The Invisible Prison: Reconciling the Constitutional Doctrines of Coercive Terry Stops and Miranda Custody

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INTRODUCTION

Consider the following scenario: two policemen, stationed on the side of a highway in a marked highway patrol car, observe a passing vehicle driving at an excessive speed. The officers turn on the sirens and lights of the patrol car and begin to follow the vehicle. The driver immediately pulls his car over and waits patiently for the police to approach. Once both the police and the driver’s vehicle are parked out of highway traffic, two officers exit the vehicle and approach the car. Standing at the driver’s side window with their weapons affixed at their hips, the officers request that the driver turn over his license and registration. Immediately, the driver reaches into his glove compartment, retrieves the registration and hands over his license. The officers return to their car to check the vehicle and driver’s information and do not return to the driver’s vehicle for approximately twenty minutes.

The officers run the plates of the vehicle in the database and see that the driver is the registered owner of the vehicle, there are no liens on the vehicle, and it has not been reported stolen. Furthermore, the driver’s background check clears without a problem, and he has no violations on his license nor warrants for his arrest. However, thinking that the driver somewhat resembles an individual described in a drug-related anonymous tip, the officers instruct the driver to exit the vehicle with his hands in the air and to lay face down on the ground. Caught quite off guard and incredibly confused, he instantly exits the car and acquiesces to their demands. The officers surround him, place him in handcuffs, and question him for about twenty minutes while the driver lies face down on the highway in the prone position. Approximately forty minutes have elapsed.
since the officers initiated the stop. While the police reassure the suspect that he is not under arrest, his hands are cuffed behind his back and he is surrounded by two armed police officers who still retain possession of both his license and registration. Is the suspect "in custody" for purposes of *Miranda* warnings, or is the suspect being subjected to a temporary detention by police officers, whereby he is free to leave?

In *Miranda v. Arizona*, the Supreme Court held that police may not interrogate a suspect who has been taken into custody without first advising the suspect of his rights. This case focused on the Fifth Amendment’s protection against self-incrimination by providing a procedural safeguard to protect suspects from making coerced statements. Two years later, the Court decided *Terry v. Ohio*, and held that police may temporarily stop and frisk a suspect for weapons, albeit lacking probable cause to make an arrest, as long as the police have reasonable suspicion that the suspect is armed or dangerous. The holding in *Terry* created a narrow exception to Fourth Amendment jurisprudence, allowing an officer who "observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot" to briefly stop and detain a suspect to dispel reasonable fear for his own or the safety of others.

*Miranda* was initially presented as a bright-line rule to protect suspects from coerced confessions and self-incrimination under the Fifth Amendment. On the other hand, *Terry* created an exception to the probable cause requirement for search and seizures under the Fourth Amendment. Therefore, it seems quite clear that these two distinct inquiries implicate two different constitutional doctrines and thus mandate

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1. *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (requiring that when an individual is taken into custody, or otherwise deprived of his freedom by the authorities in any significant way, and subject to interrogation, he must be clearly informed of his rights, particularly his rights to remain silent, to consult with a lawyer, and to have a lawyer present during any interrogations).
2. *Id.*
3. *Id.* at 478–79.
4. *Id.*
6. *Id.* at 30.
7. *Id.* at 30–31.
8. See *Miranda*, 384 U.S. at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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.").
9. *Terry*, 392 U.S. at 30. "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27.
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two separate analyses. Moreover, it is of fundamental importance that all courts understand how Terry and Miranda interact and coexist in order to adequately protect an individual’s constitutional rights.

Courts have struggled to articulate a uniform standard for determining when, if ever, a Terry stop is also Miranda custody. As evidence of this struggle, the appellate courts are split as to whether certain coercive Terry stops constitute Miranda custody. The First, Fourth, and Eighth Circuits have held that if an investigative stop is reasonable under Terry, then the suspect is per se not in custody for Miranda purposes. The Second, Seventh, Ninth, and Tenth Circuits have held that the Terry reasonableness standard is irrelevant to determining Miranda custody and that some reasonably initiated Terry stops may require Miranda warnings before a further interrogation can proceed. Thus, following the logic of the second set of courts, a stop can be reasonable under Terry while the suspect is nevertheless considered to be in custody under Miranda. The difference between these two approaches is monumental. The First Circuit’s approach, operating under the presumption of a Terry reasonableness standard, overlooks a prophylactic safeguard implemented specifically to protect against self-incrimination.

10 See United States v. Newton, 369 F.3d 659, 673 (2d Cir. 2004) (rejecting Fourth Amendment reasonableness standard for resolving Miranda custody challenges); see also United States v. Pelayo-Ruelas, 345 F.3d 589, 591 (8th Cir. 2003) (holding that an individual that was detained and interrogated by police was not in custody for Miranda purposes); see also United States v. Kim, 292 F.3d 969, 976 (9th Cir. 2002) (distinguishing the issues of whether a search and seizure were unreasonable under the Fourth Amendment and whether an individual was “in custody” for the purposes of the Fifth Amendment); see also United States v. Trueber, 238 F.3d 79, 95 (1st Cir. 2001) (concluding that since the actions of the police officer during a stop and frisk were justified at its inception, the stop was permissible under Terry and did not require the administration of Miranda warnings); see also United States v. Leshuk, 65 F.3d 1105, 1110 (4th Cir. 1995) (establishing that because a noncustodial Terry stop involved a brief detention limited in scope, the officers did not need to provide the suspect with Miranda warnings); see also United States v. Ali, 68 F.3d 1468, 1473 (2d Cir. 1995) (explaining that whether a stop was permissible under Terry is irrelevant to determining Miranda custody); and United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993) (noting that “historically, the maximum level of force permissible in a standard Terry stop fell short of placing the suspect in ‘custody’ for purposes of triggering Miranda”).

11 Compare Newton, 396 F.3d at 673 (quoting Ali, 68 F.3d at 1472) (focusing on “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,” rather than the Fourth Amendment reasonableness standard, for resolving Miranda custody challenges), with Trueber, 238 F.3d at 92 (holding that if an investigatory stop is reasonable under the Fourth Amendment, the suspect is not “in custody” for Miranda purposes).

12 See supra note 10.

13 Id.

14 Id.

15 See United States v. Fornia-Castillo, 408 F.3d 52, 63 (1st Cir. 2005) (emphasizing that “Terry stops do not implicate the requirements of Miranda” because “though they are inherently somewhat coercive, they do not usually involve the type of police dominated or compelling atmosphere which necessitates Miranda warnings”); see also Trueber, 238 F.3d at 95 (holding that since the officers’
the best approach, as they are both tailored to different interests and policy concerns, the approach taken by the Second, Seventh, Ninth, and Tenth Circuits most effectively harmonizes the differing interests and protects individuals’ basic constitutional rights.

Part I of this Note details the historic cases that created the legal landscape for Fourth and Fifth Amendment jurisprudence. Terry created a narrow exception to the requirement of probable cause; and Miranda restricted police authority by necessitating procedures to guard against unwarranted intrusions of constitutionally protected privacy. Part II of this Note discusses the current circuit split regarding coercive Terry stops and Miranda custody. Further, it provides a detailed analysis of the differing perspectives and rationales adopted by the courts. Part III proposes a new approach to determine when an individual is considered “in custody” for purposes of Miranda warnings. This Part argues that a Terry inquiry is separate from a Miranda inquiry, and thus mandates two completely distinct constitutional analyses. Finally, this note proposes a new interpretation for reconciling the two doctrines and articulates a broader definition for the concept of Miranda custody, which is essential to protect constitutionally guaranteed rights.

I. BACKGROUND

Part I discusses the Miranda and Terry doctrines, as well as the major Supreme Court cases that have attempted to interpret the collision between the two.

