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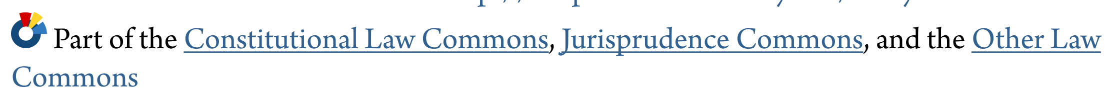
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MIRANDA WARNINGS AND *TERRY* STOPS: ANOTHER PERSPECTIVE

Eugene L. Shapiro[*]

There is no doubt that the federal Courts of Appeals are grappling with the issue of whether an investigative stop upon less than probable cause under *Terry v. Ohio*[1] may sometimes involve a need for *Miranda* warnings prior to questioning. During recent years, a number of insightful commentators have discussed the increasingly intrusive nature of permissible *Terry* stops,[2] and have viewed the judicial debate as preoccupied with the continuing vitality of the Supreme Court's generalized 1984 statement in *Berkemer v. McCarty*,[3] which noted that *Miranda* warnings had always been deemed unnecessary during such encounters.[4] The current holdings among the circuits have often been regarded as being roughly equally divided on the issue.[5]

Despite the prominence that *Berkemer*'s twenty-six-year-old observation has been given in the discussion, it is the view of this commentary that post-*Berkemer* analyses by the Supreme Court concerning the *Miranda* "in custody" determination have had a singular influence upon judicial developments. There is now a very noticeable trend among the circuits towards the recognition of the appropriateness of *Miranda* warnings during some *Terry* stops.

THE DEVELOPMENT OF THE CONCEPT OF CUSTODY IN *THOMPSON V. KEOHANE* AND *YARBOROUGH V. ALVARADO*

While *Miranda*'s central concern was, of course, that custodial interrogation exerts inherently coercive pressures that threaten to improperly influence a suspect's relinquishment of the privilege against self-incrimination, the opinion itself was famously general in its description of the restraints that would constitute the circumstances requiring administration of its protective warnings. In *Miranda*, the Court stated that, "[b]y custodial interrogation," it meant 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."[6] By 1984, it became

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1. 392 U.S. 1 (1968).
2. *See* Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); Katherine M. Swift, Comment, *Drawing a Line Between* Terry *and* Miranda: *The Degree and Duration of Restraint,* 73 U. CHI. L. REV. 1075 (2006); Michael J. Roth, Note, Berkemer *Revisited: Uncovering the Middle Ground Between* Miranda *and the New* Terry, 77 FORDHAM L. REV. 2779 (2009).
3. 468 U.S. 420 (1984).
4. *Id.* at 439-40; *see generally* Godsey*, supra* note 3 at 715-17; Roth*, supra* note 3 at 2803-06.
5. *See generally* Roth*, supra* note 3 at 2812-24.
6. *Miranda*, 284 U.S. at 444.

evident to the Court that not all instances of police detention would trigger the concerns addressed in *Miranda*. In *Berkemer v. McCarty*,[7] it had occasion to address the issue of "whether the roadside questioning" before a formal arrest "of a motorist detained pursuant to a routine traffic stop should be considered 'custodial interrogation.'"[8]

Berkemer had been stopped after a state trooper observed his erratic driving, and when he left the vehicle the officer noted that he had difficulty standing.[9] The officer then concluded that Berkemer would be charged with a traffic offense and his freedom to leave was terminated.[10] Berkemer was not, however, told that he would be taken into custody, and he then failed a field sobriety test.[11] Before Berkemer's arrest, he was asked if he had been using intoxicants and he admitted having consumed two beers and marijuana shortly before.[12] He was then placed under arrest and was transported to jail, where he made additional incriminating statements.[13] At no point was Berkemer advised of his *Miranda* rights.[14] Berkemer was charged with the misdemeanor of operating a vehicle while under the influence, and he moved to suppress both his pre-arrest and post-arrest statements on the grounds that *Miranda* warnings had not been administered.[15] The motion was denied, Berkemer pleaded "no contest," and he was convicted.[16] The Ohio Court of Appeals affirmed Berkemer's conviction on the ground that *Miranda* was not applicable to misdemeanors.[17] The Ohio Supreme Court dismissed Berkemer's appeal as "fail[ing] to present a 'substantial constitutional question.'"[18] Berkemer then filed a motion for a federal writ of habeas corpus, and relief was denied in the federal district court.[19] The Court of Appeals for the Sixth Circuit reversed, holding that, with regard to the post-arrest statements, *Miranda* warnings were required for the misdemeanor traffic offense.[20] The opinion was unclear with regard to the pre-arrest statements, stating without specificity that "at least some [of them] were inadmissible."[21]

In an opinion written by Justice Marshall, the Supreme Court unanimously concluded that *Miranda* is applicable to an interrogation after an arrest for a misdemeanor traffic offense, and Berkemer's post-arrest statements should have been suppressed.[22] Writing for eight Justices, Justice Marshall then turned to the

