Drawing a Line between *Terry* and *Miranda*: The Degree and Duration of Restraint

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INTRODUCTION

A felon answered the door in his underwear. Three police officers and three parole officers were there to search his apartment for a gun on the basis of a tip from his mother.[1] The police handcuffed him in the hallway outside his apartment, but told him he was not under arrest; the handcuffs were for his safety and the safety of the officers. Then they took him inside and asked about the gun, which he told them was in a shoebox on the table. The police never read the suspect his *Miranda* warnings. Was he "in custody"? Or was this merely a temporary detention?

Miranda v Arizona[2] held that police may not interrogate a suspect who has been taken into custody without first issuing the familiar warnings.[3] Investigative stops, valid under *Terry v Ohio*,[4] are not subject to *Miranda*'s notice requirements.[5] Courts have not settled on a workable rule for determining custody in *Terry* stop cases. Part of the problem is that custody cases involve so many factors.[6] But more important, coercive police behavior that would have required *Miranda* warnings in 1966 often is deemed reasonable under *Terry* today.

This has led to a circuit split over whether coercive *Terry* stops constitute *Miranda* custody.[7] The First, Fourth, and Eighth circuits hold

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1 The facts used in this example are drawn from *United States v Newton*, 369 F3d 659, 663 (2d Cir 2004). Newton had signed a release stating that his parole officer could search his "person, residence and property" without a warrant. Id.

2 384 US 436 (1966). See *Cruz v Miller*, 255 F3d 77, 85 (2d Cir 2001) (stating that "[t]he cases in our Circuit seem not entirely consistent" and listing potentially conflicting cases where the circuit did and did not find custody to illustrate that the rule defining custody is unclear).

3 See 384 US at 444–45. See also note 13.

4 392 US 1 (1968) (holding that police may stop and frisk without probable cause so long as they have a reasonable suspicion that a violent crime is about to be committed).

5 See *Berkemer v McCarty*, 468 US 420, 440 (1984).

6 See text accompanying notes 27–28.

7 See *Newton*, 369 F3d at 673, quoting *United States v Ali*, 68 F3d 1468, 1472 (2d Cir 1995):

> Some courts have concluded that where an investigatory stop is reasonable under the Fourth Amendment, the seized suspect is not "in custody" for purposes of *Miranda*. [Other courts] have focused on "whether a reasonable person in defendant's position would have

that so-called *Terry* reasonableness means *Miranda* warnings are not required, even if the stop was coercive.[8] The Second, Seventh, Ninth, and Tenth circuits hold that a coercive *Terry* stop requires warnings but still is deemed a valid *Terry* stop.[9] This split illustrates a misunderstanding about how *Terry* and *Miranda* interact. Courts tend to address one piece of the analysis—typically Fourth Amendment reasonableness—and then stop the inquiry without also asking whether the police conduct in question, although perhaps reasonable, violates a suspect's Fifth Amendment rights under *Miranda*.

This Comment proposes a new approach for determining *Miranda* custody in *Terry* stop cases. It focuses on just two factors: the degree and duration of restraint.[10] The higher the degree of restraint used, the less time required before a *Terry* stop becomes *Miranda* custody; the longer the detention, the lower the degree of restraint allowed before such a stop becomes custodial. This approach highlights the fact that a stop cannot be both valid under *Terry* and custodial under *Miranda*. If a

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understood himself to be subjected to the restraints comparable to those associated with a formal arrest."

8 See *United States v Pelayo-Ruelas*, 345 F3d 589, 592 (8th Cir 2003) (finding that a suspect is not in custody when an investigative stop is reasonable); *United States v Trueber*, 238 F3d 79, 92 (1st Cir 2001) (same); *United States v Leshuk*, 65 F3d 1105, 1110 (4th Cir 1995) (same).

9 See *Newton*, 369 F3d at 673 ("This court . . . has specifically rejected Fourth Amendment reasonableness as the standard for resolving *Miranda* custody challenges."); *United States v Kim*, 292 F3d 969, 976 (9th Cir 2002) ("[W]hether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is 'in custody' for *Miranda* purposes are two different issues."); *Ali*, 68 F3d at 1472–73 (holding that whether a stop was permissible under *Terry* is irrelevant to the *Miranda* question, because "*Terry* is an exception to the Fourth Amendment probable cause requirement, not to the Fifth Amendment protections against self-incrimination"); *United States v Smith*, 3 F3d 1088, 1097 (7th Cir 1993) (noting the "vast difference" between *Miranda* rights aimed at "protect[ing] a fair criminal trial and the rights guaranteed under the Fourth Amendment"), quoting *Schneckloth v Bustamonte*, 412 US 218, 241 (1973); *United States v Perdue*, 8 F3d 1455, 1464–65 (10th Cir 1993) (holding that a gunpoint stop that was reasonable under the Fourth Amendment nevertheless placed the suspect in custody for purposes of *Miranda*).

10 This Comment's framework differs from more general Fourth Amendment frameworks, see, for example, Wayne R. LaFave, 4 *Search and Seizure: A Treatise on the Fourth Amendment* § 9.1(d) (West 4th ed 2004), in at least three ways. First, the Comment focuses on a narrow range of police encounters. Fourth Amendment theory generally addresses a wide range of police encounters to determine the minimal amount of information required at each level of investigation: no information (administrative searches), reasonable suspicion (*Terry* stops), probable cause (arrest), or a warrant (generally needed for search of a house, for example). See, for example, id. This Comment considers only the range of encounters between the *Terry* stop and the arrest. Second, this Comment does more than take sides. It does not argue only that *Miranda* warnings should be required where *Terry* stops become coercive. It proposes a rule to solve the problem of when a police encounter crosses that line. Third, this Comment considers two factors, the degree and duration of restraint, and argues that they are inversely related: more of one means less of the other is required for a finding of custody. Sliding scales elsewhere in Fourth Amendment law generally consider the presence or absence of one factor: for example, the exigency of the circumstances for warrantless searches, probable cause for arrests, or the lack of a possibility for prosecution in administrative searches.

stop involves coercive police behavior, then the suspect is in *Miranda* custody, which means a de facto arrest has occurred, which requires probable cause. Police cannot take suspects into custody under *Terry* because a *Terry* stop requires only reasonable suspicion, not probable cause.[11] This is consistent with the Court's interpretation of the Constitution in *Miranda* and *Terry*.[12] What is new here is the suggestion that courts should focus on the degree and duration of restraint, above and beyond other factors in the custody determination. By focusing on these two factors, courts should be able to simplify the task of determining *Miranda* custody.

Part I discusses the evolution of the *Miranda* and *Terry* doctrines, and then analyzes the circuit split over whether *Terry* stops can rise to the level of *Miranda* custody. Part II presents this Comment's approach, and discusses its positive and normative foundations. This Part also examines the Supreme Court's de facto arrest cases, which distinguish *Terry* stops and de facto arrests in a way that is analogous to the distinction between *Terry* stops and *Miranda* custody. The distinguishing characteristics in the de facto arrest cases support this Comment's proposed approach. Finally, Part III addresses potential criticisms of the proposed approach and concludes that they are outweighed by its ease of application, potential for creating greater uniformity and predictability among the circuits, and faithfulness to the original purposes of *Miranda* and *Terry*.

I. The Difficulty of Determining Custody

This Part discusses the custody test that has evolved from *Miranda* and the expansion of the *Terry* doctrine. It then examines the circuit split over whether *Terry* stops can be custodial under *Miranda*. This spilt exemplifies the difficulty lower courts have had applying the custody test. The difficulty seems to arise from a contraction of the range of encounters where *Miranda* applies, coupled with the expansion of

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11 See 392 US at 26–27 (explaining that the brief detention required to carry out a limited search for weapons is justified on less than probable cause, but noting that such a detention is very different from "taking a person into custody," which does require probable cause). See also *California v Beheler*, 463 US 1121, 1125 (1983) (finding that custody consists of "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest"); *Dunaway v New York*, 442 US 200, 208–09 (1979) (discussing the probable cause requirement for "the kind of intrusion involved in an arrest," and explaining that the kind of intrusion involved in a *Terry* stop-and-frisk is "a sui generis rubric of police conduct" involving less than probable cause) (internal quotation marks omitted); *United States v Richardson*, 949 F2d 851, 858 (6th Cir 1991) ("The general rule is that 'a police confinement [that] . . . goes beyond the limited restraint of a *Terry* investigatory stop may be constitutionally justified only by probable cause.'"), quoting *United States v Royer*, 460 US 491, 496 (1983).

12 See *Miranda*, 384 US at 479; *Terry*, 392 US at 26–27.

the use of *Terry*. Furthermore, the totality of the circumstances nature of the test makes it a vague, ad hoc standard.

Miranda was meant to create a bright line rule to prevent coerced confessions. *Terry* was meant to create an exception to the probable cause requirement for searches and seizures that allows law enforcement officers to protect themselves. It makes sense to maintain separate doctrines because they address different constitutional concerns, but courts should address how they operate together when the facts of a case implicate both.