A. Miranda: The Procedural Safeguard for Fifth Amendment Protection

Miranda16 is the landmark decision that established the well-known criminal procedure requirement that before engaging a suspect in “custodial

actions during the investigatory stop were “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place,” what occurred was a permissible Terry stop and, thus, would not mandate the administration of Miranda warnings).

16 Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court considered the constitutionality of a number of cases, decided jointly, in which suspects were questioned while in custody or otherwise deprived of their freedom in any significant way. In Vignera v. New York, the petitioner was questioned by police, made oral admissions, and signed an inculpatory statement, all without being notified of his right to counsel. Similarly, in Westover v. United States, the petitioner was arrested by the FBI, interrogated, and forced to sign statements without being notified of his right to counsel. Finally, in California v. Stewart, local police held and interrogated the defendant for five days without notifying him of his right to counsel. In all of these cases, suspects were questioned by police officers, detectives, or prosecuting attorneys in rooms that secluded them from the outside world. None of the suspects were given Miranda warnings or otherwise informed of their constitutional rights at the outset of their interrogation.
interrogations," police officers must inform that suspect of his rights.17 Specifically, that he has the right to remain silent, that any statements he makes may be used against him at trial, that he has a right to the presence of counsel during questioning, and that, if he is indigent, an attorney will be provided to represent him at no cost to the suspect.18

On March 13, 1963, Ernesto Miranda was arrested in his home and taken into custody and brought to a Phoenix police station.19 After he was identified by complaining witnesses, the police escorted him to "Interrogation Room No. 2," where he was questioned by two officers.20 At no point was Miranda advised of his rights.21 After two hours of interrogation, without an attorney present, the officers exited the room with a written confession signed by Miranda.22

The Supreme Court reversed the decision of the lower court, stating "Miranda was not in any way appraised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected . . . ."23 The Court held that when an individual is taken into custody or otherwise deprived of his freedom in any significant way, "the privilege against self-incrimination is jeopardized."24 Miranda protections were designed specifically to safeguard suspects from the intimidating and coercive nature inherent in custodial interrogations that may compel a suspect to become a witness against himself.25 Thus, any statements obtained without informing a suspect of his rights are inadmissible in court.26

18 See Miranda, 384 U.S. at 479; see also Lunney, supra note 17, at 742.
19 Miranda, 384 U.S. at 491.
20 Id.
21 Id.
22 Id. at 491–92. One of the officers testified that he read a statement to Miranda informing him that the "confession was made voluntarily, without threats or promise of immunity and 'with full knowledge of [his] legal rights, understanding any statement [he made] may be used against [him].'" However, the officer only did so after Miranda had confessed orally.
23 Id. at 492.
24 Id. at 478. "Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation." Id. at 478–79.
25 See Miranda, 384 U.S. at 479; see also GEORGE BLUM ET AL., AM. JUR.: CRIMINAL LAW § 914 (2d ed. 2011).
26 See Miranda, 384 U.S. at 492 ("Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to
Miranda was decided against the backdrop of pervasive incommunicado interrogations of individuals in police-dominated environments, which resulted in suspects making self-incriminating statements without being fully informed of their constitutional rights.  

There is a long lineage of the use of physical brutality and violence in interrogations that, unfortunately, has not been eviscerated to a remnant of the past. Chief Justice Warren stressed that modern practices of in-custody interrogations are moving away from the use of physical tactics and have evolved to more psychologically oriented strategies. Thus, acknowledging the potential for abuse of police discretion, the Court implemented a prophylactic safeguard deliberately intended to protect against self-incrimination during a custodial interrogation.

In Miranda, 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.” Before interrogating a suspect, law enforcement officials must first notify the person of his right to remain silent. If the suspect provides an effective waiver, by which he clearly articulates that he understands his rights and wishes to waive them, then he must be warned that “any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” This statement of rights was coined Miranda warnings. These warnings are indispensable to overcome the pressures created by police and to ensure that the individual is fully informed of his freedom to exercise the Fifth Amendment privilege.

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27 See Miranda, 384 U.S. at 445; see also BLUM ET AL., supra note 26, at § 914.
28 Miranda, 384 U.S. at 446 (“The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country.”).
29 See Miranda, 384 U.S. at 448 (recognizing that coercion can be both mental and physical, and that “the blood of the accused is not the only hallmark of an unconstitutional inquisition”); see also Saul M. Kassin et al., Police-Induced Confessions: Risk Factors and Recommendations, 34 LAW & HUM. BEHAV. 3, 6 (2010).
31 Miranda, 384 U.S. at 444.
32 Id.
33 Id.
35 See Miranda, 384 U.S. at 469 (creating a protective device to dispel the compelling atmosphere of police or prosecution interrogations); see also Mathiason, 429 U.S. at 495 (finding that Miranda warnings are required where there has been such a restriction on a person’s freedom as to render him
The Supreme Court analyzed a number of relevant cases discussing police techniques, and stated that certain police-dominated environments are created for "no other purpose than to subjugate the individual to the will of his examiner." This practice is "at odds with one of our Nation's most cherished principles - that the individual may not be compelled to incriminate himself." Therefore, *Miranda* was one of many steps taken by the Court to adequately protect individuals' constitutional rights. Recognizing the responsibility this requirement would place on law enforcement officials, the Court stressed that this decision was "not intended to hamper the traditional function of police officers in investigating crime," but rather to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."

While this decision was momentous, it was not without its shortcomings. The important safeguard it set forth only specified the required procedure once a suspect is "in custody." This decision failed to state indicia of custody or provide a definitive framework for determining when a suspect can properly be deemed to be "in custody." Since this decision, some courts have articulated that custody is the functional equivalent of an arrest, while others require a lesser standard. Therefore, courts have struggled to ascertain the "correct" inquiry, and have arrived, and will continue to arrive, at varying conclusions on the issue.

*B. Terry Stops: The Exception to the Fourth Amendment Requirement of Probable Cause*

Two years later, in 1968, the Supreme Court balanced Fourth Amendment rights with the increasing need of police flexibility to investigate crimes. *Terry* established a narrow exception to typical Fourth Amendment probable cause and warrant requirements by providing police with limited authority to stop and search a suspect although the officer lacks probable cause to make an arrest. The officer only possesses the power to take such actions if he has reasonable suspicion that the suspect is "in custody").

36 *Miranda*, 384 U.S. at 457.
37 *Id.* at 457-58.
38 *Id.* at 469, 477.
39 See supra note 10.
40 *Id.*
armed, dangerous, or involved in criminal activity.\textsuperscript{43}

In \textit{Terry}, Officer McFadden, a veteran police officer, was patrolling downtown Cleveland when he spotted two men acting suspiciously.\textsuperscript{44} He observed one man walk away from the other, and pause for a moment while looking into a store window. Then, that man walked a short distance further before turning around and walking back toward the corner to confer with the other man, pausing briefly in the same spot at the same store window.\textsuperscript{45} The two men repeated this ritual approximately twelve times. After watching the pattern and the exchanges between the two men, the officer considered it his duty as a police officer to investigate further.\textsuperscript{46} Believing that the men were “casing a job, a stick up,” McFadden approached and identified himself as a police officer.\textsuperscript{47} When he asked for their names the men “mumbled something,” which heightened Officer McFadden’s suspicion that they were concealing a weapon. He conducted a brief pat down search and discovered that two of the three men possessed weapons.\textsuperscript{48} Officer McFadden brought the suspects to the police station and they were charged with carrying concealed weapons.\textsuperscript{49} The defendants attempted to challenge the evidence’s admissibility on the premise that the officer lacked probable cause, but the Ohio court denied the defendant’s motion.\textsuperscript{50} On appeal to the Supreme Court, six justices carved out an exception to the Fourth Amendment probable cause requirement when exigent circumstances warrant a brief and limited stop and frisk by police.\textsuperscript{51}

