

St. John's Law Review

Volume 72
Number 3 *Volume 72, Summer-Fall 1998,*
Numbers 3-4

Article 30

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TERRY AND SUBSTANTIVE LAW

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The topic of this session is the relationship between *Terry* doctrine and substantive law. The basic relationship is both simple and powerful. *Terry* defines a Fourth Amendment standard for police street encounters, and that standard is itself defined in terms of the substantive law. That is, what *Terry* means depends on what substantive criminal law means.

Consider: *Terry* says that a street stop is permissible if the officer had reasonable grounds to believe that the suspect was about to commit a crime (later, the Supreme Court said the standard applies to past crimes as well as future ones). This standard, usually called "reasonable suspicion," is not like reasonableness standards elsewhere in law. In torts, when we ask whether the defendant behaved reasonably, we are asking whether the risks he ran were justified by the benefits of running them. *Terry* does not mean that. Rather, *Terry* asks whether the probability of a particular event—a past or future crime—was over some threshold. The threshold is not defined mathematically, but one could easily enough think of it that way, and courts and lawyers basically do think of it that way. (Though, I should quickly add, there is no clear agreement on what the right mathematical line is. Probable cause officially means "a fair probability;" in practice, it means, roughly, more-likely-than-not. Reasonable suspicion plainly requires less than probable cause. A good approximation, then, might be something like a one-in-five or one-in-four chance.) So in *Terry* doctrine, reasonableness turns not on some overall balance of costs and benefits, but on whether it is plausibly likely, but not necessarily probable, that the suspect either has committed or soon will commit something the state calls a "crime."

Note that last phrase. The Fourth Amendment defines the probability level in *Terry*, but the state defines the event the

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probability of which is being estimated. If "crime" is narrowly defined, if it includes only core, violent offenses, there will be few instances where a police officer eyes someone standing on a street corner and obtains reasonable suspicion of crime. If "crime" is more broadly defined, if fairly ordinary street behavior constitutes evidence of crime, reasonable suspicion will be easy to come by. Whether *Terry* operates as a serious restriction on the police depends on what criminal law covers.

Once one understands this point, one can see why *Terry* itself was such a misleading case, why it tended to mask rather than highlight the difficulties the law faces in this area. In *Terry*, Officer McFadden saw three men apparently preparing to rob a store. Notwithstanding our sense of unease about crime, such events are not that common. And it is even less common that a police officer would see street behavior that indicated such a crime was about to occur. Seen that way, the Court's decision in *Terry* is surprising only in that Chief Justice Warren made the case sound hard. Actually, it is quite easy. Few non-lawyers would accept the idea that in the balance between *Terry*'s and *Chilton*'s interest in avoiding the indignity of a street stop and society's interest in stopping an armed robbery, the former ought to win out. One reason that is so is the infrequency of cases like *Terry*'s and *Chilton*'s.

But few *Terry* stops look like the stop in *Terry*. In 1968, when *Terry* was decided, drug cases were a growing but still quite small sector of criminal law enforcement. Today, drugs dominate criminal law enforcement in many jurisdictions, and everywhere they are a big deal. Armed robberies of stores happen rarely. Drug transactions on the street happen frequently. The kind of behavior that Officer McFadden saw will rarely be seen by a police officer, if only because it is both unnecessary and stupid for the suspects to behave that way when an officer might be watching. The kind of behavior that suggests drug activity on the street will often be seen by police officers, because it is necessary—in poor neighborhoods, street-level distribution is often, perhaps almost always, the most efficient means of delivering illegal products and services; it is simply not cost-effective to do it any other way. (That is why street markets are such a common feature of consensual crime in poor neighborhoods, going back to nineteenth-century prostitution and gambling.) So instead of *Terry* stops being an exceptional police tactic used to

combat an exceptional crime, they are a very common tactic used to combat a very common crime.

