

# SYMPOSIUM INTRODUCTION: *TERRY V. OHIO* AT 50: THE PAST, PRESENT, & FUTURE OF STOP AND FRISK

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## I. OVERVIEW

The 2018 *Idaho Law Review* symposium examined a case decided in 1968, exactly fifty years ago. As the symposium articles and presentations demonstrated, *Terry v. Ohio*'s<sup>1</sup> impact still resonates, both here in Idaho and across the country. *Terry* held that a police officer may stop an individual for a brief investigatory detention if that officer reasonably suspects criminal activity. Next, that same officer may, pursuant to *Terry*, frisk the individual for weapons if the officer reasonably believes the individual is armed and presently dangerous to the officer or to others. Though *Terry* held that a stop is a seizure and a frisk is a search, it nevertheless reasoned that both required something less than probable cause to be justified.

*Terry*'s holding that a brief investigatory detention need be supported by something less than probable cause made such stops, and the frisks that often follow such stops, easy to justify. *Terry*'s progeny has expanded the circumstances in which no probable cause is needed. For example, the Supreme Court has relied on *Terry* to justify border stops based on no more than reasonable suspicion<sup>2</sup> and used *Terry* to hold that "presence in a high-crime area . . . combined with 'headlong flight' from the police" gives rise to a reasonable suspicion inference.<sup>3</sup> *Terry* has been criticized as a case that "facilitates racial profiling," because "to the extent that reasonable suspicion is an easy evidentiary standard to meet, police officers can base their decision to stop and frisk suspects on stereotypes about criminality and dangerousness and offer race-neutral justification after the fact."<sup>4</sup>

In addition to its impact on criminal procedure cases, *Terry* pushed the police practice known as stop-and-frisk into popular culture, and stop-and-frisk is, to most, a familiar concept. There are images that come to mind when the phrase stop-and-frisk is invoked. Perhaps you hear "stop-and-frisk" and conjure an image of young men, often young men of color, lined up against a wall with their arms up.<sup>5</sup> Perhaps that image makes you uncomfortable, and perhaps the image makes you wonder, as I do, why so many young men of color were stopped.

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1. *Terry v. Ohio*, 392 U.S. 1 (1968).

2. See Margaret Anne Hoehl, *Usual Suspects Beware: "Walk, Don't Run" Through Dangerous Neighborhoods*, 35 U. Rich. L. Rev. 111, 120 (2001) (describing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

3. *Id.* at 125 (describing how *Terry* was expanded by the holding in *Illinois v. Wardlow*, 528 U.S. 119 (2000)).

4. Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543, 1573 (2011).

5. See, e.g., Jennifer Gonnerman, *Officer Serrano's Hidden Camera*, N.Y. MAG. (May 19, 2013), <http://nymag.com/news/features/pedro-serrano-2013-5/index1.html> (depicting "[a] group of teenagers getting stop-and-frisk[ed], on Seneca Avenue in the Bronx, on their way home from school in September 2012").

That suspicion has proven reasonable. Data presented in cases tried in the Southern District of New York showed that not only were NYPD stops and frisks ineffective in discovering criminality or illegal weapon possession, they disproportionately targeted Latino and Black men. Still, despite the revolutionary Southern District of New York settlements reached between the City of New York and individuals who were repeatedly stopped and frisked by the NYPD, stop-and-frisk is still constitutional. *Terry* has not been overruled. As a result, stop-and-frisk remains a topic that presidential candidates debate and academics revisit.

The 2018 *Idaho Law Review* symposium was held in Boise, Idaho on April 6, 2018 (the “Symposium”) to address *Terry*’s omnipresence. The Call for Papers explained:

The symposium will explore the impact that *Terry* and its endorsement of stop-and-frisk has had on communities of color, policing, and even national politics. We welcome a variety of proposals, including those that provide a narrative account of *Terry* and its aftermath, as well as those related to civil rights litigation, how stop-and-frisk is understood or misunderstood, *Terry*’s doctrinal importance, and its use in practice. At least one panel featured at the symposium will highlight how *Terry* impacts policing in Idaho.

The Symposium took the *Terry* discussion in exciting new directions, for example, introducing new approaches to understanding *Terry*’s frisk standard in light of expanded Second Amendment rights, and applying the lessons of the #MeToo movement and consent to the violation that a stop and frisk may create.

Part II of this introduction summarizes the Symposium events. Part III summarizes the Symposium articles, written by six of our Symposium panelists, as well as a Student Note included in this edition. Part IV reviews those presentations not accompanied by an article. This introduction concludes with acknowledgments.