While no concrete test for determining the reasonableness of governmental intrusions exists, courts often balance the need for the search against the invasion the search entails.\textsuperscript{52} Using that approach, the Supreme

\textsuperscript{43} See \textit{Terry}, 392 U.S. at 30; see also \textit{Arizona v. Johnson}, 129 S. Ct. 781, 784 (2009).
\textsuperscript{44} \textit{Terry}, 392 U.S. at 5.
\textsuperscript{45} \textit{Id.} at 6.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 7.
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Terry}, 392 U.S. at 7–8.
\textsuperscript{51} See \textit{id.} at 25–27 (highlighting that law enforcement officers may stop and frisk a suspect for weapons if they have a reasonable suspicion that a crime has taken place, is about to take place, or that the suspect is armed and dangerous).
\textsuperscript{52} See \textit{id.} at 20–21 (“[I]t is necessary ‘first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,’ for there is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’”) (quoting \textit{Camara v. Mun. Court}, 387 U.S. 523, 534–35, 536–37 (1967)); see also \textit{Tennessee v. Garner}, 471 U.S. 1, 7–8 (1985) (“[T]his Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted.”).
Court focused on balancing the underlying governmental interest justifying the intrusion with the constitutionally protected interests of the private citizen.\textsuperscript{53} Considering the increasing crime rates at that time, crime prevention and detention were of central interest to the Court’s inquiry. The Court held that a police officer may, in appropriate circumstances, and in an appropriate manner, approach a person for the purpose of investigating possible criminal behavior, even though the officer lacks probable cause to make an arrest.\textsuperscript{54}

Another important interest for police officers is the ability to take necessary steps to assure their own personal safety.\textsuperscript{55} It is a confluence of these interests that enabled the Court to recognize a limited exception to the Fourth Amendment requirement of probable cause by allowing police to briefly stop and detain a suspect to dispel reasonable suspicion.\textsuperscript{56} However, the Supreme Court did not address whether this on-the-scene inquiry implicated the \textit{Miranda} warnings that the Court implemented two years earlier.\textsuperscript{57} In light of this omission, courts have been reluctant to require \textit{Miranda} warnings during \textit{Terry} stops.\textsuperscript{58} However, subsequent to this decision, federal courts have significantly expanded the initially narrow scope of the \textit{Terry} exception.\textsuperscript{59} Many highly intrusive forms of force that were once prohibited under \textit{Terry} are now common and routine. For instance, handcuffing detainees, pointing guns at detainees, and placing suspects in police cars are now procedures that are considered permissible under \textit{Terry}.\textsuperscript{60} Many commentators have stated that judges should require

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\item \textsuperscript{53} See \textit{Terry}, 392 U.S. at 21.
\item \textsuperscript{54} See \textit{id.} at 22 (recognizing the increasing importance of crime prevention and protection for law enforcement officials while in the field).
\item \textsuperscript{55} See \textit{id.} at 24 ("[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where that may lack probable cause for an arrest."); see \textit{also} Adams v. Williams, 407 U.S. 143, 146 (1972) ("The Court recognized in \textit{Terry} that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect.").
\item \textsuperscript{56} See \textit{Terry}, 392 U.S. at 27.
\item \textsuperscript{57} See Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (highlighting that the Supreme Court has not required \textit{Miranda} warnings for a non-coercive \textit{Terry} stop encounter).
\item \textsuperscript{58} See \textit{id.; see also} United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003) (noting that most \textit{Terry} stops do not require \textit{Miranda} warnings).
\item \textsuperscript{59} See \textit{Terry}, 392 U.S. at 15 (stating that "[n]o judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us"); see \textit{also} Adams, 407 U.S. at 147 (holding that reasonable cause for a \textit{Terry} stop can be based on information provided by a third-party).
\item \textsuperscript{60} See United States v. Leshuk, 63 F.3d 1105, 1109–10 (4th Cir. 1995) (concluding that the use of handcuffs, the employment of firearms, the placement of a suspect in a police vehicle, and the use of force or threat of force during a \textit{Terry} stop does not automatically alter the nature of the stop to require \textit{Miranda} warnings); see \textit{also} United States v. Merkley, 988 F.2d 1062, 1064 (10th Cir. 1993) (holding that the display of firearms or use of handcuffs does not turn a lawful \textit{Terry} stop into an arrest); see \textit{also} United States v. Smith, 3 F.3d 1088, 1095 (7th Cir. 1993) (stating that the use of handcuffs does not
Miranda warnings when the coercion employed by police establishes custody. While this increased force may be acceptable under Terry's broadened scope, it may simultaneously compel self-incrimination. Thus, the expansive revolution of Terry has created extensive judicial discord as to what constitutes appropriate police conduct and criminal procedure.

C. Subsequent Supreme Court Decisions Attempting to Reconcile Miranda and Terry

Two years before the Court decided Terry, it articulated a definition of "Miranda custody" and ruled that a person has been taken into police custody whenever he has been "deprived of his freedom by the authorities in any significant way." Because this definition was vague and provided little guidance to lower courts, the Supreme Court attempted to clarify the concept in a series of subsequent cases. The Court addressed the relationship between Fourth and Fifth Amendment concepts yet again in California v. Beheler. While the facts were incredibly distinct from Miranda, it was the perfect opportunity for the Court to refine the Miranda holding with respect to the issue of custody. The Court narrowed the
analysis by stating that “the ultimate inquiry [when determining whether a suspect is in custody] is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”\textsuperscript{66}

While Beheler provided some clarity, it did not completely dispel the confusion. In 1984, the Court decided Berkemer v. McCarty, effectively redefining the concept of custody yet again. Berkemer established an objective test for determining whether a suspect was “subjected to restraints comparable to those associated with a formal arrest.” This decision stated “the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”\textsuperscript{67} Thus, in Berkemer, the Court held that routine traffic stops do not automatically trigger a suspect’s Miranda rights.\textsuperscript{68}

However, the Berkemer decision is best understood within its historical context. The case predates the vast expansion of Terry stops, since the modern, highly intrusive Terry stop did not exist in 1984 when this case was decided. Rather, at that time Terry stops were considered to be brief, non-intrusive detentions to confirm or dispel reasonable suspicion.

To fully understand the holding, analyzing the facts of Berkemer is useful. Berkemer was pulled over for weaving in and out of traffic on an interstate highway.\textsuperscript{69} The officer approached the car and asked Berkemer to exit his vehicle.\textsuperscript{70} Observing Berkemer struggle significantly to maintain his balance while standing, the officer asked Berkemer if he had been using any intoxicants, to which Berkemer replied, “he had consumed two beers and smoked several joints of marijuana a short time before.”\textsuperscript{71} Thereafter, the officer formally placed Berkemer under arrest and drove him in a patrol car to the police station.\textsuperscript{72}

The Supreme Court focused on two features of ordinary traffic stops to reach its ultimate holding.\textsuperscript{73} First, the detention of a motorist pursuant to a traffic stop is presumptively temporary and brief.\textsuperscript{74} Second, the Court

\textsuperscript{66} Id. at 1125 (citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).
\textsuperscript{67} Berkemer, 468 U.S. at 442 (emphasis added).
\textsuperscript{68} See id. at 439-40 (stating that there is a non-coercive nature to ordinary traffic stops that prompts the Court to hold “that persons temporarily detained pursuant to [Terry]... stops are not ‘in custody’ for the purposes of Miranda”).
\textsuperscript{69} Id. at 423.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 437.
\textsuperscript{74} See id. at 437–38 (“The vast majority of roadside detentions last only a few minutes. A motorist’s expectations... are that he will be obliged to spend a short period time answering questions and waiting while the officer checks his license... In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation...”).
emphasized the fact that traffic stops are not as police-dominated or coercive as custodial interrogations that provoke *Miranda* warnings.\(^{75}\) While this argument is certainly valid for this specific *Terry* stop, the context surrounding this decision has significantly changed and transformed how this principle should apply.

