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Stop and Frisk in a Concealed Carry World

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STOP AND FRISK IN A CONCEALED CARRY WORLD

Shawn E. Fields*

Abstract: This Article confronts the growing tension between increasingly permissive concealed carry firearms legislation and police authority to conduct investigative stops and protective frisks under *Terry v. Ohio*. For decades, courts upheld stops based on nothing more than an officer’s observation of public gun possession, on the assumption that anyone carrying a gun in public was doing so unlawfully. That assumption requires reexamination. All fifty states and the District of Columbia authorize their citizens to carry concealed weapons in public, and forty-two states impose little or no conditions on the exercise of this privilege. As a result, officers and courts can no longer reasonably assume that “public gun possession” equals “criminal activity.”

Courts and scholars have begun addressing discrete aspects of this dilemma, and this Article makes three contributions to the existing literature. First, it corrects the oft-repeated misconception that the U.S. Supreme Court’s recent Second Amendment jurisprudence has altered the Fourth Amendment’s reasonable suspicion standard. Second, it articulates the need for a “gun possession plus” reasonable suspicion standard to initiate a *Terry* stop for a suspected firearms violation. Third, it defends the right of officers to conduct automatic frisks of suspects after a lawfully-initiated stop when firearms are present, in recognition of the inherent and unique dangerousness of these weapons. The Article concludes with a recognition of the risks presented by a proposed “automatic frisk” regime, particularly for over-policed communities of color. In doing so, it suggests law enforcement would be well served to consider community policing alternatives to stop and frisk that respect the rights of firearms carriers in marginalized communities while protecting officers on the beat.

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INTRODUCTION

Few doctrines have strained the interpretive bounds of the Fourth Amendment or influenced the relationship between police officers and civilians more than “stop and frisk.”¹ “The Fourth Amendment was once considered a monolith,” where “[p]robable cause’ had a single meaning” and “‘searches’ and ‘seizures’ were all-or-nothing concepts.”² But when the U.S. Supreme Court ruled in *Terry v. Ohio*³ that a police officer could “seize a person and subject him to a limited search for weapons”⁴ on nothing more than reasonable suspicion,⁵ the Court “broke [this monolith] entirely.”⁶ In the half century since *Terry*, the controversial practice has

1. See JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 261 (6th ed. 2013) (“In terms of the daily activities of the police, as well as the experiences of persons ‘on the street,’ there is probably no Supreme Court Fourth Amendment case of greater practical impact [than *Terry v. Ohio*].”); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 384–85 (1988) (“The . . . challenges of Fourth Amendment interpretation are formidable standing alone, and the Court’s decision[] in . . . *Terry v. Ohio* ha[s] compounded the difficulty.”).

2. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 388 (6th ed., West 2017) (quoting DRESSLER & MICHAELS, *supra* note 1, at 261).

3. 392 U.S. 1 (1968).

4. *Id.* at 15.

5. *Id.* at 30.

6. DRESSLER & THOMAS, *supra* note 2, at 388; see also Sundby, *supra* note 1, at 385 (“Faced with novel Fourth Amendment questions, the Court in . . . *Terry* turned to a broad reasonableness standard and an ill-defined balancing test for the immediate solutions . . . significantly undermin[ing] the role

become synonymous with the beat tactics of the country's largest metropolitan police force,⁷ exacerbated rifts between zealous (or worse) officers and distrustful communities of color,⁸ and diminished the once-dominant warrant requirement to second-class Fourth Amendment status.⁹

The “stop and frisk” standard is deceptively easy to describe, if nearly impossible to apply with any precision. As the Court explained in *Terry*, an officer may (1) seize an individual for a brief investigatory stop upon “reasonable suspicion that the suspect was involved in, or is about to be involved in criminal activity,”¹⁰ and (2) frisk the outer clothing of the individual for weapons if she has “reason to believe that [s]he is dealing with an armed and dangerous individual.”¹¹ This “reasonable suspicion” standard necessary to justify a stop and frisk is low: “‘considerably less than proof . . . by a preponderance of the evidence,’ and ‘obviously less’ than is necessary for probable cause.”¹²

of probable cause and set[ting] the stage for long-term expansion of the reasonableness balancing test without proper justification or limits.”).

7. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560–61 (S.D.N.Y. 2013) (finding that a sevenfold increase in stop and frisks “was achieved by pressuring commanders at Compstat meetings to increase the number of stops,” and that “commanders, in turn, pressured mid-level managers and line officers . . . by rewarding high stoppers and denigrating or punishing those with lower numbers of stops”); Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk”*, 94 B.U. L. REV. 1495, 1500–20 (2014) (providing a “historical account of NYC stop and frisk”).

8. DRESSLER & MICHAELS, *supra* note 1, at 263 (“[T]here can be no gainsaying that when the police forcibly stop persons on the street to question them or to conduct full or cursory searches, highly sensitive issues of racial profiling . . . come to the fore.”); Tracey Maclin, “*Black and Blue Encounters*” – *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 255 (“[P]olice encounters involving black men contain a combination of fear, distrust, anger and coercion that make these encounters unique and always potentially explosive.”); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1275–76 (1998) (“When one examines the history and modern exercise of police ‘stop and frisk’ practices, the old adage ‘the more things change, the more they stay the same,’ aptly describes the experience of many black men when confronted by police officers.”).

9. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192 (2016) (arguing that scholars are “incorrect” to presume that “reasonableness—and not a warrant requirement—lies at the heart of the Fourth Amendment,” instead distinguishing that “[r]easonableness does lay at the heart of the Fourth Amendment, but what it meant was that, outside of apprehending a known felon, a warrant would be required”). Like Professors Maclin, Donohue, and Sundby, I harbor grave reservations about the soundness of *Terry* and its progeny. But for purposes of this Article, I recognize the established precedent of *Terry* and make suggestions within that existing stop and frisk framework.

10. *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011).

11. *Id.*

12. *Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)); *see also* *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (“[R]easonable suspicion . . . need not rule out the possibility of innocent conduct.”).