## II. EVENTS OF THE SYMPOSIUM

The College of Law’s Dean, Mark Adams, opened the Symposium by welcoming all participants and attendees to Boise and the College of Law. He highlighted the historic importance of the *Terry* decision, as well as the College of Law’s historic academic year—in the 2017–2018 year, we welcomed a first-year class to Boise for the first time.

A brief introduction to *Terry* followed. There, I drew parallels between 1968 and today, noting that we are living in a time of political unrest, a time when those who want change are marching in the streets, a time when we question the role of law enforcement and ask how we can stop police-involved shootings, and in particular, police-involved shootings of people of color.

Our first panel, “Stop-and-frisk’s Second Amendment Implications,” considered whether lawful possession of a weapon should impede law enforcement’s ability to frisk individuals under *Terry*. Our second panel, “Race-based Policing and

*Terry's Code of Conduct*<sup>6</sup> proposed that *Terry* incorrectly measured the scope of a seizure, ignoring the racial bias that singles out communities of color for extraordinary surveillance, and that *Terry* should be viewed through the lens of feminist analysis, including that employed by the #MeToo movement. One panelist suggested that *Terry* might have helpfully focused the attention on abusive law enforcement behavior.

Our keynote speaker, UC Berkeley Law Dean Erwin Chemerinsky, described what *Terry* might have been—there was an early draft of the *Terry* opinion that varied significantly from the final version.<sup>7</sup> He noted that *Terry* stands outside what is conventionally thought of as the Warren Court's progressive criminal procedure jurisprudence. Dean Chemerinsky also highlighted how *Terry*, when combined with *Los Angeles v. Lyons* and the ever-expanding doctrine of qualified immunity, has made it next to impossible to challenge unconstitutional law enforcement conduct.

### III. SUMMARY OF THE SYMPOSIUM EDITION

The edition's articles are described in the order in which they were presented.

Royce de Barondes' "Conditioning Exercise of Firearms Rights on Unlimited *Terry* Stops" reflects on the interaction between *Terry* and the now ten-year-old decision in *District of Columbia v. Heller*.<sup>8</sup> Barondes describes how states have "increasingly authorized public firearms possession[.]" at the same time that activists have sought to normalize the same. Barondes asks whether states may curtail public firearms possession, "which lower courts typically treat as an activity protected by the Bill of Rights, by conditioning it on submission to a *Terry* stop at any time[.]" He argues that "firearms possession alone" should not operate as a basis to stop a person in a constitutional carry jurisdiction. The right to bear arms should not be conditioned on consent to a *Terry* stop, Barondes concludes, noting that although "some higher number of firearms possessors are felons . . . . Gross statistical information indicating that some large percentage of persons doing some otherwise innocent activity are engaging in criminal activity is not, by itself, sufficient to authorize seizures."

For *Terry* purposes, the high-crime neighborhood is the analogue of a may-issue jurisdiction, in which relatively fewer law-abiding persons are authorized to possess firearms. As mere presence in a high-crime neighborhood is insufficient to authorize a *Terry* stop, so mere firearms possession in a may-issue jurisdiction should not authorize a *Terry* stop.

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6. The notion that *Terry* and other criminal procedure decisions impose a code of conduct is a concept developed by I. Bennett Capers. See, e.g., I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 655 (2018) (describing criminal procedure precedent as cases that "tell us that the good citizen is willing to aid the police and to consent to searches," and that if one reads between the lines, "[t]he good citizen, having nothing to hide, welcomes police surveillance" and that criminal procedure decisions, *Terry* included, "do not simply regulate police behavior," but "regulate the behavior of citizens.").

7. See generally Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891 (1998) (describing the evolution of the *Terry* opinion).

8. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

J. Richard Broughton's "Danger at the Intersection of Second and Fourth" also notes the recent prevalence of states' liberal gun possession legislation. Idaho, Broughton highlights, "allows open carry of both handguns and long guns; prohibits (by state constitutional provision) licensure or registration of firearms; allows open carry in restaurants that serve alcohol; and carry of a concealed loaded handgun in public without a permit." As a result of liberalized gun laws, *Terry* has to be reexamined. Is an armed person necessarily dangerous? Broughton proposes reading *Terry* "to preclude stops based simply on the fact of gun possession while permitting frisks of suspects who are armed and reasonably suspected as being armed, and who have otherwise been legitimately seized, responds to each of these concerns." Under this framework, "*Terry*, then, can co-exist—even if somewhat uncomfortably—within a regime of liberalized gun rights, without compromising *Terry*'s core concern for the protection of law enforcement."

