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Terry V. Ohio in Hindsight: The Perils of Predicting the Past

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TERRY V. OHIO IN HINDSIGHT: THE PERILS OF PREDICTING THE PAST

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Making a hit list of wrongly decided cases is fun and easy: mine includes *Ex parte McCardle*, the *Slaughter-House Cases*, *Younger v. Harris*, *McCleskey v. Kemp*, *DeShaney v. Winnebago County*, *City of Los Angeles v. Lyons*, *Bowers v. Hardwick* and others too numerous to mention. At first, I fancied that tracing the consequences of their obliteration would be easy too. I was sure I could show, for example, in straight linear progression, why *Hans v. Louisiana* should never have been decided, and how only good consequences (greater government accountability *and* a far more cogent eleventh amendment jurisprudence) would have followed. At the time, that seemed almost *too* easy, and so I decided to play the game using what seemed a harder case: *Terry v. Ohio*.[1] Now that I have given substantial thought to the possible consequences of *Terry's* obliteration, and have immersed myself in chaos theory for nearly a week,[2] I suspect that the argument in the other cases would have been more complex than I originally thought. As to *Terry*, the complexity of the analysis is daunting. It raises questions about many things: from the ways in which law professors use knowledge from other disciplines, to the feasibility of hindsight analysis, to the interactions among the many complex systems affected by constitutional rulemaking.

It's a tough call whether to obliterate *Terry*. The question can't be whether *Terry* was correct when decided, because there is no way, from our current vantage point, to ignore more than thirty years of evidence about how it has worked in practice.

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1. 392 U.S. 1 (1968).

2. Surely sufficient time for a law professor to become proficient at a highly complex field of which she knew nothing previously.

The rules of this game don't deprive us of our historical knowledge (indeed time travel was specifically mentioned) so the question must be: in light of what we know now, would we have been better off without the *Terry* decision? The question is complicated by the fact that during the time we were accruing evidence about the effects of stop and frisk, we were also gaining a less linear, more sophisticated understanding of the laws of cause and effect.

Chaos theory studies the behavior of dynamic systems, or systems that are not in constant equilibrium. It posits that in such systems, cause and effect are not linear or proportionate—instead, seemingly minor causal agents may lead to disproportionately major effects. The connection among forces in a system may even appear random, though over time more complex and subtle patterns may appear. But even these patterns will not be exactly duplicative because each recurrence takes place in a different environment. Moreover, individual systems do not exist in isolation, but are themselves part of a complex environment that is in a continual state of flux. Changes result from the interaction of many forces that are constantly changing, as are the interactions among them.[3]

It does seem that chaos theory offers some important lessons here. Take the question: what would have occurred if *Terry* had never been decided?[4] Several interdependent systems would be affected by this disturbance.[5] But before reviewing all the possible interactions, let's examine the choices before the Supreme Court in 1968.

Terry v. Ohio was widely viewed as a compromise. Civil libertarians had urged the Court to keep in place the traditional Fourth Amendment structure, which required that searches and seizures be accompanied by probable cause and either a warrant or an exception to the warrant requirement.[6] This path would most likely have meant holding stops and frisks invalid, since police with probable cause could simply arrest and perform a

3. James Gleick, *Chaos: Making a New Science* (Viking, 1987); Vincent Di Lorenzo, *Legislative Chaos: An Exploratory Study*, 12 Yale L. & Policy Rev. 425, 430-31 (1994).

4. I am assuming that the rules don't permit the more satisfying alternative of assuming that *Terry* had been decided differently.

5. Or lack of a disturbance, depending on one's chronological vantage point.

6. See brief of the NAACP Legal Defense and Education Fund, Inc. as amicus curiae, *Terry v. Ohio*, 392 U.S. 1 (1968); Brief of American Civil Liberties Union et al., as amici curiae, *Terry v. Ohio* 392 U.S. (1968).

more intrusive search incident to arrest.[7] The Court's solution[8]—bringing the practice within the Fourth Amendment by severing the warrant clause from the reasonableness clause and holding that certain categories of police conduct need only be reasonable—was billed as a middle ground between the civil libertarian position and the position that stops and frisks weren't Fourth Amendment activity at all.