A. The Evolution of *Miranda*'s Custody Test

Miranda held that the privilege against self-incrimination begins with custodial interrogation. *Miranda* warnings must be given at that moment;[13] otherwise, incriminating statements elicited afterwards cannot be used against the suspect in court.[14] *Miranda* defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise *deprived of his freedom of action in any significant way*."[15] The Court focused on what should happen *after* suspects are taken into custody.[16] The Court did not articulate the indicia of custody, or otherwise help courts (or police) to determine the steps leading up to custody.

1. Contraction of the *Miranda* doctrine.

After *Miranda*, the Court has interpreted "custody" and "custodial interrogation" narrowly. A suspect is not in custody when he voluntarily goes to a police station alone to answer questions.[17] A suspect

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13 See *Miranda*, 384 US at 444–45:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

14 See id at 444.

15 Id (emphasis added).

16 Miranda was questioned by police officers "in a room in which he was cut off from the outside world," and his questioning involved "incommunicado interrogation" in a "police-dominated atmosphere." Id at 445. The problem, the Court said, is that even without employing brutality or the "third degree," "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Id at 455. The Court explained that "such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." Id at 457.

17 See *Oregon v Mathiason*, 429 US 492, 495 (1977).

is also not in custody when he voluntarily accompanies police to a police station to answer questions.[18]

The Supreme Court's current formulation of the custody test asks "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[19] This articulation, taken from *California v Beheler*,[20] is narrower than *Miranda*'s "deprived of his freedom of action in any significant way" definition of custody.[21] Further limiting what counts as custody, the Court has held that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."[22] An officer may forgo the warnings and pose as a cellmate to trick an incarcerated suspect into confessing to a crime: "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns."[23]

Lower courts have developed riffs on the Supreme Court's custody test, without distinguishing carefully among the various formulations or explicitly concluding that each formulation amounts to the same kind of conduct. Some courts conflate the so-called "free to leave" test with *Beheler*'s "restraint associated with arrest" formulation, as if they are different descriptions of the same test.[24] Some courts acknowledge these tests conflict, noting that "not being free to leave" captures more situations (and is therefore broader than) "being re-

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18 See *California v Beheler*, 463 US 1121, 1125 (1983). The Court has attempted more specificity in defining "interrogation"; in *Rhode Island v Innis*, 446 US 291 (1980), the Court held that interrogation is direct questioning or the functional equivalent of questioning that the police should know is reasonably likely to elicit an incriminating response. A discussion of the meaning of "interrogation" is beyond the scope of this Comment.

19 *Beheler*, 463 US at 1125.

20 463 US 1121 (1983).

21 384 US at 444.

22 *Stansbury v California*, 511 US 318, 323 (1994).

23 *Illinois v Perkins*, 496 US 292, 297 (1990).

24 See *United States v Kim*, 292 F3d 969, 973 (9th Cir 2002) ("[A] court must, after examining all of the circumstances surrounding the interrogation, decide whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.") (internal quotation marks omitted). As though it meant the same thing, *Kim* then stated, "[W]e must determine whether the officers established a setting from which a reasonable person would believe that he or she was not free to leave." Id at 973–74 (internal quotation marks and citations omitted). Likewise, the Second Circuit found that the custody determination is based on "whether a reasonable person in defendant's position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest." *United States v Ali*, 68 F3d 1468, 1472 (2d Cir 1995) (internal quotation marks omitted). But at the same time, "[a]n accused is in 'custody' when, in the absence of an actual arrest, law enforcement officials act or speak in a manner that conveys the message that they would not permit the accused to leave." Id, quoting *Campaneria v Reid*, 891 F2d 1014, 1020–21 n 1 (2d Cir 1989).

strained to the degree associated with arrest."[25] These differences reveal confusion about the meaning of "custody."[26]

2. The ad hoc nature of the custody test.

Regardless of how they address other aspects of the custody test, courts consider the totality of the circumstances in making custody determinations.[27] Those circumstances may include any combination of the following: (1) the location of the encounter and whether it was familiar to the suspect, or at least neutral or public; (2) the number of officers questioning the suspect; (3) the degree of physical restraint used to detain the suspect; (4) the duration and character of the interrogation; (5) the language used to summon the suspect; (6) the extent to which the suspect is confronted with evidence of guilt; and (7) whether the suspect initiated contact with the police.[28] Most courts conclude their list of factors by pointing out that the list is nonexhaustive and that no one factor is dispositive.[29]

This grab bag of relevant factors makes custody determinations unpredictable and inconsistent. Courts do not agree on which factors to consider; courts do not even agree on the weight to give individual factors. For instance, some courts have held that handcuffing a suspect or drawing weapons on him creates a custodial situation; other courts have held that such restraints and coercion do not, on their own, yield custody.[30] Even the Supreme Court has acknowledged the difficulty of

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25 See *United States v Leshuk*, 65 F3d 1105, 1109–10 (4th Cir 1995) (rejecting the free-to-leave test in favor of the test requiring restraint of the degree associated with formal arrest). See also *United States v Pelayo-Ruelas*, 345 F3d 589, 592–93 (8th Cir 2003).

26 Courts also seem to disagree about how to address *Stansbury*'s reasonable-person standard. It is unclear who the relevant reasonable person is: the police officer, the defendant, or an abstract reasonable observer. See *United States v Smith*, 3 F3d 1088, 1095–96 (7th Cir 1993) ("Courts will look to several factors in determining the distinction between a stop and an arrest, among them are *the officers' intent*, impressions conveyed, length of stop, questions asked and any search made.") (emphasis added). See also Andrew V. Jezic, Frank Molony, and William E. Nolan, *Maryland Law of Confessions* § 8:11 (West 2005) (noting cases, including *Smith* and *Perdue*, that focus more on the coercive nature of the detention than on whether *a reasonable person* would feel detained to the level of a formal arrest).

27 See, for example, *Beheler*, 463 US at 1125; *United States v Martin*, 95 Fed Appx 169, 177 (6th Cir 2004) (unpublished opinion); *United States v Hernandez-Hernandez*, 327 F3d 703, 706 (8th Cir 2003).

28 See *United States v Trueber*, 238 F3d 79, 93 (1st Cir 2001); *Smith*, 3 F3d at 1095–96, citing *United States v Serna-Barreto,* 842 F2d 965, 967 (7th Cir 1988). See also *United States v St. Germain*, 107 Fed Appx 91, 92 (9th Cir 2004) (unpublished opinion); *Martin*, 95 Fed Appx at 177; *United States v Galceran*, 301 F3d 927, 929–30 (8th Cir 2002).

29 See, for example. *Galceran*, 301 F3d at 930; *Smith*, 3 F3d at 1095–96.

30 Compare *United States v Newton*, 369 F3d 659, 677 (2d Cir 2004) (holding that handcuffing creates custody), with *Leshuk*, 65 F3d at 1109–10 (holding that handcuffing and drawing weapons do not create a custodial arrest).

determining custody based on the totality of the circumstances.[31] Some courts have admitted that their own cases are not consistent.[32] Often, courts resist creating a rule to solve the problem.[33] The difficulty courts have determining custody is further highlighted by the circuit split over whether *Terry* stops can rise to the level of *Miranda* custody.[34]

B. The Expansion of *Terry*'s Probable Cause Exception

Whereas *Miranda* was intended to protect individual liberty and dignity under the Fifth Amendment, *Terry* balanced Fourth Amendment rights with the needs of police to investigate crime. *Terry* held that police may stop and frisk a suspect for weapons without probable cause, so long as they have reasonable suspicion that the suspect is armed or about to commit a violent crime.[35] The use of the *Terry* stop has expanded significantly in the past three decades. Conventional wisdom holds that violent crime has increased since *Terry*,[36] and that this increase has given police reason to use more coercive measures in *Terry* stops.[37] Although it may not have been appropriate for Officer

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31 See, for example, *Oregon v Elstad*, 470 US 298, 309 (1985) ("[T]he task of defining 'custody' is a slippery one.").

32 See *Cruz v Miller*, 255 F3d 77, 85 (2d Cir 2001) (internal citations omitted):

> We have rejected custody as to a suspect questioned at an airport, . . . and as to a suspect taken out of her apartment during a search and questioned elsewhere in the building . . . . We also found no custody as to a person who was told to get out of her car at gunpoint and then briefly handcuffed. . . . However, . . . we found custody for an airport interrogation where there were seven officers, a display of handguns, and the removal of the suspect's papers. We also found custody . . . as to a suspect taken to a private room at an airport for questioning. We have recognized that a *Terry* stop "may turn into custodial detention," . . . but we seem to have placed considerable weight on whether the suspect feels "free to leave," . . . without acknowledging that in all *Terry* stops (and traffic stops), the suspect does not feel free to leave, at least not while the permitted (brief) questioning is occurring.