7. 468 U.S. 420 (1984).
8. *Id*. at 435.
9. *Id.* at 423.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*. at 423-24.
15. *Id.* at 424.
16. *Id*.
17. *Id*. at 425.
18. *Id*. at 425.
19. *Id*.
19. McCarty v. Herdman, 716 F. 2d 361, 364 (6th Cir. 1983).
21. *Id*.
22. *Berkemer*, 468 U.S. at 434.

question of the admissibly of Berkemer's roadside statements before his arrest.[23] Addressing the language of *Miranda*, the Court "acknowledged at the outset that a traffic stop significantly curtails the 'freedom of action'"[24] of the occupants of the vehicle, but "decline[d] to accord talismanic power" to the phrase in *Miranda*'s description of custody, quoted above.[25] Rather, the Court focused upon whether the restraint inherent in an ordinary traffic stop "exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights."[26]

The Court found two features of such a stop which mitigate such a danger. First, the detention of a motorist "is presumptively temporary and brief."[27] The Court went on to discuss the perceptions of a motorist during such an encounter:

> 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. . . . In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.[28]

Secondly, the Court observed that "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police."[29] The Court added that, while some pressure on the detainee to respond to questions was created by both "the aura of authority surrounding an armed, uniformed officer" and knowledge of an officer's discretion concerning issuance of a citation, other characteristics of the stop "substantially offset these forces."[30] The public nature of the stop both reduces an officer's ability to use illegal means to obtain a statement and "diminishes the motorist's fear that, if he does not cooperate, he will be subject to abuse."[31] The typical presence of only one or two officers "further mutes [the motorist's] sense of vulnerability," and the atmosphere is "substantially less 'police dominated'" than the interrogations discussed in *Miranda* and cases applying its doctrine.[32]

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23. *Id.* at 435. Justice Stevens did not join this portion of the opinion, as he did not view the issue as within the question presented by the petition for certiorari or necessary for the disposition of the case. *Id.* at 445-46.
24. *Id.* at 436.
25. *Id.* at 437.
26. *Id.*
27. *Id.*
28. *Id.* at 437-38 (citing *Miranda*, 384 U.S. at 451) (footnote omitted).
29. *Id.* at 438.
30. *Id.*
31. *Id.*
32. *Id.* at 438-39.

It is at this point in its opinion that the Court alluded to its past treatment of *Terry* stops with the following broad generalizations:

> In both of these respects, the usual traffic stop is more analogous to a so-called "*Terry* stop," than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." . . ." [The] stop and inquiry must be 'reasonably related in scope to the justification for their initiation." Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.[33]

The Court concluded that the "similarly noncoercive" character of an ordinary traffic stop led it "to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*."[34] As noted earlier, in the view of some,[35] it is this passage in *Berkemer* which, in light of the increasingly intrusive nature of permissible *Terry* stops, has calcified the view of many courts on the subject of *Miranda* warnings and dominated the discussion in this area.

By the time that *Berkemer* was decided, when discussing custody in other contexts, the Court had been emphasizing terminology which invoked reference to the Fourth Amendment concept of arrest. Most significant was the Court's dictum in *California v. Beheler*,[36] which was later expressly endorsed by the Court[37] and which, to this day, forms a very important component in the Court's approach.

The dictum in *Beheler* appeared to arise almost as a judicial afterthought. The case had involved a murder by Beheler's companion and step-brother following an unsuccessful attempt to steal drugs from the victim.[38] After the killing, Beheler called the police.[39] When they arrived, Beheler identified the killer, admitted that he had witnessed the hiding of the gun, and consented to a search which revealed the weapon.[40] Soon afterward, Beheler voluntarily agreed to accompany the police

33. *Id*. at 439-40 (footnotes and citations omitted).
34. *Id*. at 440.
35. *See* Godsey, *supra* note 3; Swift, *supra* note 3; *Roth, supra* note 3.
36. 463 U.S. 1121 (1983).
37. *See* Minnesota v. Murphy, 465 U.S. 420, 430-31 (1984).
38. 463 U.S. at 1122.
39. *Id*.
40. *Id*.

to the station house and was specifically told that he was not under arrest.[41] At the station, Beheler's conversation with the police lasted less than thirty minutes, and he was not advised of his *Miranda* rights.[42] He returned to his home and was arrested five days later.[43] Beheler was then advised of his *Miranda* rights, waived them, and acknowledged in a second taped confession that his earlier statements had been voluntary.[44] The trial court held that *Miranda* rights were not required before the first interview, and both statements were admitted into evidence at Beheler's trial for first degree murder.[45] He was convicted as an accessory.[46] In a per curiam opinion, the Supreme Court stated that the question of whether warnings had been required before the first statement had clearly been settled by its past decisions,[47] and that it was "beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action."[48] In fact, the Court added, "Beheler's freedom was not restricted in any way whatsoever."[49]

The Court went on to discuss custody generally, and, implicating Fourth Amendment concepts, stated: "[a]lthough the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[50] Before *Berkemer*, this dictum was cited again by the Court as the appropriate standard for determining "custody,"[51] and, predictably, the meaning of *Beheler*'s phrase "of the degree associated with a formal arrest" will, for some courts, continue to be a fertile ground for discussion.

