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The Spirit of 1968: Toward Abolishing Terry Doctrine

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Symposium: Teaching From the Left

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Introduction

As I understand it, the mission of this conference is to "think outside the box." The box here is the common sense of an increasingly reactionary jurisprudential mainstream. To get out of that box, we need to move beyond liberal scholarship.

Change is necessary because liberal scholars have been tethered to what is when imagining what could be.[1] For instance, the Fourth Amendment of the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

Even liberal scholars have assumed that the Court's current interpretation of that language, that it only requires reasonable police action and that probable cause is merely one way of clearly passing that threshold, will remain the rule. Conceding that point forecloses the possibility of a truly "Left" interpretation of the Fourth Amendment.

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[1] Anthony Amsterdam & Jerome Bruner describe culture as the dialectic between what is and what might be. ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 219 (2000) (identifying United States' racial dialectic). Elsewhere, I describe my general conception of the relationship between law and culture. *See* Frank Rudy Cooper, Terry*'s "See Saw Effect" From Racial Profiling to Depolicing: Toward Critical Cultural Theory*, *in* NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH 139, 150-51 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) (reviewing law and cultural studies scholarship).

[2] U.S CONST. amend. IV.

If this conference is not merely about tinkering with what is, it is also about imagining a whole different world. There is indeed a better world that might have been. It is the world of 1968. In so many ways, that is the year that revolutionary thought was killed off. The F.B.I. assassinated Martin Luther King, Jr. for linking black civil rights with peace and economic justice.[3] Perhaps more importantly, the F.B.I. killed Bobby Kennedy for raising the prospect that a more-than-liberal politician would control the state.[4] Most important of all, and surprisingly rarely mentioned here in the United States (U.S.), the French government squelched a true revolution that had linked Unions, peace activists, and other Leftists.[5]

While 1968 was the death of the Left, it also created ashes from which a new revolution in thought might emerge. We are all steeped in the post-structuralist ideas of Althusser,[6] Foucault,[7] and Derrida,[8] each of whom emerges from the post-1968 French intelligencia. (I do not include Lacan, who equivocally said of the 1968 revolution, "They want new masters; they shall have them!") More mundanely, in its 1968 *Terry v. Ohio* opinion, the U.S. Supreme Court almost made probable cause the sine qua non of the Fourth Amendment. If we could return to the spirit of 1968, we could excavate a Left Fourth Amendment.

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[3] This is my opinion. *See generally* MARK LANE & DICK GREGORY, MURDER IN MEMPHIS: THE FBI AND THE ASSASSINATION OF MARTIN LUTHER KING (1993) (1977) (reviewing circumstances of King assassination); WILLIAM F. PEPPER, ORDERS TO KILL: THE TRUTH BEHIND THE MURDER OF MARTIN LUTHER KING (1998) (1995) (same).

[4] This is my opinion. *See generally* JOE BROWN & ZACHARY SKLAR, THE ASSASSINATIONS: PROBE MAGAZINE ON JFK, MLK, RFK, AND MALCOM X (James DiEugenio & Lisa Pease eds., 2002) (reviewing circumstances of Robert Kennedy assassination).

[5] *See generally* ANDREW FEENBERG, & JIM FREEMAN, WHEN POETRY RULED THE STREETS: THE FRENCH MAY EVENTS OF 1968 (2001) (describing France's May Revolution).

[6] *See generally* LOUIS ALTHUSSER, LENIN AND PHILOSOPHY 121-73 (Ben Brewster trans., 1971) (defining interpellation in essay Ideology and Ideological State Apparatuses).

[7] *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1979) (describing contemporary forms of power).

[8] *See generally* JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., 1976) (considering and expanding upon post-structuralist linguistic theory).

The remainder of this essay summarizes how the 1968 *Terry* opinion made Fourth Amendment doctrine more conservative and why that result has gone largely unchallenged. I will conclude by calling on us to return to the beginning of 1968, both spiritually and in *Terry* doctrine.