33 See *Trueber*, 238 F3d at 93 ("There is no scientifically precise formula that enables courts to distinguish between investigatory stops . . . and . . . de facto arrests.") (internal quotation marks omitted).

34 See Part I.C.

35 See 392 US at 30.

36 This conventional wisdom seems a bit skewed. Although drug crimes have increased over the past three decades, serious violent crime has been on the decline. See Bureau of Justice Statistics, Key Crime & Justice Facts at a Glance, online at http://www.ojp.usdoj.gov/bjs/glance.htm#Crime (visited June 7, 2006).

37 See, for example, David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 UC Davis L Rev 1, 5 (1994):

> Perhaps as a result of the high-visibility use of frisks as a contemporary crime control device, or because of general public antipathy to crime, lower courts have stretched the law governing frisks to the point that the Supreme Court might find it unrecognizable. Lower courts have consistently expanded the types of offenses always considered violent regardless of the individual circumstances. At the same time, lower courts have also found that certain types of persons and situations always pose a danger of armed violence to police.

McFadden to pull a gun on Terry in 1968, today such action may be deemed appropriate, particularly if the circumstances involve suspicion of a drug crime, burglary, or illegal gambling.[38]

The expansion of the *Terry* doctrine has caused as much difficulty for lower courts as has the contraction and ad hoc nature of the *Miranda* doctrine. The limited question in *Terry* was "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest."[39] The Court answered no. But, although this was a significant step in the history of Fourth Amendment jurisprudence, it made some sense in the context of *Terry*'s facts, at least as compared to the kinds of police conduct *Terry* is applied to today.

In *Terry*, Officer McFadden, a veteran police officer, had been watching Terry and two other men "casing a job, a stick-up," and he feared they had a gun.[40] When McFadden questioned them about what they were doing, the men "mumbled something," and McFadden "grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol."[41] In this context, the Court held that

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.[42]

Terry was about protecting the police officer. It was more about allowing the limited search for weapons than it was about the limited seizure of the suspect. But, more important, it was exclusively about Fourth Amendment concerns, and explicitly *not* about the Fifth Amendment concerns addressed in *Miranda*.[43]

When confronted with these offenses, persons, or situations, police may automatically frisk, whether or not any individualized circumstances point to danger.

38 See id at 24–27 nn 128, 132–34, 136 (listing categories of cases where frisks have been allowed).

39 392 US at 15.

40 Id at 6.

41 Id at 7.

42 Id at 27.

43 See id at 19 n 16 ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause *for purposes of 'detention' and/or interrogation*.") (emphasis added).

The Court expanded *Terry* and, at the same time, narrowed *Miranda* in *Beheler* and *Berkemer v McCarty*.[44] *Beheler*, though not a *Terry* stop case, focused on when a noncustodial situation becomes custodial and held that *Miranda* warnings are not required where a suspect goes with police to the police station voluntarily, is questioned for less than thirty minutes, and is then allowed to leave:

> Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." . . . The police are required to give *Miranda* warnings only "where there has been such a restriction on a person's freedom as to render him in custody."[45]

The Court emphasized that all suspect-police encounters are coercive, "simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."[46] Thus, the Court expanded what was allowed under *Terry* and stepped away from the Fifth Amendment rationale for *Miranda*: coercion to self-incrimination is not enough; a suspect must endure a restriction on his freedom—a Fourth Amendment seizure—similar to that of a formal arrest before the warnings are required.

The connection between *Terry* and *Miranda* became clearer in *Berkemer*, which held that the "roadside questioning of a motorist detained pursuant to a routine traffic stop" does not amount to "custodial interrogation."[47] *Berkemer* found that "the usual traffic stop is more analogous to a so-called '*Terry* stop,' than to a formal arrest."[48] *Berkemer* did not hold that all traffic stops are exempt from *Miranda*; it held only that "routine" or "usual" traffic stops are exempt. That makes sense, at least in terms of *Beheler*'s definition of custody: a routine traffic stop does not resemble an arrest, even if it does deprive freedom of action in a significant way (which, in itself, is debatable).

But *Berkemer* was a turning point that has led to a significant expansion of the kinds of police conduct allowed under *Terry*. Some lower courts have interpreted *Berkemer* to mean that *Miranda* warnings are never necessary for a lawful *Terry* stop.[49] *Berkemer* also led courts to carve out other types of police encounters beyond the rou-

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44 468 US 420 (1984).

45 463 US at 1124, quoting *Mathiason*, 429 US at 495. See also Part I.A.1.

46 *Beheler*, 463 US at 1124.

47 468 US at 435.

48 Id at 439 (internal citation omitted).

49 See, for example, *Pelayo-Ruelas*, 345 F3d at 592.

tine traffic stop where a stop and frisk is, per se, always allowed.[50] Thus *Berkemer* provided the impetus for a simultaneous contraction of *Miranda* and expansion of *Terry*. This has led to a circuit split over whether a *Terry* stop can rise to the level of *Miranda* custody. This instability points out the need for a clearer definition of custody in *Terry* stop cases, as proposed by this Comment's approach. In addition to simplifying custody determinations, this Comment's approach emphasizes that it is unconstitutional for a *Terry* stop to involve conduct that is custodial under *Miranda*.

C. The Circuit Split

The First, Fourth, and Eighth circuits have held that if an investigative stop is reasonable under *Terry*, then the seized suspect is not in custody for *Miranda* purposes.[51] The Second, Seventh, Ninth, and Tenth circuits have held that the *Terry* reasonableness standard is irrelevant to *Miranda* custody determinations; a stop can be reasonable under *Terry* and the suspect can nevertheless be in custody under *Miranda*.[52] The distinction matters because if a suspect is in custody, he must receive *Miranda* warnings, or else have any incriminating statements excluded from evidence. This Part explains the arguments on both sides of the split and concludes that both sides are wrong. Part III proposes this Comment's solution.

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50 See *United States v Place*, 462 US 696, 698 (1983) (holding that, although a ninety-minute detention was unreasonable, detaining luggage suspected of containing narcotics was generally reasonable under *Terry*, without discussion of whether such luggage could pose any danger to law enforcement); *Leshuk*, 65 F3d at 1109 (allowing a stop and frisk of unarmed suspects on suspicion of a drug crime). See also Harris, 28 UC Davis L Rev at 5 (cited in note 37) (explaining that lower courts have expanded the types of offenses, persons, and situations deemed always to pose a danger of armed violence, thus justifying *Terry* stops for a much broader array of situations "whether or not any individualized circumstances point to danger").

51 See *Trueber*, 238 F3d at 92; *Leshuk*, 65 F3d at 1110; *Pelayo-Ruelas*, 345 F3d at 592.

52 See *Ali*, 68 F3d at 1472, 1473 (holding that whether a stop was permissible under *Terry* is irrelevant to the *Miranda* question, because "*Terry* is an exception to the Fourth Amendment probable-cause requirement, not to the Fifth Amendment protections against self-incrimination"); *Smith*, 3 F3d at 1097 (noting the "'vast difference'" between *Miranda* rights aimed at "'protect[ing] a fair criminal trial and the rights guaranteed under the Fourth Amendment'"), quoting *Schneckloth v Bustamonte*, 412 US 218, 241 (1973); *Kim*, 292 F3d at 976 ("[W]hether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is 'in custody' for *Miranda* purposes are two different issues."); *United States v Perdue*, 8 F3d 1455, 1464–65 (10th Cir 1993) (holding that a gunpoint stop that was reasonable under the Fourth Amendment nevertheless placed the suspect in custody for purposes of *Miranda*).

1. If it is reasonable, it is not custody.

The First, Fourth, and Eighth circuits have held explicitly that *Terry* and *Miranda* do not overlap: reasonable *Terry* stops are by definition noncustodial. These circuits allow *Terry* stops to become coercive without requiring *Miranda* warnings. The Fourth Circuit offers the clearest example. *United States v Leshuk*[53] found the suspect's reasonable belief that he was in custody insufficient to transform a *Terry* stop into *Miranda* custody.[54] *Leshuk* eschewed the free-to-leave custody test and held that, because the stop was reasonable, it did not constitute *Miranda* custody: "A brief but complete restriction of liberty is valid under *Terry*."[55] Furthermore, "[i]nstead of being distinguished by the absence of any restriction of liberty, *Terry* stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion."[56] The court focused on the duration of detention, to the exclusion of the degree of restraint. Indeed: "[W]e have concluded that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes."[57] The court left open the possibility that something might "elevate a lawful stop into a custodial arrest," but it is hard to imagine what.

The First and Eighth circuits also have held that reasonable *Terry* stops are not custodial. The Eighth Circuit relied heavily on dicta in *Berkemer* to find that *Miranda* warnings were not required. "Citing *Berkemer,* we have declared that, 'No Miranda warning is necessary for persons detained for a *Terry* stop.'"[58] The First Circuit also empha-

53 65 F3d 1105 (4th Cir 1995).