The Court viewed the routine traffic stop in *Berkemer* as representative of all *Terry* stops – an assumption that sweeps too broadly given the evolution of modern *Terry* stops. While this decision was fitting for its time, the scope of *Terry* stops has significantly expanded beyond the contours that the Court envisioned when it decided *Berkemer*. In reaching this holding, it is evident that the Court imagined a *Terry* stop as it was originally created by the *Terry* decision in 1968, and not as the reality that exists today.\(^{76}\) Simply stated, the *Berkemer* decision did not address the, now ever so pervasive, highly intrusive *Terry* stop simply because it did not exist at that time.\(^{77}\)

Most recently, the Supreme Court decided *Stansbury v. California* and affirmed that the objective test is the appropriate analysis for custody determinations.\(^{78}\) The case stands for the principle that while the officer’s subjective beliefs are relevant “to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her ‘freedom of action,’”\(^{79}\) their beliefs are but one of many factors in the retrospective totality of the circumstances approach. The Court stated that the “weight and pertinence of any communications regarding the officer’s degree of suspicion will depend upon the facts and circumstances of the particular case.”\(^{80}\)

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\(^{75}\) See *id.* at 438–39 (noting that “circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police,” and since the traffic stop is conducted in public view, there is a substantially reduced ability for the police to employ illegitimate tactics to provoke a self-incriminating statement).

\(^{76}\) See *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) (recognizing that the last few decades have experience a multifaceted expansion of the initial *Terry* exception, specifically with respect to the wildly permissive amount of police force used during *Terry* stops); see also Mark A. Godsey, *When *Terry* Met *Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 739 (1994) (explaining that “it is clear that the Supreme Court was envisioning a *Terry* stop as a brief encounter, without the use of handcuffs or weapons, where the officer merely frisks the suspect and/or asks him a few questions relating to his identity and the suspicious circumstances”).

\(^{77}\) See *Perdue*, 8 F.3d at 1463; Godsey, *supra* note 76, at 739 (“*The Berkemer* Court did not address that issue because the highly intrusive *Terry* stops that are common today did not exist then.”).

\(^{78}\) 511 U.S. 318 (1994) (holding that the initial determinations of custody depends on the objective circumstances of the interrogation, not on the subjective views of the police).

\(^{79}\) *Id.* at 325.

\(^{80}\) *Id.* Since this approach is incredibly time consuming, mandates a very fact specific inquiry, and places the burden of conducting a hefty balancing test on the courts, Part III of this Note provides a new test for determining custody that should relieve some of the pressure from both the police and the courts.
In considering what a reasonable person would understand, courts analyze the totality of the circumstances in making custody determinations. To determine whether the detention was an arrest or the functional equivalent of an arrest, courts typically consider any combination of the following factors: 1) location; 2) number of officers questioning the suspect; 3) degree of physical restraint used to detain the suspect; 4) duration and character of the interrogation; 5) language used to summon the suspect; and 6) whether the suspect initiated contact with the police. This list is not exhaustive and no one factor or group of factors is dispositive. Therefore, courts face much adversity in determining custody, as evidenced by the current circuit split.

II. THE CIRCUIT SPLIT

Courts have struggled to articulate a uniform standard for the relationship between Terry stops and Miranda custody. Thus, appellate courts are split as to whether some coercive Terry stops may constitute Miranda custody. The First, Fourth, and Eighth Circuits have held that if an investigative stop is reasonable under Terry, then the suspect is per se not in custody for Miranda purposes.81 However, the Second, Seventh, Ninth, and Tenth Circuits have held that the Terry reasonableness standard is irrelevant to determining Miranda custody and that Terry stops may require Miranda warnings before a further interrogation can proceed.82 The distinctions between these two approaches are quite significant because the first set of circuits overlook a necessary procedural safeguard implemented to protect against self-incrimination. This Part explains the differing perspectives and rationales for the arguments on both sides of the circuit split.

81 See United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003) (finding that a suspect is not in custody when an investigative stop is reasonable); see also United States v. Trueber, 238 F.3d 79, 92 (1st Cir. 2001) (using Terry reasonableness to determine whether Miranda custody is implicated); and United States v. Leshuk, 65 F.3d 1105, 1110 (4th Cir. 1995) (holding that if a stop is justified and reasonable under Terry, then the suspect is not in Miranda custody).

82 See United States v. Newton, 369 F.3d 659, 673 (2d Cir. 2004) (mandating that a Terry analysis not be utilized to determine if a suspect is "in custody" for purposes of Miranda); see also United States v. Kim, 292 F.3d 969, 976 (9th Cir. 2002) (concluding that under the totality of the circumstances the suspect would not have felt free to leave, and therefore was in custody for Miranda purposes); see also United States v. Ali, 68 F.3d 1468, 1473 (2d Cir. 1995) (holding that whether a stop is permissible under Terry is irrelevant to determining Miranda custody); see also United States v. Smith, 3 F.3d 1088, 1097 (7th Cir. 1993) (explaining that the Fifth Amendment analysis is much narrower and gives police officers much less discretion than in a Fourth Amendment analysis); and United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993) (positing that even a reasonable Terry stop can require Miranda warnings once the police use excessive, coercive force).
A. Approach #1: If A Stop is Reasonable Under Terry, It Automatically Does Not Constitute Custody Under Miranda

The First, Fourth, and Eighth Circuits have held that because reasonable Terry stops are by definition non-custodial, no overlap exists between Terry and Miranda. Under this approach, Terry stops can grow increasingly coercive without ever requiring Miranda warnings. The Fourth Circuit offers a clear example of this interpretation. In United States v. Leshuk, the court reasoned that "the perception . . . that one is not free to leave is insufficient to convert a Terry stop into an arrest." Refusing to enable a suspect’s reasonable belief that he was in custody to transform a Terry stop into Miranda custody, the court determined that since the deputies acted within the ambit of a permissible Terry stop, their actions were justified and not subject to a Miranda analysis.

In Leshuk, Steve Leshuk and Glen Smith were found in the woods and cornered by police after officers discovered chicken wire enclosing thirty-three marijuana plants. The deputies identified themselves as police, frisked the defendants, and determined that they were not armed or dangerous. Informing the defendants that they were investigating a nearby marijuana site, they questioned the defendants about their purpose in the woods. Neither defendant answered. Questioning continued, but at no point were Miranda rights read. After a series of questions, one defendant attempted to run from the police. Only then was he read his rights, and placed in a police car.