In large part because of this low and malleable “reasonable suspicion” standard, the permissible scope of the stop and frisk practice has expanded significantly since *Terry*. While *Terry* involved an on-the-street stop of a would-be robber casing an establishment with a gun bulging from his coat,¹³ since then the Court has upheld an officer’s ability to frisk individuals stopped for minor traffic violations who are suspected of carrying weapons,¹⁴ search car compartments within “the lunge area” of the stopped individual,¹⁵ arrest suspects for refusing to affirmatively identify themselves during a *Terry* stop,¹⁶ and initiate a stop based on a mistake of law.¹⁷

But in the last decade, this near linear expansion of pre-arrest investigative powers has been stymied from an unlikely source—the Second Amendment. The U.S. Supreme Court’s recent decisions recognizing an individual’s Second Amendment right to keep and bear arms for personal protection¹⁸—and concurrent increase in the number of states authorizing concealed and open carry of firearms in public¹⁹—has forced a reexamination of traditional stop and frisk jurisprudence.²⁰

13. *Terry v. Ohio*, 392 U.S. 1, 5–7 (1968).

14. *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (“[M]ost traffic stops . . . resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. . . . [T]raffic stops are especially fraught with danger to police officers.” (citations and quotations omitted)).

15. *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983) (holding that the principles of *Terry* “compel our conclusion that the search of the passenger compartment of an automobile . . . is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons”); *United States v. Morris*, No. 95-50158, 1996 U.S. App. LEXIS 45162, at *2 (5th Cir. May 2, 1996) (citing *Michigan v. Long* to uphold officer’s protective search of “the ‘lunge area’” of a suspect’s car for weapons).

16. *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 178, 189 (2004) (but explaining that “an officer may not arrest a suspect for failure to identify himself if the identification request is not reasonably related to the circumstances justifying the stop”).

17. *Heien v. North Carolina*, 574 U.S. ___, 135 S. Ct. 530, 536 (2014) (observing that the “reasonable suspicion” standard allows for officers to make reasonable mistakes of fact regarding criminality or dangerousness, and finding that “[t]here is no reason . . . why this same result should [not] be acceptable . . . when reached by way of a similarly reasonable mistake of law”).

18. *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008) (recognizing an individual’s right to keep and bear arms for self-defense and other lawful purposes under the Second Amendment); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (holding that the individual right to keep and bear arms applies to the states via the Fourteenth Amendment).

19. David Kopel, *Growth Chart of Right to Carry*, WASH. POST: VOLOKH CONSPIRACY (Feb. 17, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/17/growth-chart-of-right-to-carry/?utm_term=.f1753d60a71b [<https://perma.cc/WNA4-SR6T>] (describing dramatic increase in states providing “objective and fair procedures for the issuance of concealed handgun carry permits” between 1986 and 2014).

20. See Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 25 (2015) (“Perhaps the most immediate impact of expanding gun rights on policing tactics is legal uncertainty regarding what police can do when they observe, or learn of, a person carrying a firearm.”).

“Before the Court’s decision in [*District of Columbia v. Heller*],²¹ there was a widely-held ‘assumption that a person carrying a concealed weapon was engaged in the crime of unlawful weapons possession,’” thus justifying a stop under the first *Terry* prong.²² Moreover, there was once “nearly unanimous agreement that to be armed was to be dangerous,” giving officers the right to frisk armed individuals on the basis of this “blanket assumption of dangerousness.”²³ But in a post-*Heller* world, where more than forty states have little or no restrictions on the public concealed carry of firearms,²⁴ courts can no longer assume that public handgun possession is unlawful.²⁵ Moreover, “holes have begun to appear in the blanket assumption of dangerousness that courts used to apply to firearms and their carriers.”²⁶

This Article explores the growing tension between increasingly permissive “right to carry” laws throughout the country and the rights of officers to safely conduct investigative stops and searches. In doing so, the Article makes three contributions to the existing literature and offers a word of caution about the conclusions it reaches.

First, it corrects a misconception often repeated by courts and scholars that *Heller* directly forces a reexamination of Fourth Amendment stop and frisk doctrine.²⁷ *Heller* did nothing more than recognize an individual’s

21. 554 U.S. 570 (2008).

22. Matthew J. Wilkins, *Armed and Not Dangerous? A Mistaken Treatment of Firearms in Terry Analyses*, 95 TEX. L. REV. 1165, 1169 (2017); see also Bellin, *supra* note 20, at 25 (“Traditionally, courts (and police) assumed that officers could stop and question someone they observed with a concealed handgun, at least in jurisdictions with strict regulation of concealed weapon carrying.”).

23. Wilkins, *supra* note 22, at 1170.

24. *Concealed Carry*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> [<https://perma.cc/A536-U56E>] (summarizing concealed carry laws by state and noting that twelve states require no permits to carry concealed weapons in public and thirty additional “shall issue” states require permits but allow little or no discretion in the issuance of the permits).

25. See, e.g., *Northrup v. City of Toledo Police Dep’t.*, 785 F.3d 1128, 1132 (6th Cir. 2015) (“Where it is lawful to possess a firearm, unlawful possession ‘is not the default status.’ There is no ‘automatic firearm exception’ to the *Terry* rule.”); *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000) (comparing an officer’s stop of an armed individual in a concealed carry state based on a suspicion that possession might have been illegal as to a stop of an individual because he “possessed a wallet, a perfectly legal act”).

26. Wilkins, *supra* note 22, at 1171.

27. See *United States v. Robinson*, 814 F.3d 201, 208 (4th Cir. 2016) (“As public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt. Within the last decade, federal constitutional law has recognized new Second Amendment protections for individual possession of firearms.”), *rev’d*, 846 F.3d 694 (4th Cir. 2017) (en banc); *United States v. Williams*, 731 F.3d 678, 693–94 (7th Cir. 2013) (Hamilton, J., concurring) (“After *Heller* and *McDonald*, all of us involved in law enforcement, including judges, prosecutors, defense attorneys, and police officers, will need to reevaluate our thinking about these

right to keep and bear arms for lawful purposes under the Second Amendment. It said nothing about any right to, or prohibition against, carrying concealed firearms in public, which remains the salient feature of firearms-based weapons searches under *Terry*.²⁸ Rather, officers and judges must reconsider the nature of “reasonable suspicion” in light of increasingly permissive state gun-possession laws authorizing public concealed carry, a trend dating back at least thirty years.

Second, the Article defends the premise that gun possession alone is no longer sufficient to justify a *Terry* stop and articulates a new “gun possession plus” reasonable suspicion test for investigative seizures. In this sense, the Article seeks to swing the pendulum towards gun carriers in recognition of the sensible (and increasingly true) presumption that those carrying firearms in public are doing so lawfully.

