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TERRY V. OHIO IN THE TRENCHES: A GLIMPSE AT HOW COURTS APPLY “REASONABLE SUSPICION”

GEORGE C. THOMAS III*

The papers by Professors Saltzburg¹ and Harris² are both splendid—in the best tradition of legal scholarship. Each paper is thoughtful, insightful, and provocative. I want to suggest that, in a sense, they are both right. How can this be?

Professor Saltzburg presents Terry³ in its aspirational stance. This is Terry as Chief Justice Warren and the other members of the Terry majority wanted it to be—permitting flexible, cautious law enforcement responses to fluid, potentially dangerous street encounters, but always requiring the police to demonstrate specific facts which give rise to permissible inferences that crime is afoot. Professor Saltzburg is satisfied with Terry, I think, because he believes it comes close to that aspiration.

Professor Harris, on the other hand, is a cynic. He sees the loose language that has evolved as a Terry standard—reasonable suspicion—and he believes that prosecutors can drive a truck through that language. He believes that judges will wink or nod or doze and rule in favor of the prosecution on very thin evidence. In the Terry opinion itself, the Court fretted about the burden of aggressive policing on racial minorities, noting that the exclusionary rule has no effect on the “wholesale harassment by certain elements of the police community, of which minority

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* Professor of Law, Rutgers University, Newark. Joshua Dressler and Dan Richman provided thoughtful assistance at several stages of this project. I also thank the St. John's University Law School community for its assistance and, most importantly, for arranging this conference.


groups, particularly Negroes, frequently complain. If prosecutors win almost all Terry suppression hearings, it means the police can hassle just about anybody who happens to be in or near a high-crime area, which means the burden of Terry's loose standard falls disproportionately on racial minorities.

It seemed to me when I was reading these papers that each writer is right, in the sense that if the world feared by Professor Harris is the one we inhabit, there is good reason to reject Terry. But if the world is closer to that envisioned by Professor Saltzburg, then Terry may be more beneficial than harmful. So the issue, I think, is how best to determine which world we inhabit.

More than a half century ago, the legal realists rejected the notion that law was a science that could be applied the way engineers apply math. Instead of pretending that judges are bound by a rigid rule of law (which would be a ridiculous claim for Terry's standard of reasonable suspicion), the legal realists called for a better understanding of how judges apply law at the "wholesale" level of trial courts. This, they argued, would tell us more about law than any study of doctrinal categories. One way to understand how judges apply law is to count what they do— who wins, who loses. Examining this empirical reality would give us more confidence when describing how law works—in this case, how effectively the lower courts limit the discretion of police officers to make stops and frisks based on hunches or on class and race stereotypes.

Few researchers took the legal realist challenge to gain an empirical understanding of law. The reasons for this are varied, ranging from habit (if creating or clarifying doctrinal categories was good enough for Blackstone and Wigmore, it is surely good enough for us) to the tedious, time-intensive nature of most em-

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4 Id. at 14.
6 I do not mean to suggest that there is a complete absence of empirical research. Indeed, an excellent volume excerpting numerous studies is LAW AND SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW (Stewart Macaulay et al. eds., 3d ed., 1995). But compared to the number of scholars doing non-empirical research, and compared to the volume of the law review literature devoted to non-empirical articles, the empirical literature is tiny.
pirical projects. There has recently been a resurgence of interest in the empirical question of how *Miranda v. Arizona* has affected police interrogation and the confession rate. Professors Richard Leo and Paul Cassell have each undertaken recent field studies of police interrogation (Cassell was assisted by Bret Hayman). Closer to *Terry*’s Fourth Amendment “home,” Professor Peter Nardulli in the 1980s conducted two major studies of pre-trial motions to suppress, lumping into a single category all motions seeking to suppress physical evidence.

