A Stop Is Just a Stop: *Terry*'s Formalism

Alexandra Natapoff*

Terry v. Ohio expanded police authority by creating a new legal category—the stop based on reasonable suspicion, an easier standard to meet than an arrest based on probable cause.[1] The formal line between those two categories, however, has turned out to be blurry. In practice, stops morph easily into arrests even without new evidence, an elision that *Terry* doctrine does not contemplate. The implications are significant for the enormous misdemeanor arena where legal rules generally lack traction, and *Terry* stops are common. Once those stops become arrests, they typically convert smoothly into criminal charges, which easily become convictions. *Terry* stops thus influence eventual outcomes far more than they should given their lightweight evidentiary basis. This slippery slope undermines the integrity of basic distinctions between policing and prosecution throughout the petty offense process, an unprincipled state of affairs exacerbated by the original *Terry* compromise.

I. INTRODUCTION

The Supreme Court has long been excoriated for its unrealistic and overly formalistic criminal procedure decisions. In a range of doctrines—from consent to waiver to Fourth Amendment reasonableness—the Court defines and applies rules in ways that ignore or even contradict widely accepted social, racial, and institutional realities. In the Court's world, for example, when police accost a young African American male on the street and ask him where he lives, he "need not answer . . . indeed, he may decline to listen to the questions at all and may go on his way."[2] The same person sitting on a bus will "feel free 'to disregard the police and go about his business'" when armed officers want to search him and his luggage.[3] According to the Court, when police take people to jail and ask them to confess, as long as they have been Mirandized, they experience no coercion.[4] Scholars have roundly condemned these types of decisions, and the sanitized

* Professor of Law, U.C. Irvine School of Law. Special thanks to Brie Clark, Sharon Dolovich, and Lisa Griffin for their helpful comments, and to Jennifer Laurin for including me in this Symposium.

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

2 Florida v. Royer, 460 U.S. 491, 498 (1983).

3 Florida v. Bostick, 501 U.S. 429, 434 (1991) (quoting California v. Hodari D., 499 U.S. 621, 628 (1991)).

4 Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) (reasoning that *Miranda* warnings presumptively "dispel whatever coercion is inherent in the interrogation process" (citing Moran v. Burbine, 475 U.S. 412, 427 (1986))).

worldview from which they stem, as overly formalistic and dissociated from the power dynamics and psychological realities of actual police encounters.[5] Or, as Justice Souter articulated in a dissenting opinion, such analyses generate an "air of unreality" around the doctrine.[6]

Similarly, the Court's criminal procedure decisions have been heavily criticized for ignoring the realities and significance of racially biased decision making. In *Whren*, the Court held that as long as the police have probable cause, the Fourth Amendment is not offended if arrests are motivated by racial profiling and stereotypes.[7] Devon Carbado describes this decision as making race "disappear": "for purposes of Fourth Amendment law, race does not matter."[8] In *McCleskey v. Kemp*, the Court decided that neither the Equal Protection Clause nor the Eighth Amendment's prohibition against cruel and unusual punishment is triggered by large statistical racial disparities in the imposition of the death penalty.[9] As Carol and Jordan Steiker point out, "the *McCleskey* decision proved controversial not least because of its disingenuousness."[10] By failing to acknowledge the pervasive impact of race, the Court's death penalty cases "offered a woefully incomplete picture of the underlying practice."[11] In each of these arenas, by eschewing racial analysis, the Court created doctrines dissociated from the realities of racialized decision-making throughout the U.S. criminal system.[12]

By contrast, *Terry v. Ohio* has generally been viewed the opposite type of case, openly acknowledging the power dynamics of police-citizen encounters and racial realities on the street. Instead of adhering rigidly to the extant rule—all seizures require probable cause—the Court got practical. "[M]indful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street,"[13] the Court acknowledged both sides of the coin. On the one hand, police need tools to

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[5] *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964–66 (2002); *see also* Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 222 (2001) (describing formulaic application of consent standard in hundreds of cases).

[6] United States v. Drayton, 536 U.S. 194, 208 (2002) (Souter, J., dissenting).

[7] *See* Whren v. United States, 517 U.S. 806, 817–18 (1996).

[8] Carbado, *supra* note 5, at 1033; *see also* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 376 (1998).

[9] McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

[10] Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 287 (2015).

[11] CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 109 (2016).

[12] *See* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 114 (Sharon Dolovich & Alexandra Natapoff eds., 2017) ("[T]he gap between constitutional meaning and constitutional implementation in the criminal context is a yawning chasm.").

[13] Terry v. Ohio, 392 U.S. 1, 12 (1968).

manage "the rapidly unfolding and often dangerous situations on city streets."[14] On the other hand, increasing the incidents of stops "can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities."[15]

Moreover, the Court did not make race disappear. As Tracey Maclin puts it, "*Terry* was the Court's first Fourth Amendment ruling to acknowledge that a police intrusion may cause adverse racial tensions."[16] By doing so, it "candid[ly]" confronted the practical and racial implications of the case:

> We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.[17]

In a footnote, the Court delved even deeper:

> The President's Commission on Law Enforcement and Administration of Justice found that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups." . . . This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."[18]

The *Terry* Court's ultimate holding is widely perceived as an anti-formalistic, pragmatic compromise: it created a new rule that gave police less power than they wanted but more than civil libertarians would have liked. Stephen Saltzburg concludes that "the results reached under *Terry* are practical, reasonable and defensible. They are practically as perfect as we are likely to get."[19] Hadar Aviram singles out *Terry* as an example of a broad, flexible approach to "fairness-based due process," in contrast to a more rigid, rule-oriented "formalism-based due

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[14] *Id.* at 10.