Third, in recognition of the inherent dangerousness of firearms and enhanced safety risks to officers and the public of increased public handgun presence, the Article advocates for an officer’s ability to conduct an automatic frisk for weapons after a lawful stop and upon reasonable suspicion that the suspect is armed. While some lower courts have implied that armed individuals are per se dangerous for purposes of *Terry*’s second prong,²⁹ this Article suggests a shift away from the perceived and subjective dangerousness of the individual and towards the inherent and objective dangerousness of the firearm. This subtle analytical shift produces several benefits, including eliminating dependence on unreliable empirical data about the criminal propensities (or lack thereof) of concealed carry permit holders, reducing subjective and often unconscious invidious judgments about the dangerousness of suspects of color and other marginalized groups, and injecting some much-needed common sense about the risks of firearms.

Fourth Amendment issues and how private possession of firearms figures into our thinking.”); Bellin, *supra* note 20, at 26 (“The post-*Heller* argument that a person’s possession of a firearm cannot alone constitute reasonable suspicion to justify a stop is simply stated.”).

28. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2007) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . in sensitive places such as schools and government buildings.”); *cf.* *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1172 (9th Cir. 2014) (holding that *Heller* “does require that the states permit some form of carry for self-defense outside the home”).

29. *See, e.g., United States v. Robinson*, 846 F.3d 694, 700 (4th Cir. 2017) (en banc) (upholding frisk of armed individual because “the officer reasonably believed that the person stopped ‘was armed and thus’ dangerous” (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977))); *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007) (upholding protective frisk of suspect because “Officer Ferragamo’s reasonable suspicion [was] that Orman was carrying a gun, which is all that is required for a protective frisk under *Terry*”).

At the same time, the Article recognizes the potentially negative consequences of advocating for an “automatic frisk” regime, particularly when the very practice of “stop and frisk” has become increasingly synonymous with racially charged police abuses.³⁰ An officer who stops a person of color may be more likely to *suspect*, implicitly or explicitly, that the person is armed and search that individual in a situation where he might not search a white suspect. Accordingly, the Article concludes with a cautious acknowledgement of the risks of advocating for automatic frisks and suggesting that law enforcement consider not just what is legally permissible under the Fourth Amendment, but also what makes sense as a matter of sound community policing. The logic of *Terry* justifies the automatic frisk of a gun carrier for the protection of the officer under current reasonable suspicion analysis, a fact that, if widely adopted, could lead to a dramatic increase in the number of warrantless frisks conducted by police officers. This prospect understandably may cause concern for civil libertarians and communities of color, given the terrible history of racially discriminatory stop and frisk practices over the last half century. While not retreating from its primary conclusions, the Article acknowledges that legitimate concern, and suggests that law enforcement consider alternatives to traditional frisk practices in the presence of a citizen with a firearm.

I. DUELING AMENDMENTS: *TERRY* STOPS AND EXPANDING GUN RIGHTS

A. *The Stop and Frisk Paradigm: Origins, Justifications, Evolution*

For nearly 180 years, Fourth Amendment jurisprudence focused primarily on the warrant requirement and whether arrests were properly based upon probable cause.³¹ That changed with *Terry*, which “provided

30. One need only consider the tragic case of Philando Castile, a lawfully armed African-American man shot to death during a traffic stop after announcing he had a firearm but was only reaching for his identification, to recognize that no objective standard can eliminate the grave risks facing men of color during police interactions. Mr. Castile, who had previously been stopped fifty-two times for traffic infractions, was shot seven times by Officer Jeronimo Yanez while reaching for his driver’s license, and later died on Facebook Live while his girlfriend filmed the encounter. Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?noredirect=on&utm_term=.fce8a35388c2 [<https://perma.cc/7ZRV-KXBC>]. Yanez was later acquitted of manslaughter. *Id.*

31. See DRESSLER & MICHAELS, *supra* note 1, at 262 (observing that the 1967 case *Camara v. Municipal Court* changed the focus of the Fourth Amendment from warrants based on probable cause to a “general Fourth Amendment standard of ‘reasonableness’”).

the impetus, as well as the framework, for a move by the Supreme Court away from the proposition that ‘warrantless searches are *per se* unreasonable,’ to the competing view that the appropriate test of police conduct ‘is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.’”³² This shift from “probable cause” to “reasonable suspicion” was momentous. Despite the Court’s attempt to minimize the purportedly “quite narrow” scope of the holding, *Terry* ironically expanded police power far more than a decade of friendly Warren-era decisions did for the rights of criminal defendants.³³

Terry represented what would become a typical stop and frisk case—an on-the-street observation by an officer of a suspected violent crime. A Cleveland beat cop observed two men standing on a street corner, then proceeding back and forth along an identical route multiple times in front of a department store, stopping each time to look inside the store window.³⁴ Each completion of the route was followed by a conference between the two on the corner.³⁵ The two men eventually joined up with a third individual two blocks from the store.³⁶ Suspecting the individuals of “casing a job, a stick-up,” the officer stopped the three men and asked their names.³⁷ When the men “mumbled something,” the officer spun around suspect John W. Terry and patted down his outside clothing, feeling a pistol in his overcoat pocket.³⁸ After removing a revolver from Terry’s coat pocket, he patted down the other two suspects and seized another revolver.³⁹

The Court found that the officer’s actions amounted to a “search and seizure” under the Fourth Amendment—that the officer “seized” Terry

32. *Id.* (citations omitted); *see also* *Terry v. Ohio*, 392 U.S. 1, 11 (1968) (holding that lawful police encounters can exist “which do[] not depend solely upon the voluntary cooperation of the citizen and yet which stop[] short of an arrest based on probable cause”).

33. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCE* 55 (2014) (quoting contemporaneous national newspapers criticizing the Warren Court for “‘wrapp[ing] its flowing robes around all prisoners so as to virtually immunize them’ from police interrogations,” then observing that “[i]ronically, the Warren Court’s last controversial criminal justice decision [*Terry*] actually expanded police authority”); Maclin, *supra* note 8, at 1275 (“The irony, of course, is that the police power to ‘frisk’ suspicious persons is the product of a Supreme Court that did more to promote the legal rights of black Americans than any other court.”).