In 1995 and 2004, in *Thompson v. Keohane*[52] and *Yarborough v. Alvarado*[53] respectively, *Beheler*'s approach was refined by the Court in a manner that has a significant bearing upon the question of *Miranda* warnings and intrusive and potentially coercive *Terry* stops. The analytical approaches of these cases has brought some, though certainly not all, Courts of Appeals to a consideration of the issue, which reaches well beyond the question of whether *Berkemer*'s generalization about *Terry* stops is outmoded, and has reinforced a trend towards expanded perceptions of *Miranda*'s applicability.

In *Thompson*, Justice Ginsburg, writing for the Court, discussed the standard for determining custody in the context of considering whether a state court's determination that a defendant was not in custody for purposes of *Miranda* is a finding of fact which is entitled to a presumption of correctness under the federal

41. *Id*. at 1123.
42. *Id*.
43. *Id*.
44. 463 U.S. at 1123.
45. *Id*.
46. *Id*.
47. *Id*. at 1121-22.
48. *Id*. at 1123.
49. *Id*.
50. *Id*. at 1125.
51. *See* Minnesota v. Murphy, 465 U.S. 420, 430-31 (1984).
52. 516 U.S. 99 (1995).
53. 541 U.S. 652 (2004).

habeas corpus statute.[54] The Court held that the determination of custody does not warrant the presumption because it is a mixed question of law and fact requiring independent review on federal habeas.[55] *Thompson* was decided in a non-*Terry* context. Thompson had undergone a two hour interrogation session at state trooper headquarters.[56] Concluding that an "in custody" determination falls among those issues possessing a "uniquely legal dimension [,]"[57] the Court augmented the description of the basic inquiry described in *Beheler*:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*. . . .[58]

The Court noted that, while the first inquiry was clearly factual, the second called for the application of the legal standard to historical fact, presenting a "mixed question of law and fact" requiring independent review.[59]

The Court's discussion of "the crucial question" as involving an evaluation of a "reasonable person[s']" perceptions included a parenthetical which quoted *Berkemer's* statement that a "court must assess 'how a reasonable man in the suspect's position would have understood his situation [.]'"[60] Specifically, the Court said: "But the crucial question entails an evaluation made after determination of those circumstances: if encountered by a 'reasonable person,' would the identified circumstances add up to custody as defined in *Miranda*? See *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (court must assess 'how a reasonable man in the suspect's position would have understood his situation' . . . .)." [61] While in *Berkemer* this statement had been made in the context of the Court's rejection of the notion that an officer's uncommunicated intent during a traffic stop was significant, in *Thompson* the Court viewed it as buttressing its conclusion that assessing a reasonable person's perception is a *critical* aspect of an "in custody" determination generally. It is of course this discussion of a reasonable person's perceptions which brings the inquiry concerning *Terry* stops well beyond the brief generalization about such stops in *Berkemer*. It now provides a significant part of

54. 516 U.S. at 99, 102.
55. *Id.* at 106-07. Justice Thomas and Chief Justice Rehnquist dissented. *Id.* at 116-21. (Thomas, J. joined by Rehnquist, Ch. J., dissenting).
56. *Id.* at 101-03.
57. *Id.* at 112-13.
58. *Id.* at 112 (footnote omitted) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).
59. *Id.* at 101.
60. *Id.* at 113-114.
61. *Id.* (footnote omitted).

the focus in the lower courts for evaluating those stops which are potentially coercive.

Thompson has not been alone among the Supreme Court's analyses in emphasizing the importance of considering a reasonable person's perception during an "in custody" determination. In *Yarborough v. Alvarado*,[62] in which the Supreme Court also assessed a non-*Terry* station house interview, the Justices' conclusions concerning a reasonable interviewee's perception formed the centerpiece for a 5-4 difference of opinion among the members of the Court. Moreover, the opinion of the Court in *Alvarado* made it expressly clear that *Berkemer*'s earlier "in custody" consideration of a traffic stop had indeed involved just such an inquiry – an observation of even more significance because the driver's freedom "to leave" had there been clearly recognized as, in fact, nonexistent.[63] *Alvarado*'s discussion consequently reinforces the importance of *Thompson*'s language concerning a reasonable person's feeling that "he or she was not at liberty to terminate the interrogation."[64] This aspect of *Alvarado* facilitates the conclusion of some that, during a *Terry* stop in which the suspect is not free to go, the emergence of intrusive police measures can still form an important part of the *Thompson-Alvarado* "in custody" inquiry when examined in light of *Miranda*'s concern with coercive influences.