Shawn E. Fields' "*Terry*, Handguns, and the Hand Formula: Some Preliminary Thoughts" describes the way Fourth Amendment analysis sets "goalposts" for reasonableness, and suggests that "in the age of concealed carry[,] "tort law probability principles can play a role in clarifying a justifiable reasonableness standard in the age of concealed carry." The tort principle Fields applies is "the iconic Hand Formula," which he uses to consider "a *Terry* stop and a *Terry* protective frisk as two types of 'precautions,'" "designed to prevent crime and injury." He asks, using the Hand Formula, "what amount of risk . . . and magnitude . . . of harm would be required to justify these precautions?" Mere gun possession, under Fields' analysis, may not be enough "to demonstrate a sufficient risk of criminal activity to justify a stop."

In Russell L. Jones' "*Terry v. Ohio*: Its Failure, Immoral Progeny, Racial Profiling," the *Terry* decision is fixed in time, described in the context of an era in which "racial and social tensions in America were unsettled." He describes how, leading up to the *Terry* decision, stop-and-frisk proponents described the practice as essential to protecting society—a key aspect of police work. Stop-and-frisk was no more than a "petty intrusion." Others feared that constitutionalizing stops and frisks as tactics that required less than probable cause would encourage "the use of abusive police power." Jones describes the *Terry* decision, which weighed in favor of giving law enforcement broad investigatory tools, as flawed in one key respect: it failed to define the "Terry stop."

Jones describes how *Terry* "concluded that a Fourth Amendment seizure occurs when a police officer stops an individual and restrains his freedom to walk away from the encounter." Jones posits that in *Terry*, "a Fourth Amendment seizure occurred when Officer McFadden approached the men to investigate what he had concluded was a potential crime," that is, earlier than the moment identified by the Court. The consequences of this description are significant. Jones argues for a more rigid definition of seizure that analyzes cultural factors regarding when a particular individual truly feels free to leave. In minority neighborhoods, Jones contends, officer experience is too often deferred to, and fear of law enforcement violence too often ignored. *Terry* is, in part, to blame. Jones asks us to consider "the double-edged sword for African American men; not only are they suspects in a high-crime area, but they are also suspects in locations where they traditionally do not belong."

In *Terry*, Officer McFadden testified that Terry and Chilton caught his attention because “they didn’t look right to me at the time” and he “just didn’t like them.” African American men may attract a police officer’s attention simply because the officer believes he does not belong where he is observed. A good example of this is the shooting of Trayvon Martin by George Zimmerman, a neighborhood watch volunteer, in a gated community in Sanford, Florida. On the night of the shooting, Zimmerman called 911 after noticing Trayvon. He reported a “real suspicious guy.” Zimmerman told the dispatcher “this guy looks like he is up to no good, or he’s on drugs or something. It’s raining, and he’s just walking around.” Unknown to Zimmerman, Trayvon was headed to his father’s residence in the neighborhood after going to the store to buy snacks. When Zimmerman approached Trayvon, a scuffle occurred and Trayvon was shot to death. Trayvon caught Zimmerman’s attention because “he[] [was] a black male” and “they always get away.” Zimmerman assumed that Trayvon did not belong in the community because of his race. Police officers also will often single out an individual not because of his criminal activity, but because of his race or ethnicity.

Josephine Ross’s “What the #MeToo Campaign Teaches about Stop and Frisk” describes how “[t]he #MeToo campaign turned a spotlight on power, consent and sexual abuse,” and how submitting to unwanted touchings by a person who wields power “may be deeply disturbing and coercive even for encounters that lack visible violence.” Ross revisits the death of Eric Garner with these lessons in mind, reframing the final moments of his life as stark examples of what happens when individuals refuse to consent to police aggression.

The chokehold that ended Mr. Garner’s life must be recognized as his punishment for refusing to give the police what they wanted. The investigatory stop morphed into an arrest when Mr. Garner complained: “Every time you see me, you want to mess with me. I’m tired of it. It stops today.” The NYPD called it “resisting arrest.” But Mr. Garner’s crime was actually “refusing to consent.” Eric Garner’s death illustrates what can happen under *Terry* when a man tries to hold onto his dignity and rights.

Ross notes that “a frisk can feel like a sexual touching.” Ross envisions relying on the #MeToo movement’s lessons to:

[C]ounter the idea that there’s nothing wrong with a crime-fighting strategy that depends upon police halting civilians in order to convince them to give up their right to silence, their property rights (for searches of their bags) or inherent dignity (for searches of their person). The power dynamic in policing cannot change any more than we can stop the power dynamic between an intern and her employer. The only way to stop the abuse is to abolish the consent doctrine and that, in turn, means the end of *Terry*’s justification for stop and frisk on less than probable cause.