I do not know of any similar research that isolates how *Terry* issues are decided. Without that kind of insight into what *Terry* means at the level of the day-to-day operation of the criminal justice system, I can claim that both Professor Saltzburg and Professor Harris describe a world that could be the world we inhabit. Stated differently, we can endlessly debate the value of *Terry* at the level of abstract theory and never resolve anything because we do not know whether we have the “good” *Terry* or the “bad” *Terry* operating when courts decide motions to suppress.

Professor Harris presented some examples of how lower courts have evolved pernicious *Terry* categories as a substitute for the hard work of applying the fact-sensitive standard of reasonable suspicion. While I mostly share his criticisms of these cases, we don’t know how representative they are. Indeed, a Westlaw search for “Terry v. Ohio” & “reasonable suspicion” turned up more than 5,000 state and federal cases. If that many cases are in the Westlaw database, which consists predominantly of appellate cases, there must be tens of thousands of *Terry* cases decided at the trial stage. We need a random sample to tell us what is really happening at the level of the motion to

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11 See Harris, supra note 2.
suppress.

The best kind of study would be one like Nardulli’s—where a researcher isolates the motions to suppress that decide Terry reasonable suspicion issues and then records which party won at the trial level. There are two problems in applying this methodology to the Terry issue. First, I could not undertake such a study in time to present it as part of the St. John’s University Law School Terry conference. Second, and more fundamental, it is unlikely that a written motion to suppress will always, or even often, disclose that Terry is the crucial issue. Rather, I suspect that most Fourth Amendment motions to suppress are something along the lines of “move to suppress evidence found in a search of defendant’s person and vehicle, conducted in violation of the Fourth Amendment.” Why would a defendant raise Terry? Defendants would prefer to litigate the search as a failed search incident to arrest or vehicle search, both of which require probable cause. The prosecution is the party who would, at the hearing on the motion to suppress, raise Terry as a safe harbor in case the judge found the search and seizure to lack probable cause. If this is right, researchers cannot use court records to construct a database, as Nardulli did, and would be forced to attend the motions to suppress or, alternatively, persuade judges to permit the taping of the hearings. Both of those arrangements are difficult, time-consuming tasks.

Because I wanted to have something to say to you today, I chose an easier route—a Westlaw search. I began with federal district court opinions on the theory that a federal district court is a trial court and thus closer to the actual fact-finding that forms an enormous part of deciding questions about reasonable suspicion. I drew a sample of 100 cases that met one of two criteria: (1) criminal cases that reached the merits of the Terry reasonable suspicion issue—here I rejected cases that found the suspect was free to leave or that found probable cause or consent to justify the stop and frisk; and (2) civil cases in which the Terry reasonable suspicion issue was raised.\textsuperscript{12} Almost all of category (2) cases were 42 U.S.C. § 1983 actions alleging federal civil rights violations. In this context, Terry was raised by the civil defendant (police officers or departments) as a way to argue that

\textsuperscript{12} Initially, I simply rejected the civil cases without counting them, but when I discovered how numerous they were, I returned to the beginning of the sample and included them.
there was no Fourth Amendment violation. I made no effort to determine who "won" the civil Terry issue, in part because my interest was in the criminal context and in part because a civil jury verdict will usually not reveal which issues persuaded the jury to find for or against the plaintiff. The reason I counted civil cases as part of the universe was to gauge the extent to which civil plaintiffs are challenging police actions that can be at least plausibly described as Terry stops and frisks. Presumably, the larger the number of civil Terry actions, the greater the incentive for police departments to create and enforce departmental rules about Terry stops and frisks. Thus, I was interested in seeing how the number of civil actions compared to the criminal motions to suppress. Table 1 presents the raw data:

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Number</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Government Wins Motion</td>
<td>51</td>
<td>51%</td>
</tr>
<tr>
<td>Defendant Wins Motion</td>
<td>20</td>
<td>20%</td>
</tr>
<tr>
<td>Civil Case</td>
<td>29</td>
<td>29%</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100%</td>
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</tbody>
</table>

Two observations seem justified. First, civil plaintiffs are filing large numbers of lawsuits against police actions that raise Terry issues. Second, criminal defendants do not do so badly in this universe of cases. Because I am ultimately interested in the criminal context, I removed the civil cases from the universe and restated the first two categories.