The context of the Court's discussion in *Alvarado*, another federal habeas corpus case, was its consideration of whether the Ninth Circuit had correctly concluded that a California court had unreasonably applied clearly established federal law when it held that Alvarado was not in custody under *Miranda*.[65] Alvarado had been a juvenile, just under 18, who had participated in an attempt to steal a truck when its driver was shot and killed by his accomplice.[66] Acting upon information apparently supplied by other teenagers who were nearby, a Los Angeles County sheriff's detective left a message that she wished to speak with Alvarado at his home and at his mother's workplace. He was brought to the sheriff's station at about noon by his parents, and they waited in the lobby while the interview was conducted in a small room.[67] The interview, which occurred about a month after the killing, lasted approximately two hours and Alvarado was aware that it was being recorded.[68] No *Miranda* warnings were given.[69] At first, in response to the detective's request for an account of his activities on the night in question, Alvarado presented only a general description of his having had alcohol with some friends and their going to a nearby mall to use the telephones. The

62. 541 U.S. at 652 (2004).
63. *See Berkemer*, 468 U.S. at 425.
64. *See* 541 U.S. at 663 (citing Thompson v. Keohane, 516 U.S. 99, 133 (1995)).
65. *Id.* at 655. With regard to an adjudication by a state court, the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (d)(1) (2006), provides that a writ of habeas corpus may be granted if a state court judgment "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."
66. 541 U.S. at 655-56.
67. *Id.* at 656. It was contended that they unsuccessfully sought to accompany Alvarado. *Id.*
68. *Id.*
69. *Id.* at 659.

detective's reply asked him about the shooting, and after he denied having seen it, the detective remarked that witnesses were saying "quite the opposite."[70] Alvarado gradually changed his story, at first stating that he was present during the attempted carjacking but denying knowledge of the details of the event.[71] Eventually, Alvarado acknowledged that he had helped another man attempt to steal the truck by standing near the door on the passenger side. He identified the other person as Paul Soto, adding that he knew that Soto was armed.[72] Alvarado said that he had helped hide the gun afterward,[73] and that he had expected Soto to use the gun to intimidate the driver but had not expected Soto to kill him.[74] Alvarado twice declined to take a break at the invitation of the detective, and after the interview he drove home with his father.[75]

Alvarado and Soto were tried for first-degree murder and attempted robbery. Alvarado moved to suppress his statements at the sheriff's station on the basis of *Miranda*. The motion was denied on the ground that the interview was non-custodial, and when Alvarado testified in his defense, he was cross-examined with the use of the statements.[76] During the examination, Alvarado agreed that the interview "was a pretty friendly conversation," that there was "sort of a free flow between [him] and [the detective]," and that he "did not 'feel coerced or threatened in any way'" during the conversation.[77] He and Soto were convicted by the jury of first-degree murder and attempted robbery, and Alvarado's homicide conviction was later reduced by the trial court due to his comparatively minor role.[78] The District Court of Appeal, considering the standard in *Thompson*, rejected Alvarado's argument that the recorded statements should have been excluded because of a lack of *Miranda* warnings, and held that he had not been in custody during the interview.[79] The California Supreme Court denied Alvarado's application for discretionary review.[80] Alvarado filed a federal habeas corpus petition, and the District Court agreed that he had not been in custody for *Miranda* purposes.[81] The Court of Appeals for the Ninth Circuit reversed, however, holding that the state courts should have considered Alvarado's age and lack of experience in evaluating whether a reasonable person in his position would have felt free to leave.[82] The court also found that the deference to a state court determination, which is required by statute on habeas review, did not foreclose relief because clearly established Supreme Court case law concerning juvenile status compelled

70. *Id.* at 656-57.
71. *Id.* at 657.
72. *Id.*
73. 541 U.S. at 658.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 658-59.
79. *Id.* at 659.
80. 541 U.S. at 659.
81. *Id.*
82. *Id.* at 659-60.

the "extension of the principle that juvenile status is relevant" to *Miranda* custody determinations.[83]

The Supreme Court reversed, holding that the California courts' conclusions that Alvarado had not been in custody for *Miranda* purposes was not an "unreasonable application" of clearly established law.[84] Justice Kennedy, writing for the five Justice majority,[85] reviewed the Court's earlier cases concerning custody, pointedly discussing *Berkemer*'s treatment of traffic stops with the initial observation that "[o]ur more recent cases instruct that custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." [86] The Court also quoted, in the main text of its discussion (in contrast to the parenthetical citation in *Thompson*), *Berkemer's* statement that: "[t]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[87] Continuing with its discussion of the standard for determining custody, the Court then went on to quote, without modification, the "two discreet inquiries" language of *Thompson* discussed above.[88] The Court's discussion of *Berkemer* as setting forth a need to determine "how a reasonable person . . . would perceive his circumstances," in the discussion leading to the reiteration of *Thompson*'s "discreet inquiry" as to whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave[,]"[89] makes it evident that the Court regarded *Berkemer*'s earlier methodology for evaluating traffic stops as a precursor to the Court's current express inclusion of a reasonable person inquiry in its standard for determining custody. It is not surprising, therefore, that this has reinforced the growing trend towards interpreting *Berkemer*'s observations about *Terry* as incorporating the same approach.