54 Id at 1109.

55 Id, quoting *United States v Moore*, 817 F2d 1105, 1108 (4th Cir 1987) (internal quotation marks omitted).

56 *Leshuk*, 65 F3d at 1109, citing *Florida v Royer*, 460 US 491, 500 (1983).

57 *Leshuk*, 65 F3d at 1109–10.

58 *Pelayo-Ruelas*, 345 F3d at 592. The court also quotes the following two passages from *Berkemer*:

> The comparatively nonthreatening character of [typical *Terry* stops] explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purpose of Miranda.

468 US at 440 (internal quotation marks and citations omitted). But the second passage *Pelayo-Ruelas* quoted from *Berkemer* cuts back on its finding that *Terry* stops never require *Miranda* warnings. "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer*, 468 US at 440. In this second passage, *Berkemer* explicitly states that a traffic stop may become custodial, in which case *Miranda* warnings would be required and the stop would no longer be valid under *Terry*.

sized *Berkemer*:[59] "*Terry* stops, though inherently somewhat coercive, do not usually involve the type of police dominated or compelling atmosphere which necessitates *Miranda* warnings."[60] The court acknowledged in *United States v Trueber*[61] that a *Terry* stop could escalate to a de facto arrest, in which case it would no longer be a valid *Terry* stop and would require *Miranda* warnings.[62] But *Trueber* ignored the expansion of *Terry* stops into what would otherwise be considered custodial situations: the court concluded that Trueber was not in custody, not because the force used did not rise to the level of a formal arrest, but because such force was reasonable given that Trueber was suspected of drug trafficking, a commonly violent crime.[63] *Trueber* allowed its *Terry* analysis to make its *Miranda* custody determination.

Finally, the Second Circuit is conflicted over whether *Terry* stops can rise to the level of *Miranda* custody.[64] In *Cruz v Miller*,[65] the Second Circuit concluded that a suspect was not in custody, even though several factors pointed in that direction.[66] The court weighed the procustody factors against the noncustody factors, and in the end gave up the pursuit:

> The difficulty of determining "custody" for purposes of *Miranda*, . . . and the Supreme Court's lack of clear guidance on the issue in the context of sidewalk questioning suggest that, unless the facts clearly establish custody, a state court should be deemed to have made a reasonable application of clearly established Supreme Court law in concluding that custody for *Miranda* purposes was not shown.[67]

Courts holding that a reasonable detention is necessarily noncustodial do not focus on the coercive nature of police behavior during such detentions. Instead of acknowledging the Fifth Amendment concerns inherent in such stops, they focus on whether danger to the police officer justified the coercive conduct. If it does, they conclude that the stop was reasonable and therefore noncustodial. But such stops

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59 See *Trueber*, 238 F3d at 92.

60 Id, quoting *United States v Streifel*, 781 F2d 953, 958 (1st Cir 1986) (internal quotation marks omitted).

61 238 F3d 79 (1st Cir 2001).

62 See id at 92.

63 See id at 94.

64 Compare *Cruz*, 255 F3d at 86 (analyzing federal law to determine whether a state court reasonably applied Supreme Court precedent and finding that the state court's conclusion of reasonableness should be followed unless custody is clearly shown), with *Ali*, 68 F3d at 1472 (holding that reasonableness under *Terry* is inapposite to *Miranda* custody).

65 255 F3d 77 (2d Cir 2001).

66 See id at 94.

67 Id at 85–86.

are often custodial in the sense meant by *Miranda*, *Beheler*, and *Berkemer*—they compel suspects to speak—and should therefore require a reading of the *Miranda* warnings.

2. Reasonableness is irrelevant to custody.

The Second, Seventh, Ninth, and Tenth circuits have held that a suspect may be in custody for *Miranda* purposes, even if the coercive conduct is reasonable given the circumstances of the stop.[68] The Ninth Circuit, in *United States v Kim*,[69] found that "whether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is 'in custody' for *Miranda* purposes are two different issues."[70] Police kept Insook Kim locked in her store for three hours.[71] The court considered that factor and several others (Kim did not speak English well, police outnumbered her five to one and surrounded her in an intimidating way even if they did not handcuff her, and they would not let her talk to her husband or son[72]) in concluding that, even if the detention was reasonable because Kim was suspected of selling ingredients for methamphetamine, it nonetheless constituted custody for *Miranda* purposes.[73]

The Second Circuit, in *United States v Ali*,[74] also held that whether a stop is reasonable under *Terry* is irrelevant to the *Miranda* question, because "*Terry* is an exception to the Fourth Amendment probable cause requirement, not to the Fifth Amendment protections against self-incrimination."[75] The Seventh Circuit, in *United States v Smith*,[76] agreed that "our inquiry into the circumstances of temporary detention for a Fifth and Sixth Amendment *Miranda* analysis requires a different focus than that for a Fourth Amendment *Terry* stop."[77] *Smith* noted the "vast difference" between *Miranda* rights aimed at "protect[ing] a fair criminal trial and the rights guaranteed under the

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68 See *Ali*, 68 F3d at 1472–73; *Smith*, 3 F3d at 1097; *Kim*, 292 F3d at 976; *Perdue*, 8 F3d at 1464–65.

69 292 F3d 969 (9th Cir 2002).

70 Id at 976.

71 See id at 971.

72 See id at 971–73.

73 See id at 977.

74 68 F3d 1468 (2d Cir 1995).

75 Id at 1473 (internal quotation marks omitted). "The fact that the seizure and search of a suspect comports with the Fourth Amendment under *Terry* simply does not determine whether the suspect's contemporaneous oral admissions may be used against him or her at trial. A *Terry* stop may turn into custodial detention." Id, citing *United States v Hooper*, 935 F2d 484, 494 (2d Cir 1991).

76 3 F3d 1088 (7th Cir 1993).

77 Id at 1096.

Fourth Amendment."[78] Finally, the Tenth Circuit, in *United States v Perdue*,[79] held that a gunpoint stop that was reasonable nevertheless placed the suspect in custody for purposes of *Miranda*.[80]

Many of these courts are also wrong. By allowing a *Terry* stop to rise to the level of *Miranda* custody while remaining a valid *Terry* stop these courts implicitly endorse the expansion of *Terry* to cover custodial situations. That endorsement allows police to take suspects into custody without probable cause, so long as they read them their rights.[81] This violates the Fourth Amendment's protection against unreasonable seizures.[82] A constitutional approach would be to require the *Miranda* warnings in such situations, but also to emphasize that when a *Terry* stop becomes custodial, it is no longer a valid *Terry* stop, and probable cause is required. This Comment's proposal—requiring a focus on degree and duration of restraint—highlights that such an approach is compelled by the Constitution.

II. A NEW RULE FOR DETERMINING CUSTODY

The case law on the custody test tries to pinpoint the difference between a *Terry* stop and *Miranda* custody, but there is no single characteristic that, if present, makes a *Terry* stop custodial.[83] Courts therefore have settled for vague totality of the circumstances analyses. This Comment's approach instead recommends considering only the degree and duration of the restraint. Part II.A describes this approach. Part II.B offers the Supreme Court's de facto arrest cases as support for the approach. Part II.C analyzes existing cases under the approach.

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78 Id at 1097, quoting *Bustamonte*, 412 US at 240–41.

79 8 F3d 1455 (10th Cir 1993).

80 Id at 1464–65.

81 But see *United States v Hooper*, 935 F2d at 494 ("If the intrusion becomes excessive, it ceases to be a *Terry* type detention that can be justified based on reasonable suspicion and instead becomes a seizure that requires a showing of probable cause.") See also Note, *Custodial Engineering: Cleaning up the Scope of* Miranda *Custody During Coercive* Terry *Stops*, 108 Harv L Rev 665, 671 n 49 (1995) ("Because a *Terry* inquiry is based only on reasonable suspicion, the inquiry cannot become a custodial interrogation without the stop becoming an illegal arrest.").

82 See *Terry*, 392 US at 26–27 (noting that "taking a person into custody" requires probable cause). See also *Beheler*, 463 US at 1125 (finding that custody consists of "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest"); *Dunaway v New York*, 442 US 200, 208–09 (1979) (discussing the probable cause requirement for "the kind of intrusion involved in an arrest" and explaining that the kind of intrusion involved in a *Terry* stop-and-frisk is "a sui generis rubric of police conduct" involving less than probable cause) (internal quotation marks omitted).

83 See *Smith*, 3 F3d at 1095–96 (noting that none of the factors considered in a totality of the circumstances analysis is dispositive).

A. Balancing the Duration and Degree of Restraint

The proposed approach balances the duration and the degree of restraint in making custody determinations. It is not a bright line rule, and it is not absolute. It is a balancing test that weighs two inversely related factors to provide courts an intelligible principle to guide custody determinations. This approach can be distinguished from a bright line rule in the same way "reasonable doubt" is distinguished from a mathematical percentage of certainty in jury instructions. Just as judges never tell jurors that a finding of reasonable doubt means that they are less than 97 percent certain, this Comment is not meant to give judges a tool[84] to determine with any mathematical certainty where an investigative stop ends and custody begins. Instead, this approach is meant to highlight the relationship between the two most important factors in a custody/*Terry* stop case.

