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HANG ON TO YOUR HATS! *TERRY* INTO THE TWENTY-FIRST CENTURY

ERIC L. MULLER*

The title of our section of this Symposium is "*Terry* and the Future of Constitutional Criminal Procedure: Into the 21st Century," so I'd like to spend my time on an important point of agreement between Professors Amar and Slobogin that indicates a promising path for Fourth Amendment doctrine. This is a path that could carry the Fourth Amendment's requirement of "reasonable" police conduct into areas of police-citizen interaction that are currently outside the scope of the Fourth Amendment entirely. It is a path worth traveling, or at least exploring, because there is a potential for a great deal of mischief in this currently uncharted terrain. By talking briefly about one small piece of this terrain—the so-called "community caretaker" doctrine—I hope to persuade you that the central idea of *Terry v. Ohio*¹ and its progeny will remain relevant in the next century.

At a conference devoted entirely to *Terry v. Ohio*, it is, of course, dangerous to refer to "the central idea of *Terry*" as though that were self-defining. I take the central idea of *Terry* to be its refreshing flexibility: Its willingness to break from the rigidity of the probable cause requirement, and to recognize that police officers interact with citizens in many more ways than a strict Warrant Clause approach would envision. It is important to remember that police officers were stopping and frisking suspects on the streets for years before 1968.² The *Terry* decision did not create the stop-and-frisk; police officers did. *Terry*'s innovation was its honesty, its willingness to acknowledge that things were happening on the streets that did not easily fit a Warrant Clause model, but that still deserved some form of scrutiny by judges. The flexibility offered by *Terry* was, of

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¹ 392 U.S. 1 (1968).

² See David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 7 (1994).

course, quite limited: It replaced a single level of police suspicion, probable cause, with two levels, probable cause and reasonable suspicion. Furthermore, *Terry* opened the eyes of the judges only to the stop-and-frisk—a single and fairly intrusive sort of investigative technique that did not look quite like a full-blown arrest or a formal search. However, *Terry* introduced the idea that the Fourth Amendment might have relevance across at least a somewhat broader segment of a continuum of police-citizen encounters, and for this I believe it deserves praise.

Professors Amar and Slobogin believe this too. What links their work most powerfully, and most usefully, is their endorsement of the sliding scale in Fourth Amendment analysis. Professor Slobogin advocates that “the level of certainty necessary to authorize a police action . . . be governed solely by the level of its intrusiveness.”³ This proposal, referred to as “the proportionality principle,” is an unabashed call for a sliding scale approach to the Fourth Amendment.⁴ The less intrusive the investigative tactic, the less certain of wrongdoing the police need be in order to use it. His approach dramatically de-emphasizes the eternally perplexing inquiry into whether a particular police tactic constitutes a classically defined “search” or “seizure,” and instead focuses attention on how intrusive, and how justified, the tactic was. His approach also carries the Fourth Amendment below full-blown Warrant-Clause searches, past *Terry*-style stop-and-frisks, to even the most minimally intrusive police tactics.

I read Professor Amar to favor a sliding scale as well, although one that examines a richer set of factors than does the Slobogin proportionality principle. For Professor Amar, the sliding scale is right there in the text of the Fourth Amendment: The reasonableness requirement. Searches and seizures by *warrant* need to be supported by probable cause, but *all* searches and seizures must be reasonable. And reasonableness is, of necessity, a sliding scale: As Professor Amar states, “serious crimes and serious needs can justify more serious searches and seizures.”⁵ Admittedly, the Amar sliding scale differs in major

³ Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 68 (1991).

⁴ *Id.* at 75 (describing the proportionality principle as requiring “a flexible, sliding scale analysis”).

⁵ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 802 (1994).

ways from the Slobogin sliding scale. Professor Slobogin's inquiry into proportionality involves a straightforward focus on intrusiveness. On the other hand, Professor Amar's inquiry into reasonableness involves an examination of a much wider array of factors, including not just the degree of intrusion but also the impact of the police tactic on other constitutional norms.⁶ Despite their differences, the two proposals we have heard about today share a common desire to expand the scope of the Fourth Amendment to a much broader segment of the spectrum of police-citizen interaction than the current two-tiered approach can capture. Their proposals make good on *Terry's* promise of Fourth Amendment flexibility.