To be sure, *Alvarado* also reinforces the *Miranda* custody inquiry as "an objective test."[90] Not only did the Court include *Thompson*'s language about the "ultimate inquiry," but the four Justice dissent added the following helpful observation about the proper place of the "reasonable person" factor:

> In the present context, that of *Miranda*'s "in custody" inquiry, the law has introduced the concept of a "reasonable person" to avoid judicial inquiry into subjective states of mind, and to focus the inquiry instead upon objective circumstances that are known to both the officer and the suspect and that are likely relevant to the

83. *Id*. at 659-60.
84. *Id*. at 664-66.
85. *Id.* at 652. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined the opinion of the Court.
86. *Id.* at 662.
87. *Id*. (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).
88. *Id*. at 663 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995). *See supra* note 58 and accompanying text.
89. *Id*. at 662-63.
90. *Id.* at 667.

> way a person would understand his situation. . . . This focus helps to keep *Miranda* a workable rule.[91]

The significance of this "reasonable person" inquiry in the determination of custody is reflected in the central basis for the dissent of four justices, including the author of *Thompson*, Justice Ginsburg. Applying what they characterized as "ordinary common sense,"[92] the dissenters found Alvarado to clearly be in custody,[93]as "[a] reasonable person . . . would *not* have felt free to terminate the interrogation and leave."[94] As a consequence, the dissenters concluded that the Ninth Circuit had been correct in its holding that the state courts had unreasonably applied clearly established federal law.[95]

TERRY STOPS AND THE INFLUENCE OF *THOMPSON* AND *ALVARADO* AMONG THE CIRCUITS

In light of *Thompson* and *Alvarado*, it is instructive to examine the split of opinion among the federal circuits, in order to assess the influence of those Supreme Court opinions in affecting the courts' views of *Berkemer* and whether *Miranda* warnings are required for some *Terry* stops. Before *Thompson*, a number of circuits had adhered to the view that *Beheler*'s unadorned language ("whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest") had indicated a need for either an actual arrest or circumstances which, by their intrusiveness beyond that of a *Terry* stop, had developed into a *de facto* arrest. A *Terry* stop may, of course, develop into a *de facto* arrest as its conditions become more intrusive, and under such circumstances, the encounter may be sustained only upon probable cause.[96] This approach, requiring a *de facto* arrest before *Miranda* warnings are necessary, still remains unmodified in several circuits. Moreover, at times this approach has included the observation that the Court's generalization about *Terry* stops in *Berkemer* mandates such a conclusion.

For example, in 1992, the Court of Appeals for the District of Columbia Circuit, in *United States v. Gale*,[97] examined questioning during a *Terry* stop which had been based upon the representation of an informant that Gale possessed cocaine. With regard to unwarned admissions obtained during the investigatory stop, the court quoted *Beheler*'s language and added:

91. *Id.* at 674 (Breyer, J., dissenting).
92. *Id.* at 670 (Breyer, J., dissenting).
93. *Id.* at 669 (Breyer, J., dissenting).
94. *Id.* at 673 (Breyer, J., dissenting) (emphasis in original). The dissenters were Justices Breyer, Stevens, Souter and Ginsburg. Justice O'Connor, who joined the opinion of the Court, wrote a short concurrence to note that, in some cases, a suspect's age may be relevant. *Id.* at 669 (O'Connor, J., concurring).
95. *Id.* at 676 (Breyer, J., dissenting).
96. *See* Dunaway v. New York, 442 U.S. 200 (1979).
97. 952 F.2d 1412 (D.C. Cir. 1992).

> Although appellant was not free to leave at the time Officer Stroud asked him if he had any drugs, he was subject to a limited seizure only – a *Terry* stop – and not a "full-blown" arrest. As such, the stop did not require the police to inform appellant of his *Miranda* rights before asking him a few brief questions designed to confirm or alleviate their suspicions. *See Berkemer*. . . .[98]

The District of Columbia circuit has not revisited this policy. In another pre-*Thompson* opinion, *United States v. Leshuk*,[99] the Court of Appeals for the Fourth Circuit also concluded that an arrest was necessary, and, in dictum, stated 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."[100] In *Leshuk*, of these circumstances, only a threat by an individual accompanying the officers to "shoot the defendants' dog if [they] did not call it off" was present.[101] Significantly, after *Thompson*, this position was expressly reaffirmed by the Fourth Circuit.[102] Two post-*Thompson* unpublished opinions in the Third Circuit, decided in 2003, indicate that a policy of requiring an arrest or a reasonable person's perception of a "formal arrest" has been pursued.[103] Finally, in the Sixth Circuit, which has long relied upon *Beheler*'s language as requiring "restraint . . . tantamount to a formal arrest,"[104] a post-*Thompson* opinion has read *Thompson*'s "free to leave" language as "presumably [excepting] a *Terry* stop situation."[105]