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Number</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Government Wins Motion</td>
<td>51</td>
<td>72%</td>
</tr>
<tr>
<td>Defendant Wins Motion</td>
<td>20</td>
<td>28%</td>
</tr>
<tr>
<td>Total</td>
<td>71</td>
<td>100%</td>
</tr>
</tbody>
</table>

From this sample, we can conclude that federal district court
defendants win more than a quarter of the “reasonable suspicion” cases—not an insignificant number by any means. Peter Nardulli’s 1983 data showed that, in state trial courts in medium-sized Midwestern counties, defendants won 17% of motions to suppress physical evidence.13 Dan Richman pointed out to me that my methodology is skewed in favor of finding more successful motions to suppress than actually occur.14 The only cases that show up in a Westlaw search are those in which opinions are written, and those are more likely to be close cases and thus more likely to go for defendants. Nardulli, on the other hand, had access to the court records and counted all motions. Acknowledging that confounding variable, I remain surprised at the percentage of Terry suppression motions that defendants win.15

I wondered if there was something about the federal judiciary, or the kinds of cases they see, that might explain the relatively high percentage of successful Terry motions. For example, it seemed to me that a disproportionate number of cases where the defendant wins were immigration cases. The federal district courts seemed quite skeptical of the kind of categorical inference that most concerns Professor Harris—that a person’s ethnicity could be the sole or predominant basis of reasonable suspicion. As immigration cases were a substantial percentage of the total (14.6%), if there were a large skewing of cases in defendants’ favor in this category, it would skew the results by several percentage points.

To check my federal outcomes, I drew a sample of state cases (almost exclusively appellate cases16) that met my two criteria above. There is, of course, still a bias in favor of finding an arti-

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13 See Empirical Assessment, supra note 9, at 594.
14 Telephone Interview with Daniel Richman, Associate Professor of Law, Fordham University (Mar. 25, 1998).
15 I asked my research assistant, Jennifer Alonzo, to draw a different sample of federal cases and read them using my methodology. Having two “readers” obviously increases the chance of differential categorizations. Nonetheless, her results closely mirrored mine and serve, I believe, as a substantial confirmation of my conclusions in the text. She found 44 cases in which the government won, 19 in which the defendant won, and 34 civil cases (her sample wound up being 97 cases, rather than 100). Removing the civil cases from her sample, the government won 70% of the criminal cases and the defendant won 30%, strikingly close to my 72%-28% result.
16 I found one trial court decision in my data set, see State v. Gregory, No. CR 106283, 1997 WL 781831 (Conn. Super. Ct. Dec. 10, 1997), but the other 99 were appellate cases.
ficially large percentage of "defendant wins" in a Westlaw sample, and now I faced a new set of potentially confounding factors. The only way a Terry claim winds up in an appellate court is if (1) the defendant wins the motion to suppress and the state files an interlocutory appeal; (2) the defendant loses the motion at trial, chooses to appeal, and chooses to raise the Terry claim; or (3) the state allows the defendant to enter a conditional guilty plea and preserve the Terry claim for appeal. Each of these mechanisms for producing appellate review seems likely to increase the number of successful Terry claims in the pool of appellate cases.

But I noticed a mitigating factor that works against defendants winning at the appellate level and thus may offset the biases that artificially inflate the defense victories. The state courts who spoke to the issue in my sample apply a very deferential standard of review on appeal of denial of motions to suppress. Though the standard gets phrased in different ways, its salient qualities are (1) to presume the correctness of the trial court's findings of fact, subject to clear error or a showing that the factual findings are not credible or are not supported by substantial evidence; and (2) to review de novo the question of law. This kind of deferential standard was approved in Ornelas v. United States, where the Court wrote:

> We... hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

While the formulation establishes a de novo standard for

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17 Of the defendants who appeal, those who see weak Terry arguments implode at the motion to suppress will be more likely to appeal on other grounds.
18 Defendants who plead guilty but preserve a Terry claim should have, on balance, stronger claims than the average defendant who raises a Terry claim. The defense lawyer has obviously made a judgment that the claim is worth appealing.
19 I did not keep track of the number of cases using a deferential standard, but I doubt that a rigorous count is possible in any event. Many cases do not state the standard of review being applied, and it is not clear to me that appellate courts consistently apply a single standard. Rather, it seems to me that they apply the deferential standard when they want to affirm the trial court but not otherwise.
21 Id. at 699.
questions of law, the crucial part of making a *Terry* determination is not the law but the facts; the second part of the Court's formulation explicitly permits a standard of review that presumes the correctness of the facts found by the trial court. Justice Scalia, dissenting in *Ornelas*, put it in his typically penetrating style: "Because, with respect to the questions at issue here, the purpose of the determination and its extremely fact-bound nature will cause de novo review to have relatively little benefit, it is in my view unwise to require courts of appeal to undertake the searching inquiry that standard requires."^22^  

State courts have taken the Supreme Court's invitation to presume the correctness of the trial court's findings. Ohio has adopted the *Ornelas* formulation.^23^ Nebraska seems similar: "[i]n making this [de novo] determination, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses."^24^ The Arkansas formulation is different but the standard seems roughly the same: "[W]e make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling is clearly against the preponderance of the evidence. In making this determination, we view the evidence in the light most favorable to the State."^25^ The Tennessee standard is virtually identical.^26^ Texas applies an abuse of discretion standard when "the resolution of the motion turns on an evaluation of credibility and demeanor."^27^ For example, after reviewing a close application of *Terry*, the Texas Court of Appeals concluded: "Considering the informant's tip and Deputy Hamilton's personal observations, we cannot say that the trial court abused its discretion in denying appellant's motion to suppress."^28^ The Kansas standard is about the same: "If the findings of the trial court on a motion to suppress evidence are based on substantial evidence,

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^21^ *Id.* at 700 (Scalia, J., dissenting).


^23^ See *State v. Craven*, 571 N.W.2d 612, 617 (Neb. 1997).


^25^ See *State v. Simpson*, 968 S.W.2d 776, 779 (Tenn. 1998).


HOW COURTS APPLY "REASONABLE SUSPICION"

the appellate court must not substitute its view of the evidence for that of the trial court.\(^2\)

One does not have to be a David Harris cynic to note how heavily the Ornelas standard weighs in favor of the party who wins at the trial level. Terry's legal standard is so loose that the party who gets a presumption in favor of the facts found below should win all of the close cases. I believe that the party who most often benefits from a deferential standard of review on motions to suppress is the state, because the state will usually be the appellee. Though some appeals in my data set were state interlocutory appeals from a granting of a motion to suppress, I suspect that the state appeals a smaller percentage of its losses at the motion stage than do defendants. This intuition is largely based on the state's powerful position in most criminal cases. The state usually has more than enough evidence to convict and can often do so without the evidence that was suppressed. Moreover, when the evidence is important, the state can offer a plea bargain to a lesser offense rather than undertake an appeal. Finally, the state in a sense has less to lose than does the defendant; it is easier to justify dismissing a prosecution or offering a very favorable plea bargain than it is for a defendant to forgo appealing a conviction. The state has opportunity costs—other cases may displace the Terry appeal—and "repeat player" concerns—it has to worry about making "bad" law in the reported cases. Defendants, on the other hand, are one-shot players with no concerns about Terry doctrine and no opportunity costs that would deter an appeal (indeed, quite the contrary).

If I am right that the state is disproportionately the appellee and thus disproportionately benefits from the deferential standard of review, that should increase the percentage of prosecution victories in my state database as compared to the federal outcomes (because the government does not benefit from a favorable standard of review at the district court level, at least in theory\(^3\)). It would therefore be surprising if the state outcomes ap-

\(^2\) State v. Wonders, 952 P.2d 1351, 1356-57 (Kan. 1998). The Kansas Supreme Court then felt the necessity to define "substantial evidence." I will spare the reader. The court noted that its scope of review was "unlimited" when the facts are not in dispute. Id. at 1357.