The differences go further. The basis for the officer's suspicion in *Terry* was reasonably concrete: The officer saw three men behaving either criminally or very oddly. If everyone who behaved that way was stopped by a police officer, the number of stops, once again, would not be large. Not so for the behavior that gives rise to suspicion of drug activity. Young men hanging out on street corners, talking with people as they walk by, maybe passing something between them and maybe not, sometimes talking with people in passing cars—this is not strange behavior, and would not be strange even in a world that knew nothing of cocaine or heroin. It is in the nature of street-level drug transactions that their cues are subtle, and often the cues capture not only illegal behavior but a great deal of *legal* behavior as well. Indeed, it would be shocking were that not so. If drugs must be sold on the streets, the people who sell them have a substantial incentive to do so in ways that conceal their activity. Since they cannot conceal *themselves*—they are, after all, on the street—the best way to conceal their activity is to look normal, to make their activities resemble the ordinary activities of people who *aren't* selling drugs.

So, in a world where drugs are both big business and a law enforcement priority, *Terry* doctrine deals with police behavior very unlike Officer McFadden's encounter on Euclid Avenue. Reasonable suspicion of the sort Officer McFadden had might cover a few people engaged in a strange variant on window shopping. Reasonable suspicion of drug activity might cover a large fraction—sometimes, a large majority—of the young males hanging around on the street in communities where drug sales happen.

Of course, the police aren't going to stop all the young males on the street in poor neighborhoods; they don't have the manpower to do that. Which points up another difference between *Terry* and the world to which it applies. Officer McFadden wasn't looking at a large set of people all of whom looked like they were about to rob someone, and choosing to pick out Terry and Chilton for special attention. It is perfectly plausible to believe McFadden would have stopped anyone who behaved the way Terry and his friends behaved. Street stops in drug cases are different. Drug crime is sufficiently common that the police

must decide in the first instance where to look for it. Having made that decision, they must decide whom to target. They cannot target everyone *Terry's* standard would permit, so they must pick and choose.

That discretion, of course, gives rise to concerns about discrimination. This too is a function of substance. In any system that has both a large drug market and a significant commitment to containing it or stamping it out, police officers must have the authority to target some suspects and not others. That is not so of societies that want to stamp out armed robbery. If we are to have drug enforcement, we must have broad police discretion, and we cannot have broad police discretion without creating the potential for the bad exercise of that discretion.

The point is clear enough. Debates about the proper scope of Fourth Amendment law on the street, debates about the optimal meaning of *Terry's* reasonable suspicion standard—these debates are mostly misplaced. The real issue is, what crimes do we want the police to attack? If the answer is armed robbery and things like it, the Fourth Amendment questions are not worth worrying about anyway. If the answer is drugs, nothing Fourth Amendment law can do is likely to prevent the problems that prompted *Terry* in the first place.

This is a particular instance of a more general proposition. The nature of criminal law enforcement—the tactics the police use, the care with which they take account of suspects' interests, the degree to which the police treat some population groups worse than others—is subject to four major influences. First is the definition of crimes: As we have seen, street stops are very different in a society with and without drug crime. Second is the level and source of police funding. Funding determines how constrained police will be, and hence how much discretion they will exercise. And funding determines what police hiring and training standards will look like, which in turn may determine how well or poorly they exercise that discretion. Third is the nature and degree of political control over the police. If police forces are isolated from the populations they are supposed to protect, they will tend to act as a hostile force, an occupying army. If they are accountable to those populations, they will tend to be seen not as the people's enemy, but as their agent. Fourth is the law of criminal procedure, which purports to determine what searches and seizures are, and are not, allowed.

Lawyers, judges, and law professors often talk as if the last item on that list is the only one, or at least the most important one. Actually, it is the *least* important one. Fourth Amendment law matters, and it is worth trying to do right. But it matters much less than we tend to think—and political controls, spending decisions, and decisions about what crimes we want stopped matter much more. If we want to understand and control police misconduct, we would do well to look to those other forces. They are more important than *Terry*.

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