Under this approach, the degree and duration of restraint are inversely related. Many lower court cases fit the rule: they find custody where the degree of restraint is low, but the duration is long; they also find custody where the duration is brief, but the degree of restraint is high. Following this approach should lead to results that are fairer, more uniform and predictable, and more in line with Supreme Court precedent. The approach simply presents the facts of cases in relation to one another. The approach makes it easier to compare a new case to precedent, and it prevents the ad hoc nature of the common custody tests.

The goal is to address the hard case: a stop that is reasonable given the circumstances, but also coercive.[85] An approach that adequately addresses the hard cases will force courts to acknowledge that if a stop puts the suspect on the custody side of the line, then the stop is not valid under *Terry*. Probable cause is required. So are *Miranda* warnings.

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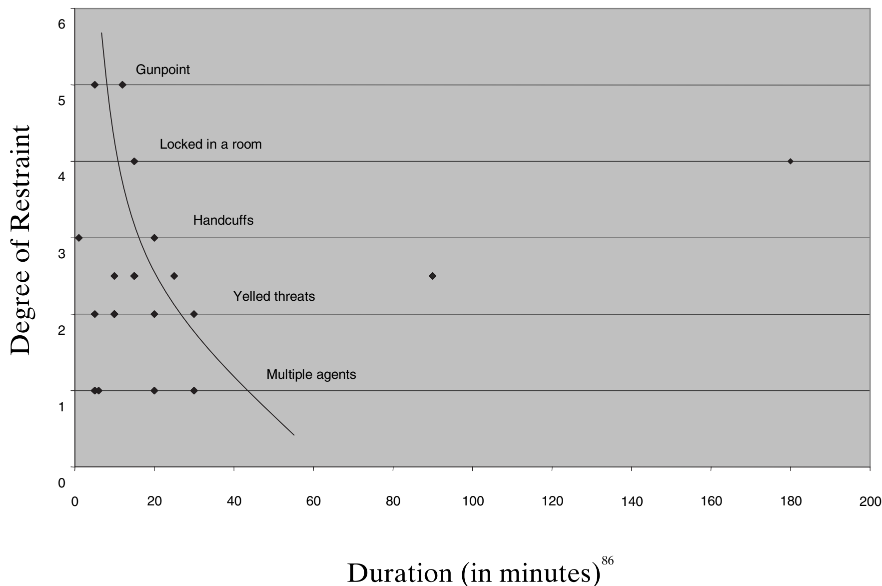
84 See Figure 1.

85 See Part I.C for discussion of the circuit split over these hard cases.

FIGURE 1



1. Duration.

Time is a discrete, quantifiable factor, and courts have understandably focused on it in *Terry* stop cases. Still, there is no consensus on how long a detention has to be before it becomes custodial, or when the clock starts and stops. This Comment compares detentions based on when the police officer first interacts with the suspect face to face (as opposed to when the officer turns on his flashers to pull the suspect over, for instance), but this is not crucial. What is crucial is that the clock be started and stopped at the same point in each case, so that cases can be compared. Courts are not consistent on this point. The only explicit consensus is that *Terry* stops must be "brief."[87] The Supreme Court has held a ninety-minute detention unreasonable.[88] However, the Court stated that no rigid time limitation on *Terry* stops is

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86 See Appendix for a listing of cases plotted on Figure 1.

87 *Berkemer*, 468 US at 441–42 ("[O]nly a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be temporary. . . . Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest."); *United States v Robinson*, 414 US 218, 228 (1973), quoting *Terry*, 392 US at 26 ("The protective search for weapons . . . constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person."); *Leshuk*, 65 F3d at 1109 ("A brief but complete restriction of liberty is valid under *Terry*."); *In re M.E.B.*, 638 A2d 1123, 1126 (DC App 1993) ("A *Terry* seizure . . . involves a more temporary detention, designed to last only until a preliminary investigation either generates probable cause or results in the release of the suspect.").

88 See *United States v Place*, 462 US 696, 709–10 (1983).

possible or desirable.[89] This flexibility has allowed lower courts to uphold a ninety-minute detention as reasonable under *Terry*,[90] while other courts have found *Miranda* custody where a detention lasted only fifteen minutes,[91] roughly five minutes,[92] and even less than one minute.[93] Courts also have found detentions of thirty minutes[94] and approximately ten minutes[95] noncustodial.

Courts, therefore, clearly do not focus exclusively on duration.[96] Something else is at work. Cases holding that reasonable *Terry* stops do not require *Miranda* warnings rely most often on *Berkemer*, without considering that the "routine traffic stop" in *Berkemer* lasted only about five to ten minutes, making it one of the shortest detentions discussed here. That is a far cry from the ninety-minute detention found to be noncustodial in *Trueber*.

Time is not doing all of the work in these cases, but the fact that most cases do emphasize the length of the detention suggests that it is an important factor.

2. Degree of restraint.

To "restrain" means to "check, hold back, or prevent (a person or thing) from some course of action."[97] This Comment interprets "restraint" as bodily restraint—conduct that physically prevents a suspect from leaving the scene—because that interpretation best comports with the cases. In terms of restraint, the distinction between a *Terry* stop and *Miranda* custody is primarily a physical one: did the police officer merely pat down the suspect, or did he grab him and hold him

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89 See id at 709 n 10.

90 See *Trueber*, 238 F3d at 92. However, *Trueber* relied on *Berkemer* (which involved a much briefer—probably less than ten minutes—stop) in holding that such a detention was reasonable and therefore noncustodial, suggesting that the *Trueber* court was not focused on the length of the detention involved. In fact, the court in *Trueber* never stated explicitly how long the detention lasted; the reader must assess the facts and reach that conclusion independently. Trueber was stopped and questioned for ten to fifteen minutes, and then questioned for an additional hour and twenty minutes in his hotel room. See id at 84–85.

91 See *Ali*, 68 F3d at 1471–73; *Smith*, 3 F3d at 1093, 1098.

92 See *Perdue*, 8 F3d at 1458–59, 1467 (describing the stop—which included forcing the defendant out of his car and onto the ground and questioning him at gunpoint—and the "rapidity with which the events unfolded").

93 See *United States v Newton*, 369 F3d 659, 664, 677 (2d Cir 2004).

94 See *United States v Pelayo-Ruelas*, 345 F3d 589, 591 (8th Cir 2003).

95 See *Leshuk*, 65 F3d at 1107, 1110 (describing a detention that seems to be roughly ten minutes long without stating how long it lasted).

96 See, for example, id at 1109–10 (focusing on the length of detention without explicitly stating the length of detention or how long would be too long).

97 *Oxford English Dictionary* 756 (Clarendon 2d ed 1989).

down? Was the subject free to leave, or was he restrained to the degree of arrest, such that he would not be allowed to leave?[98]

Furthermore, the other factors courts consider in custody determinations—those that this Comment's approach ignores, including location, language, and the extent to which the suspect is presented with evidence of his own guilt—appear to be attempts to ascertain the level of physical restraint applied to the suspect. On their own, these factors say nothing about the coercive nature of the encounter; it is only their capacity to physically restrain the suspect that makes these factors relevant to courts. For example, the location of the encounter is often a factor that courts consider in making custody determinations. But location is not relevant per se—encounters at police stations are not always custodial, and street encounters are not always noncustodial. Location makes a difference when it physically restrains or confines the suspect.[99] Otherwise, location is immaterial.

Therefore, "restraint" under this Comment's approach does not include the location of the encounter, other than aspects of that location that physically restrain the suspect, such as that it is a locked room. For the same reason, it does not consider language used by police.

Another reason for not considering factors such as the language used by the officers, the extent to which the suspect is confronted with his guilt, and the subjective impressions of the officer or the suspect is that these factors require interpretation of the officers and/or the suspect's subjective impressions, which the Supreme Court has forbidden.[100] The language used and the location of the encounter can be determined objectively, but their impact on whether the detention was custodial is often subjective. Courts often discuss whether the location was "neutral" or "familiar" to the suspect, on the theory that such locations are somehow less coercive.[101] This implicitly looks to the suspect's subjective impressions. Moreover, a court may misinterpret those impressions: an investigative detention in familiar territory

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98 See *Berkemer*, 468 US at 442 ("[A] single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.").

99 Compare, for example, *Beheler*, 463 US at 1125 (holding that a suspect is not in custody when he *voluntarily* accompanies police to a police station), with *Kim*, 292 F3d at 971 (holding that a suspect was in custody where she was *locked in her own store and not allowed to leave*). See also *United States v Martin*, 95 Fed Appx 169, 177 (6th Cir 2004) (unpublished opinion) (discussing the significance of the location of the stop in terms of whether it "confined" the suspect).