[15] *Id.* at 12.

[16] Maclin, *supra* note 8, at 365.

[17] *Terry*, 392 U.S. at 9–10.

[18] *Id.* at 14 n.11 (citations omitted).

[19] Stephen A. Saltzburg, Terry v. Ohio: *A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 912 (1998).

process."[20] According to Paul Butler, "[i]n *Terry*, the Supreme Court did what it sometimes does when it is presented with an interpretation of the Constitution that seems both correct and politically untenable: it split the baby."[21] In sum, *Terry*'s supporters and detractors alike view it as a pragmatic case that bent the probable cause standard in view of various social realities, rather than, as the Court has so often done in other arenas, distorting or ignoring reality so as to preserve the formal clarity of the rule.[22]

In this essay, I would like to suggest that notwithstanding its pragmatic features, *Terry* was formalistic in a different and consequential way. True, the *Terry* Court "fudged" the probable cause rule by permitting searches and seizures based only on reasonable suspicion. But it justified the fudge based on a deeper, more profoundly rule-based understanding of the criminal process itself, namely, that police-citizen encounters can be sliced up into neat categories with clear lines between them. In other words, a stop is *just* a stop. The core justification for the lower reasonable suspicion standard is that it is limited to a very specific circumstance—temporary, limited searches and seizures that fall short of a full arrest. As the Court explained:

> An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest.[23]

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[20] Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 LAW & SOC. INQUIRY 237, 247 (2011).

[21] Paul Butler, *"A Long Step Down the Totalitarian Path": Justice Douglas's Great Dissent in* Terry v. Ohio, 79 MISS. L.J. 9, 23 (2009).

[22] *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1276–77 (1998) (noting that *Terry* is considered a "compromise" and lauded for its "pragmatism"); Daniel Richman, *The Process of* Terry*-Lawmaking*, 72 ST. JOHN'S L. REV. 1043, 1051 (1998) ("I suppose we should . . . celebrate *Terry*'s effort to apply the Fourth Amendment pragmatically to the exigencies of street encounters").

[23] *Terry*, 392 U.S. at 26.

In its cases following *Terry*, the Court continued to justify the lower reasonable suspicion standard in precisely this way: this broader, more flexible police authority is limited to narrow circumstances short of arrest.[24]

This is the most basic sort of formalism: the notion that there is a meaningful line between a stop and an arrest, and for that matter another one between an arrest and a criminal charge, and yet another one between a charge and a criminal conviction. Such legal line-drawing permits the selection of alternate governing rules and standards: reasonable suspicion for one circumstance, probable cause for another. Indeed, this formalism is so basic that we might think of it as a feature of rule of law itself—the notion that lines can meaningfully be drawn between legal entities and legally salient moments which can then be analyzed separately and in isolation from the actual confounding practices that happen to arise around them.[25]

Such line-drawing is robust and influential in many important areas of law enforcement. But in the messy world of misdemeanor policing and processing, relying on such formal clarity is not always justifiable. Lawyerly differentiations between a "brief investigative detention" and a full-fledged "arrest" do not always hold up as matters either of practice or theory. Similarly, distinctions between arrest and charge fade when the same officer who effectuates the arrest also decides whether charges will be filed. Even the line between being charged and being convicted likewise loses much of its force when so many people plead guilty. In ways that legal rules neither contemplate nor account for, the process can be a kind of slippery slope: stops morph into arrests, which mutate into charges, which slide into convictions.

These elisions are symptomatic of a deep feature of the misdemeanor system, which is that rule of law itself wanes at the bottom of the "penal pyramid" where offenses are pettiest and caseloads are enormous[26]—legal distinctions fade and rules become less salient. Lack of resources, time, and transparency all diminish the force of doctrines and rule-bound practices, which do so much robust definitional and legitimating work in felony cases. This means, first, that *Terry*'s

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[24] *See* Maryland v. Buie, 494 U.S. 325, 337 (1990) (upholding "limited protective sweep" of home for officer protection); *see also* Michigan v. Long, 463 U.S. 1032, 1049 (1983) (upholding "limited" search of passenger compartment of a car for officer's protection).

[25] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25 (Amy Gutmann ed., 1997) ("Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is *about* form."). *See also* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783 (1989) (noting that a social practice conception of rules poses a fundamental challenge to the inherently formalist notion of rule of law); *see also* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 187 & n.18 (2005) ("Though many people criticize his approach as formalistic, Justice Scalia embraces formalism as the point of the rule of law.") (quoting Scalia, *supra*).

[26] Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING, *supra* note 12, at 71.

formal distinction between stop and arrest is not as robust as the Court thought it would be. They are not, in fact "wholly different kind[s] of intrusion[s]."[27] Moreover, because *Terry* affirmatively weakened one of the most important legal lines drawn in criminal procedure—the threshold of the police's seizure power—it substantially contributed to this antiformal messiness.