Thirty years later, there is widespread disagreement about whether *Terry* succeeded.[9] Although there are strong arguments on either side, I find this a much easier question than the question of whether some other course would have succeeded better. *Terry* has not succeeded. It has had the salutary effect of clarifying that stop and frisk is regulated by the Fourth Amendment, and therefore subject to judicial review.[10] However, the nature of the judicial review contemplated—deferential review of discretionary, low profile, street level decisions according to a malleable balancing standard—was poorly suited to achieve the desired result of creating clear guidelines for the use of stop and frisk. In many ways, *Terry* has given us the worst of both worlds. *Terry* was intentionally more like an opening salvo than a blueprint.[11] It offered little guidance about what sorts of police conduct would be permissible and coupled the lack of guidance with a new broad permission to balance public safety against the rights of suspects. As Wayne LaFave said at the time, the decision "[left] room for later movement in almost any direction."[12] It should come as no surprise that such movement by the lower courts, prosecutors, police, and even the Supreme Court itself

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7. As Tracey Maclin correctly points out, stop and frisk would likely have continued under any circumstances, but absent *Terry*, its fruits would have been inadmissible. Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 St. John's L. Rev. 1271, 1287 (1998).

8. Supported by the Brief of the National District Attorneys' Association, as amicus curiae, *Terry v. Ohio*, 392 U.S. 1 (1968).

9. See generally the superb symposium at 72 St. John's L. Rev. (1998), and compare Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 St. John's L. Rev. 911 (1998) with David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 St. John's L. Rev. 975 (1998).

10. Although it isn't accurate to say that stop and frisk would have been entirely outside the judicial purview absent *Terry*, just that there would be no uniform Supreme Court standard.

11. In counterpoint to *Miranda*. See John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 St. John's L. Rev. 749, 789 (1998) (citing comments of Justice Fortas memorialized in Justice Douglas' conference notes about *Terry*).

12. Wayne R. LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters *and Beyond*, 67 Mich. L. Rev. 40, 46 (1968).

has been inexorably away from Terry's narrow holding and toward increased police discretion.

At the same time, the Court itself began using *Terry's* balancing test as a means of adopting more sweeping rules permitting whole categories of conduct to be investigated under the *Terry* criteria, rather than under the traditional Fourth Amendment requisites of probable cause and a warrant. Thus the legacy of *Terry* is a doubly unfortunate one. Judicial review has not succeeded in controlling the widespread abuse of stop and frisk,[13] the vast brunt of which falls, as it did in 1968, on minority suspects.[14] Whatever the result of declaring stop and frisk unconstitutional or of refusing to review its constitutionality might have been, the result of *Terry* was to legalize and place the High Court's imprimatur on a practice that serves as a tool to harass and abuse minority citizens. In addition, the doctrinal basis the Court used to achieve its "narrow" holding in *Terry* has inexorably expanded to permit numerous police practices to flourish, unaccompanied by probable cause, a warrant, or, in many cases, any level of suspicion at all.[15]

But this kind of armchair quarterbacking[16] is easy. The far harder question is whether we would be better off now if *Terry* hadn't been decided. I've come to believe, partly aided by chaos theory, that the question may be an incoherent one. Or perhaps it is particularly incoherent in the context of assessing *Terry*. *Terry* asks the question at the heart of criminal procedure: what is the correct balance between government intrusion and individual autonomy? There can be no answer to this question that isn't shaped by time, place, vantage point, and a host of interactive, evolving societal forces.

What systems would have been affected if *Terry* hadn't been decided? Police departments, obviously. One variable is the trajectory of police behavior in the face of a lack of Supreme

13. See, e.g., David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Street*, N.Y. Times A1 (Feb. 15, 1999) (citing statistic that of over 45 thousand frisks performed by the NYPD Street Crimes Unit, under 10 thousand turned up any weapons.)

14. See, e.g., Elizabeth Kolbert, *The Perils of Safety*, The New Yorker 50, 52 (March 22, 1999) (though stop and frisk looks like a racially neutral tactic, in practice in New York it has resulted in thousands upon thousands of young black and Latino men getting searched for weapons).

15. See, e.g., the "special needs" cases, including *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (drug testing).

16. It seemed appropriate to mix a football metaphor with my discussion of chaos theory, since football is another area about which I know very little.

Court guidance. Police would continue to stop and frisk suspects, with most of the impact occurring in poor and minority neighborhoods. The President's Commission on Law Enforcement noted in 1967 that this differential treatment, this accrual of petty and not so petty humiliations, was taking its toll on the affected neighborhoods. The report also noted that it was predictable that such police-citizen encounters would occasionally escalate, and particularly in the broader context of continuing mistreatment, would occasionally lead to serious civil disturbances.[17] Would police departments have responded to escalating tensions by generating internal regulations or changing their training and disciplinary regimes? This would depend on the pressures they faced and the action or inaction of local, state and federal legislative, administrative and other political bodies. Perhaps they would have felt more need to do so in the absence of Supreme Court action.

