] *Id*. at 7. The petition also noted that the Second Circuit recognized a circuit split and broke from the First and Fourth Circuit in their approach to the application of *Miranda* to *Terry* stops. *Id*.

[220] State v. Snell, 129 S. Ct. 626 (2008).

As the constitutional guidelines governing criminal procedures evolve, it is imperative that the new rules reflect the actual changes and practices of law enforcement. Mindful of the changes in nature of a *Terry* stop, courts ought to apply *Miranda* to the context of a lawful *Terry* stop that rises to the level of custody imagined by *Miranda*.