34. *Terry*, 392 U.S. at 5–6.

35. *Id.* at 6.

36. *Id.*

37. *Id.* at 6–7.

38. *Id.* at 7.

39. *Id.*

when he stopped him on the street,⁴⁰ and “searched” him when he patted down his outside clothing.⁴¹ But despite the absence of a warrant or any exigent circumstances previously recognized by the Court as obviating the warrant requirement, the Court upheld the propriety of the officer’s actions, observing that the Fourth Amendment protects only against *unreasonable* searches and seizures.⁴² The Court defined reasonableness as an objective test from the officer’s perspective: “[W]ould the facts available to the officer at the moment of the seizure or search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”⁴³ On the facts presented, the Court found that the officer, utilizing his years of experience apprehending thieves, had reasonable suspicion to suspect a crime was about to take place, and thus to stop the individuals.⁴⁴ Moreover, the Court found that the particular crime suspected by the officer—a “stick-up”—made it reasonable for the officer to assume the individuals were armed and dangerous.⁴⁵

Importantly, the Court emphasized that “[t]he sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”⁴⁶ This pat down of the outer clothing “by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment, and probable cause is essential.”⁴⁷

“*Terry* created a two-pronged analysis, with the first prong governing the propriety of the initial investigatory seizure and the second prong

40. *Id.* at 16 (“Whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

41. *Id.* (“[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”).

42. *Id.* at 9 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

43. *Id.* at 21–22 (“[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. . . . If subjective ‘good faith’ alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.” (citations omitted)).

44. *Id.* at 30.

45. *Id.* at 28 (“[T]he record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.”).

46. *Id.* at 29.

47. *Id.* at 16 n.12 (quoting *State v. Terry*, 214 N.E.2d 114, 120 (Ohio Ct. App. 1966)).

governing the propriety of any subsequent frisk.”⁴⁸ These analyses are distinct and must be undertaken separately; the satisfaction of one prong cannot serve as justification for the second prong. Under the first prong, an officer may stop an individual (the seizure) if she has reasonable suspicion of *criminal activity*.⁴⁹ Under the second prong, an officer may frisk the individual (the search) if she has reasonable suspicion that the person “is armed and presently dangerous to the officer or to others.”⁵⁰ Because these analyses are distinct, an officer may reasonably suspect a person is committing a crime but lack the requisite suspicion that the individual is armed and dangerous, and vice versa.⁵¹

Since *Terry*, the Court has applied the “reasonable suspicion” standard to expand an officer’s ability to stop and frisk individuals in less suspicious and dangerous contexts. The Court has held that a traffic stop for a motor vehicle infraction counts as a “stop” despite the absence of reasonable suspicion of *criminal activity*.⁵² Moreover, any traffic violation, no matter how minor, can serve as a legitimate basis for the traffic stop.⁵³ Once stopped, pat-down searches can be conducted on drivers *or passengers*,⁵⁴ and officers can also expand the search beyond the person to car compartments.⁵⁵ Known as frisking “the lunge area,”⁵⁶ the Court explained that an officer may protect himself by searching any areas from which the suspect could grab a weapon.⁵⁷

48. Wilkins, *supra* note 22, at 1168 (First, “to initiate an investigatory seizure, a police officer must have a reasonable suspicion that the person being stopped ‘ha[s] engaged, or [is] about to engage, in criminal activity.’” Second, to search the individual, a police officer must have a reasonable suspicion that “he is dealing with an armed and dangerous individual”).

49. *Terry*, 392 U.S. at 26.

50. Bellin, *supra* note 20, at 30.

51. *See Terry*, 392 U.S. at 32–33 (“[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. . . . [T]he person addressed . . . certainly need not submit to a frisk for the questioner’s protection.”); *United States v. Burton*, 228 F.3d 524, 527 (4th Cir. 2000) (holding that an officer may not conduct a protective search to allay a reasonable fear that a suspect is armed without first having a reasonable suspicion to support an investigatory stop); *United States v. Gray*, 213 F.3d 998, 1000–01 (8th Cir. 2000) (finding protective frisk violated the Fourth Amendment because officers had no reasonable suspicion that the individual was engaged in criminal activity).

52. *Arizona v. Johnson*, 555 U.S. 323, 330 (2008).

53. *Whren v. United States*, 517 U.S. 806, 818 (1996).

54. *Johnson*, 555 U.S. at 333.

55. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

56. *United States v. Morris*, No. 95-50158, 1996 U.S. App. LEXIS 45162, at *2 (5th Cir. May 2, 1996) (citing *Michigan v. Long* to uphold officer’s protective search of “the ‘lunge area’” of a suspect’s car for weapons).

57. *Long*, 463 U.S. at 1049.

In 2004, the Court upheld an officer's arrest of an individual who refused to identify himself during a *Terry* stop, despite serious concerns about the infringement of Fifth Amendment privileges against self-incrimination.⁵⁸ And in 2014, the Court ruled 8-1 that a *Terry* stop does not violate the Fourth Amendment even if the reasonable suspicion developed by the officer was premised on a mistake of law.⁵⁹ These cases appear to confirm fears that, far from representing a “narrow” ruling, *Terry* opened a “Pandora’s box” of broad and sweeping police investigative powers in conflict with the originally intended primacy of probable cause and the Fourth Amendment’s warrant requirement.⁶⁰

B. *Stop, Frisk, and Firearms*

When the Court decided *Terry* in 1968, American attitudes towards the public possession of firearms differed significantly from today.⁶¹ During that time, strict control and regulation of gun possession was a bipartisan issue, with prominent members of both parties supporting the near-total elimination of public firearm possession.⁶² Even the president of the National Rifle Association testified before Congress in favor of strict firearms regulations, stating “I have never believed in the general practice of carrying weapons I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under

58. *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 188–91 (2004).

59. *Heien v. North Carolina*, 574 U.S. ___, 135 S. Ct. 530, 536 (2014).

60. Esther Jeanette Windmueller, *Reasonable Articulable Suspicion – The Demise of Terry v. Ohio and Individualized Suspicion*, 25 U. RICH. L. REV. 543, 549, 564 (1991) (decrying the “Pandora’s box” opened by “*Terry* and its companion cases” and arguing for a new standard for individualized suspicion so that “the individual security guaranteed by the Fourth Amendment would be retained, sealing the lid to the Pandora’s box of privacy-encroaching monsters”).