Other post-*Thompson* rulings have made it evident, however, that *Thompson* and *Alvarado* have fueled a broader trend towards holding *Miranda* warnings applicable during some coercive *Terry* stops. For example, in 2006, in *United States v. Martinez*,[106] the Court of Appeals for the Eighth Circuit held for the first time that *Miranda* warnings were there required. In *Martinez*, defendant, who matched the description of a bank robber, had been handcuffed during the *Terry* stop.[107] Quoting *Thompson*, the court concluded that "[a] reasonable person would not, considering the totality of the circumstances, feel he was at liberty to stop the questioning and leave."[108] It added that Martinez's freedom "was restricted to a degree often associated with formal arrest, and we find he was in custody at the time he was handcuffed."[109] The admission of the statements was harmless error,

98. *Id.* at 1415 n.4.
99. 65 F.3d 1105 (4th Cir. 1995).
100. *Id.* at 1109-10.
101. *Id.* at 1107.
102. *See* United States v. Sullivan, 138 F.3d 126, 131-32 (4th Cir. 1998).
103. *See* United States v. Hargett, 58 Fed. Appx. 942, at 945; 2003 WL 383229 (C.A. 3 (Pa.) (no arrest); United States v. May, 87 Fed.Appx.223, at 227; 2003 WL 22903000 (C.A. 3 (Pa.) ("An objective, reasonable person in [defendant's] position would not have felt restrained to the degree of formal arrest.").
104. United States v. Knox, 839 F.2d 285, 292 (6th Cir. 1988).
105. United States v. Salvo, 133 F.3d 943, 949-50 (6th Cir. 1998); *See also* United States v. Swanson, 341 F.3d 524, 528 (6th Cir. 2003).
106. 462 F.3d 903 (8th Cir. 2006).
107. *Id.* at 906.
108. *Id.* at 909.
109. *Id.*

however.[110] Quoting its 2003 precedent discussing *Berkemer* and holding that warnings had not been required in its earlier opinion, the court underlined that it had previously said "*[m]ost Terry* stops do not trigger the detainee's *Miranda* rights."[111] Similarly, in 2005, the First Circuit, which had previously read *Berkemer* and *Beheler* restrictively,[112] appears to have opened the door to requiring *Miranda* warnings during coercive *Terry* stops. In *United States v. Teemer*,[113] discussing the questioning of a passenger after the driver of a car had been arrested and an assault rifle found in the vehicle, the court noted:

> [O]n the broad spectrum from a speeding ticket to a grilling in the squad room, the events here were in the *Terry* stop range and short of any *de facto* arrest or custodial interrogation; given this, *and that the circumstances were not inherently coercive*, no *Miranda* warning was required.[114]

Further evidencing this general trend, in 2004 in *United States v. Acosta*,[115] the Eleventh Circuit found its interpretation of the language of *Berkemer* and *Beheler,* which spoke of "suspects 'subjected to restraints comparable to those associated with formal arrest,'"[116] to be informed by *Berkemer*'s inquiry as to "whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self incrimination."[117] The court then, seemingly approvingly, discussed *United States v. Perdue*,[118] a pre-*Thompson* Tenth Circuit opinion which had required *Miranda* warnings for "highly intrusive" *Terry* stops.[119] The Eleventh Circuit distinguished the facts of the case before it, however, and found the circumstances insufficiently coercive to implicate *Miranda*.[120]

A "reasonable person" inquiry, parallel to the pivotal issue in *Alvarado*, was recently reaffirmed by the Tenth Circuit as significant in its "in custody" *Terry* determination.[121] Since 1993, the Tenth Circuit has squarely held that *Miranda* warnings are required during some coercive *Terry* stops. Back then, in *United States v. Perdue*,[122] after acknowledging *Berkemer*'s generalization, it had stated,

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110. *Id.* at 910.
111. *Id.* at 910-911 (quoting Pelayo-Ruelas,. 345 F.3d 589, 592 (8th Cir. 2003)(emphasis in original). Roth, *Middle Ground*, *supra* note 2, at 2813 n.263, regards *Martinez* and *Pelayo-Ruelas* as inconsistent. As he noted, however, observers have at times differed in their characterizations of some approaches within the circuits. *See id.* at 2813 n. 264.
112. *See* United States v. Trueber, 238 F.3d 79, 92 (1st Cir. 2001).
113. 394 F.3d 59 (1st Cir. 2005).
114. *Id.* at 66 (emphasis added).
115. 363 F.3d 1141 (11th Cir. 2004).
116. *Id.* at 1149 (quoting Berkemer, 468 U.S. at 441).
117. *Id.* (quoting Berkemer, 468 U.S. at 437).
118. 8 F.3d 1455 (10th Cir. 1993).
119. Acosta, 363 F.3d at 1150.
120. *Id.* The court did not discuss *Thompson*.
121. *See* United States v. Revels, 510 F.3d 1269 (10th Cir. 2007).
122. 8 F.3d 1455 (10th Cir. 1993).