The behavior (and to some extent the actual composition) of policymaking bodies, in turn, would have been heavily influenced by public perceptions and attitudes.[18] For example, if the conventional wisdom is that Richard Nixon was elected in some significant part because of public reaction to the Warren Court's perceived pro-criminal, pro-minority stance, it is difficult to gauge what effect silence from the Court in the face of escalating police abuse might have had on electoral outcomes and political policymaking. Would it have led to more sympathy for poorly treated minorities, or to even greater fear of crime? To widespread indignation on behalf of innocent, hardworking citizens brutalized and humiliated by arrogant cops, or on behalf of hardworking, working class cops trying to do their jobs under dangerous circumstances? How would those perceptions have affected public behavior at the polls, or the behavior of elected officials? And where would they fit within the context of all the other shifting social and economic factors that made the political landscape during the Warren Court very different from that of the Burger and Rehnquist Courts?

Absent *Terry,* lower courts, lacking guidance, would continue generating contradictory decisions that called the scope of basic fourth amendment principles (such as search, seizure, con-

17. Brief of NAACP at 62-68 (cited in note 6) citing The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967).

18. Which in turn would be influenced by the Court's behavior—its decision to place its imprimatur on certain practices and to treat others as beyond its purview.

sent, and probable cause) into question and gave little guidance to street level cops. Stop and frisk statutes were being passed and needed to be evaluated.[19] Such uncertainty would lead to some sort of reaction, though not necessarily from the judiciary.

It is also difficult to predict what the lack of *Terry* would mean for the course of Supreme Court precedent. How would it have affected Fourth Amendment jurisprudence, or criminal procedure jurisprudence? Would it have led to more expansive definitions of probable cause or consent, greater tolerance of pretextual grounds for police intrusion, or narrower definitions of search and seizure?[20] But why assume any particular amendment or set of amendments is a discrete system? Perhaps, if not for *Terry,* the Court might eventually have dealt with the issues of unequal treatment raised by stop and frisk through the equal protection clause, for example.

It is said that *Terry* was a response to hydraulic pressures building up in the Warren Court in the aftermath of *Brown v Board of Education, Brown v. Allen, Mapp* and *Miranda*, and that the Court felt it could not afford another anti-police, pro-minority decision.[21] To the extent the Court did see itself as having a finite amount of capital to expend, and to the extent it had an overall plan for spending it, who knows what the lack of *Terry* would have done to that accounting. But this analysis treats the Warren Court, if only for descriptive purposes, as a discrete system. Like any other court, the Warren Court was itself an unstable and evolving system.[22] It (and its successor courts) evolved through inevitable changes in personnel, leadership, vision, and political context. Its decisions evolved through the common law process, the vagaries of individual cases, the makeup and interpretations of lower courts, and all the other obvious variables that make the path of the law unpredictable.

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19. Barrett, 72 St. John's L. Rev. at 760 (cited in note 11).

20. Interestingly, all of these came to pass anyway. See, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983) (lowering probable cause threshold); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (adopting broad definition of consent); *Oliver v. United States*, 466 U.S. 170 (1984) (adopting narrow definition of search); *Florida v. Bostick*, 501 U.S. 429 (1991) (adopting narrow definition of seizure); and *Whren v. United States*, 517 U.S. 806 (1996) (holding evidence of pretext irrelevant).

21. Maclin, 72 St. John's L. Rev. at 1318 (cited in note 7) (citing Justice Douglas's dissent in *Terry*).

22. See Yale Kamisar, *The Warren Court (Was It Really so Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* 62, 62-68 (Yale U. Press, 1983) (critiquing the notion of a unitary Warren Court).

A question like "what if *Terry* hadn't been decided?" seems to assume a stable environment, a jigsaw puzzle with one piece removed. But, in Ron Allen's and Ross Rosenberg's insightful description, the common law system is a "grown" rather than a "made" system;[23] a system with too many variables to yield any sort of predictive certainty.[24] This point holds true for all the other interlocking systems discussed above. There is no overall top-down plan. And there are no discrete systems at work here either, just a complex set of forces, actions and reactions, causes, effects and feedback loops, all in constant flux.

Was *Terry* wrongly decided? Yes. It didn't achieve what it set out to; it never faced the racial issues that have, if anything, worsened; and it arguably placed its imprimatur on an abusive set of practices. In the bargain it seriously damaged the structure of Fourth Amendment law, allowing for an ad hoc, unprincipled balancing whose costs go far beyond the excesses of stop and frisk. Would we have been better off without it? That depends.

23. Ronald J. Allen and Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 St. Johns L. Rev. 1149, 1189-98 (1998)

24. See also Glenn Harlan Reynolds, *Chaos and the Court*, 91 Colum. L. Rev. 110, 113-14 (1991).