61. *See, e.g., Guns*, GALLUP NEWS, <http://news.gallup.com/poll/1645/guns.aspx> [<https://perma.cc/3FR2-ELPW>] (providing historical public opinion data about gun regulation). In one historical trend noted by Gallup, 60% of Americans supported the outright ban of handguns in 1959, but by October 2017 support had fallen to 28%. *Id.*

62. On August 8, 1967, the U.S. House of Representatives passed by a 378-23 margin the Omnibus Crime Control and Safe Streets Act of 1968, which among other things strictly limited interstate transfers for handguns and raised the minimum age for buying handguns to twenty-one. *To Pass H.R. 5037, The Law Enforcement and Criminal Justice Assistance Act of 1967, as Amended*, GOVTRACK, <https://www.govtrack.us/congress/votes/90-1967/h107> [<https://perma.cc/XH9X-JG5X>]. The Senate passed the bill on May 23, 1968, by a 72-4 margin. *To Pass H.R. 5037, After Substituting for its Text the Language of S. 917 as Amended*, GOVTRACK, <https://www.govtrack.us/congress/votes/90-1968/s439> [<https://perma.cc/Q5DV-MCQC>]. President Lyndon B. Johnson signed it into law on June 19, 1968, nine days after *Terry*. *See Omnibus Crime Control and Safe Streets Act of 1968*, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 5, 18, 28, 34, 42, 47 U.S.C.).

licenses.”⁶³ Perhaps most famously, on March 2, 1967, when heavily armed members of the nascent Black Panther Party, led by co-founders Huey Newton and Bobby Seale, marched at and inside the California state capitol to protest a bill repealing a law allowing the public carrying of loaded firearms (and thus inadvertently launching the modern gun rights movement),⁶⁴ Governor Ronald Reagan declared that he saw “no reason why on the street today a citizen should be carrying loaded weapons.”⁶⁵ The following year, four months after the Court’s ruling in *Terry*, President Lyndon B. Johnson signed into law the Gun Control Act of 1968,⁶⁶ which significantly restricted interstate firearms transfer and further limited public possession of firearms.⁶⁷

Within that context, one can understand why an officer reasonably may have suspected criminal activity was afoot when she observed, discovered, or received a tip about an individual’s possession of a firearm in public. An officer could reasonably suspect that a public gun possessor was committing a weapons possession offense because most states either tightly constricted or prohibited the public carrying of firearms.⁶⁸ As a result, courts routinely upheld *Terry* stops based on nothing more than suspected gun possession.⁶⁹ This assumption, combined with the once “nearly unanimous agreement that to be armed was to be dangerous,” provided the necessary justification to conduct an automatic frisk of public gun possessors.⁷⁰ But in the current rapidly-changing, gun-friendly deregulatory environment, these assumptions require reconsideration.

63. Michael S. Rosenwald, *The NRA Once Believed in Gun Control and Had a Leader Who Pushed for It*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/retropolis/wp/2017/10/05/the-forgotten-nra-leader-who-despised-the-promiscuous-toting-of-guns/?utm_term=.2f93fcd1fb0a [https://perma.cc/X2PN-KHV7].

64. Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [https://perma.cc/YGT9-C4ER]; see also Jad Abumrad, *The Guns Show*, RADIOLAB PRESENTS: MORE PERFECT (Oct. 11, 2017), <https://www.wnycstudios.org/story/gun-show> [https://perma.cc/Q6XB-XBVM].

65. Winkler, *supra* note 64.

66. The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–931 (2012)).

67. *Id.*

68. See *infra* notes 83–91; Bellin, *supra* note 20, at 31 (describing the widely held “assumption that a person carrying a concealed weapon was engaged in the crime of unlawful weapons possession”).

69. See, e.g., State *ex rel.* H.B., 381 A.2d 759, 762, 769 (N.J. 1977) (finding that an anonymous phone tip “giving a general description and location of a ‘man with a gun’” constituted reasonable suspicion to stop and frisk the suspected individual).

70. Wilkins, *supra* note 22, at 1170–71 (describing the “blanket assumption of dangerousness” under which most officers and courts traditionally operated with respect to gun possessors).

C. *Rethinking “Reasonable Suspicion” in a Concealed Carry World*

Needless to say, public opinion about gun rights and gun control have changed since the standoff between Ronald Reagan and Bobby Seale in 1967. In part owing to this shift, an increasing number of states have relaxed or eliminated restrictions on public firearm possession.⁷¹ Beginning in the 1970s, shortly after the Black Panthers first prominently utilized the Second Amendment as an instrument of individual gun possession rights, the National Rifle Association followed suit, electing in 1977 an executive vice president who “would transform the NRA into a lobbying powerhouse committed to a more aggressive view of what the Second Amendment promises to its citizens.”⁷² And in the last decade, the Court has delivered significant victories to the gun rights movement, declaring in two landmark cases that the Second Amendment protects an individual’s right to possess a firearm for self-defense or any other lawful purpose,⁷³ and that this protection applies to the states via the Fourteenth Amendment’s Due Process Clause.⁷⁴ These two significant changes challenge the once-reasonable assumption that a public gun carrier is a dangerous lawbreaker.

1. *Gun-Friendly Legislation*

States’ public gun possession laws broadly fall within one of four “right-to-carry” categories:

71. Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 680–88 (1995).

72. Winkler, *supra* note 64. Winkler also observes the following: “[This] new NRA . . . shared some of the Panthers’ views about firearms. Both groups valued guns primarily as a means of self-defense. Both thought people had a right to carry guns in public places They also shared a profound mistrust of law enforcement.” *Id.*

73. Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. L.J. 1, 6 (2009) (observing that *Heller* delivered a significant victory for gun rights advocates and “imperiled [the] case for gun control”).

74. *McDonald v. Chicago*, 561 U.S. 742, 758–60 (2010) (discussing the well-known doctrine of “selective incorporation,” wherein only those most fundamental of constitutional rights apply to restrict the actions of both the federal and state governments and recognizing the “fundamental” nature of the individual right to keep and bear arms as one restricting the states).