I. The Assassination of the Probable Cause Standard

When I say that 1968 almost saw the United States Supreme Court make probable cause the sine qua non of the Fourth Amendment, I refer to the *Terry* opinion.[9] Therein, the Court considers a case where a white police officer observed two black men seemingly "case" a store for a potential robbery, then consult with a white man.[10] The officer grabbed the men and patted down the outside of their clothing to determine whether they had weapons.[11] The issue was whether a weapons charge should be dismissed because those "stops" and "frisks" of the suspects violated the Fourth Amendment.[12] The *Terry* Court held that police officers may stop and frisk people upon reasonable suspicion a crime is afoot rather than probable cause a crime is afoot.[13] Probable cause was the more traditional standard for establishing Fourth Amendment reasonableness.[14] Probable cause is a greater quantum of evidence than reasonable suspicion.[15]

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[9] 392 U.S. 1 (1968).
[10] *Id.* at 6.
[11] *Id.* at 7.
[12] *Id.* at 9.
[13] *Id.* at 21-22.
[14] *Terry*, 392 U.S., at 11 (referring to Petitioner's argument that "the traditional jurisprudence of the Fourth Amendment" requires probable cause).
[15] *See Alabama v. White*, 496 U.S. 325, 330 (1990) (declaring reasonable suspicion requires less, and less reliable, evidence).

The *Terry* Court borrowed the reasonable suspicion standard from the 1967 *Camara v. Municipal Court* case.[16] That decision dealt with the question of whether a municipal inspector may search an apartment to discover whether it violates a municipal code without first procuring a warrant based upon probable cause.[17] The traditional probable cause test would have required the inspector to establish suspicion as to the particular dwelling. The *Camara* Court decided municipal inspections are a special case requiring "balancing" the government's general interest in inspecting the houses in an area against the individual's private interest in her particular building.[18] Accordingly, the inspections are constitutionally reasonable as to each house in the area whenever the balancing test weighs in the government's favor.[19] But the *Camara* Court explicitly holds that in criminal investigations, the traditional probable cause test is the standard.[20]

The February 1968 first draft of the *Terry* opinion followed the *Camara* decision's interpretation of probable cause. Chief Justice Warren originally intended to write a lengthy *Miranda*-type[21] set of instructions for police officers wishing to conduct stops and frisks.[22] Perhaps because of widespread popular criticism of the Court in general and the *Miranda* opinion in particular,[23] the other Justices had no stomach for

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[16] 387 U.S. 523 (1967).
[17] *Id.* at 526-27.
[18] *Id.* at 536-37.
[19] *Id.* at 535.
[20] *Id.* at 535 ("For example, in a criminal investigation . . . . a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling."); *id.* at 538 (referring to argument against "vary[ing] the probable cause test from the standard applied in criminal cases . . .").
[21] *See Miranda v. Arizona*, 384 U.S. 436 (1966) (invalidating confession evidence that did not protect Fifth and Sixth Amendment rights to the degree of specified warnings).
[22] *See* John Q. Barrett, Terry v. Ohio*: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, *in* 295, 304 CRIMINAL PROCEDURE STORIES (Carol Steiker ed., 2006) (describing opinion's drafting).
[23] *See* MICHAEL FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM 3 (2005) (describing extreme popular dislike for Warren Court).

such an approach.[24] Warren's first draft of the *Terry* opinion thus straightforwardly holds that the traditional probable cause test is the standard for both stops and frisks.[25] The first draft concludes that the *Terry* facts meet that standard.[26]

Then Justice Brennan got his hands on the opinion.[27] Brennan's redraft of the *Terry* opinion, which is essentially the final opinion, implicitly rejects the *Camara* Court's limitation on application of the balancing test. The new draft of the *Terry* opinion holds that probable cause is actually irrelevant to activity governed only by the Fourth Amendment's Reasonableness Clause.[28] Without mentioning the prior stricture against applying the balancing test to criminal investigations, the eventual *Terry* opinion cites *Camara* when describing the test for stops and frisks of suspects.[29] Stops and frisks need only be based on "reasonable" suspicion, not probable cause.[30]

Reconsider the text of the Fourth Amendment in light of the *Terry* opinion's disappearance of the probable cause standard. You might easily think that the clause containing the probable cause standard modifies the clause requiring reasonableness.[31] Until the *Camara* decision, the Court generally held that all searches and seizures require the traditional form of probable cause.[32] So why did the *Terry* Court abandon probable