In reaching this conclusion, the Fourth Circuit relied extensively on the Berkemer assessment of Terry stops. The court stated that "a noncustodial Terry stop involves a brief [but complete] detention of liberty;" and the officers in this case did not need to reduce the intensity of their efforts

84 See Swift, supra note 83, at 1075.
85 See Leshuk, 65 F.3d at 1105.
86 Id. at 1109 (quoting United States v. Moore, 817 F.2d 1105, 1108 (4th Cir. 1987)).
87 Id. at 1109–10
88 Id. at 1107.
89 Id.
90 Id.
91 Leshuk, 65 F.3d at 1007.
92 Id.
93 Id. at 1110.
because this was a limited *Terry* stop that was reasonable to protect their safety.\(^\text{94}\) The Fourth Circuit relied on the premise that "*Terry* stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion."\(^\text{95}\) The court concluded that "drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes."\(^\text{96}\)

The First and Eighth Circuits have similarly held that reasonable *Terry* stops mean that the detention is not custodial.\(^\text{97}\) Using the legal framework set forth in *Berkemer*, the First Circuit, in *United States v. Trueber*, acknowledged that while *Terry* stops are inherently somewhat coercive, they do not entail the same type of police-dominated, compelling atmosphere that mandates *Miranda* warnings.\(^\text{98}\) *Trueber* did recognize that a *Terry* stop could escalate to a de facto arrest, at which point it would cease to be a valid *Terry* stop and would require *Miranda* warnings. However, based on the specific facts of that case, the First Circuit held that the stop of the defendants was a valid *Terry* stop that did not transform into a de facto arrest necessitating the administration of *Miranda* warnings.\(^\text{99}\)

This group of courts has held that a reasonable detention is necessarily noncustodial and thus has declined to analyze the coercive police behavior during the stop. The constitutional inquiry stops short at the Fourth Amendment and does not address *Miranda* Fifth Amendment concerns. These courts analyze "whether the officer['s] actions were justified at [their] inception," and if so," then the stop is a reasonable *Terry* stop regardless of its intensity and duration.\(^\text{100}\) Therefore, these courts agree that if a stop is reasonable when initiated, it automatically does not implicate *Miranda* warnings.

\(^\text{94}\) *Id.* at 1109 ("As a general rule, officers conducting a *Terry* stop are authorized to 'take such steps as [are] reasonable necessary to protect their personal safety and to maintain the statute quo during the course of the stop.'") (quoting United States v. Hensley, 496 U.S. 221, 235 (1985)).

\(^\text{95}\) *Id.* at 1109.

\(^\text{96}\) *Id.* at 1109–10.

\(^\text{97}\) See generally Leshuk, 65 F.3d at 1109–10.; see also United States v. Trueber, 238 F.3d 79, 95 (1st Cir. 2001).

\(^\text{98}\) See *Trueber*, 238 F.3d at 95 (rejecting the defendant's *Miranda* challenge during a *Terry* stop in which the police drew weapons and forced the defendant to place his hands over his head, because where the *Terry* search falls short of an arrest, *Miranda* warnings are not required).

\(^\text{99}\) See *id.* at 93 (detailing the two-step inquiry set forth in determining whether *Trueber* was in custody when he was questioned by detectives after the police stopped his truck).

\(^\text{100}\) *Id.* at 92 (quoting United States v. Owens, 167 F.3d 739, 748 (1st Cir. 1999)).
B. Approach #2: Terry Reasonableness is Irrelevant To Determine Miranda Custody

The Second, Seventh, Ninth, and Tenth Circuits have consistently held that even if a Terry stop is reasonable, a suspect may still be in custody for Miranda purposes, if coercive conduct is employed. Unlike the first set of appellate courts, this group has held that a coercive stop, while valid under Terry, may nevertheless still require Miranda warnings.

In United States v. Ali, the Second Circuit held that whether a stop is reasonable under Terry is irrelevant to the Miranda doctrine because "Terry is an 'exception' to the Fourth Amendment probable cause requirement, not the Fifth Amendment protections against self-incrimination." In Ali, a customs inspector at John F. Kennedy Airport in New York City was conducting a routine x-ray examination of luggage when he discovered shotguns in baggage checked under the defendant's name. Seven customs officials, five in uniform with visible weapons, approached the defendant for questioning. He was thereafter isolated, surrounded by customs officials and bombarded with questions. After intense questioning, he admitted that his luggage contained shotguns. He was thereafter arrested and brought to the customs building where he was read his Miranda rights for the first time. The Second Circuit remanded the case to the lower court with instructions to follow the proper inquiry: "whether a reasonable person in Ali's shoes would have felt free to leave under the circumstances."

The Seventh Circuit, in United States v. Smith, adopted the same reasoning and found that the "inquiry into the circumstances of temporary detention for a Fifth ... Amendment Miranda analysis requires a different focus than that for a Fourth Amendment Terry stop." Similarly, the Ninth Circuit has stated, "whether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether the individual is 'in custody' for Miranda purposes are two different issues." In United States v. Perdue,

101 See supra note 82.
102 United States v. Ali, 68 F.3d 1468, 1473 (2d Cir. 1995) ("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. A Terry stop may turn into a custodial detention."); see United States v. Hooper, 935 F.2d 484, 494 (2d Cir. 1991) ("If the intrusion becomes excessive, it ceases to be a Terry type detention that can be justified based on reasonable suspicion and instead becomes a seizure that requires a showing of probable cause.").
103 Ali, 68 F.3d at 1473.
104 United States v. Smith, 3 F.3d 1088, 1096 (7th Cir. 1993).
105 United States v. Kim, 292 F.3d 969, 976 (9th Cir. 2002).
the Tenth Circuit held that while a stop where an individual was detained at gunpoint, handcuffed, and questioned for forty-five minutes was reasonable, the suspect was nonetheless placed in *Miranda* custody, and thus should have been read his *Miranda* rights.106

The Second Circuit clearly articulated that the test for determining when an accused is in custody is "whether a reasonable person in the defendant's position would have understood himself to be ‘subjected to the restraints comparable to those associated with a formal arrest.’"107 Furthermore, "[a]n accused is in 'custody' when, in the absence of an actual arrest, law enforcement officials act or speak in a manner that conveys the message that they would not permit the accused to leave.”108

In *United States v. Newton*, the Second Circuit held that a suspect who was seized by police, handcuffed and questioned at length in his apartment, was subject to a custodial interrogation by police, despite the fact that he was not subject to a formal arrest. While the court found that the suspect was in custody for *Miranda* purposes, Judge Raggi concluded that the stop did not amount to a *Miranda* violation, despite being in *Miranda* custody without being read his rights, because the officer's actions fell within the public safety exception.109 Therefore, unless police conduct is justified by the public safety exception, some coercive *Terry* stops require *Miranda* warnings before further questioning can proceed.

### III. RECONCILING THE *MIRANDA* AND *TERRY* DOCTRINES

This Note considers the interplay of *Miranda* and *Terry* and proposes a new definition for custody that will provide adequate protection to individuals subject to intrusive and/or coercive stops. This Note does not advocate a return of the *Terry* doctrine to its pre-expansion dimensions. Rather, this new approach seeks to broaden the definition for *Miranda* custody to coincide with the more expansive, and often psychologically coercive, *Terry* stops that are permissible today. Therefore, this broader definition is consistent with the central concern of *Miranda*, which is to protect a suspect from the psychological pressures inflicted by police.

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106 United States v. Perdue, 8 F.3d 1455, 1465 (10th Cir. 1993) (holding that because any person in Perdue's position would have felt that they were at the mercy of the police, he was deemed to be in custody at the time that he was interrogated).

107 *Ali*, 68 F.3d at 1472 (quoting United States v. Mussaleen, 35 F.3d 692, 697 (2d Cir. 1994)).

108 *Id.* (quoting Campaneria v. Reid, 891 F.2d 1014, 1021 n.1 (2d Cir. 1989)).

109 United States v. Newton, 369 F.3d 659, 677–78 (2d Cir. 2004) (finding that because there was a concern for the existence of weapons in the home, as well as a record of violence, the officers were justified in delaying *Miranda* warnings under the public safety exception).
Further, this Part critiques the two different approaches the circuit courts have taken by highlighting fallacies in the support, policy, and ultimate conclusion of each.