Because this is an important promise, these are important proposals. *Terry* itself called judicial attention to the stop-and-frisk, and thereby brought some semblance of order to what had been an entirely unregulated police practice. A great deal of investigatory mischief remains undetected thirty years after *Terry* because it remains entirely outside the scope of the Fourth Amendment. One fertile area for such mischief is the so-called "community caretaking" function of the police. I would like to describe the community caretaker doctrine to you in the hopes that you will come to see it as a type of police-citizen interaction calling for some form of judicial supervision, just as the stop-and-frisk had done thirty years ago.

You have probably heard the old joke that the most terrifying words a person can ever hear are "I'm from the government, and I'm here to help you." That joke is a fairly accurate description of the community caretaker doctrine. The police officer on the beat does more than just investigate crime; he also helps stranded motorists, gets the neighbor to turn down the stereo, rescues cats from trees, gives directions, helps lost children find their parents, and generally does good deeds in the community. Because the courts typically see these "community caretaking functions" as being "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,"⁷ they often do not recognize them as engaging

⁶ See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998); see also Amar, *supra* note 5, at 804-11 (examining other constitutional objectives to Fourth Amendment cases to determine constitutional reasonableness).

⁷ *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

Fourth Amendment concerns at all.⁸

Whenever the courts leave an entire category of police-citizen interaction largely unsupervised, you can expect some mischief; and mischief is what you get. Allow me to read you the facts of a case from the State of Washington called *State v. Chisholm*.⁹ To quote the well-known legal scholar Dave Barry, "I am not making this up".¹⁰

On November 15, 1980 at approximately 12:30 a.m., Sergeant Cowan of the Longview Police Department observed a pickup truck moving in traffic with a hat resting on top of the cab. The officer, driving an unmarked police vehicle, watched as the hat blew into the bed. *Concerned that the hat was endangered*, Sergeant Cowan attempted to stop the truck. Having no success, the officer summoned a marked police vehicle to make the stop. . . .

Upon walking up to the cab, Sergeant Cowan saw an open can of beer between the driver and his passenger, . . . both known by Sergeant Cowan to be minors. The occupants were placed under arrest and a later search of [the passenger's] person produced a quantity of marijuana, for which he was charged with possession.¹¹

It is safe to say that these two young fellows probably could have gotten by just fine without Sergeant Cowan's "help," not to

⁸ See, e.g., *United States v. York*, 895 F.2d 1026, 1029 (5th Cir. 1990) (holding that police entry into an intoxicated defendant's home, at the request of the defendant's guests in order to retrieve their belongings, was not a Fourth Amendment search); *Thompson v. State*, 797 S.W.2d 450, 451-52 (Ark. 1990) (determining that the police encounter with an intoxicated defendant was not a Fourth Amendment seizure because police were acting in a caretaker capacity, precipitated by their observation of the defendant's parked car with the lights and motor on); *State v. Halfmann*, 518 N.W.2d 729, 730-31 (N.D. 1994) (holding that an officer's questioning of an intoxicated defendant after she pulled off the road was not a Fourth Amendment stop but a community caretaker action); *State v. Quigley*, 786 P.2d 1274, 1276 (Or. Ct. App. 1990) (concluding that a police officer's initial contact with the defendant was not a Fourth Amendment stop because the officer approached the defendant out of concern for the defendant's safety after observing the defendant's car parked in an isolated lot with fogged up windows). *But see* *State v. Anderson*, 417 N.W.2d 411, 413-14 (Wis. Ct. App. 1987) (recognizing that community caretaker functions can sometimes amount to Fourth Amendment "searches" or "seizures"), *rev'd on other grounds*, 454 N.W.2d 763 (Wis. Ct. App. 1990).

⁹ 696 P.2d 41 (Wash. Ct. App. 1985). My thanks to fellow panelist Scott Sundby for bringing this wonderful example of the community caretaking doctrine to my attention.

¹⁰ See, e.g., DAVE BARRY, *DAVE BARRY IS NOT MAKING THIS UP* (1995).