To be clear, this is not a radical claim about the impossibility of legal rules: formal rules are efficacious and meaningful throughout the criminal system, and lines are often bright and strong. But, as I have argued elsewhere,[28] rules are *more* meaningful at the top of the pyramid where cases are serious and the culture of adjudication is strongly committed to rule-bound decision-making. In federal courts and homicide cases, arguments over evidence and procedure matter; they authentically determine outcomes and pervade decision-making throughout the process. FBI agents anticipate that their seizures will be scrutinized. Lawyers anticipate parrying over rules and judges expect to entertain arguments. In such cases, a stop may authentically function as "just" a stop at the end of the day because there is a working apparatus devoted to enforcing the distinction between a stop and an arrest. But the world of misdemeanors has a weaker legal culture. Here, evidence and legal categories hold less sway over outcomes. Stops can morph into arrests under the radar even without new evidence, legal procedures, or a record. This informal culture begins in the street where misdemeanor policing is discretionary, underdocumented, and fluid, and ends in the courtroom where lawyers often forgo legal arguments for the sake of efficiency and where some judges resist hearing arguments at all because it holds up the docket.[29]

The challenge for the *Terry* Court, therefore, was not just whether or not to hang on to probable cause. It was whether to risk drawing a new, more permissive legal line in a highly discretionary, informal environment where legal lines do not work very well in the first place. As Jeff Fagan has pointed out, "[t]he boundary between lawful and unlawful policing is not easy to draw."[30] And this was not just any boundary. *Terry* moved the legal threshold, the place where police first acquire legitimate coercive power to seize and search. Individual liberty and privacy—once guarded by probable cause—would now be protected from police intrusion only by reasonable suspicion. The result was to expose a much larger population to coercive police authority under color of law.[31] By opening the

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[27] *Terry*, 392 U.S. at 26.

[28] Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING, *supra* note 12, at 73.

[29] *See* Alexandra Natapoff, Gideon*'s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 463–64 (2015); *see also* Eve Brensike Primus, *Our Broken Misdemeanor System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80, 81 (2012) (recalling misdemeanor judges who refused to hear her legal arguments).

[30] Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 87.

[31] *Cf.* Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 60–61 (2010) (arguing that *Terry* extended legal regulation into the previously

floodgates, so to speak, the decision had ripple effects all the way down the pipeline of the misdemeanor process. By creating an enormous new legal category of permissible seizures, *Terry* flooded the system, eroding institutional protections against subsequent arrests, charges, and ultimately convictions. Indeed, insofar as *Terry*'s reasoning and validity rests on a clear distinction between stop and arrest, it ironically sowed the seeds of its own demise. The fact that the Court did not intend or foresee such consequences is at least in part a testament to its optimism about legal rules, what we might think of as a hopeful formalism. While such optimism may be warranted for many of our legal institutions, the petty offense process is not one of them.

The remainder of this essay charts how the misdemeanor process functionally erodes key formal distinctions between the most important stages of criminal processing: stop, arrest, charge, and conviction. It then conceptualizes the special "pathological politics"[32] of the misdemeanor criminal process more broadly as a competition between (weak) rule-enforcement and (strong) institutional hydraulics. It ends by considering how the empirical and sociological turn in legal scholarship might improve the landscape.

II. MISDEMEANOR MESSINESS

A. *When stops become arrests*

"Did they arrest you?" Countless public defenders have asked their clients this seemingly straightforward question, but the answer can easily be "I don't know." People may not know whether they have been stopped or arrested because the actual experience of being seized by police does not invite such fine distinctions. People often think they have been arrested when, legally speaking, they have only been *Terry*-stopped.[33] Conversely, people may not realize that the encounter has escalated into a legal arrest. So lawyers ask proxy questions: How long did you sit on the curb? Were you handcuffed? These proxy questions have legal salience: being taken to the police station, for example, is a nice bright line.[34] But many intrusions short of the proverbial "trip downtown" can convert a stop into an arrest without the seized individual having any idea that a new rule has been triggered, and their constitutional status has changed.

The elision between stop and arrest is not just a matter of lay optics. The doctrinal line between stop and arrest is infamously fuzzy: a "stop" can last as little

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unregulated context of police stops even as it contracted the legal right to be protected by probable cause).

[32] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505 (2001).

[33] *See* Seth W. Stoughton, Terry v. Ohio *and the (Un)Forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19 (2017) (on police awareness of lay people's legal ignorance).

[34] *See* Berkemer v. McCarty, 468 U.S. 420, 441–42 (1984).

as a few minutes or as long as sixteen hours.[35] The formal standard is that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," namely, "to confirm or dispel [police] suspicions."[36] But reasonable minds, and judges, often disagree over precisely how much time and intrusion is necessary to dispel suspicion. Or as the Court has admitted, *Terry* and its progeny "create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest."[37] Because stops have this amorphous quality, they can slide easily into de facto arrests without much notice.

Even more problematically, police have the ability to generate probable cause *sua sponte* during a stop and therefore can affirmatively convert stops into arrests in legally substantive ways. Perhaps the most powerful way is through the assertion that the stopped person has engaged in offenses such as disorderly conduct, resisting arrest, and similar behaviors colloquially referred to as "contempt of cop." Because misdemeanor laws criminalize many such behaviors, police have at their disposal numerous bases for arrest that can grow out of the *Terry*-stop itself. In effect, if police want to convert a stop based on reasonable suspicion into an arrest requiring probable cause, they can. Indeed, *Terry* expressly recognized the risk that stops and arrests might be "motivated by the officers' perceived need to maintain the power image of the beat officer."[38]

That concern turned out to be prescient. According to one study, "[t]here is abundant evidence that police overuse disorderly conduct and similar statutes to arrest people who 'disrespect' them or express disagreement with their actions."[39] In Seattle, for example, a 2008 investigation uncovered the heavy use of obstruction and resisting arrest charges against African American men.[40] While Seattle is a predominantly white city, black men were eight times as likely as whites to be arrested for obstruction or resisting.[41] These arrests so routinely included police use of force that defense attorneys nicknamed obstruction a "cover charge," the arrest used to justify and "cover" the use of force.[42] The investigation

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[35] *Compare* Terry v. Ohio, 392 U.S. 1, 7 (1968) (stop converted immediately into arrest after officer discovered gun) *with* United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (upholding 16-hour airport detention).