A. Fallacies of Current Approaches and Misplaced Reliance on Berkemer

Approach #1 is not the appropriate inquiry because it is based on an outdated premise that Terry stops are minimally brief intrusions. The First, Fourth, and Eighth Circuit have incorrectly used a Terry analysis to determine if Miranda was implicated, instead of first addressing the Fourth Amendment concerns, and then addressing Miranda under the Fifth Amendment. These courts rely heavily on Berkemer; however, Berkemer was decided in 1984, which predates the federal courts’ expansion of the Terry doctrine in the early 1990’s.

Relying on Berkemer, the First, Fourth, and Eighth Circuits hold that the reasonableness of a stop and frisk permitted under Terry precludes the necessity of Miranda considerations, even during particularly intrusive stops. This approach effectively diminishes a defendant’s ability to invoke Miranda protections during any type of Terry stop. The courts’ reference to Berkemer’s classification of Terry stops as nonthreatening, and thus not invoking Miranda, is inapplicable, as the scope of Terry has expanded beyond what Berkemer describes. While the analysis in Berkemer is correct in its dealings with routine traffic stops, those stops are by their nature very different and unique.

Presently, certain practices that were not permissible under Terry are commonplace and routine. For instance, handcuffing detainees, pointing guns, and placing a suspect in the back of a police car are all acceptable under the expansive Terry doctrine that exists today. Relying on the legal support of Berkemer, courts have declared “[n]o Miranda warning is necessary for persons detained for a Terry stop.” The Eighth Circuit rejected the contention that an individual is in custody whenever a reasonable person would not feel free to leave, and instead concluded,

110 See supra Part II.A.
111 See Berkemer v. McCarty, 468 U.S. 420, 437–39 (1984) (distinguishing traffic stops by noting that they only last a few minutes, the questioning is brief and limited in scope, they are visible to the public, and they are limited to one or two police officers); see also Maryland v. Shatzer, 130 S. Ct. 1213, 1224 (2010) (identifying a traffic stop as temporary and relatively nonthreatening).
112 United States v. Pelayo-Ruelas, 345 F.3d 589, 592–93 (8th Cir. 2003) (holding that a Drug Enforcement Administration (DEA) agent’s conduct during a Terry stop did not curtail the defendant’s freedom to the degree associated with a formal arrest, and thus the defendant was not entitled to Miranda warnings prior to his arrest).
“most Terry stops do not trigger the detainee’s Miranda rights.”\footnote{Id. (emphasis added) (stating that “[o]ne is not free to leave a Terry stop until the completion of a reasonably brief investigation, which may include limited questioning”).} While this logic was historically true, it, like Berkemer, ignores the recent expansion of the exception to Fourth Amendment jurisprudence. It fails to consider the Terry stops that are so oppressive in nature that they function to detain the suspect in the same manner as a custodial interrogation.

The Tenth Circuit readily distinguished Berkemer and outlined why reliance on that case is misplaced.\footnote{See United States v. Perdue, 8 F.3d 1455, 1466 (1993) (distinguishing the Terry stop that occurred in that case from the routine traffic stops described in Berkemer, and explaining the essential differences between the two).} The court stressed that Berkemer was decided at a time when Terry stops were considered to be brief, non-intrusive encounters.\footnote{See id. at 1465.} When the Supreme Court reached its holding in Berkemer, the Court was envisioning a Terry stop as mandated by Terry v. Ohio. The holding cannot be interpreted to support the proposition that Miranda is inapplicable to Terry stops as they frequently occur today. The Court was unable to address the new confines of Terry simply because at the time of the Berkemer decision they did not exist.\footnote{See Berkemer, 468 U.S. at 439-40; see also Perdue, 8 F.3d at 1464 (“[H]istorically, the maximum level of force permissible in a standard Terry stop fell short of placing the suspect in ‘custody’ or purposes of triggering Miranda. This fact led the Court to announce in Berkemer, ‘the comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda.’”) (quoting Berkemer, 468 U.S. at 440). This case was decided in 1984. Since this decision, police authority during Terry encounters has been significantly expanded and applied to a number of situations that would have been unacceptable under Terry as the Court decided it in 1968.} Therefore, the First, Fourth, and Eighth Circuits’ reliance on Berkemer as the backbone of their approach is without merit.

While the approach of the First, Fourth, and Eighth Circuits provides a bright line rule, which is quite easy for police to follow and use to govern their conduct, privacy rights and basic civil rights are significantly impaired, if not completely sacrificed, under this rule. If this view were to prevail in future cases, it would open a Pandora’s box for abuse of police discretion. If courts fail to recognize a distinction between Terry stops and coercive Terry stops, courts will grant the police unfettered discretion to use whatever means they please to stop and detain suspects. Under this view, there is a great risk that police will interrogate suspects using coercive measures, without probable cause, and without administering Miranda safeguards.\footnote{See Perdue, 8 F.3d at 1464 (describing a scenario where police officers drew guns on the defendant and interrogated him without reading him his Miranda rights); see also Godsey, supra note 76, at 736-37 (discussing the risks of providing the police with wide, unchecked discretion to conduct
Other courts have rejected Approach #1 because the approach is out of sync with the current reality of Terry stops. Thus, these courts created Approach #2 to better address the interplay between Terry and Miranda. While this Note agrees with the constitutional inquiry and reconciliation of Terry and Miranda in Approach #2, this Note disagrees that a coercive stop requiring Miranda warnings can still be deemed reasonable under Terry. In order to avoid compromising either constitutional doctrine implicated in these types of encounters, courts should require Miranda warnings in coercive Terry stops.

Allowing a Terry stop to rise to the level of Miranda custody while remaining a valid Terry stop defies the very purpose and existence of the limited Terry doctrine. Reaching that conclusion would essentially enlarge Terry to the point that it sanctions custodial interrogations. The Supreme Court never contemplated such a conclusion when it decided Terry or Miranda. It acknowledged, “a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.” In Terry, the Supreme Court stressed that police-conducted stop and frisks, “[are] serious intrusion[s] upon the sanctity of the person, which may inflict great indignity and arouse strong resentment,” and should not be undertaken lightly. The language utilized by the Court clearly emphasized that Terry stops were supposed to be a narrow exception to the requirement of probable cause, strictly circumscribed, and authorized only in rare and limited scenarios. On numerous occasions, the Court stressed that Terry stops must be “limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.” “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry . . . .”

Since the Terry doctrine has undergone a substantial transformation that

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118 See generally Miranda v. Arizona, 384 U.S. 436 (1966) (neglecting to discuss the interplay between Miranda warnings and Terry stops); see also Berkemer, 468 U.S. at 440 (disregarding respondent’s concern that “exempt[ing] traffic stops from the coverage of Miranda will open the way to widespread abuse”); and Terry v. Ohio, 392 U.S. 1, 25–26 (1968) (explaining that a search for weapons, which are not supported by probable cause, must be supported by the exigency which permitted the search).

119 Terry, 392 U.S. at 18, 19 (“The scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”).

120 Id. at 15, 17 (“[C]ourts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.”).


122 Id.
significantly enlarged police authority, courts must broaden the definition of “custody” to proportionately coincide with the broader *Terry*. This more flexible standard will provide parallel constitutional protection to individuals’ liberties. Therefore, if a coercive *Terry* stop mandates *Miranda* warnings to protect a suspect against self-incrimination, that stop can no longer be deemed reasonable under *Terry* without issuing *Miranda* warnings.  

A stop can, at its inception, be reasonable under *Terry*, however, once that stop rises to a level that requires the procedural safeguards of *Miranda*, it is removed from the ambit of the *Terry* analysis and must then be analyzed under *Miranda*.

