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Recent decision breathes fresh air into the *Terry* and *Gross* rulings

You do not have to be a lawyer to have heard of a *Terry* stop. But do you remember the facts of *Terry v. Ohio* from your law school days? I'll save you the trouble of looking up 392 U.S. 1 (1968) and simply remind you.

Officer Martin McFadden was a 39-year veteran of the Cleveland police force. One day while on patrol, he happened to notice John Terry and two other men walking back and forth outside a store. This went on for 10 to 12 minutes. McFadden interpreted this as "casing a job" in preparation for a robbery; the possible robbery also made him suspect the men were armed.

He approached the men, identified himself and asked for their names. After Terry mumbled a response, McFadden grabbed him and patted down his outer clothing. This led to the recovery of Terry's illegal weapon.

Compare this 1960s version of police work with a more recent example from Washington, D.C., as described in *U.S. v. Gross*, No. 13-3102 (D.C. Cir. 2015).

The D.C. Metropolitan Police operates a Gun Recovery Unit. Four officers were working "gun patrol," which involved riding through an area looking to see whether they could recover guns. They were in an unmarked car, but each wore a tactical vest that had the word "POLICE" on the front and back.

At around 7 p.m., they observed Will Gross walking along a street in southeast Washington. Although they had no reason to suspect Gross of any criminal wrongdoing, the officer driving the car pulled up alongside him and another officer called out, "Hey, it is the police; how are you doing? Do you have a gun?"

When Gross did not answer, the officer added, "Can I see your waistband?" Gross lifted his jacket slightly. Another officer then exited the car and said, "Hey man, can I check you out for a gun?"

Gross then ran. After a short

chase, the officer apprehended Gross, frisked him and recovered a firearm. Gross was charged with unlawful possession of a weapon by a felon. The trial court denied his motion to suppress, and he was convicted.

In a 2-1 decision, the U.S. Court of Appeals for the D.C. Circuit found that none of the police questioning of Gross amounted to a seizure and therefore it was all valid under the Fourth Amendment. Moreover, his subsequent flight provided reasonable suspicion for a *Terry* stop and frisk that resulted in the discovery of the weapon. It thus affirmed.

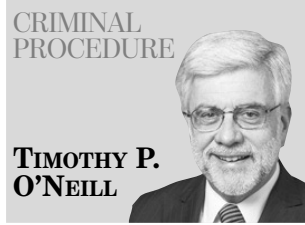
Note how different the police-citizen encounters are in these two cases. *Terry* concerns an officer who just happens upon suspicious behavior. *Gross*, on the other hand, involves police who are actively looking for situations in which they will be able to use *Terry* frisks to recover firearms.

A recent article discusses the vast difference between these two situations. Tracey L. Meares, "Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident," 82 Univ. of Chicago Law Review 159 (2015).

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proactive tool to ferret out crime.*

Meares emphasizes that the *Terry* framework is based on a "one-off investigative incident." But he notes that urban police departments have shifted to using *Terry* not as a response, but rather as an initiative. *Terry* was designed as a reactive tool to be used if a situation of reasonable suspicion presented itself. Instead, police are now using *Terry* as a proactive tool to ferret out crime.

Meares cites the New York Police Department as an example of a police force that has used the



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Terry stop-and-frisk tool "systematically, deliberately and with great frequency." And the problem is that this level of proactive policing was used in so-called high-crime neighborhoods, which were invariably places with high concentrations of minorities.

By using *Terry* as a sword rather than a shield, police are no longer using it to investigate specific people they suspect to be committing particular crimes in progress, "but are instead proactively policing people that they [only] suspect could be offenders."

Consequently, minorities in

high-crime neighborhoods see themselves as targets of the police regardless of what they are doing. As Meares notes, minorities "experience the program as a group, not as individuals, because the program is suspect driven, not incident driven."

So what happened in New York? A federal court in 2013 in *Floyd v. City of New York* ordered the NYPD to end its policy of stopping large numbers of people of color based primarily on where they happened to live.

So what has happened in Wash-

ington? Nothing, at the moment. But Judge Janice Rogers Brown's withering dissent in *Gross* may be the catalyst for action.

Brown characterized the so-called gun patrol as nothing more than a rolling roadblock that subverts the spirit of *Terry*. She castigated the police for relying on "voluntary consents" from minority citizens who happen to get caught up in these police dragnets. And she excoriated the D.C. Circuit for perpetuating the myth that a consent in this type of situation could ever be actually "voluntary."

On this point, Brown, an African-American woman, proposed what she calls a "thought experiment." Instead of these rolling roadblocks being conducted in minority "high-crime" areas such as southeast Washington, she suggested that we "try to imagine this scene in Georgetown.

"Would residents of that neighborhood maintain there was no pressure to comply if the district's officers patrolled Prospect Street in tactical gear, questioning each person they encountered about whether they were carrying an illegal firearm?"

Brown goes on to suggest that finding voluntary consent in these situations is "roughly equivalent to finding the latest Sasquatch sighting credible."

Once you eliminate the chimera of "voluntary consent," Brown said we are left with a minority-targeted program that "sweeps citizens up at random and subjects them to undesired police interactions culminating in a search."

Brown closed by telling citizens caught up in this program to "speak to officers firmly, politely, respectfully. Tell them, 'I do not wish to have an encounter with the police right now. Am I free to leave?' If the answer is 'no,' then coercion will cease to masquerade as consent."

The *Terry-Gross* issue needed some fresh air. We should be grateful to Brown for providing it.