[36] United States v. Sharpe, 470 U.S. 675, 684, 686 (1985) (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).

[37] *Id.* at 685.

[38] *Terry*, 392 U.S. at 14–15 n.11 (internal quotations omitted).

[39] CHRISTY E. LOPEZ, AM. CONST. SOC'Y, DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH "CONTEMPT OF COP" ARRESTS 2 (2010).

[40] *See* Eric Nadler, Lewis Kamb & Daniel Lathrop, *'Obstructing' Justice: Blacks Are Arrested on 'Contempt of Cop' Charge at Higher Rate*, SEATTLE POST INTELLIGENCER, Feb. 28, 2008, at A1.

[41] *Id.*

[42] *Id.*

found that "[t]he number of black men who faced stand-alone obstructing charges during the six-year period reviewed is equal to nearly 2 percent of Seattle's black male population."[43] Most of the charges were later dismissed.[44]

In New York, high rates of stop-and-frisk invited a similar dynamic. Tyquan Brehon was eighteen years old and lived in Brooklyn; he estimated that he was stopped by NYPD between sixty and seventy times.[45] In his experience, if he asked a question or complained about the stop, police converted the stop to an arrest. As he described it:

> I've been taken in a lot of times because if you're stopping me, I'm going to want to know why. And that's when you can hear a change in their tone, they start to get a little more aggressive, and you feel threatened. They were like "If you're going to talk back, we're going to take you in. If you're going to ask questions, we're going to take you in."[46]

"Contempt of cop" is an old and deep problem.[47] It raises First Amendment issues: as the Court has recognized, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[48] There are also well-known evidentiary risks. In *Lewis v. City of New Orleans*, the Supreme Court struck down a disorderly conduct ordinance that made it a crime for a person to curse at a police officer.[49] In concurrence, Justice Powell noted the danger, inherent in all such statutes, in giving police officers the power to establish probable cause based solely on their say-so:

> This ordinance . . . confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in "one-on-one" situations where the only witnesses are the arresting officer and the person charged. All that is required for conviction is that the court accept the testimony of the officer that obscene or opprobrious language had been used toward him while in performance of his duties.[50]

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[43] *Id.*

[44] *Id.*

[45] Julie Dressner & Edwin Martinez, Opinion, *The Scars of Stop-and-Frisk*, N.Y. TIMES, (June 12, 2012), http://www.nytimes.com/2012/06/12/opinion/the-scars-of-stop-and-frisk.html [https://perma.cc/8WHF-599E].

[46] *Id.*

[47] *See* LOPEZ, *supra* note 39.

[48] City of Houston v. Hill, 482 U.S. 451, 462–63 (1987).

[49] Lewis v. City of New Orleans, 415 U.S. 130 (1974).

[50] *Id.* at 135 (Powell, J., concurring).

Terry fuels the contempt-of-cop phenomenon. Because *Terry* broadly permits the initial nonconsensual encounter, it opens the door to arrests that flow from the conflictual nature of the encounter itself—not from evidence of any other distinct crime. Formally speaking, this is backwards: seizures are not supposed to *generate* probable cause. But because offenses like resisting arrest, disorderly conduct, and obstruction are easily alleged and hard to disprove, they effectively give police the power to assert probable cause based on violations of their own sense of authority. This probable cause can be real: people may in fact become disorderly in response to police interference. Even if it is not real, the allegation is powerful because, as Justice Powell implies and as many scholars have pointed out, judges tend to accept police assertions of probable cause even where the defendant tells a different story.[51] In the world of petty offense processing where pre-trial litigation and evidentiary testing are already rare, police assertions of probable cause are especially immune from challenge.

The Supreme Court's recent decision in *Utah v. Strieff* conferred on police yet another way to generate evidence. It did so by permitting the post-stop discovery of an outstanding warrant to retroactively justify the fruits of a search incident to arrest, even when the initial stop is baseless. Because warrants are so common—in some communities there are as many outstanding warrants as there are adults—*Strieff* further blurs the line between stops and arrests because a stop (even an illegal one) can now so easily be converted into a fruitful search incident to arrest. As Justice Sotomayor warned in dissent, because "outstanding warrants are surprisingly common," this exception to the exclusionary rule functions as a massive expansion of the police power:

> Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." In the St. Louis metropolitan area, officers "routinely" stop people—on the street, at bus stops, or even in court—for no reason other than "an officer's desire to check whether the subject had a municipal arrest warrant pending." In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. The Justice Department analyzed these warrant-checked stops and reported that "approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion."[52]

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[51] *See* Maclin, *supra* note 8, at 382–83 (on testilying).

[52] Utah v. Strieff, 136 S. Ct. 2056, 2068–69 (2016) (Sotomayor, J., dissenting) (internal citations omitted).