> The last decade, however, has witnessed a multifaceted expansion of *Terry*. Important for our purposes is the trend granting officers greater latitude in using force in order to "neutralize" potentially dangerous suspects during an investigatory detention. As discussed in our Fourth Amendment analysis, when circumstances reasonably indicate that the suspects are armed and dangerous, courts have been willing to rely on the "officer safety" rationale of *Terry* and authorize the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons, and other measures of force more traditionally associated with the concepts of "custody" and "arrest" than with "brief investigatory detention." Thus, today, consonant with this trend, we held that police officers acted reasonably under the Fourth Amendment when they, without probable cause and with guns drawn, stopped Mr. Perdue's car, forced him to get out of his car, and demanded that he lie face down on the ground.
>
> One cannot ignore the conclusion, however, that by employing an amount of force that reached the boundary line between a permissible *Terry* stop and an unconstitutional arrest, the officers created the "custodial" situation envisioned by *Miranda* and its progeny.[123]

Perdue remains the leading Tenth Circuit case on the issue. In 2007, in *United States v. Revels*,[124] the court reaffirmed its analysis, observing that *Perdue* had "recognized, consistent with *Berkemer*, that whether an individual is subject to a lawful investigative detention . . . does not necessarily answer the separate question of whether a suspect is in custody for purposes of *Miranda*. . . ."[125] In a parenthetical, it also quoted *Berkemer*'s statement that "[t]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[126]

Revels had been handcuffed while dressed only in her underclothes, and placed face down on the floor of her home during the execution of a search warrant for cocaine.[127] She was then permitted to dress, separated from her boyfriend and her two children, and questioned independently.[128] She was not told whether she was under arrest, was confronted with a bag of cocaine that had been seized,[129] and made a number of incriminating statements during this course of events.[130] The

123. *Id.* at 1464. Before the stop, police officers, executing a search warrant for marijuana, had found a loaded pistol and a shotgun and shells on the premises. *Id.* at 1458.
124. 510 F.3d 1269 (10th Cir. 2007).
125. *Id.* at 1274.
126. *Id.*
127. *Id.* at 1270-71.
128. 510 F.3d at 1270-71, 1275.
129. *Id.*
130. *Id.* at 1271-72.

Tenth Circuit cited three particular factors which "inform[ed]" its "fact-specific analysis": "1) whether the circumstances demonstrated a police-dominated atmosphere; (2) whether the nature and length of the officers' questioning was accusatory or coercive; (3) whether the police made Revels aware that she was free to refrain from answering questions, or to otherwise end the interview."[131] The court concluded that a reasonable person in Revels's position would have understood her freedom of action to have been sufficiently restricted to require warnings.[132]

The "reasonable person" analysis reflected in *Thompson* and *Alvarado* has also recently figured prominently in several other circuits. In *United States v. Newton*,[133] the Second Circuit concluded that "a reasonable person would have understood that [Newton's] interrogation was being conducted pursuant to arrest-like restraints."[134] Newton was convicted of being a felon in possession of a firearm.[135] He had been on parole when information was received that his mother had stated that Newton had threatened to kill her and her husband. She also stated that Newton kept a gun in a shoe box in her house, where Newton resided.[136] Parole and police officers went to the apartment, where Newton answered the door dressed only his underwear. The officers handcuffed him, stated that they were doing so out of safety concerns, and told Newton that he was not under arrest. No *Miranda* warnings were given, and Newton was asked if he had any contraband in the house. Newton replied "only what is in the box," and described its contents as "a two and two." In the box, the police found an unloaded .22 caliber automatic weapon, a fully loaded magazine, and additional ammunition.[137] The Second Circuit articulated its "reasonable person" standard, although it held that his responses which led to the discovery of a firearm were properly admitted under the public safety exception to *Miranda*.[138]

In addition, the Court of Appeals for the Seventh Circuit, which, quite unusually, has long viewed the language of *Berkemer* as in fact "underscor[ing]" that Fifth Amendment rights "are implicated before a defendant has been arrested,"[139] more recently stated expressly in *United States v. Wyatt*[140] that in evaluating an investigative stop:

> The test for whether an individual is 'in custody' under *Miranda*. . . is '"how a reasonable man in the suspect's position would have understood his situation . . .' ." . . . This court uses a totality of the

131. *Id.* at 1275.
132. The court did refer to a reasonable person's perception of restrictions to a degree "consistent with formal arrests," *Id.* at 1270, 1275, but while its use of this phrase was somewhat odd, *Revels*' reaffirmance of *Perdue* was explicit.
133. 369 F.3d 659 (2nd Cir. 2004).
134. *Id.* at 677.
135. *Id.* at 662.
136. *Id.* at 663.
137. *Id.* at 663-64.
138. *Id.* at 679; *See* New York v. Quarles, 467 U.S. 649 (1984).
139. United States v. Smith, 3 F.3d 1088, 1097 (7th Cir. 1993).
140. 179 F.3d 532 (7th Cir. 1999).