¹¹ *Chisholm*, 696 P.2d at 42 (emphasis added).

mention without the hat.¹²

The reporters are full of cases in which an officer's offer of aid, or his seemingly innocent desire to "ask just a few questions" of a passerby, turns quickly into reasonable suspicion, or even full-blown probable cause. It will not do to say that the Fourth Amendment has no concern for these cases because a police officer who is playing the role of the community caretaker is not "searching." As Professor Amar points out, the Secret Service agent who merely scans the crowd surrounding the President is performing a very real "search," albeit not an especially intrusive one.¹³ Law enforcement officers carry their attentiveness and their suspicion with them everywhere, just as they carry their service revolvers.

To place community caretaking encounters between the police and the citizens completely outside the scope of the Fourth Amendment is to create an enormous pocket of unreviewed and essentially unreviewable¹⁴ discretion in the daily activities of law enforcement. While it is impossible to know just how common it is for police to engage in *Chisolm*-style abuse of the community caretaker function,¹⁵ the scope of police discretion is enormous,

¹² For a tragic example of apparently good-faith community caretaking gone awry, see *Tom v. Volda*, 963 F.2d 952 (7th Cir. 1992). Here an officer approached a young man to help him after she saw him fall off his bicycle. When he rebuffed her efforts to help, she began to follow him. She ended up shooting and killing him after their interaction turned violent.

¹³ See Amar, *supra* note 5, at 768 (describing different types of Fourth Amendment searches).

¹⁴ It remains possible for a defendant to engage the Fourth Amendment by persuading a court that an officer's community caretaking efforts were actually a pretext for a groundless investigatory stop. Indeed, the *Chisholm* court remanded the case to the trial court for just such an inquiry. See *Chisholm*, 696 P.2d at 43 (ordering remand for suppression hearing to determine whether Sergeant Cowan's actions were "subterfuge"). However, the Supreme Court recently expressed strong disapproval of pretext analysis in Fourth Amendment cases. See *Whren v. United States*, 517 U.S. 806 (1996). In *Whren*, the Court made clear that the "[s]ubjective intentions [of police officers] play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. Pretext analysis might not be an adequate strategy for regulating the police in their community caretaking role.

¹⁵ Professor James J. Fyfe's interesting contribution to this Symposium suggests that such manipulation may be more common than we suspect. He quotes from a training manual for police officers which *instructs* officers to use community caretaking for investigative purposes. See James J. Fyfe, *Terry: A[n-Ex-] Cop's View*, 72 ST. JOHN'S L. REV. 1231 (1998) (quoting GEORGE T. PAYTON & MICHAEL AMARAL, *PATROL OPERATIONS AND ENFORCEMENT TACTICS* 203-07 (9th ed. 1993)) (noting the manual's instruction that where an officer sees a suspicious person who does not appear to fit into the community, the officer should approach him and say, "Good evening, sir. Are

as is the potential for abuse. If *Terry* teaches us anything, it teaches us the value of opening our eyes to existing law enforcement practices that may not look like traditional searches or seizures, but that leave the police free to accomplish the results of traditional searches and seizures without any real strictures. To quote Professor Amar, “[r]ule-of-law values affirmed in various constitutional ways . . . teach us to be especially wary of searches and seizures that allow too much arbitrariness and ad hocery, unbounded by public, visible rules promulgated in advance by legislatures and executive agencies.”¹⁶

Having said that Professors Slobogin and Amar both offer approaches to the Fourth Amendment that can help us to explore currently uncharted areas of police-citizen interaction, I should also say that I believe Professor Slobogin’s approach holds less promise than Professor Amar’s. Both speak of a “proportionality principle”—the idea that “more serious intrusions require more weighty justifications.”¹⁷ For Amar, the degree of intrusiveness is just the starting point of the inquiry into Fourth Amendment reasonableness. For Slobogin, it is also the ending point. Admittedly, Professor Slobogin entitles a portion of his paper “Incorporating Other Interests Into Invasiveness Analysis.”¹⁸ Here Slobogin chides the Court for “fail[ing] to take into account those interests aside from privacy, property, and autonomy that are protected by other provisions of the Constitution.”¹⁹ But it is not clear to me why interests aside from “privacy, property, and autonomy” have any place in Professor Slobogin’s Fourth Amendment world. Reasonableness, for Slobogin, is a function of invasiveness: “[A] search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action.”²⁰ The chief virtue of this proposal is, of course, its clarity. Invasiveness, and invasiveness alone, becomes the organizing principle of Fourth Amendment “reasonableness” analysis.

you looking for a particular place? Maybe I can help you.”).