Similar dynamics are found throughout the world of low-level policing. In Baltimore, police use baseless arrests for loitering and other order maintenance crimes to retroactively justify stopping and searching young black men in high crime neighborhoods. During its investigation of the Baltimore City Police Department, for example, the U.S. Department of Justice observed a supervising officer order a subordinate officer to stop, question, and disperse a group of men on the street.[53] The lower ranked officer protested that he had no reason to stop them because they were not doing anything wrong: "Then make something up," responded the supervisor.[54]

Establishing police authority is not the only motivation for this kind of bootstrapping. It is encouraged by police departmental quotas, which pressure police into maintaining and justifying high arrest rates. Indeed, the DOJ concluded that Baltimore police's unconstitutional conduct could be largely explained by top-down pressure to "clear corners" and make arrests;[55] similar allegations have been made in New York by city police officers.[56]

These dynamics are specific to misdemeanors. Elision between stop and arrest occurs more easily with minor crimes than with felonies because the seriousness of the underlying crime determines how much evidence is necessary to assert reasonable suspicion and probable cause. Reasonable suspicion for a homicide is more difficult to establish than reasonable suspicion for disorderly conduct. As Fagan explains, *Terry*'s "original sin" of watering down the standard for a stop "has differential effects by crime seriousness":

> The *Terry* Court never said *which* crimes had to be "afoot" to justify a stop, only that the act was criminal. When the criminal law is so broadly enforced, and when non-criminal violations or local ordinances are integrated with the overall mission of street policing to detect weapons and control violence, the likelihood increases that both benign and serious crimes will be part of the umbrella of suspicion. The burden of proof for administrative violations or low-level misdemeanor offenses is intrinsically lower than for felony offenses and places *Terry*'s fundamental rules at risk.[57]

Or as William Stuntz put it, "if fairly ordinary street behavior constitutes evidence of crime, reasonable suspicion will be easy to come by. Whether *Terry*

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[53] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 29 (2016) [hereinafter DOJ BALTIMORE INVESTIGATION].

[54] *Id.*

[55] *Id.* at 17–18.

[56] *See* Saki Knafo, *A Black Police Officer's Fight Against the N.Y.P.D.*, N.Y. TIMES MAG. (Feb. 18, 2016), https://www.nytimes.com/2016/02/21/magazine/a-black-police-officers-fight-against-the-nypd.html?_r=0 [https://perma.cc/76F4-57QW].

[57] Fagan, *supra* note 30, at 45, 93–94.

operates as a serious restriction on the police depends on what criminal law covers."[58] Since the burden of proof for minor crimes is already low, and can often be satisfied merely by police assertion, reasonable suspicion elides easily into the assertion of probable cause.

To be sure, there are many important, meaningful differences between stops and arrests, including their consequences. By definition, stops do not lead to booking, fingerprints, and an arrest record, although even here there are elisions: police in many large cities now record information about the people they stop on "cards," which are placed in gang and other databases.[59] As an empirical matter, stops are also far more frequent. Most stops do not become arrests, especially in heavily policed jurisdictions. Of five million stops made by NY police between 2004 and 2012, only 12 percent resulted in a summons or an arrest.[60] Indeed, NYPD's overuse of stops and arrests led to civil rights litigation, increased scrutiny, and, eventually, fewer stops.[61]

But formalists should not take comfort. Hundreds of thousands of those baseless New York City stops *could* easily have become arrests, and often did.[62] The checks on police power did not flow intrinsically from legal distinctions between stops and arrests but from the confluence of politics, history, and the fact that New York is teeming with some of the best criminal and civil rights litigators in the country. To put it another way, it took decades of protest and litigation to establish meaningful content to the reasonable suspicion standard, and to enforce the distinction between stops and arrests on the ground. This is hardly rule-based formalism at its best.

B. *When arrests become criminal charges*

The complex institutional relationships between police and prosecutors produce a similar elision between misdemeanor arrests and criminal charges. On paper, these are two very different animals. An arrest is the purview of police: it reflects only the determination that there is probable cause that a crime may have been committed, and the seizure is temporary—it can only last 48 hours.[63] By

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[58] William J. Stuntz, Terry *and Substantive Law*, 72 ST. JOHN'S L. REV. 1362, 1363 (1998).

[59] *See, e.g.*, Chip Mitchell, *Contact Card Data Cast Doubt on Chicago-Style Stop-and-Frisk*, WGLT, NPR, (May 4, 2016), http://wglt.org/post/contact-card-data-cast-doubt-chicago-style-stop-and-frisk [https://perma.cc/AC4U-9NKU].

[60] Joseph Goldstein, *Trial to Start in Class Suit on Stop-and-Frisk Tactic*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/nyregion/stop-and-frisk-trial-to-open-this-week-in-federal-court.html [https://perma.cc/AR8B-ARZ4].

[61] *See* Al Baker, *Street Stops by New York City Police Have Plummeted*, N.Y. TIMES (May 30, 2017), https://www.nytimes.com/2017/05/30/nyregion/nypd-stop-and-frisk.html [https://perma.cc/V84Q-RTZ7].

[62] Floyd v. City of New York, 283 F.R.D. 153, 159 (S.D.N.Y. 2012).

[63] County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).

contrast, a criminal charge is a doctrinally weighty thing. Although it too requires only probable cause, it is supposed to reflect the considered decision of a prosecutor—an attorney and officer of the court—to initiate the adversarial process against a defendant. Conversely, the prosecutorial decision to decline a charge serves vital institutional functions: it means that an arrestee will not become a "defendant," and it limits the nature and number of cases that fill the system. Because it is so influential, the filing decision receives special doctrinal treatment. Filing formal charges triggers the all-important right to counsel; an arrest does not.[64] Prosecutors have absolute immunity from suit when they decide to file; police have only limited protection when they decide to arrest.[65] The line between being arrested and being charged does an enormous amount of doctrinal work. But, as with so many aspects of misdemeanor processing, this line is not always so clear on the ground.