Unrestricted: State law allows individuals to carry concealed firearms for lawful purposes without a permit.⁷⁵ These states are sometimes referred to by gun rights advocates as “constitutional carry” states.⁷⁶

Shall Issue: State law requires a license to carry a concealed firearm in public, but the granting of such licenses is nondiscretionary and subject only to meeting determinate criteria set forth in the law.⁷⁷

May Issue: State law requires a license to carry a concealed firearm in public and provides the issuing entity with discretion over the issuance of a permit.⁷⁸ This discretion varies significantly from jurisdiction to jurisdiction.⁷⁹

No Issue: State law does not allow any private citizen to carry a concealed handgun in public, with very few limited exceptions.⁸⁰

As recently as 1988, forty states either prohibited the public possession of firearms (sixteen “no issue” jurisdictions) or tightly regulated such possession (twenty-four “may issue” jurisdictions).⁸¹ Over the next thirty

75. Brian Enright, *The Constitutional “Terra Incognita” of Discretionary Concealed Carry Laws*, 2015 U. ILL. L. REV. 909, 918–27 (2015) (discussing types of concealed carry jurisdictions); *Kansas: Permitless Carry Bill To Be Heard Tomorrow on Senate Floor*, NRA-ILA (Feb. 24, 2015), <https://www.nra.org/articles/20150224/kansas-permitless-carry-bill-to-be-heard-tomorrow-on-senate-floor> [<https://perma.cc/V457-URKU>] (discussing pending “constitutional carry” or “permitless carry” legislation in Kansas).

76. CBS 13, *Maine Lawmaker Submits “Constitutional Carry” Bill*, BANGOR DAILY NEWS (Feb. 26, 2015, 7:26 PM), <https://bangordailynews.com/2015/02/26/news/state/maine-lawmaker-submits-constitutional-carry-bill/> [<https://perma.cc/WGH7-EGE4>]; see also Charles C. W. Cooke, *Vermont: Safe and Happy and Armed to the Teeth*, NAT’L REV. ONLINE (June 24, 2014, 8:21 PM), <http://www.nationalreview.com/corner/396857> [<https://perma.cc/XDN3-9UAZ>] (noting that “constitutional carry” is sometimes referred to as “Vermont carry” because Vermont for decades was the only state in the country that did not require a permit to carry a concealed firearm in public).

77. Enright, *supra* note 75, at 919–20 (“As the name suggests, shall-issue laws require the issuing authority to issue a permit to an applicant who meets delineated requirements. There is little discretion on the part of the issuing body.”); see also Walter Ricksaw, *What Is the Difference Between Shall Issue and May Issue?*, CONCEALED CARRY CLASS, <http://www.concealedcarryclass.net/what-is-the-difference-between-shall-issue-and-may-issue/> [<https://perma.cc/B7PS-E7LZ>]; Nancy Thorne, *What is the Difference Between “May Issue”, “Shall Issue”, “No Issue” and “Unrestricted” Concealed Carry Laws?*, NAT’L CARRY ACAD. (Aug. 29, 2016), <https://www.nationalcarryacademy.com/mayissueshallissuenoissue/> [<https://perma.cc/VW2H-QLSZ>].

78. See Enright, *supra* note 75, at 921–23.

79. See *id.* at 921 n.188, 922 (observing that some “may-issue laws . . . are applied more like shall-issue laws” (like Alabama), but that “[o]ne of the strictest may-issue laws is found in New York”).

80. See generally *id.*; Ricksaw, *supra* note 77; Thorne, *supra* note 77. See also Enright, *supra* note 75, at 923 (“A no-issue state is one that requires, but does not issue, permits for public carry.”).

81. As of 1988, eight states were “shall-issue” jurisdictions. See ALA. CODE § 13A-11-75 (1988) (enacted 1975); CONN. GEN. STAT. § 29-28(a) (1988) (enacted 1959); FLA. STAT. § 790.06(2) (Supp. 1988); IND. CODE § 35-47-2-3 (1988) (enacted 1985); ME. STAT. tit. 25, § 2003(1) (1988) (enacted 1985); N.D. CENT. CODE § 62.1-04-03(1) (1988) (enacted 1985); S.D. CODIFIED LAWS § 23-7-7

years, states across the country began relaxing their public concealed and open carry laws.⁸²

Table 1:
Number of States with Concealed Carry Laws by Year

Year	Unrestricted	Shall Issue	May Issue	No Issue
1990 ⁸³	1	15	20	14
1995 ⁸⁴	1	27	14	8
2000 ⁸⁵	1	30	12	7
2005 ⁸⁶	2	35	9	4
2010 ⁸⁷	3	36	9	2
2015 ⁸⁸	7	35	8	0

(1988) (enacted 1985); WASH. REV. CODE § 9.41.070 (1988). Vermont was the lone unrestricted jurisdiction. Cooke, *supra* note 76.

82. Cramer & Kopel, *supra* note 71 at 685 (“Since 1987, states have increasingly adopted a new breed of concealed handgun permit laws that make easier the process for many adults to get a permit to carry a concealed handgun.”).

83. In 1990, Tennessee switched from “no issue” to “may issue.” 1990 Tenn. Pub. Acts ch. 905, § 3 (codified as amended at TENN. CODE ANN. § 39-17-1351 (West 2018)); Cramer & Kopel, *supra* note 71 at 705–06. That same year, six states—Oregon, Idaho, West Virginia, Mississippi, Georgia, and Pennsylvania—became “shall issue” jurisdictions. *See* Cramer & Kopel, *supra* note 71 at 686–707 (summarizing concealed carry handgun law changes from 1987 to 1995).

84. Four states became “shall issue” jurisdictions in 1994: Alaska, Arizona, Tennessee, and Wyoming. *See* Cramer & Kopel, *supra* note 71 at 686–707. Seven states became “shall issue” jurisdictions in 1995: North Carolina, Nevada, Oklahoma, Arkansas, Texas, Virginia, and Utah. *See id.*

85. Three states became “shall issue” jurisdictions in 1996: Kentucky, Louisiana, and South Carolina. 1996 Ky. Acts ch. 119, § 1 (codified as amended at KY. REV. STAT. ANN. § 237.110(4) (West 2018)); 1996 La. Acts 1st Ex. Sess., No. 4, § 1 (codified as amended at LA. STAT. ANN. § 40:1379.3(A)(1) (West 2018)); 1996 S.C. Acts 464 (codified as amended S.C. CODE ANN. §§ 23-31-215(A)–(C) (West 2018)).