\(^3\) Though magistrates can initially hear the motion to suppress, the review in the district court is de novo in every sense of the word. The district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may
proached the federal outcomes. But they do, as Table 3 shows:

| TABLE 3 |
| State Appellate Court Criminal Outcomes |

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Wins</td>
<td>73</td>
<td>73%</td>
</tr>
<tr>
<td>Defendant Wins</td>
<td>26</td>
<td>26%</td>
</tr>
<tr>
<td>Total</td>
<td>99</td>
<td>100%</td>
</tr>
</tbody>
</table>

I found the state results even more surprising than the federal results (caveats about confounding variables noted for the record). That the percentage of cases won by the defense was virtually the same in both federal and state databases suggests that the defense bar has found an equilibrium between frivolous *Terry* appeals and those with a decent chance of prevailing. It also suggests that state and federal judges take seriously their job of rejecting weak or fabricated *Terry* claims made by the State.

So what's here for the Saltzburg/Harris dichotomy? Well, I think they can both tell a story to explain these data. Professor Saltzburg has the easier story—look, judges take seriously the job of putting teeth into the amorphous "reasonable suspicion" standard, and they won't defer completely to the hunch or intuition of police. Indeed, I found cases in my data set where judges said essentially that. So, this story vindicates Professor

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accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." 28 U.S.C. § 636(b)(1) (1994).

My state data set included only one civil case, a false arrest tort case. As this was a trivial number, I simply discarded the civil case and report only criminal outcomes. The trivial number of state civil cases in my sample does suggest the importance of 42 U.S.C. § 1983 in obtaining civil redress for constitutional violations. Fully 29% of my federal sample were civil cases as opposed to only 1% of my state sample.

I mean, of course, that defendant wins the *Terry* issue on appeal, not necessarily that the defendant secured a reversal of the conviction.

See, e.g., United States v. Covarrubia, 911 F. Supp. 1409, 1420 (D.N.M. 1994) (finding that "it appears that Agent Harrison acted upon nothing more than a gut instinct or a mere hunch which by chance unfolded criminal activity"); Wright v. State, 959 S.W.2d 355, 357 (Tex. App. 1998) (noting that the State's "reasons appear to be an attempt through hind-sight to create a justification for stopping and detaining. . .").
Saltzburg's aspirational view of *Terry*.

Professor Harris can tell a more troubling story of what I will call the *Terry* “red shift” effect. If one imagines police cause to stop and frisk arrayed on a spectrum from clear cause to zero cause, perhaps the effect of *Terry* is to shift police intervention toward the innocent-conduct end of the spectrum. If so, the 26-28% who are winning their motions are people who would have escaped police intrusion but for *Terry*. In this story, *Terry* remains a potential villain, responsible for a large number of essentially arbitrary stops, some of which judges rectify (at the cost of a suspect being turned into a defendant who has to make a motion to suppress and perhaps win an appeal).

There is no empirical way to check for this “red shift,” but one rough check would be to examine some of the cases to see whether defendants are winning only those cases in which the police act outrageously. I offer four cases that I believe are representative of my samples. I will not tell you whether the prosecution or the defendant won until you have read all four. I took very small liberties in one of the cases because the court’s attitude toward the case came through in the characterization of one of the facts, which I changed to a neutral tone.

**CASE 1:**

At approximately 8:50 p.m., Defendant Amelia Covarrubia was traveling westbound on Anapra Road in a 1974 Chevrolet with a New Mexico license plate. As Ms. Covarrubia approached the main intersection... from Anapra Road, she noticed a Border Patrol agent in a marked unit positioned close to the northeast corner of the intersection. Ms. Covarrubia glanced towards the Border Patrol agent’s vehicle, stopped at the stop sign, looked around to see if traffic was coming, and turned right (north) onto Highway 11. [The Border Patrol Agent on the scene testified that defendant looked at him three times and that she waited at the stop sign for approximately one minute.] Anapra Road is a well-known drug and alien smuggling route [in New Mexico].