100 See *Stansbury v California*, 511 US 318, 323 (1994) (finding that the officer's subjective view of whether the person interrogated is a suspect is irrelevant to determining custody under *Miranda*).

101 See, for example, *Kim*, 292 F3d at 977 (discussing the effects of interrogating the suspect at her own place of business).

might be all the more coercive—it might be more frightening to be interrogated in your home or hotel room than at a police station because of the intrusion on private space.[102] It is hard to determine in the abstract what the location adds to the analysis.

Language may also be ambiguous. Short of saying "You are under arrest," much of what an officer says to a suspect could have multiple meanings, some implying restraint and some not. Still, leaving out language is controversial. It allows an officer to say to a suspect, "If you know what's good for you, you'll tell me everything I want to know." This threat would not qualify as "restraint" under this Comment's definition, which may be a substantial criticism. It is unlikely, however, that the Supreme Court would conclude that such words create custodial situations either. These words do not appear to restrain to the degree of a formal arrest, as required by *Beheler*. In the framework of this Comment, the degree of restraint implicit in such language does not constitute custody.

Another reason to ignore the other factors commonly used is that they complicate the analysis, and, inasmuch as duration and degree of restraint are doing most of the work in these cases, it is unnecessary at best (and obfuscating at worse) to include them.

Finally, this Comment's understanding of "restraint" draws on interpretations of the Fifth Amendment arguing that the amendment sets up its own hierarchy of physical restraint allowed by the government. The text of the Fifth Amendment suggests a range of permissible restraint from capital punishment (taking life) at the upper end to issuing a fine (taking property) at the lower end.[103]

Figure 1 lays out this Comment's hierarchy of restraint, which covers a narrow range of police encounters common to *Terry* stops. At the low end of the degree of restraint axis is "Multiple agents." Multiple officers imply physical force in a way that a single agent would not. Indeed, "Single agent" is not on Figure 1, because situations involving

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102 See, for example, *Payton v New York*, 445 US 573, 587 (1980) ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.") (internal quotation marks omitted).

103 See David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 Notre Dame L Rev 717, 722–23 (1999) (internal citations omitted):

> The Fifth Amendment . . . regulates the way in which the government applies its power to the individual. The clauses proceed in descending order of gravity for the individual affected by the government action—from a requirement for how the government may prosecute felonies (i.e., very serious crimes) to a purely civil matter, the taking of property. The Fifth Amendment thus sets forth, if only in broad outline, a hierarchy of restraints on how the power of the state is exercised, from irremediable capital punishment to the exercise of imminent domain [sic], easily to be remedied by a money payment.

just one officer, and no other form of physical restraint, would be like *Terry* or *Berkemer*—sidewalk or roadside stops in which there was no custody finding. When multiple agents are involved in a stop, it is because of the possibility that the suspect will need to be restrained.[104] By contrast, during an ordinary traffic stop, say for speeding, a reasonable person would not feel free to leave, but she wouldn't feel as if she was under arrest, either.[105]

At the high end of the degree of restraint axis is "Gunpoint." Like the presence of multiple officers, the tactic of holding suspects at gunpoint is used because of the possible need for physical restraint. Moreover, even though mere brandishing of a weapon does not physically "restrain" (like handcuffs or a locked room does), the *threat* of being shot might as well be physically restraining because of the fear it causes.[106] This is a threat of extreme violence, to be carried out if the suspect does not do as the officer commands. This kind of coercion says, "Tell me what I want to know, or I'll shoot you." This is well beyond the kind of coercion *Miranda* custody was designed to prevent. *Miranda* set the bar at coercion likely to make a person incriminate himself. This included, for example, subtle techniques such as "good-cop, bad-cop" interrogation that involved officers manipulating suspects into confessing, and fell far short of threats to shoot suspects. Still, it is important to note that, technically speaking, being held at gunpoint is just a proxy for physical restraint. The use of proxies for physical restraint on this axis reveals that the definition of "restraint" is rough around the edges.[107]

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104 Compare *United States v Acosta*, 363 F3d 1141, 1150 (11th Cir 2004) ("The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability."), quoting *Berkemer*, 468 US at 438–39.

105 See *Berkemer*, 468 US at 437:

> A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.

Berkemer notes that "no State requires that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate." Id at 437 n 26.

106 A suspect who is actually shot, as opposed to merely being threatened, likely has a more serious substantive due process claim than a *Miranda* violation claim, and therefore such a situation is not considered in this Comment. Consider generally *Chavez v Martinez*, 538 US 760 (2003) (holding that a suspect who was coercively interrogated after being shot did not have a claim for a *Miranda* violation but that a substantive due process claim should be considered on remand).

107 The definition of "force" faces similar ambiguities in the rape context. Catharine MacKinnon has argued that all sex that is not *mutual* should be considered rape, and the Akayesu tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are *coercive*. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 172–73 (Harvard 1989);

In the middle of the axis are "Handcuffs" and "Locked in a room." Reasonable minds may differ about which of these involves more restraint (and about where other forms of restraint should fall on the axis). Indeed, lower courts have differed on these points.[108] This Comment suggests that being locked in a room is more restraining, because, theoretically, a suspect could run away with handcuffs on. Not so when he is locked in a room. The latter is more like jail; the former is more like Officer McFadden's restraint of Terry. The psychological affront of being grabbed and handcuffed is not as coercive as being locked up. Under this view, being locked up is more likely to induce a suspect to incriminate himself because it involves a greater degree of restraint. However, this conclusion may depend on an intuition that being locked up generally lasts longer than being handcuffed. In addition to being a potentially false assumption, this gets away from the degree of restraint axis and back to the duration axis. It is plausible that, if duration is held constant, a reasonable person would find being handcuffed more coercive than being locked in a room, if only because handcuffs are so physically uncomfortable.

The cases don't help this determination. They don't support or undercut the contention that being locked in a room is more coercive than being handcuffed. The cases don't agree that being handcuffed or locked in a room (or held at gunpoint, for that matter) is coercive at all. Furthermore, courts confront factual situations involving myriad variations of restraint. A suspect may be handcuffed and placed in an unlocked room, or handcuffed and held at gunpoint, or held at gunpoint by multiple officers. This Comment does not attempt to address these admittedly difficult situations. Instead, it lays out a hierarchy of restraint based on the level of physical control the government has over the suspect, and includes in that hierarchy categories of conduct common to *Terry* stops.

B. De Facto Arrest

The Supreme Court's de facto arrest cases address when an investigative stop becomes a "de facto arrest." They acknowledge that, even if the police officer does not formally arrest the suspect, the officer's conduct, if it is sufficiently restraining, may transform a *Terry* stop into

Rwanda International Criminal Tribunal Pronounces Guilty Verdict in Historic Genocide Trial, UN Doc Press Release AFR/94 L/2895 (Sept 2, 1998), available at http://www.un.org/News/Press/docs/1998/19980902.afr94.html (visited June 7, 2006). But both of these definitions beg the questions: What is "mutual"? What is "coercive"?

108 Compare *Leshuk*, 65 F3d at 1109 (finding that handcuffs are not a sufficient restraint to create custody), with *Newton*, 369 F3d at 676 (finding that "[h]andcuffs are generally recognized as a hallmark of a formal arrest").

a de facto arrest requiring probable cause.[109] These cases do not address *Miranda* custody—their focus is whether there was a Fourth Amendment violation, not whether that violation compelled the suspect to self-incriminate—but the factual determination is the same, and therefore they provide guidance for custody determinations and support this Comment's approach.

The de facto arrest cases identify a list of factors for determining when a *Terry* stop becomes a de facto arrest. These factors mirror those used by lower courts in making custody determinations, but they also provide support for the rule proposed here because they tend to focus on the degree and duration of restraint at issue. For example, where suspects are taken involuntarily to a police station,[110] or to a private, locked room,[111] the Court focuses on those restraints and not on the length of detention; the suggestion is that the length of detention could be very brief, and the situation would still be deemed custodial because of the degree of restraint used.[112] On the other hand, where the degree of restraint is relatively minimal, the situation often is not deemed custodial unless the Court determines that the detention has gone on too long.[113]

In *Dunaway v New York*,[114] the Court found that the defendant had been subject to a de facto arrest because he was taken from a private dwelling, transported unwillingly to the police station, and subjected to custodial interrogation resulting in a confession—all based on reasonable suspicion, not probable cause.[115] The Court held that this exceeded the limits of *Terry*. The court focused on the fact that the suspect was taken unwillingly to the police station. This emphasis on location was more about physical restraint or control over the suspect

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109 It bears considering that not all de facto arrests are deemed custodial, and not all custodial arrests involve interrogation. See generally, for example, Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 Yale L & Pol Rev 381 (2001) (discussing the difficulty in determining when an arrest has occurred justifying a search incident to arrest).