86. Six states became shall issue jurisdictions between 2001 and 2005: Michigan (2001); Colorado, Minnesota, Missouri, and New Mexico (all 2003); and Ohio (2004). 2003 Colo. Sess. Laws 638 (codified as amended at COLO. REV. STAT. § 18-12-203(1) (2018)); 2000 Mich. Pub. Acts No. 372, § 5b (codified as amended at MICH. COMP. LAWS ANN. § 28.425b(7) (West 2018)); 2003 Minn. Laws No. 842 (codified as amended at Minn. Stat. § 624.714(2)(b) (2018)); 2003 Mo. Laws 2nd Ex. Sess. (codified as amended at Mo. Rev. Stat. § 571.101(1) (2018)); 2003 N.M. Laws ch. 255, § 4 (codified as amended at N.M. STAT. ANN. § 29-19-4(A) (2018)); 2004 Ohio Laws (codified as amended at OHIO REV. CODE ANN. § 2923.125(D) (West 2018)). Also, in 2003, Alaska became the second state in the country to become an “unrestricted” jurisdiction. 2003 Alaska Sess. Laws ch. 62 (repealing Alaska’s concealed carry permitting requirements, ALASKA STAT. § 18.65.700).

87. Nebraska and Kansas became shall issue jurisdictions in 2006. 2006 Kan. Sess. Laws ch. 32, § 3 (codified as amended at KAN. STAT. ANN. § 75-7c03 (2018)); 2006 Neb. Laws § 4 (codified as amended at NEB. REV. STAT. § 69-2430(3)(b), 69-2433 (2018)). Arizona became the third unrestricted jurisdiction in 2010. 2010 Ariz. Sess. Laws ch. 59, § 2 (codified as amended at ARIZ. REV. STAT. ANN. § 13-3102(a) (2018)).

88. Three states became shall issue jurisdictions between 2011 and 2015: Wisconsin (2011), Iowa (2011), and Illinois (2013). 2011 Wis. Sess. Laws (codified as amended at WIS. STAT. § 175.60

Year	Unrestricted	Shall Issue	May Issue	No Issue
2017 ⁸⁹	13	29	8	0

As reflected above, as of 2015, every state and the District of Columbia allow the public concealed carry of firearms.⁹⁰ The vast majority of these states are now unrestricted or shall-issue jurisdictions, in which there are little to no restrictions on an individual’s ability to lawfully carry a firearm in public.⁹¹ These “increasingly permissive gun-possession laws erode the assumption that public handgun possession is unlawful.”⁹² “[A]s public possession and display of firearms become lawful under more

(2018)); 2011 Iowa Acts ch. 47 (codified as amended at IOWA CODE § 724.7(1) (2018)); *Illinois Enacts Nation’s Final Concealed-Gun Law*, USA Today (July 9, 2013), <https://www.usatoday.com/story/news/2013/07/09/illinois-enacts-concealed-gun-law/2503083/> [<https://perma.cc/LK2Y-E6T8>]. Wyoming (2011), Arkansas (2013), Kansas (2015), and Maine (2015) became unrestricted jurisdictions. 2011 Wyo. Sess. Laws ch. 84, § 1 (codified as amended at WYO. STAT. ANN. § 6-8-104(b) (2018)); 2013 Ark. Acts § 1 (codified as amended at ARK. CODE ANN. § 5-73-309 (2018)); 2015 Kan. Sess. Laws 231 ch. 16, § 8 (codified as amended at KAN. STAT. ANN. § 75-7c03 (2018)); 2015 Me. Laws ch. 341 (codified as amended at ME. REV. STAT. ANN. tit. 25, § 2003(1) (2018)).

89. Six additional states became unrestricted jurisdictions in 2016 and 2017: Idaho, New Hampshire, North Dakota, Mississippi, Missouri, and West Virginia. 2016 Idaho Sess. Laws ch. 208, § 1 (codified as amended at IDAHO CODE ANN. § 18-3302(3)(f) (2018)); 2017 N.H. Laws (codified as amended at N.H. REV. STAT. ANN. § 159:6 (2018)); 2017 N.D. Laws ch. 428, § 2 (codified as amended at N.D. CENT. CODE §§ 62.1-02-04–62.1-02-05, 62.1-04-01–62.1-04-05) (2018)); 2016 Miss. Laws (codified as amended at MISS. CODE ANN. § 97-37-7(24) (2018)); 2016 Mo. Laws (codified as amended at MO. REV. STAT. § 571.030 (2018)); 2016 W. Va. Acts ch. 252 (codified as amended at W. VA. CODE § 61-7-3 (2018)).

90. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 24 (“Every state—as well as the District of Columbia—allows the carrying of concealed weapons in some form.”).

91. *See* ALASKA STAT. § 18.65.700; ARK. CODE ANN. § 5-73-309; ARIZ. REV. STAT. § 13-3112; COLO. REV. STAT. § 18-12-203(1); FLA. STAT. § 790.06(2); GA. CODE ANN. § 16-11-129; IDAHO CODE ANN. § 18-3302(1); IND. CODE § 35-47-2-3; IOWA CODE § 724.7(1); KAN. STAT. ANN. § 75-7c03; KY. REV. STAT. ANN. § 237.110(4); LA. REV. STAT. ANN. § 40:1379.3(A)(1); ME. REV. STAT. tit. 25, § 2003(1); MICH. COMP. LAWS § 28.425b(7); MINN. STAT. § 624.714(2)(b); MISS. CODE ANN. § 45-9-101(6)(c); MO. REV. STAT. § 571.101(1); MONT. CODE ANN. § 45-8-321(1); NEB. REV. STAT. §§ 69-2430(3)(b), 69-2433; NEV. REV. STAT. § 202.3657(3); N.H. REV. STAT. ANN. § 159:6(I)(a); N.M. STAT. ANN. § 29-19-4(A); N.C. GEN. STAT. § 14-415.12; N.D. CENT. CODE § 62.1-04-03(1); OHIO REV. CODE ANN. § 2923.125(D); OKLA. STAT. tit. 21, § 1290.12(A)(12); OR. REV. STAT. § 166.291; 18 PA. CONS. STAT. ANN. § 6109(e)(1); S.C. CODE ANN. § 23-31-215(A)-(C); S.D. CODIFIED LAWS § 23-7-7; TENN. CODE ANN. § 39-17-1351; TEX. GOV’T CODE ANN. § 411.172; UTAH CODE ANN. § 53-5-704; VA. CODE ANN. § 18.2-308.02; WASH. REV. CODE § 9.41.070; W. VA. CODE § 61-7-4; WIS. STAT. § 175.60; WYO. STAT. ANN. § 6-8-104(b). In addition to these forty state statutes, Alabama and Connecticut “by statute allow considerable police discretion but, in practice, commonly issue permits to applicants who meet the same standards as in “shall issue” states.” *Drake v. Filko*, 724 F.3d 426, 441 n.5 (3d Cir. 2013) (Hardiman, J., dissenting); *see also* ALA. CODE § 13A-11-75; CONN. GEN. STAT. § 29-28(a).