> circumstances test "to determine whether a reasonable person would have believed he or she was free to leave," weighing "such factors as the length of the interrogation, the purpose of the questioning, and the location of the interrogation."[141]

In the Ninth Circuit, where rulings have not been consistent with regard to *Miranda* warnings and *Terry* stops,[142] those cases acknowledging the applicability of *Miranda* have employed a similar inquiry. In *United States v. Hayden*,[143] the court stated that custody determinations must consider "the totality of the circumstances," and must ask whether a reasonable person in such circumstances would conclude, "after brief questioning," that he or she would not be free to leave.[144] Relevant factors include the language used to summon the detainee, confrontation with evidence of guilt, the physical surroundings, the detention's duration, and the "degree of pressure" applied to effectuate the detention.[145]

MITIGATING THE EFFECT OF POTENTIALLY COERCIVE INFLUENCES

It is evident that *Thompson* and *Alvarado* have had their influence, and that much discussion among the circuits that are following this trend is no longer hide-bound by the earlier debate about the importance of *Berkemer*'s broad generalization about *Terry* stops. In recognizing the coercive measures that may implicate *Miranda* during investigative detentions, it is also evident that perhaps the most difficult task for the lower courts will be to identify and articulate those situations in the *Terry* context that present the greatest pressures with which *Miranda* was so concerned.

It is, of course, very appropriate that some of these courts which have regarded coercive influences during *Terry* stops as sometimes rendering *Miranda* warnings necessary have sought to describe the types of factors which are relevant to this assessment. Their efforts to gauge the degree of coercion that might influence a reasonable person's perceptions have included consideration of the nature of any protective restraints employed by the police, the duration, persistence and tenor of the questioning, and the circumstances surrounding the stop.[146]

Perhaps the most important inquiry, however, in assessing the need for *Miranda* warnings lies in the extent to which the circumstances or explicit words or actions of the police dissipate any coercive influences which extend a *Terry* stop beyond the brief, moderate and "comparatively nonthreatening character" of the

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141. *Id.* at 536.

142. This inconsistency has been noted in Roth, *supra* note 32 at 2813. *Compare* United States v. Kim, 292 F.3d 969, 973-74 (9th Cir. 2002) (finding custody) *with* United States v. Galindo-Gallegos, 244 F.3d 728, 732 (9th Cir. 2001) (stating that a *Terry* stop is "not custodial questioning, under *Berkemer*").

143. 260 F.3d 1062 (9th Cir. 2001).

144. *Id.* at 1066.

145. *Id.*

146. The most notable efforts to articulate such relevant factors have appeared in the Tenth Circuit in *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993), and *United States v. Revels*, 510 F.3d (10th Cir. 2007); the Seventh Circuit in *United States v. Wyatt*, 179 F.3d 532 (7th Cir. 1999); and the Ninth Circuit in *United States v. Hayden*, 260 F.3d 1063 (9th Cir. 2001).

investigative stops discussed in *Berkemer*.[147] The *Berkemer*-era concept of a *Terry* stop in which "the police diligently pursu[e] a means of investigation that [is] likely to confirm or dispel their suspicions quickly"[148] in a noncoercive manner may well have rightfully given way to the pressing need to preserve officer safety, through the use of restraints or other protective methods of inquiry when they are necessary. But information conveyed to a defendant that highlights the brevity of the encounter or the temporary nature of the protective measure is probably the most powerful antidote for those coercive influences which threaten to undermine the goals of *Miranda*.

The conveying of mitigating information by the police neither threatens the efficacy of a legitimate *Terry* inquiry nor is impractical. An individual who is informed that he or she is being handcuffed only out of safety concerns,[149] or that a few brief questions from the police are in order, is unlikely to reasonably perceive the overbearing, police-dominated atmosphere that has become a characteristic of so many of today's *Terry* stops. The stakes are extremely high in the recognition of both coercive and mitigating influences during such encounters. If *Miranda* is to remain true to its promise as an effective tool in preserving the privilege against compelled self-incrimination, the continuing judicial trend towards frankly acknowledging the problems now presented by investigative *Terry* stops constitutes a very significant development indeed.

147. *See Berkemer*, 468 U.S. at 439-40.
148. United States v. Sharpe, 470 U.S. 675, 686 (1985).
149. *See* United States v. Newton, 369 F.3d 659 (2d Cir. 2004); Revels, 510 F.3d 1269.