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[24] Barrett, *supra* note 22, at 304.
[25] *Id.* at 304.
[26] *Id.* at 305.
[27] *See id.* at 305 (describing Brennan's change of heart about probable cause).
[28] *See id.* at 305 (summarizing Brennan's rewrite).
[29] *Terry*, 392 U.S., at 21.
[30] *See id.* at 20 (distinguishing Fourth Amendment Clauses governing different types of police conduct).
[31] *See e.g.,* Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 20 (1994) (declaring "the Warrant Clause defines and interprets the Reasonableness Clause"). Note as well that while the Fourth Amendment is referred to as having only a Reasonableness Clause and a Warrant Clause, as a matter of grammar, it contains numerous clauses.
[32] *See Camara*, 397 U.S., at 523 (declaring without citation to precedent, "But reasonableness is still the ultimate standard").

cause? Some would argue the logic of the Fourth Amendment required the decision.[33] Looking with a more jaundiced eye—one made that way by our nation's history of unconstitutionally searching and seizing Leftists and racial minorities[34]—I suspect the *Terry* decision expresses a prioritization of "law and order" over civil liberties, particularly the civil liberties of racial minorities.[35] Warren circulated the final *Terry* draft opinion for approval of the other Justices in May 1968, just after the country had been engulfed in extensive urban riots responding to the assassination of Martin Luther King, Jr.[36] Concern about such "modern forms of lawlessness"[37] may have led the Court to abandon its prior interpretation of what the Fourth Amendment requires of criminal investigations.

II. The Contract Against Black Civil Liberties

Why has the assassination of the probable cause standard gone largely unchallenged? The first thing to note is that there will never be a "good time" for the expansion of Fourth Amendment rights. Yale Kamisar identifies the problem:

> According to the media, the claims of law enforcement officials, and the statements of politicians, we have always been experiencing a "crime crisis"—at no time in our recent, or not-so-

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[33] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774 (1994) (contending "[t]he Warrant Clause says only when warrants may not issue, not when they may or must").
[34] *See generally* Natsu Taylor Saito, *For "Our" Security: Who is an "American" and What is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23 (2003) (detailing CIA and FBI abuses of authority against Leftist and racial minority groups).
[35] *See* FLAMM, *supra* note 23, at 7 (arguing economic stagnation made working-class whites "more receptive to messages that blamed others—especially minorities . . .").

Another way of thinking about the *Terry* opinion is that it responds to a "masculinity crisis." *See generally* Frank Rudy Cooper, *"Who's the Man?": Performing Masculinity in* Terry v. Ohio (manuscript on file with author, July 24, 2006) (theorizing that Court refused to deter officers from using stops and frisks "to maintain the power image of the beat officer" because it wanted to allow officers to be manly in interactions with citizens).
[36] *See* Barrett, *supra* note 22, at 306 (describing timing of circulation).
[37] *Terry*, 392 U.S., at 38 (Douglas, J. dissenting).

> recent past, has there been a time when "society" could afford a strengthening or expansion of the rights of the accused.[38]

If we wait for a time when the mainstream is ready to prioritize rights, 1968 will never come. An obvious example of this is the current argument that civil liberties are inappropriate in a "post-9/11 world."[39] As Green Day sings, "Wake me up when September ends."[40] Our role as Left theorists is to declare an end to the latest "crisis" and demand an expansion of rights rather than a mere return to the already truncated rights that existed on September 10, 2001.

A second reason that politically conservative *Terry* doctrine has gone largely unchallenged is that the mainstream of the public has made an implicit contract with those seeking law and order: The police will be granted nearly unfettered discretion with the understanding that they will not use those powers on "good" citizens. Donald Dripps reveals why this contract is formed: "Almost everyone has an interest in controlling crime. Only young men, disproportionately black, are at a significant risk of erroneous prosecution for garden-variety felonies."[41] We must recognize that this is the linchpin of the denial of civil liberties. People are wiling to trade rights for law enforcement protection on the basis of the implicit bargain that excessive law enforcement power will only be spent on the marginalized. As Natsu Taylor Saito argues, measures designed for

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[38] Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 46 (1995).

[39] That current argument has roots in the 1960s. *See* FLAMM, *supra* note 23, at 3 (describing conservative argument that "the community's right to order—to public safety as they saw it—took precedence over the individual's right to freedom").