**B. The Proper Inquiry for Reconciling Terry Stops and Miranda Custody**

While courts currently struggle to reach a consensus on a uniform test for determining custody, the problem is not created by the test, but rather with the standard being applied. In *Berkemer*, the Court held that the ultimate basis for *Miranda* custody was whether a reasonable person in the suspect’s position would have concluded that he was under arrest or subject to the functional equivalent of an arrest. Given the federal courts' recent expansion of *Terry*, it is useful to conceptually consider the *Terry* doctrine in two categories: traditional-*Terry* and modern-*Terry*. Traditional-*Terry* consists of *Terry* stops as they were initially contemplated under *Terry*, as brief detentions to dispel or confirm reasonable suspicion. Modern-*Terry*, on the other hand, pertains to the highly intrusive and forceful stops that are now routinely employed by police.

While the standard from *Berkemer* may be applicable under traditional-*Terry*, given the extensive development of the permissible force in *Terry* encounters, modern-*Terry* mandates a different standard for custody. For purposes of *Miranda*, “custody” is limited to a formal arrest or restraint of freedom of movement to a degree associated with a formal arrest. The current standard for custody fails to provide citizens with the protections

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123 See Swift, *supra* note 83, at 1088 (stating that, “[a] constitutional approach would be to require the Miranda warnings in such [coercive] situations, but also to emphasize that when a Terry stop becomes custodial, it is no longer a valid Terry stop . . . .”); see also United States v. Trueber, 238 F.3d 79, 93 (1st Cir. 2001).

124 See *Terry*, 392 U.S. at 18 (“This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.”).

125 *Berkemer* v. McCarty, 468 U.S. 420, 442 (1984) (emphasizing that the focus should be on how a “reasonable man in the suspect’s position would have understood his situation.”).

126 See *Miranda* v. Arizona, 384 U.S. 436, 478 (1966); see also *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (requiring *Miranda* warnings only where there has been a restriction on a person’s freedom as to render him in custody).
from psychological pressures imposed by law enforcement in police-dominated environments, and specifically in coercive Terry stops.

The appropriate standard for defining custody to protect suspect's constitutional rights would consider whether a suspect is restrained in a way associated with a formal arrest or subject to the pressures of a coercive, police-dominated environment. This new rule is in line with the basic principles of Miranda, the Fifth Amendment, and the underlying public policy considerations. It has long been held that this prohibition permits a suspect not to answer "official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." In all proceedings of this nature, "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers" in a subsequent case where he is the defendant.

Without such protections, a suspect can be coerced into make self-incriminating statements. In reaching the Miranda holding, the Supreme Court was concerned with the psychological pressures a suspect faces that may provoke him to make self-incriminating statements. Ruling that Miranda warnings are required when a suspect is in custody before interrogation can be initiated, the Court acknowledged that when "normal procedures fail to produce the needed result, the police may resort to deceptive stratagems . . . ." Therefore, the Court tried to protect a suspect's constitutional rights by requiring police to notify him of his rights before interrogation.

While this approach may appear to place the burden on police, it still provides for a public safety exception, as articulated in Quarles v. New York. Police may dispense with the warnings requirement when there is

127 See Miranda, 384 U.S. at 478 (expressing a concern for protecting a suspect's Fifth Amendment rights against self-incrimination); see also Michigan v. Mosley, 423 U.S. 96, 100 (1975) (discussing the guidelines Miranda established to protect a person's constitutional privilege against compulsory self-incrimination).
128 U.S. CONST. amend V.
130 Id. at 78 (emphasis added).
131 See id.; see also Chavez v. Martinez, 538 U.S. 760, 768 (2003) ("We have also recognized that governments may penalize public employees and government contractors . . . to induce them to respond to inquiries, so long as the answers elicited (and their fruits) are immunized from use in any criminal case against the speaker.").
132 Miranda, 384 U.S. at 455; see Rhode Island v. Innis, 446 U.S. 291, 299 (1980) (discussing the use of "psychological ploys" as techniques of persuasion during interrogations).
133 467 U.S. 649, 656 (1984) (holding that "there is a 'public safety' exception to the requirement
an overwhelming concern for public safety. If the state can prove that a public safety threat warranted a delay of *Miranda* warnings, then the new standard, which requires *Miranda* warnings in police-dominated atmospheres, would not apply.

This approach to defining custody comports with the principles and concerns that the Court initially addressed in *Miranda*. While *Miranda* did hold that a suspect is in custody when they are detained in the form of an arrest, or the functional equivalent of an arrest, the courts now confront cases that are not quite an arrest, but significantly curtail the suspect's freedom in such a manner that they would not be permitted to leave without obstructing justice. Therefore, the current standard for custody is no longer adequate to protect the basic tenets of the *Miranda* decision.

C. Standard Suite – Illustrations of Differing Perspectives

1. Hypo #1 – An Example of Traditional-Terry

Police responding to an anonymous tip, regarding drug trafficking and illegal activity, follow a car that fits the informant’s description. A police car follows the vehicle down a service road and stops behind the car at a dead end. A uniformed officer exits the vehicle and approaches the suspect’s car. He requests the driver’s license and registration information. Noticing a concealed object in the suspect’s jacket pocket, the officer requests that the suspect exit the vehicle, to enable the officer to perform a brief pat down search. During the search, the officer questions the suspect about his presence in the area and his ultimate destination. The suspect willingly answers the officer’s questions and at all times complies and acquiesces with the officer’s demands.

Under Approach #1, a court would conclude that the suspect was not entitled to the safeguards prescribed by *Miranda*, because his freedom of action was not curtailed to the degree associated with a formal arrest.

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134 *Quarles*, 467 U.S. at 655; *see also* United States v. Shea, 150 F.3d 44, 48 (1st Cir. 1998) (applying the public safety exception).
135 *Quarles*, 467 U.S. at 655.
136 *Miranda*, 384 U.S. at 448 (stressing that the psychologically oriented aspects of modern interrogations must be curtailed to protect a suspect’s constitutional rights so as to not buckle under the pressure and make self-incriminating statements).
137 *Id.* at 447 (stating that the *Miranda* decision was a necessary limitation upon custodial interrogations that was essential to ensure that coercive practices are eradicated in the foreseeable future); *see* Michigan v. Mosley, 423 U.S. 96, 103 (1976) (referring to *Miranda* warnings as a “critical safeguard”).
Following this approach, a court would emphasize that the suspect voluntarily complied with the officer’s demands and willingly continued the conversation about his purpose and presence in the area. Courts that adopt this approach believe that Terry stops that are initiated reasonably are not custodial. Therefore, under this approach, the stop would be deemed reasonable under Terry and thus would not require warnings.

Under Approach #2, a court would separate the two different constitutional inquiries, and explain that inquiry into the “circumstances of temporary detention for a Fifth and Sixth Amendment Miranda analysis requires a different focus than that for a Fourth Amendment Terry stop.” A court using this approach would analyze the police-dominated environment and focus on certain coercive aspects of this detention. This approach allows courts to protect suspects who are victims of stops that move away from what is a reasonable Terry stop to the more modern forms of detention that are permissible today. Thus, this stop may be deemed reasonable under Terry, but could also compel warnings under Miranda if it rose to a coercive level. However, given the facts of this hypothetical, it is likely that a court would find this encounter to be the epitome of a “traditional-Terry” stop. Since it lacks indicia of police-dominated coercion, it would not require Miranda warnings. However, the importance of this approach is that it separates the two different constitutional analyses, providing the necessary prophylactic safeguards to guard against a violation of a suspect’s Fourth and/or Fifth Amendment rights.

Under this new approach, a court would have a more flexible standard for determining whether a suspect was in Miranda custody. The new standard allows the court to decide if a suspect was subject to an arrest, the functional equivalent of an arrest, or a detention that significantly restricts the suspect’s freedom of movement, and forces the suspect to submit to coercive police pressures without rising to the level of a full-blown arrest. Under this approach, a court would not be confined to a narrow definition of custody, and would be able to adequately assess the important elements of coercion. Therefore, a court utilizing this approach would likely determine that Miranda warnings would not be required since there was no coercive police pressure.