¹⁶ Amar, *supra* note 5, at 809.

¹⁷ Amar, *supra* note 6; see also Christopher Slobogin, *Let's Not Bury Terry: A Call For Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998) (“A search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action.”).

¹⁸ See Slobogin, *supra* note 17.

¹⁹ *Id.*

²⁰ *Id.*

But if that is what Fourth Amendment reasonableness is about, then Fourth Amendment reasonableness is *not* about other things. It is not about race or gender or youth; it is not about arbitrariness; it is not about public humiliation or harassment. However, it seems to me that discriminatory, arbitrary or needlessly humiliating police tactics can be unreasonable—even if they are not particularly invasive. We might want to describe Sergeant Cowan's decision to return Chisholm's hat as unreasonable, even if it was not very intrusive. If the Marshals at the entrance to a federal courthouse were able to set the surveillance camera so that it only actually switched on when a young person or an African-American person approached, we might want to describe that practice as "unreasonable," even though it may not be at all intrusive.²¹ A police department that responded more aggressively to noise complaints about loud hip-hop rather than loud country-western might be acting "unreasonably," even though not intrusively. In short, if we are to make good on the promise of *Terry* and spread the requirement of reasonableness across the entire spectrum of police-citizen interaction, we will probably need a richer definition of reasonableness than the Slobogin proportionality principle seems to offer.²²

²¹ It is worth noting that such a practice, deployed against young people, would probably *not* independently violate the Equal Protection Clause of the Fourteenth Amendment. Age is not a suspect classification. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (holding that age is not a suspect classification for the purposes of equal protection analysis). As a result, the government would need to supply nothing more than a rational basis for its surveillance system. See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (holding that only a rational basis is necessary for justifying classification by age). This is a notoriously easy burden to sustain. The Fourth Amendment's Reasonableness Clause might therefore be the only piece of constitutional text that can capture the unconstitutionality of a youth-targeted surveillance system.

²² In a fascinating passage in his paper, Professor Slobogin correctly observes that the Supreme Court's unfortunate fascination with the probable cause standard has driven it to define "searches" and "seizures" in an excessively narrow way. See Slobogin, *supra* note 17. As he argues, "[i]f the Court had been willing to recognize that some relatively less invasive 'searches' and 'seizures' can take place on less than probable cause it would have felt much more comfortable broadening the definition of those two terms, instead of declaring, in essence by fiat, that all sorts of searches and seizures are not." *Id.*

Regrettably, though, Professor Slobogin is not in a position to capitalize on his accurate critique of the Supreme Court's approach. While he rightly chides the Court for failing to recognize that comparatively non-invasive police tactics can constitute "searches" or "seizures," his proportionality principle will produce almost

I will not attempt in my limited time to predict how the courts might go about enforcing Fourth Amendment reasonableness in community caretaking cases, or in other types of cases currently off the Fourth Amendment radar screen. I will instead merely predict, in my role as a commentator on the relevance of *Terry* in the next century, that the central idea of *Terry* will offer the courts a sound strategy for charting this new terrain. It is impossible to say exactly where Fourth Amendment law will go, but I am confident that *Terry's* refreshing focus on reasonableness will help take us there. So, ladies and gentlemen, onward to the 21st century! Hang on to your hats!

nothing but rubber-stamped approvals of such police tactics. If the invasiveness of a police tactic is slight, it needs but slight justification. Thus, while a barely invasive police tactic would fall within the scope of Slobogin's Fourth Amendment, it would almost invariably be permissible. If the result of bringing non-invasive police tactics within the ambit of the Fourth Amendment is to approve them categorically, the change in the law hardly seems worth the trouble.