[40] GREEN DAY, *Wake Me Up When September Ends*, on BULLET IN A BIBLE (Warner Bros. Records 2005) (lampooning post-9/11 militarism).

[41] Donald Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson*,* Miranda*, and the Continuing Quest for Broad-but-shallow*, 43 WM. & MARY L. REV. 1, 46 (2001).

"our" security have never considered Leftists or racial minorities to be part of the "us."[42] Likewise, Anthony Amsterdam and Jerome Bruner point out that the way in which the U.S. has resolved the conflict between its espousal of egalitarian values and its encouragement of the pursuit of self-interest is by presuming that some people are not part of the "us."[43]

The resolution of the egalitarianism versus self-interest conflict is played out on the backs of blacks, especially by means of law enforcement. There was a virtually uninterrupted tradition of excluding blacks from taking a piece of the pie from 1619-1964.[44] By 1980, the majority of whites had come to resent having to share the pie with blacks, as reflected in Ronald Reagan's capture of the "white ethnic" vote.[45] The white mainstream has engaged in the psychological process of "splitting." Blacks are either fully assimilationist "good blacks" or dangerous "bad blacks."[46] The latter are deemed the "dregs" of the black community and presumed to be dangerous.[47] It is that presumption of black danger that drives a "culture of control" in which surveillance and preemptive strikes are normalized as ways of dealing with the marginalized.[48] This is a culture wherein the Fourth Amendment trades black civil liberties for a (false) white

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[42] *See generally* Saito, *supra* note 34 (connecting current push for PATRIOT Act to past counter-intelligence against Leftists and racial minorities).
[43] AMSTERDAM & BRUNER, *supra* note 1, at 262-63 ("Racism has played an important role in reconciling the American Creed and the American Caution.").
[44] *See generally* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the War on Drugs Was a War on Blacks* 6 IOWA J. GENDER, RACE & JUST. 381 (2002) (contending that in U.S. blacks always available for use as boogey men).
[45] *Cf.* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 136 (2001) (saying of Reagan anti-crime message, "The public knows, without having to be told, that these 'superpredators' and high-rate offenders are young minority males . . .")
[46] *See generally* Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006) (explicating process, motivations, and effects of splitting black men into Bad and Good groups).
[47] AMSTERDAM & BRUNER, *supra* note 1, at 277-78.
[48] *See e.g.,* GARLAND, *supra* note 45, at 136 (revealing implicit argument that "[t]he only practical and rational response to such types [young minority male 'superpredators' and high-rate offenders], as soon as they offend if not before, is to have them 'taken out of circulation' for the protection of the public.").

sense of protection.[49] A revitalization of the Fourth Amendment will seek to void that bargain.

Conclusion

If we are to overcome the barriers to the promotion of civil liberties, we must return to the spirit of 1968. Everything must go! That includes *Terry* doctrine as a whole.

Terry doctrine is not fixable. Its language of "reasonable" suspicion is inherently ambiguous.[50] It therefore has a tendency to be reduced to its lowest possible level in order to find a stable standard. Even in its original form, however, the *Terry* opinion contained the seeds of racial profiling.[51] We saw that when the *Whren v. United States*[52] opinion refused to consider racial motivations for an arrest on grounds that officers with probable cause have already gone beyond what the Fourth Amendment minimally requires.[53] The *Terry* opinion enshrined that conception of mere reasonableness, rather than probable cause, as the baseline Fourth Amendment requirement.

What I propose, therefore, is the abolishment of the right to make *Terry* stops and frisks. To some, this will seem an unrealistic goal. But is not that what the spirit of 1968 is all about? Yes. 1968 was a time when we dared to dream big. I call on us to dream big again.

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[49] *See id.* at 122 (noting shift from seeking to reduce crime to merely changing levels of fear of crime).
[50] *See* Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851, 885 (2002) ("The very terminology of the reasonable suspicion doctrine, therefore, prevents meaningful review of an officer's decision to stop or frisk a suspect.").
[51] *See generally* Anthony Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (demonstrating that *Terry* opinion led to approval of racial profiling).
[52] 517 U.S. 806 (1996).
[53] *See id.* at 809-10 (holding officer's subjective intent generally not considered when she objectively has probable cause).