Border Patrol Agent Michael Harrison, who was located at the intersection, has been a Border Patrol Agent for approximately 12 years. He considered Ms. Covarrubia's presence at the intersection to be suspicious. According to the agent, normally no local traffic travels at
8:50 p.m. and the vast majority of vehicles that approaches the Anapra Road/Highway 11 intersection travels south. Agent Harrison testified that normal traffic will not go north; “it’s smugglers” that go north from Anapra Road. . . .

Agent Harrison testified that he found it “suspicious” that defendant’s vehicle had an “out-of-county” license plate, specifically a Dona Ana license plate, because he felt that a vehicle from Dona Ana County would have no legitimate reason for traveling along Anapra Road and turning north towards Deming, New Mexico. He also testified that he found it suspicious that defendant’s vehicle was big and old, of the type often used to transport illegal drugs or illegal aliens . . . .

In addition, Agent Harrison testified that he found it suspicious that defendant, a female, was traveling alone at 8:50 p.m. on Anapra Road. His suspicions were further raised when defendant turned and looked at him and when she stopped at the stop sign before turning north onto Highway 11. Armed with these “suspicions,” Agent Harrison decided to follow defendant by traveling along a sidestreet that paralleled Highway 11. After following defendant for about five or six blocks, he then turned onto Highway 11 and pulled in behind defendant in order to check her plates. At this point, defendant noticed the Border Patrol vehicle pull in behind her as she traveled northbound on Highway 11. Shortly after this, she turned right at the first available right-hand turn. . . . Agent Harrison characterized defendant’s right-hand turn as an “abrupt” turn and perceived it as an attempt to evade him. Agent Harrison testified that based on the aforementioned factors he stopped defendant because he believed she was transporting illegal aliens.34

CASE 2:
As Agent Garcia approached [a] turn-off point, he noticed a 1982 Chevrolet van traveling towards him. The van slowed down, seemingly to permit Agent Garcia to make his left turn onto Highway 67, and then inexplicably sped up, nearly colliding with the Border Patrol vehicle.

Agent Garcia had to brake sharply in order to avoid a

34 Covarrubia, 911 F. Supp. at 1411-12 & n.2 (footnotes omitted).
collision.... At the time of the near collision, Agent Garcia was able to notice only that there were two occupants and that the driver was a Hispanic female. Agent Garcia began following the van west on O'Reiley and noticed that it had pulled into a closed gas station. It was around 6:50 in the morning and all of the gas stations in Presidio were closed. A license check of the vehicle revealed that it was registered to an individual in El Paso, Texas. As the Agent neared the parked van, the van abruptly left the gas station. Agent Garcia likewise turned around and continued to follow the van. While the Agent had not turned on his lights to signal for the van to pull over, the van slowed down and began driving on the shoulder of the road. After about half a mile or so of such driving, Agent Garcia turned on his lights to signal for the van to pull over. The van did not immediately pull over, but continued to hug the shoulder for another one-half mile until it reached the parking lot of the Three Palms Motel, at which point it came to a complete stop.

Agent Garcia testified at the suppression hearing that his reason for deciding to pull the vehicle over was to check the citizenship status of its occupants. Several factors made the Agent suspect that the car's occupants may be in the country illegally, even though the vehicle bore Texas license plates. First, the Agent suspected that the occupants may be from out of town when they slowed down to make the turn onto Highway 67, overshot it, and then accelerated, oblivious to the yield sign directing traffic. Second, all local residents would know that gas stations in Presidio were closed at that time of the morning. Next, Agent Garcia became most suspicious when the van suddenly departed the gas station as soon as his Border Patrol vehicle came into clear view. Finally, Defendant's erratic driving behavior with a Border Patrol vehicle in tow, i.e. driving on the shoulder of the highway when the Agent had not signaled for the van to pull over, made the Agent suspect that something illegal was afoot. 

