St. John's Law Review

Volume 72, Summer-Fall 1998, Numbers 3-4 Article 1

Foreword

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Recommended Citation

Bobis, Charles S. (1998) "Foreword," *St. John's Law Review*: Vol. 72 : No. 3 , Article 1.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol72/iss3/1

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VOLUME 72 SUMMER-FALL 1998 NUMBERS 3-4

FOREWORD

CHARLES S. BOBIS*

The articles in this symposium issue of the *St. John's Law Review* arise out of the conference that St. John's hosted on April 2 and 3, 1998, to mark the 30th anniversary of one of the United States Supreme Court's most important and controversial constitutional criminal procedure decisions, *Terry v. Ohio*. In *Terry*, the Court placed its constitutional imprimatur on the police investigative practice known as "stop and frisk," holding that the Fourth Amendment permits an officer, without a warrant and without probable cause to arrest, to stop and question a person who the officer reasonably suspects is engaged in criminal behavior, and to frisk the person for a weapon if the officer reasonably suspects the person may be armed and dangerous. The Court did not apply the Fourth Amendment's Warrant Clause and its probable cause requirement to this police practice. Instead, the Court employed a reasonableness balancing test to determine whether the officer's conduct violated the Fourth Amendment's proscription against unreasonable searches and seizures. The *Terry* decision and its mode of analysis have had a profound and lasting effect on Fourth Amendment jurisprudence and policing in the United States.

The *Terry* conference brought together leading legal scholars, jurists, practitioners, and experts on law enforcement from throughout the United States. They explored *Terry*'s impact on Fourth Amendment law, its place in legal theory, its effect on day-to-day policing, its impact on relations between minority

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populations and the police, and its relationship to the substantive criminal law. The *St. John's Law Review* is proud to provide this outstanding group of thinkers from the bench, bar, academy, and law enforcement the opportunity to illuminate one of the most important decisions in modern Fourth Amendment jurisprudence by presenting the papers that grew out of the presentations at the seven conference panels. The authors have given generously of their time and talent to produce what we believe will become standard reference works in Fourth Amendment law and constitutional criminal procedure generally.

The contributions to this issue begin with papers based on what the conference organizers affectionately dubbed the "memoir" panel, which brought together several of the principal lawyers who litigated the *Terry* case and two of the Justices' law clerks who worked on the stop and frisk decisions behind the scenes. Congressman Louis Stokes, then an attorney in private practice in Cleveland, Ohio, represented Mr. Terry all the way to the Supreme Court, where he argued his case in December 1967. Mr. Reuben Payne, who as an assistant prosecutor in Cleveland was assigned to prosecute what seemed at the time a routine gun possession case, successfully litigated the *Terry* case at every stage of the proceedings. Judge Michael R. Juviler was, in 1967, the Deputy Chief of the Appeals Bureau in the office of legendary Manhattan District Attorney Frank Hogan. Judge Juviler briefed and argued, as amicus curiae, one of *Terry*'s companion cases, *Sibron v. New York*. The article by my colleague, Professor John Barrett, takes us behind the scenes and illuminates the Court's process of deciding the stop and frisk cases in 1967-68. Articles by Professor Earl Dudley, Jr. and Associate Attorney General Raymond Fisher, who clerked for Chief Justice Warren and Justice Brennan, respectively, during the crucial 1967 Term of the Court, round out the "memoir" panel.

The second panel's papers examine *Terry*'s effect on Fourth Amendment law. Was *Terry* marvel or mischief? Is it a decision that works for police and for citizens by striking an appropriate balance between law enforcement needs and individual liberty, or has it become a tool in the hands of lower courts for the continual expansion of police power over citizens through the use of categorical rules that undercut the fact-sensitivity at the core of the *Terry* doctrine? Articles by Professors Stephen Saltzburg and David Harris take up this debate, with reaction pieces by

Professors George Thomas III and Daniel Richman.