110 See *Dunaway v New York*, 442 US 200, 216 (1979).

111 See *Florida v Royer*, 460 US 491, 502–03 (1983).

112 Compare *Leshuk*, 65 F3d at 1109–10:

> A brief but complete restriction of liberty is valid under *Terry*. . . . Instead of being distinguished by the absence of any restriction of liberty, *Terry* stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion. . . . From these standards, we have concluded that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes.

113 See *Place*, 462 US at 709–10 (finding a ninety-minute detention of luggage unreasonable though no restraint of the person appeared to be involved).

114 442 US 200 (1979).

115 See *United States v Sharpe*, 470 US 675, 684 n 4 (1985) (construing the facts of *Dunaway*).

than it was about location per se. Likewise, in *Florida v Royer*,[116] the Court held that a defendant detained for fifteen minutes in a small room at an airport, while police searched his luggage for narcotics, was under de facto arrest.[117] *Royer* emphasized that investigative stops must be brief, but given that this stop *was* brief, it seems that the degree of restraint involved was significant to the Court.

At the other end of this spectrum, in *United States v Place*[118] the Court held that ninety minutes was too long for a *Terry* stop.[119] *Place* involved a seizure of luggage, but the Court treated it as a seizure of the suspect who owned the luggage.[120] The Court held that an investigative seizure of personal property could be justified under *Terry* in the right circumstances, but that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause."[121] There was no corresponding discussion of the degree of restraint used. This conclusion, too, supports the proposed approach: the detention was too lengthy, so it did not matter that little restraint was used.[122]

Finally, in *United States v Sharpe*,[123] the Court attempted to tie the earlier de facto arrest cases together, but determined that creating a workable rule to apply in later cases was probably not possible.[124] Inasmuch as *Sharpe* warned against fashioning such a rule, it could be said to cut against this Comment's proposed approach. But, like this Comment, *Sharpe* did focus on two factors, one of which is shared by this Comment's approach. *Sharpe* focused on the length of detention, and, like *Terry*, on the balance between law enforcement needs and the suspect's Fourth Amendment rights.[125] Thus, *Sharpe* lends support to the Comment's approach as well.

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116 460 US 491 (1983).

117 Id at 503. See also id at 500 (noting that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop").

118 462 US 696 (1983).

119 Id at 709.

120 Id at 709–10.

121 Id at 709.

122 However, in a later case, the Court emphasized that:

> [T]he rationale underlying [the conclusion in *Place*] was premised on the fact that the police knew of respondent's arrival time for several hours beforehand, and the Court assumed that the police could have arranged for a trained narcotics dog in advance and thus avoided the necessity of holding respondent's luggage for 90 minutes.

Sharpe, 470 US at 684–85.

123 470 US 675 (1985) (finding that a twenty-minute detention was reasonable because it was a diligent investigation by a Drug Enforcement Administration agent with no unnecessary delay).

124 See id at 685.

125 See id, quoting *Place*, 462 US at 709:

C. Applying the Rule to Existing Cases

This Part applies the proposed approach to four lower-court cases, and argues that some are incorrectly decided because they did not focus on the inverse relationship between the degree and duration of restraint. Under this Comment's proposal, cases holding that reasonableness under *Terry* means no custody under *Miranda* are more likely to be wrongly decided. This is because courts on that side of the circuit split are less likely to consider the coerciveness of the facts in question once they determine that the stop was reasonable.[126] However, certain courts on the other side of the split—those holding that a stop may be custodial under *Miranda* and still be valid under *Terry*—are wrong under this Comment's approach, too. This is because these courts allow police to take suspects into custody on less than probable cause, in violation of the Fourth Amendment. All of these courts fail to consider the most relevant factors—degree and duration of restraint—closely.

Though it is a close case, the Second Circuit should not have found custody in *United States v Newton*,[127] even though Newton was handcuffed and detained by multiple officers, because his detention was so brief—less than one minute.[128] Had he been detained twenty minutes longer, the number of officers and the handcuffs clearly would have made this detention custodial; had the officers drawn their guns or physically restrained him, the brief duration would not have kept this detention from being custodial. But on its facts, the case does not involve a sufficient degree or duration of restraint to constitute custody.[129]

> While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.

126 See *Pelayo-Ruelas*, 345 F3d at 592; *Trueber*, 238 F3d at 92; *Leshuk*, 65 F3d at 1110.

127 369 F3d 659 (2d Cir 2004).

128 Id at 664.

129 As for the other cases on this side of the circuit split, *Kim* correctly found custody where the defendant was locked in her place of employment (separated from her husband and son) and questioned by several police officers, for a total of three hours. 292 F3d at 976. *Ali* correctly remanded for reconsideration a finding of noncustody where the defendant had his ticket, boarding pass, and passport taken away, was pulled aside into an adjacent corridor or jetway at an airport, and was questioned by seven customs officials with five weapons showing, for fifteen minutes. 68 F3d at 1472. *Smith* incorrectly found a reasonable *Terry* stop but correctly found custody where the suspects were handcuffed, and the "officers outnumbered the [five] suspects," who were questioned for fifteen to twenty minutes. *Smith*, 3 F3d at 1092. A police encounter cannot constitutionally be both custodial under *Miranda* and reasonable under *Terry*. See text accompanying notes 11 and 82. *Perdue* also found custody for a reasonable *Terry* stop where two officers pulled over two suspects and held them at gunpoint on the ground while police helicopters circled overhead, throughout questioning for five minutes. *Perdue*, 8 F3d at 1464–65. Again,

By contrast, *United States v Pelayo-Ruelas*[130] was rightly decided, even though it was wrongly analyzed. The facts clearly point to noncustody, though not merely because they were reasonable under *Terry*. Multiple officers asked the suspect to leave his vehicle, conducted a pat-down search for weapons, and questioned him for thirty minutes.[131] During this time, an agent got written consent to search the car and had a drug dog brought in, but used no other restraints. The degree and duration of restraint put this case in the noncustody zone.[132] The court should have analyzed the case for degree and duration of restraint, and not simply concluded that, because the police conduct was reasonable, the stop was noncustodial.

Trueber involved a much higher degree of restraint over a longer period of time than did *Pelayo-Ruelas*. At least two agents and two police officers pulled Trueber over after receiving a tip that he possessed cocaine; one officer had his gun drawn as he approached the car. The detention lasted a total of ninety minutes, and included both a traffic stop and a search of Trueber's hotel room. All told, five law enforcement officers were involved. The district court found that, because there was probable cause to arrest Trueber from the moment police pulled him over and because they intended to arrest him, he deserved *Miranda* warnings.[133] But the appeals court disagreed,[134] finding reasonable suspicion to justify pulling over the truck, and that the limited detention and search did not escalate beyond its original justification, so that it did not warrant *Miranda* warnings.[135] The court focused on its perception of the reasonableness of the detention, and not on whether the detention was custodial. The length of the detention and the amount of force used put this case well into the custody zone under this Comment's proposed approach.

Finally, *Leshuk* also was wrongly decided; the court should have determined that the stop was custodial. The defendants were stopped in the woods one mile off the road by two officers and an armed turkey hunter.[136] The hunter threatened to shoot their dog.[137] The officers

while this encounter was unquestionably custodial, it should not have been deemed reasonable under *Terry*. Custody requires probable cause.

130 345 F3d 589 (8th Cir 2003) (finding that a suspect is not in custody when an investigative stop is reasonable).

131 Id at 591.

132 See id at 593.

133 See *Trueber*, 238 F3d at 92.

134 See id ("The subjective intent of the agents is not relevant to either part of the inquiry: it does not impact the validity of the initial investigative stop, and it has no bearing on determining whether police conduct transformed an investigative stop into a de facto arrest.").

135 See id at 93, 95.

136 See *Leshuk*, 65 F3d at 1107.

137 See id.

did not read them their rights until they had walked back to the road, one of the defendants had tried to run, and an officer caught him.[138] The court did not say, but a conservative estimate would put the detention at twenty to thirty minutes. This adds up to custody because of the duration, the number of detainers, and the prominent presence of the gun (the threat to shoot the dog is perhaps a plus factor). Furthermore, the location in this encounter possibly may be considered a form of physical restraint because there was no place for the suspects to go. In that respect, location in this case is somewhat like a locked room. But this argument stretches this Comment's proposed approach a bit. It is enough to say that the degree and duration of restraint, without consideration of location, made the encounter custodial, but the court held otherwise.[139]

III. CRITIQUE

Criticism of the proposed approach likely will focus on the legitimacy of the degree of restraint factor, and it may take two tacks: first, that it is an arbitrary bright line rule, and second, that the points may be manipulated to achieve desired outcomes. Parts III.A and III.B address these criticisms in turn.

A. The Danger and Appeal of a Bright Line Rule

This Comment's approach attempts to achieve some of the benefits of a bright line rule (primarily increased predictability and decreased cost of decision) without the attendant costs (arbitrariness or over- and underinclusiveness). It attempts to establish an intelligible principle that courts can follow (and that people can use to plan their behavior), without leading to arbitrary results.