CASE 3:

[Shortly after midnight, a Beloit, Wisconsin police officer, 35

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Kurt Wald, observed an unoccupied vehicle that appeared to be stalled in the lane of traffic. The tire closest to the curb was more than three feet from the curb and a majority of the vehicle was blocking the east bound lane of traffic. The vehicle appeared to be disabled and was a traffic hazard. Wald observed an Illinois license plate on the vehicle. Wald testified that the legal distance a vehicle is to be parked from a curb is no more than twelve inches.

Wald activated the red and blue emergency lights on his squad car and pulled up behind the vehicle. He got out of the squad car and approached the vehicle to make sure that no one was lying down on the seat and to get the VIN (Vehicle Identification Number) from the vehicle. As he did so, a man approached him in an excited state, stating that the vehicle was his. In response to Wald's request, the man identified himself with a Wisconsin photo I.D. card as Billy Evans. Evans was talking fast, was excited, was watching all around him and did not seem completely rational. It appeared to Wald that Evans did not want him near the vehicle for some reason.

Evans told Wald that he was not driving the vehicle. Wald asked Evans to have a seat in the vehicle while he ran information on Evans on the mobile data computer in his squad car. When Wald asked Evans to sit in his car, he had no reason to believe there was any outstanding warrant on him. He had not seen him do anything of a criminal nature and had not seen him drive the vehicle.  

CASE 4:
At about 4:00 a.m. [a car passed officers parked along side a highway]; in the right rear seat was a passenger, identified in court as appellant, who was leaning out of the open car window. Appellant was vomiting on the side of the car. The officers stopped the car occupied by the driver, appellant, and another passenger. There was no testimony that the car was being driven recklessly or in any way unlawfully. When Deputy Tomlinson came within two or three feet of the car he smelled odors he associated with alcoholic beverages and marihuana. In

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plain view on the console between the front seats, Deputy Tomlinson saw a partially burned marihuana cigarette.\(^{37}\)

To me, all four of these cases present plausible Terry claims. Perhaps I have been rendered too cynical by the expansion of Terry, but I would not have been surprised if all four cases had come down in favor of the state. But the courts in two of these cases found a Fourth Amendment violation. If you cannot pick out the two cases that defendants won on appeal (my criminal procedure class could not),\(^{38}\) I think that suggests that these are close cases. That defendants won two of these cases also suggests that defendants win close cases that present plausible Terry claims and not just cases where the police conduct was outrageous. And now you want to know who won? Answer in the footnote.\(^{39}\)

It may be that this exercise is not as reassuring to everyone as it is (modestly) to me. Joshua Dressler read these cases as demonstrating that the outcomes of many Terry cases are governed by random chance or by some factor extraneous to the doctrine.\(^{40}\) He views this as a criticism.\(^{41}\) But it is a criticism, of


\(^{38}\) Though the sample was too small for a statistically significant finding, my summer criminal procedure students who volunteered to take this “test,” scored at precisely the 50% level when the results for all four cases were totaled. This, of course, is random chance.

\(^{39}\) Defendants won Case 1 and Case 4. The key in Case 1 was that the court found the “abrupt” nature of the turn to be a matter of characterization, and the court rejected as not credible the agent’s testimony that the defendant looked at him several times when she first noticed him. See Covarrubia, 911 F. Supp. at 1418-19; id. at 1411 n.2. Without the inferences from these facts, the driving episode looked innocent. Defendant lost Case 2 largely on the ground that driving on the shoulder of the highway to permit the agent to pass was, considered with the other facts, quite suspicious. See Espinoza-Santill, 976 F. Supp. at 569. It’s hard to imagine how the defendant lost Case 3, but there is a sort of trick involved. The court held that there was cause to believe that a traffic offense had occurred (parking too far from the curb) and reasonable suspicion to believe that the defendant was the driver (even though he said he was not). See Evans, 1998 WL 133785, at *4. Case 4 also surprised me, but the court stressed that the car was operating normally and it was, after all, a passenger who vomited out the window. See Wright, 959 S.W.2d at 357. How did you do?