138 United States v. Smith, 3 F.3d 1088, 1096 (7th Cir. 1993).
2. Hypo # 2—An Example of Modern-Terry

On a routine police patrol of a neighborhood, two police officers spot two suspicious men congregating on a street corner. The officers observe the men and study their movements for approximately ten minutes. Upon seeing an exchange of money for an obscured object, the police exit their vehicle with guns drawn. The suspects immediately freeze in their positions and do not attempt to resist or run. The officers request that the men place their hands in the air and lay flat on their stomachs. The officers place handcuffs on each of the suspects and isolate the individuals. While handcuffed, the police place one suspect in the backseat of the police car and the other remains handcuffed, face down on the pavement. One officer, sitting in the front seat of the police car, starts to question the suspect about his identity and the exchange. Ten minutes into the basic questioning, the officer escalates his tone and continues to press matters the suspect has stated he does not know. The officer persists and continues to interrogate the suspect while he remains handcuffed in the back seat of the police car. The officer never reads the suspect his Miranda rights.

Under Approach #1, this would be deemed a valid Terry stop because the officers had the requisite reasonable suspicion to conduct a stop and search of the suspect. Since this stop was initiated as a valid Terry stop, a court following this approach would hold that the suspect is not in custody within the meaning of Miranda, despite the fact that the suspect is handcuffed in the backseat of a police car. Therefore, regardless of how coercive the stop becomes, as long as it was valid at its initiation, it does not constitute custody. However, under Approach #2, a court would likely hold that while this stop may have been reasonable at its inception, it has significantly moved into a more coercive realm, thus requiring Miranda warnings to avoid a constitutional violation.

Finally, under the new approach, a court would likely determine that while drawing weapons and handcuffing suspects are now commonly used during Terry stops, given the circumstances, the police should have provided the suspect with Miranda warnings. As a result of this expansion, a Terry stop is now often scarcely distinguishable from a traditional arrest. Using this philosophy, a court could conclude that this stop

139 See Godsey, supra note 76, at 733 ("Terry stops—as a whole—have become much more intrusive than they were just a few years ago. It is commonplace for these investigatory detentions to involve handcuffs, drawn weapons . . . and other forms of force that used to be appropriate only for full-scale arrests."); see also Omar Saleem, The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk," 50 Okla. L. Rev. 451, 452 (1997) ("[T]he line between a formal arrest and a Terry stop and frisk [has] become[ ] blurred. This blur is the
significantly restricted the suspect’s freedom of movement and forced him to submit to coercive police pressures without rising to the level of a full-blown arrest. Therefore, under this Note’s approach, the police should have read the suspect his *Miranda* rights before interrogating him.

### D. The New Approach Is Better Equipped to Protect the Constitutional Contours of the Fourth and Fifth Amendments

The new approach, which advocates for a broader standard of custody, is necessary since the current definition under *Miranda* has become unworkable in light of the expansion of *Terry*. Since *Terry* was decided in 1968, federal courts have authorized the use of handcuffs, brandishing weapons, and holding suspects at gunpoint as permissible under *Terry*. Thus, what was never even contemplated under the original *Terry* decision has become routine and acceptable. While it is clear that *Terry* has expanded beyond its original contours, a universal regimented method does not exist for measuring when that stop rises to the level of an arrest.

A number of policy reasons support this Note’s approach over the status quo. First and foremost, a main policy concern is that there are endless scenarios in which an individual’s statements are obtained by law enforcement under non-arrest, yet coercive, conditions. Police should be prohibited from utilizing those statements in subsequent criminal prosecutions, unless the suspect was fully informed of his or her rights. The approach advocated by this Note provides a standard that officers can use to govern and adjust their own actions during a coercive *Terry* stop. Courts will also be equipped with a principled basis to evaluate legal challenges to coercive *Terry* stops.

Additionally, the benefits of requiring police to *Mirandize* suspects in coercive, police-dominated environments outweigh any burden that such an obligation places on police, as this requirement will provide tremendous benefits to individuals’ rights, as well as to this country’s criminal justice

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140 See United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994) (“In the recent past, the . . . ‘permissible scope of the intrusion [under the Terry doctrine has] expanded beyond [its] original contours.’”) (quoting United States v. Chaidex, 919 F.2d 1193, 1198 (7th Cir. 1990); *see also* United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993) (“The last decade . . . has witnessed a multifaceted expansion of *Terry*.”)).

141 *See supra* note 60.

142 *See Tilmon*, 19 F.3d at 1223; *see also* United States v. Hardnett, 804 F.2d 353, 354–55 (6th Cir. 1986).

system. *Miranda* warnings should be viewed as a necessary safeguard, not a burdensome impediment. Many legal scholars and authorities believe that *Miranda* warnings are a powerful tool in professional police work because the warnings force law enforcement officials to accumulate scientific and legal evidence to build a solid case.\(^4\)

Furthermore, numerous studies have suggested that suspects waive their rights eighty to ninety percent of the time.\(^5\) Therefore, requiring police to issue *Miranda* warnings would not create obstacles for law enforcement, nor would it impose a burden on police to conduct criminal investigations. It would, however, reinforce the principles in the Fifth Amendment, adhere to the basic tenets of *Miranda*, and provide a safeguard to protect suspects from succumbing to police pressures and rendering self-incriminating statements. Suspects may choose to waive their rights, but to strip individuals of their ability to be informed of their rights should not be permissible.

**CONCLUSION**

In the last two decades the lower federal courts have dramatically increased the scope of permissible force that officers may use when conducting a *Terry* stop.\(^6\) This trend has had a massive impact on Fourth and Fifth Amendment jurisprudence, and has sparked much debate about *Miranda* custody and *Terry* stop detentions.\(^7\) While some have embraced the expansion of *Terry* as an effective way of protecting the safety of police and ensuring efficiency in criminal investigations, it has significantly impacted and intruded upon constitutionally protected rights. Circuit courts have struggled to reconcile the conflicting judicial frameworks for these two doctrines, which has resulted in mass confusion in this area of


\(^6\) See Tilmon, 19 F.3d at 1224; see also Godsey, supra note 76, at 716 (explaining that in the late 1980s and early 1990s, federal courts dramatically broadened the ambit of permissible force that police may use during a *Terry* stop).

A main problem contributing to the confusion is that courts are trying to figure out the correct test to determine "custody." However, as articulated by this Note, the real issue is that the legal definition of custody needs to be reworked to adequately align with the expansion of Terry. Federal courts have invoked two distinct approaches to resolve this conundrum; however, both of these approaches are flawed in that they fail to provide the appropriate level of constitutional protection the Court envisioned when it decided Miranda. Some courts rely on an untenable Supreme Court precedent that no longer provides historically relevant or even accurate guidance on the issue, while other courts have articulated the correct basic legal framework, but fail to reach the right ultimate conclusion. This Note has sought to develop an analytical framework to dispel the immense uncertainty associated with the standard of custody. It is an attempt to restore doctrinal consistency to stop, search, and interrogate jurisprudence.

Since the judicial system is often entrusted with the responsibility of setting the boundaries for Terry and Miranda, courts need direction and structure to create solid, constitutionally sound precedent. With that objective in mind this Note seeks to propose a revised standard of custody that has been expanded to parallel the expansion of the modern Terry doctrine. Therefore, broadening the definition of custody will provide necessary protection to suspects, given the liberal scope of Terry, while also harmonizing the basic principles emphasized in Miranda.

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148 See supra note 10 (demonstrating a circuit split regarding Terry stops and Miranda custody).
149 See supra Part II.