For a number of reasons, low-level arrests can convert seamlessly and without friction into formal charges. In some municipal courts, for example, there is no prosecutor at all, and police file charges directly.[66] Defendants must work out plea bargains with the officer who arrested them. Being arrested in these jurisdictions is thus nearly tantamount to being charged.

In courts where there is a prosecutor, misdemeanor screening rates vary. In cities like Manhattan and Baltimore, for example, ultimate dismissal rates are relatively high, around 50 percent.[67] That suggests that prosecutors are performing their traditional screening function and that arrests are meaningfully subject to scrutiny, although cases that are not immediately declined but are ultimately dismissed can still mark and burden defendants in significant ways.[68] But in many other jurisdictions, declination and dismissal rates are low to nonexistent. For example, the Vera Institute studied prosecutorial decision-making in various cities. "In Mecklenburg, [North Carolina,] managers were surprised to learn that the

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[64] Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008); Massiah v. United States, 377 U.S. 201, 206 (1964).

[65] *See* Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976).

[66] *E.g.*, DIANE DEPIETROPAOLO PRICE ET AL., AMERICAN CIVIL LIBERTIES UNION & NAT'L ASS'N. OF CRIMINAL DEF. LAWYERS, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS 19–20 (2016); *see also* Nikolas Frye, *Allowing New Hampshire Police Officers to Prosecute: Concerns with the Practice and a Solution*, 38 N.E. J. ON CRIM. & CIV. CONFINEMENT 339, 339 (2012).

[67] *See* COURT OPERATIONS DEP'T, ADMIN. OFFICE OF THE COURTS, MARYLAND JUDICIARY ANNUAL STATISTICAL ABSTRACT FISCAL YEAR 2015, tbl.DC-4, (2015) (of approximately 39,000 total cases filed in Baltimore City District Court, 19,000 were nolle prosequi); *see also* NYS DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK COUNTY ADULT ARRESTS DISPOSED (2016) (of approximately 50,000 adult misdemeanor arrests in New York County, 22,000 were dismissed).

[68] Declinations and dismissals are not equivalent. Declinations take place immediately after arrest; the defendant is not formally charged and does not have to go through the criminal process at all. Dismissals, by contrast, can take place at any point along the way, including right before trial, and therefore subject the defendant to the full criminal process experience, including the pressure to plead guilty.

office had been declining to prosecute only 3-4% of drug cases. . . . [I]n 98.9% of [drug unit] cases, the ADA adopt[ed] all the police charges."[69] In Iowa, misdemeanor declination rates are on the order of two percent.[70] Where initial declination rates are low, arrests convert automatically into charges. As a result, police effectively get to decide who will be *charged* by deciding who will be *arrested*. Formally speaking, this is a role reversal: "[w]hether to prosecute and what charges to file . . . are decisions that generally rest in the prosecutor's discretion."[71] But low declination rates mean that police are functionally "deciding which suits to bring," a traditional prosecutorial function for which prosecutors have long enjoyed absolute immunity.[72]

In some ways, the threat of elision between arrest and charge is already built into the legal standard: a criminal charge requires only probable cause, the same quantum of evidence required for arrest. Legally speaking, prosecutors do not need any more information or evidence than a police officer has to convert an arrest into a charge. Prosecutors are *supposed* to consider equitable and other factors and weigh different options, but the law does not require them to do so.[73] In practice, felony prosecutors follow this model, screening robustly and declining at a high rate: typically the more serious or complex the crime, the more robust the screening.[74] This dynamic is further strengthened by the Fifth Amendment's grand jury requirement: inserting additional checks and balances into the all-important prosecutorial decision to bring charges. But for misdemeanors, there are no such checks. Low declination rates mean that police arrest decisions routinely become criminal charges, eroding the institutional distinction.

The Supreme Court has waffled over just how bright a line separates police and prosecutorial functions. On the one hand, the Court recently acknowledged that police and prosecutors share authority to initiate the adversarial process. In *Rothgery*, the Court held that even though there was no prosecutor on the case, formal adversarial proceedings had indeed begun based on the existence of police-

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[69] *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 32, 37 (2009) (statement of Wayne S. McKenzie, Director, Vera Institute of Justice, Program on Prosecution & Racial Justice).

[70] Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717 (2010). Theoretically, low declination rates might be explained by a prosecutorial perception that police are doing a particularly thorough and accurate job. But in the context of high volume high speed misdemeanor policing, this explanation seems unlikely. I am indebted to Lisa Griffin for this point.

[71] United States v. Batchelder, 442 U.S. 114, 124 (1979).

[72] Kalina v. Fletcher, 522 U.S. 118, 125 (1997) (quoting Imbler v. Pachtman, 424 U.S. 409, 424 (1976)).

[73] Bowers, *supra* note 70, at 1657–61.