\(^{40}\) So, for example (my example, not Dressler’s), Case 1 seemed to turn on the court’s lack of confidence that the agent was testifying truthfully. But I view this as an encouraging sign for the universe of Terry cases—that judges in some cases, even a few, reject testimony of government actors as not credible shows that there are limits beyond which law enforcement cannot manipulate the fact-finding process.

\(^{41}\) E-mail Message from Joshua Dressler, Professor of Law, University of the
course, only if one’s jurisprudential goal is to achieve a just outcome in each case. While that is a noble goal, I suspect it is beyond the capabilities of any doctrine based on the shifting sands of “unreasonable searches and seizures.” Indeed, as I read the Terry opinion, the Court’s principal goal was to facilitate good investigative police work and to put limits on what would qualify as good police investigation. This implies a concern with deterrence rather than justice in individual outcomes. Even random results in close Terry cases will produce deterrence (assuming deterrence is possible in a Terry context) if defendants win a sufficient number. Good police officers will not want to create a risk of a random bad result in a motion to suppress and will wait until the reasonable suspicion is clearer. Thus, my representative cases suggest that Terry may be delivering as much deterrence as the Fourth Amendment is capable of delivering, even if it falls short of a precise doctrine that gives the right results in close cases.

There are, however, problems using these representative cases to dispel the notion of a red shift. First, consider the perceptive point made by Dan Richman: What we get in Terry litigation is not so much what the police officer was doing and thinking but, rather, a story that the prosecutor helps develop. Some form of red shift is thus already built into these cases. Secondly, even if these representative cases persuade us that police are not routinely engaging in outrageous behavior (prosecutors would have a difficult time constructing a plausible Terry story from outrageous police conduct), that does not mean that the red shift harm has been rectified. Indeed, if the police have substantially expanded the pool of people subject to Terry beyond what the Court intended, the harm is not rectified even if judges suppress the evidence found in all of the additional police interventions. These individuals may wind up having to plead to a lesser charge and, in any event, will have an arrest record. And this harm does not even include the greater harm: the large number of innocent suspects who are frisked and who do not choose to get redress through a § 1983 action. The number of in-

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Pacific, McGeorge School of Law, to George C. Thomas, Author (May 26, 1998).

42 See Interview with Daniel Richman, supra note 14.

43 I found no cases in which the claim was outrageous. I suspect prosecutors screen out those cases rather than attempt to create a plausible claim out of nothing.
nocent suspects is almost certain to increase, in percentage terms, as the level of police suspicion declines. At the level of arbitrary stops of people in high crime areas, the yield of *Terry* frisks should be quite low. So if a *Terry* "red shift" explains the data I found, Professor Harris's version of the *Terry* story is still very much intact.

After I came up with the skeptical alternative, I thought maybe I had wasted my (and now your) time. But on further reflection, I decided that at least the data avoid Professor Harris's potential knockout punch. I have asked several criminal procedure scholars to project the outcomes of my Westlaw search, and the estimates ran as high as 95% success rate for the prosecution. If the data had come out 95% prosecution and 5% defendant, with lots of cases of pure hunch being transparently turned into reasonable suspicion, I think Professor Harris's story would be more plausible than Professor Saltzburg's. But the data did not turn out that way, and I even found several cases where the courts insisted on more than the presence of a young black man in a high crime area who was standing on a corner talking to someone in a car. If defendants had lost those cases, I'd be inclined toward Professor Harris's view. But they didn't. On balance, my samples of *Terry* cases provide a bit more support for Professor Saltzburg's view. But I think we need much more data about how magistrates and trial judges are deciding *Terry* issues before we know with any kind of confidence whether we live in the Saltzburg world or the Harris world.

So let the debate continue.

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