The third conference panel looked to the future of Fourth Amendment law. Does *Terry*'s balancing approach provide a proportionality principle that should serve as the conceptual framework for 21st Century search and seizure jurisprudence? Are there two *Terry*'s, each pointing Fourth Amendment law in a different direction, one toward reasonableness as the touchstone of search and seizure law, the other toward warrants and probable cause? If so, which *Terry* is consistent with Fourth Amendment "first principles" and should be followed, and which should be rejected? These and other important questions are addressed in articles by Professors Christopher Slobogin and Akhil Amar. Responses by Professors Scott Sundby and Eric Muller enhance the debate about the proper direction of Fourth Amendment law as we approach the new millennium.

The contributions from the fourth conference panel shift the focus away from *Terry* itself to raise and debate significant questions about the current state and future prospects of a general theory of the Fourth Amendment. Are attempts by scholars to formulate a general theoretical solution to the problem of the Fourth Amendment doomed to failure because Fourth Amendment law is a "grown" not "made" system (using Friedrich Hayek's dichotomy), simply not amenable to the top-down analytical efforts in which many Fourth Amendment scholars are engaged? Should their efforts instead be redirected toward developing what might be called "local knowledge" about Fourth Amendment law? And how does the opposition between local and general theoretical knowledge impact on the *Terry* problem of regulating the behavior of the police in street stops? The article by Professor Ronald Allen and Mr. Ross Rosenberg begins the discussion, with Professors Carol Steiker and William Stuntz joining issue.

Shifting attention from the theoretical to the practical, the fifth conference panel explored the "on the job" effects on police of *Terry*'s stop and frisk doctrine. The authority to stop, to question and, where danger appears to exist, to frisk suspicious persons vests broad discretion in the police that is easily abused. Even if the stop and frisk practice that the *Terry* Court approved is a necessary, even an indispensable, investigative tool that police had long employed—after all, from a police perspective, what else was Detective McFadden to do when he saw John Terry and

his companions apparently preparing for a "stickup?"—serious questions remain about how to prevent police abuses. Should we rely on internal administrative rulemaking by police departments and involvement of communities in developing anti-crime strategies to regulate such "low visibility" police practices? Or, given the vagaries of the reasonable suspicion standard, is judicial regulation of police discretion still our best hope for enforcing the limits of *Terry*? These themes are taken up and developed in the article by Professor James Fyfe, a veteran former New York City police officer, and the responses by former New York City Police Commissioner Robert McGuire and Professors Margaret Raymond and Jerome Skolnick.

The sixth conference panel directly addressed an issue that arose several times during the conference and which inevitably must be confronted in any appraisal of stop and frisk doctrine: *Terry* and race. Why did the *Terry* Court, while openly acknowledging that aggressive police patrol and field interrogation practices were often used to harass, humiliate, and control people of color in America's inner cities, still choose to allow forcible police-citizen encounters on less than probable cause? Why did it not follow the course it had chosen in *Miranda* just two years earlier, in which it recognized the imbalance of power between the often poor and minority criminal suspect and the police in the context of custodial interrogation and intervened in an attempt to protect the Fifth Amendment values at stake there? Was the Court simply wrong in *Terry*? Is *Terry*'s Fourth Amendment legacy the continued subordination of the liberty and personal security interests of African-American men to the discretion of the police? Or has the political landscape in America changed so much that the flexible balancing approach taken in *Terry* makes it right for today? These are among the important questions explored and illuminated in articles by Professor Tracey Maclin, Judge Jack Weinstein and Ms. Mae Quinn, and Professor Tracey Meares.

The last group of papers presented in this symposium issue is derived from the roundtable discussion on the relationship between *Terry* stop and frisk doctrine and the substantive criminal law that concluded the *Terry* conference. That relationship is complex and affects current policing strategies such as community policing and the revived use of loitering ordinances aimed at drug or gang activity, including the anti-gang ordinance cur-

rently before the Supreme Court in the *Morales*[1] case. These timely issues are explored by Professors Mary Coombs, Debra Livingston, William Stuntz (who generously did double duty at the conference), and Judge John Keenan.

Enjoy!

[1] City of Chicago v. Morales, 687 N.E.2d 53 (Ill. 1997), *cert. granted*, 118 S.Ct. 1510 (1998). Oral arguments are scheduled for December 8, 1998.