[74] Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 764–65 (2003) (The federal system often has high declination rates: in 1999, 93% of civil rights cases referred to the Department of Justice were declined for prosecution); *see also* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

filed charges, a court appearance, and detention; because the adversarial process had begun, the right to counsel attached.[75] But elsewhere the Court has drawn clearer lines between the police investigative function and the prosecutor's adjudicative role. In *Buckley v. Fitzsimmons*, for example, the Court held that prosecutors lose their absolute immunity if they engage in investigation—a quintessentially police function: "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."[76] It turns out that the all-important doctrinal distinction between investigation and adjudication is not all that clear.[77]

The more police resemble prosecutors, the more troubling *Terry* looks in retrospect. *Terry*'s reasoning was intimately intertwined with the Court's understanding of what it is that police quintessentially do: their need to investigate street crime justified the expanded power to seize, while the immediate danger to officers themselves justified the expanded power to search. If the Court had considered the fact that police may also function as prosecutors for low-level cases, it might have viewed those expansions of the police power differently. Or to put it another way, we do not usually think of the distinction between police and prosecutors as a species of problematic formalism or line-drawing that requires justification. The *Terry* Court *assumed* that police are just police and not also prosecutors, and that therefore expanding their seizure authority would not implicate later decisional stages of the criminal process. This is an eminently fair assumption in felony cases like *Buckley* (or for that matter, *Terry* itself) where decisional authority shifts markedly from police to prosecutor after arrest, but a highly contestable one for the misdemeanor world in which *Terry*-stops now play such a prominent role.

The cumulative effects of the assumption turned out to be powerful indeed. *Terry* empowered police to identify, target, seize, and search a wide swath of people based on very little evidence. For order maintenance offenses, the police themselves may be the only source of that evidence. In the misdemeanor world, those same police have the concomitant power to convert those decisions into arrests and, often, into formal charges. In his *Terry* dissent, Justice Douglas famously articulated the dangers of such expansions of state power: "[t]o give the police greater power than a magistrate is to take a long step down the totalitarian path."[78] If he had been thinking about misdemeanors, Justice Douglas might have added that this greater authority is particularly troubling in a world where police already have many of the same powers as a prosecutor.

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[75] Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).

[76] Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993) (internal quotations omitted).

[77] Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 967 (2008); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1587 (2005).

[78] Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).

C. *When charges become convictions*

The final stage of this slippery slope is the ease with which misdemeanor criminal charges convert to convictions. Formally speaking, criminal charges are mere allegations. They are not evidence and have no independent weight.[79] But functionally, the fact of a misdemeanor criminal charge overwhelmingly induces a guilty plea. Trials are rare; criminal charges that survive dismissal largely translate into convictions. In Florida, seventy percent of misdemeanor defendants plead guilty at arraignments that take approximately three minutes.[80] In New York, approximately two-thirds of misdemeanor defendants plead guilty at their first court appearance.[81]

The petty offense process elides charge and conviction by converting the former into the latter smoothly and without contest. This is not just a matter of high plea rates—federal defendants also mostly plead guilty, but those cases are typically evaluated and contested along the way.[82] By contrast, the petty offense process lacks the systemic friction that gives substance to the distinction between being charged and convicted—due process, evidentiary scrutiny, adversarial hearings, and all the hoops through which the government must jump to obtain a conviction. Indeed, to the extent that there is systemic friction, it operates in the other direction to prevent litigation and to induce pleas. The majority of low-level defendants who are set bail cannot pay it: a plea is the only way to secure release and avoid unnecessary incarceration.[83] As Malcolm Feeley famously articulated, the "process" is indeed "punishing": low-level court proceedings often involve long waits, unintelligible proceedings, uncertainty, disrespect, and fear.[84] Once charged, people continue to be punished until they plead. Or as Bronx public defender M. Chris Fabricant wrote, "virtually all of my clients . . . [are] worn down

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[79] United States v. Juwa, 508 F.3d 694, 701 (2d Cir. 2007).

[80] ALISA SMITH & SEAN MADDAN, NAT'L ASS'N. OF CRIMINAL DEF. LAWYERS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011).

[81] ROBERT C. BORUCHOWITZ ET. AL., NAT'L ASS'N. OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 31–32 (2009).

[82] To be sure, many point out that long federal sentences exert such heavy pressure on defendants to plead guilty that in effect, the federal system operates in the same frictionless way, notwithstanding the availability of a more robust adversarial process. *See, e.g.*, Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 427 (2004). My thanks to Susan Klein for pressing me on this point.

[83] Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011).

[84] MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 3–5 (1992); *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (describing how the low-level court process in New York marks and burdens defendants as they pass through it).

by the methodical torture of Bronx Criminal Justice and tak[e] a guilty plea."[85] For all these reasons, the line between being charged and being convicted in the petty offense process is a functionally thin one indeed.

III. SYMPTOM OR CAUSE: DID *TERRY* MAKE IT WORSE?

The late William Stuntz famously argued that legal rules do not dictate criminal outcomes; institutional roles and power dynamics do.[86] When legislatures pass overbroad criminal codes, power accrues to prosecutors. When the Supreme Court constrains law enforcement through criminal procedures, police and prosecutors alter their practices to avoid and minimize the impact of those rules. Push one part of the system, another part gives way. These Stuntzian hydraulic forces mean that criminal practices and institutions are interdependent in ways that are not captured by formal rules, but rather that flow from the incentives and realities of criminal justice processing, budgets, and politics.