A true bright line rule in this area of law would be devastating to many criminal defendants. Bright line rules are characteristically both over- and underinclusive. That means the rate of error is higher than with an individualized determination. The cost of that error is large (freedom is at stake), so we want judges to be able to make case-by-case determinations, and that requires discretion. Indeed, the Supreme Court has resisted creating a bright line rule for determining whether a *Terry* stop is reasonable because "common sense and ordinary human experience must govern over rigid criteria."[140]

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138 See id.

139 See id at 1110.

140 *Sharpe*, 470 US at 685:

> Admittedly, *Terry*, *Dunaway*, *Royer*, and *Place*, considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a de facto

But this Comment's approach is not a bright line rule. If bright line rules are on one side of a pendulum's swing, then courts, in eschewing such rules in custody cases, have swung too far the other way. What courts have now is a standardless standard. This Comment's proposal attempts to bring courts back to the middle, to an intelligible principle to guide decisionmaking without leading to arbitrary results. In that vein, the proposal instructs courts to focus on the inverse relationship between the degree and duration of restraint. But it sets no time limits and it proscribes no conduct as per se custodial. It merely ties the two factors together and argues that consideration of their inverse relationship will lead to more predictable, uniform results.

A potential further attack is that this retreat from a bright line rule merely puts us back at square one, with the totality of the circumstances test courts currently use. This is a slippery slope argument: if this Comment's approach doesn't *actually bar* consideration of more than just the two primary factors, then what is to prevent consideration of more than the two primary factors? What is to prevent consideration of *every conceivable* factor? But the slope need not slip. It is possible to focus on the degree and duration of restraint exclusively. More important, it is not disastrous to this approach if the slope does slip a little. In other words, progress has still been made if a court balances the degree and duration of restraint, and then adds another factor to the balance—the presence of a police dog, for instance, or the presence of multiple kinds of restraint. This still counts as progress because, before this Comment's approach, courts were not operating within any guiding framework, much less explicitly focusing on the inverse relationship between degree and duration of restraint. Once they start doing that, secondary consideration of other factors does not return them to the standardless test they formerly used.

> arrest. Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops. . . . Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

See also Richard A. Williamson, *The Virtue (and Limits) of Shared Values: The Fourth Amendment and* Miranda*'s Concept of Custody*, 1993 U Ill L Rev 1, 386 (internal quotation marks and citations omitted):

> [C]ourts must recognize that the Fourth Amendment's command that seizures of people be reasonable cannot be implemented fully simply by use of a clock and a yardstick. Qualitative as well as quantitative interests define the nature of our right to be free of unreasonable seizures. The reasonableness of a seizure depends on not only when [it] is made but also how it is carried out. Thus, in categorizing a seizure, courts must consider the amount of force applied or threatened.

Another aspect of this criticism is that it is arbitrary to focus only on these two factors. But these are the factors that matter most.[141] Language may seem equally important. Certain threats ("I'm going to shoot you if you don't talk") may be almost as coercive as being held at gunpoint. Location may also seem equally important. But location and language are not relevant per se. They are only relevant inasmuch as they approximate physical restraint. Furthermore, consideration of these factors beyond their capacity to physically restrain entails consideration of subjective impressions, which the Supreme Court forbids in this context. And it complicates when one goal of this Comment's approach is to simplify. Consideration of more than two factors would keep courts in the totality of the circumstances morass where they currently find themselves. Why not simplify further, and apply just one factor? There is no single characteristic that, if present, makes a *Terry* stop custodial.[142] The inversely related factors of degree and duration of restraint balance these two extremes.

B. Susceptible to Manipulation

Perhaps, though, far from being too rigid, this rule is actually just as vague and ad hoc as the totality of the circumstances analysis courts already apply. This would be the case if it simply grouped every factor but "duration" under "degree." To avoid this problem, the approach disciplines consideration of the degree of restraint. It focuses only on physical restraints of the suspect, and creates a hierarchy of restraint that orders the relevant police conduct according to how severely it restrains the suspect's freedom of movement. Admittedly, a degree of subjectivity is involved in placing different kinds of police conduct in a hierarchy. The proposal is that multiple agents are less restraining than (perhaps yelled threats, which are less restraining than) handcuffs, which are less restraining than being locked in a room, which is less restraining than being held at gunpoint. But this is based in part on intuition, and there is room for discussion here. Reasonable minds may differ on whether being physically manhandled by a police officer involves more force than being held in an isolated room, or being held at gunpoint.

This Comment addresses this problem first by defining "restraint" and second by defining each category of restraint that appears as a point on the degree of restraint axis. However, the curve created by

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141 See, for example, *Smith*, 3 F3d at 1095 ("We have held that a stop is reasonable when the degree of suspicion is adequate in light of the *degree and duration of the restraint*.") (emphasis added), citing *United States v Chaidez*, 919 F2d 1193, 1198 (7th Cir 1990).

142 See *Smith*, 3 F3d at 1095–96.

the fixed points on each axis is not a mathematical function of those points. It would be impossible (and generally unnecessary) for courts to calibrate precisely where each case should fall on the curve. Instead, the rule is meant to give a firm sense of what degree of restraint each category of behavior constitutes, so that courts may balance the degree of restraint with the duration of the detention and compare its balancing to that in other cases.

CONCLUSION

This Comment proposes a new approach for determining *Miranda* custody in cases involving ostensibly reasonable *Terry* stops. It argues that courts should consider the degree of restraint in conjunction with its duration, thus eliminating the confusion of the totality of the circumstances test currently used to determine custody. This should simplify the custody determination and put cases into context. It will help courts return to the original purposes of *Miranda* and *Terry*: to maintain individual dignity by protecting suspects from coercive interrogation, to maintain privacy by protecting suspects from unreasonable government intrusion, and, at the same time, to allow police to do their jobs safely.

APPENDIX

Custody Cases	Degree[143]	Duration of Police Encounter[144] (in minutes)
Berkemer v McCarty, 468 US 420, 437 (1984)	1	**6**[145]
California v Beheler, 463 US 1121, 1122 (1983)	1	30
United States v Thomas, 142 Fed Appx 896, 900 (6th Cir 2005)	1	5
United States v Teemer, 394 F3d 59, 66 (1st Cir 2005)	1	30
United States v St. Germain, 107 Fed Appx 91, 92–93 (9th Cir 2004)	1	20
United States v Martin, 95 Fed Appx 169, 177 (6th Cir 2004)	1	**5**
United States v Newton, 369 F3d 659, 664 (2d Cir 2004) (finding custody)	3	1
United States v Acosta, 363 F3d 1141, 1149-50 (11th Cir 2004)	2.5	20–30
United States v Pelayo-Ruelas, 345 F3d 589, 592 (8th Cir 2003)	2	30
United States v Swanson, 341 F3d 524, 529 (6th Cir 2003)	2	10
United States v Hernandez-Hernandez, 327 F3d 703, 706 (8th Cir 2003)	2	**10**
United States v Kim, 292 F3d 969, 976 (9th Cir 2002) (finding custody)	4	180
United States v Trueber, 238 F3d 79, 92 (1st Cir 2001)	2.5	90
United States v Speal, 166 F3d 350, 1998 US App LEXIS 31656, *1 (10th Cir) (unpublished)	2	**10**

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143 The numbers used to characterize degree of restraint correlate to the following police behaviors:

Degree of Restraint	
Multiple agents	1
Yelled threats	2
Handcuffs	3
Locked room	4
Gunpoint	5

144 Duration is measured from the time the officer(s) first interacts with the suspect face to face until the encounter ends, which is usually when the suspect is formally arrested.

145 Numbers in bold are estimates of the length of detention based on the facts as described by the court, where the court did not state how long the detention lasted.

APPENDIX (CONTINUED)

United States v Sullivan, 138 F3d 126, 129 (4th Cir 1998)	1	20
United States v Leong, 116 F3d 1474, 1997 US App LEXIS 15480, *1 (4th Cir) (unpublished) (finding custody)	2	5
Washington v Lambert, 98 F3d 1181, 1183–85, 1192 (9th Cir 1996) (finding custody)	5	**12**
United States v Ali, 68 F3d 1468, 1472 (2d Cir 1995) (finding custody)	2.5	15
United States v Leshuk, 65 F3d 1105, 1110 (4th Cir 1995)	2.5	**10**
United States v Johnson, 64 F3d 1120, 1123, 1126 (8th Cir 1995)	2.5	15
United States v Perdue, 8 F3d 1455, 1459 (10th Cir 1993) (finding custody)	5	**5**
United States v Griffin, 7 F3d 1512, 1515 (10th Cir 1993) (finding custody)	4	15
United States v Smith, 3 F3d 1088, 1097 (7th Cir 1993) (finding custody)	3	20
United States v Richardson, 949 F2d 851, 859 (6th Cir 1991) (finding custody)	2	20