Eric J. Miller's "Reasonably Radical: *Terry's* Attack on Race-Based Policing" considers the classic criticisms of *Terry*: "the race-based criticism of *Terry* focuses, understandably enough, on the Court's failure to engage with a race-conscious approach to the problems of race-based policing." Miller, by contrast, studies and values "the [*Terry*] Court's explicit discussion of race-based policing." According to Miller, the Court's engagement with the 1967 President's Commission on Law Enforcement and Administration of Justice's report, "The Challenge of Crime to a Free Society," and that report's social justice orientation, allowed the Court to recognize how stopping and frisking could have "had a racially discriminatory and oppressive function." This interaction causes Miller to conclude that

A core purpose of the President's Commission's Report was to end police harassment of minorities. And a core tool in that practice of harassment was the use of stop-and-frisks. Quite clearly, the *Terry* Court recognized that stopping and frisking was a tool of harassment in the context of low-visibility public order policing. Following the President's Commission, the *Terry* Court made a clear distinction between using stops-and-frisks as a tool of harassment, and as a tool of police investigation.

This Symposium edition also features a University of Idaho College of Law student note, Naomi Doraisamy's "Erasing Presence Through Reasonable Suspicion: *Terry* and Its Progeny As a Vehicle For State Immigration Enforcement." Doraisamy argues that *Terry's* broad police power, expanded by *Terry's* progeny, is now further emboldened by state legislative provisions "authorizing or mandating immigration inquiry at the lowest level encounter with law enforcement." Consequently, states have "create[d] an environment so hostile to undocumented immigrants that they are under siege in their own communities and, ultimately, forced to leave.

#### IV. ADDITIONAL SYMPOSIUM PRESENTATIONS

The symposium's final panel featured a prominent local defense attorney, James K. Ball of Manweiler, Breen, Ball, & Davis, PLLC, and Natalie Camacho Mendoza, who heads the City of Boise Office of Police Oversight. Ball described his career's trajectory, from his early work as a prosecutor to his current criminal defense practice. He highlighted the unique experience of arguing suppression motions in Idaho as a result of certain defendant-protective aspects of Idaho law. Ball also explained how the presence of body cameras has simplified aspects of his criminal defense practice, permitting him to evaluate and confirm his clients' version of events with ease.

Mendoza described her office's role in promoting community-based policing. Her office can suggest and monitor officer training, including training about unconscious bias. Mendoza explained that the complaints her office receives from citizens often involve the perception that officers acted callously, but not necessarily illegally. She noted that nevertheless, charged interactions with law enforcement can frustrate efforts to build positive relationships between law enforcement and the Boise community. Though Mendoza has the ability to speak directly to the Chief of Police, she explained that her office recommends, but does not enforce, officer discipline. Still, her office is independent enough to speak candidly when it disagrees with a complaint's outcome.

## V. CONCLUDING ACKNOWLEDGMENTS

The symposium highlighted tensions in emerging *Terry* scholarship. For example, audience members questioned our Second Amendment panelists about *Terry* stops which serve as proxies for racial profiling. Our panelists considered how the ability to claim lawful weapon possession may be less effective depending on the identity of the individual stopped. Audience members highlighted that many people of color are victims of deadly force before seconds after they are stopped, and are thus unable to explain whether their weapon possession (perceived or actual) is lawful. Our Race-Based Policing panel offered polar opposite interpretations of *Terry*: one panelist described *Terry* as a case ignorant of the effects of racial profiling, and another considered *Terry*'s acknowledgment of a presidential commission which examined the friction between police and minority groups as a signal that the Court was concerned about racial tension and racial profiling.

Organizing an event that featured prominent scholars from around the country and hot-button issues benefitted from having capable and tireless editors to helm the symposium issue. Patxi Larrocea-Phillips and Kristyn Escalante, symposium editors for the *Idaho Law Review*, in collaboration with the symposium faculty advisor, began to work on creating innovative panels almost a year before the Symposium itself, and worked tirelessly throughout the academic year to ensure a successful event and a meaningful collection of articles. The event's logistics were deftly managed by these editors, as well as our outstanding *Idaho Law Review* Editor-in-Chief, Jaycee Nall.

Finally, we are grateful for the support of the College of Law's faculty, including Aliza Cover and Shaakirrah Sanders, who moderated complex discussions about individual rights, the Fourth Amendment's reasonableness standard, and the challenges *Terry* presents to local policing and criminal defense practitioners. The College of Law's Dean, Mark Adams, ensured that the Symposium was funded and welcomed our distinguished guests to our Symposium site—the State Capitol's glorious Lincoln Auditorium, a fitting setting for the day's events.