Nowhere is this more true than for low-level policing and misdemeanor processing, which have their own special "pathological politics."[87] Under pressure to demonstrate productivity, police convert stops into arrests. Prosecutors have strong professional reasons to defer to police and clear dockets quickly by converting arrests into formal charges. Public defenders are pressed to resolve cases. Judges, under institutional demands to clear large dockets, accept plea bargains uncritically and in bulk. In what L. Song Richardson calls "systemic triage," the forces exerted on each official player erode the efficacy of rules designed to ensure accuracy and fairness, and simultaneously weaken the lines that formally separate each stage of the process.[88]

The concrete results of these institutional dynamics ebb and flow: sometimes the hydraulic forces on the ground produce fewer convictions. After two lawsuits, for example, the Bronx prosecutor's office announced that it would no longer charge trespassing based solely on police reports.[89] As police in New York and Baltimore inflated the number of stops and arrests, prosecutors dismissed or

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[85] M. Chris Fabricant, *Rousting the Cops*, VILLAGE VOICE (Oct. 30, 2007, 4:00 AM), http://www.villagevoice.com/news/rousting-the-cops-6419395 [https://perma.cc/6YUY-MBXV]; *see also* THE BRONX DEFENDERS, NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS (2013).

[86] *See* Stuntz, *supra* note 32; *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

[87] Stuntz, *supra* note 32.

[88] L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862 (2017) (reviewing NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016)).

[89] Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES (Sept. 25, 2012), http://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html [https://perma.cc/VP63-UQEP].

negotiated down large numbers of those cases.[90] Some public defender offices have gone on strike, pushing back against the pressure exerted by massive caseloads.[91] But none of these dynamics are built into the formal legal infrastructure. They are extra-doctrinal, varying wildly from city to city, even as they change the operational meaning of core legal rules and the consequences of being stopped, arrested, or charged.

Terry made this antiformal messiness worse. By reducing the amount of evidence necessary to support police action in the first instance, *Terry* put pressure on every subsequent step of the misdemeanor process. Authorizing law enforcement to extend the police power deep into disadvantaged communities fills the pipeline at the front end, affecting the resources and decision-making of every subsequent official actor. As a result, to misquote Justice Douglas, a *Terry* stop now represents a long step down the path towards a misdemeanor conviction.

Various scholars have admonished the Court to be more empirically minded, more Stuntzian if you will, to take account of on-the-ground realities and thus acknowledge the true functional significance of its criminal procedure rules. Tracey Meares and Bernard Harcourt, for example, have called for greater reliance on social scientific evidence in constitutional decision-making, in part to render "transparent" the likely effects of doctrinal changes on actual criminal justice institutions, actors, and outcomes.[92] Had the *Terry* Court been more attuned to the informal hydraulics of the criminal process, it might have worried more about opening up the floodgates to low-level police intrusions. It might have suspected that those putatively limited stops and frisks would morph into longer, more intrusive detentions and searches. It might have realized that police have at their disposal numerous tools to justify those longer, more intrusive detentions once they decide to make them: not merely the classic evidentiary justification of probable cause that a crime has been committed, but the arsenal of self-referential policing offenses in which police *ipse dixit* is enough to establish the case. And it might have lost sleep over what would happen next to all those people stopped by police.

Such worries might not have required much of a leap: after all, the Court was already concerned about "inner cities" and minorities' experiences of police abuse. Had it taken those concerns a step further and engaged the empirical reality of low-level misdemeanor processing, the Court might have been less sanguine about

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[90] *See* DOJ BALTIMORE INVESTIGATION, *supra* note 53, at 40–41.

[91] *See* Derwyn Bunton, Opinion, *When the Public Defender Says, 'I Can't Help,'* N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?_r=0 [https://perma.cc/9VZY-WBVH].

[92] Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 777–79 (2000); *see also* Andrew Manuel Crespo, *Systemic Facts: Towards Institutional Awareness in Criminal Court*, 129 HARV. L. REV. 2049 (2016) (pointing out that courts already possess enormous amounts of data on the workings of the criminal system and criminal justice actors).

Terry's compromise. Indeed, four years later in *Adams v. Williams*, Justice Marshall expressed regret for joining the *Terry* majority. As he wrote:

> Mr. Justice Douglas was the sole dissenter in *Terry*. He warned of the "powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees . . . ." While I took the position then that we were not watering down rights, but were hesitantly and cautiously striking a necessary balance between the rights of American citizens to be free from government intrusion into their privacy and their government's urgent need for a narrow exception to the warrant requirement of the Fourth Amendment, today's decision demonstrates just how prescient Mr. Justice Douglas was. It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day.[93]

IV. RETHINKING SCHOLARLY DISTINCTIONS

Much of the scholarship on the various stages of the misdemeanor process tracks the formalist distinctions and assumptions reflected in *Terry*. There is an enormous literature on the stop-and-frisk phenomenon; a somewhat different literature on arrests; a distinct literature on prosecutorial discretion and charging; and yet another one on massive public defender caseloads. The assumption that each of these stages is analytically distinct may be defensible and accurate in the felony context where the adversarial system is more robust and legal line-drawing more enforceable. But it should not be assumed for minor offenses. The full implications of misdemeanor stop-and-frisk depend in part on what happens next during misdemeanor arrests. The implications of those arrests, in turn, depend in part on what happens next during low-level charging and plea bargaining. In other words, we need to both accept and question the working authority of criminal procedure doctrine, its theoretical stages, and its formal distinctions. Even as we fight to preserve rule of law at the bottom of the penal pyramid where it is sorely needed, our analyses should attend to the ways in which these all-important legal lines have lost much of their force.

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[93] Adams v. Williams, 407 U.S. 143, 161–62 (1972) (Marshall, J., dissenting) (internal citations omitted).