92. Bellin, *supra* note 20, at 25 (“Consequently, the Fourth Amendment authority flowing from that assumption must be reevaluated.”).

circumstances, Fourth Amendment jurisprudence and police practices must adapt.”⁹³ In particular, “when a state elects to legalize the public carry of firearms, . . . the Fourth Amendment equation changes, and public possession of a gun is no longer ‘suspicious’ in a way that would authorize a *Terry* stop.”⁹⁴ But while increasingly permissive gun laws may require a reexamination of the first *Terry* stop prong, the same logic does not necessarily apply to the “armed and dangerous” second prong of *Terry* as discussed in Part III.

2. *Heller* and *McDonald*

Further challenging these old assumptions, the Court affirmatively recognized for the first time a constitutional right for individuals to keep and bear arms for lawful purposes. In *District of Columbia v. Heller*,⁹⁵ the Court considered the constitutionality of a Washington, D.C., law prohibiting all citizens (except for law enforcement officers) from possessing handguns and requiring all lawfully-owned rifles and shotguns to be kept “unloaded and disassembled or bound by a trigger lock.”⁹⁶ Prior to *Heller*, the Court had never expressly opined on the scope of the Second Amendment’s protections for the individual right to “keep and bear Arms”⁹⁷ as opposed to the right of a “well regulated Militia”⁹⁸ to do so.⁹⁹

Writing for a bare majority, Justice Scalia used the opportunity to engage in an in-depth historical and textual analysis of the Second Amendment, something that had been missing from the Court’s previous opinions.¹⁰⁰ Rejecting the restrictive view that the Second Amendment did

93. *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring).

94. *United States v. Robinson*, 846 F.3d 694, 708 (4th Cir. 2017) (Harris, J., dissenting) (“Permitting such a justification for a *Terry* stop . . . would eviscerate Fourth Amendment protections for lawfully armed individuals in those states.”).

95. 554 U.S. 570 (2007).

96. *Id.* at 574–75.

97. U.S. CONST. amend. II.

98. *Id.*

99. *United States v. Booker*, 644 F.3d 12, 22 (1st Cir. 2011) (“In *Heller*, the Supreme Court found for the first time that this language secured an individual, and not just a collective, right to bear arms.”).

100. *Heller*, 554 U.S. at 581–628; see also Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1286 (2009) (“Justice Scalia, writing for the Court, began with a painstaking exegesis of the [Second] Amendment’s text—an exercise that occasionally crossed into pedantry.”). Prior to the 1960’s, the Second Amendment was rarely litigated and broadly viewed as an archaic military amendment like the “runt” Third Amendment. See Abumrad, *supra* note 64 (discussing quiet history of Second Amendment prior to 1970); Radley Balko, *How Did America’s Police Become a Military Force on the Streets?*, ABA J. (July 2013), http://www.abajournal.com/magazine/article/how_did_americas_police_become_a_military_force_

nothing more than grant the people the right to form a militia and for that militia to be armed, Justice Scalia determined that the Amendment protected an individual right in addition to a right of the people to form an armed militia.¹⁰¹ The Court found that implicit in an individual's right to keep and bear arms was the right to self-defense with a firearm and the right to have a working firearm in the home.¹⁰² While recognizing that some important limitations existed on this right,¹⁰³ the Court firmly held that "a complete prohibition [on the] use [of firearms] is invalid."¹⁰⁴

Heller left open the question of whether the Second Amendment's protections are incorporated by the Due Process Clause of the Fourteenth Amendment, given Washington, D.C.'s special status as a federal district.¹⁰⁵ The Court addressed that issue two years later in *McDonald v. City of Chicago*,¹⁰⁶ finding that the Second Amendment did in fact apply to the states as well as the federal government.¹⁰⁷ Justice Alito, writing for the majority, explained that the individual right to keep and bear arms should be incorporated and applied against state and local governments, because the right was both "fundamental to *our* scheme of ordered liberty" and "deeply rooted in our Nation's history and tradition."¹⁰⁸ In so doing, the Court opined that "individual self-defense is 'the *central component*' of the Second Amendment right."¹⁰⁹ But like *Heller*, the Court in *McDonald* only considered the right to private possession of firearms in one's home and left open for another day the scope of the right to possess firearms in public.¹¹⁰

on_the_streets [https://perma.cc/8KHN-AT5K] ("You might call [the Third Amendment] the [']runt piglet['] of the Bill of Rights Amendments—short, overlooked, and sometimes the butt of jokes.").

101. *Heller*, 554 U.S. at 582 ("The phrase 'keep arms' was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to 'keep arms' as an individual right unconnected with militia service.").

102. *Id.* at 599 (finding that "self-defense . . . was the *central component* of the right itself").

103. *Id.* at 626–27 ("Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); see also *id.* at 627 (limiting the right to arms that are "in common use," leaving it open to states to regulate and ban certain types of assault weapons and weapons commonly useful only in military service).

104. *Id.* at 629.

105. *Id.* at 620 n.23 (noting that "incorporation" is "a question not presented by this case").

106. 561 U.S. 742 (2010).

107. *Id.* at 776.

108. *Id.* at 767.

109. *Id.* at 767 (quoting *Heller*, 554 U.S. at 599).

110. *Id.* at 786.

While these seminal opinions clearly carry significant weight for gun rights jurisprudence broadly, they carry far less relevance for the Fourth Amendment stop and frisk analysis than courts and scholars have argued post-*Heller*.¹¹¹ In neither case did the Court opine on whether the Second Amendment's protections extended to the *public* possession of firearms.¹¹² By leaving open the question, the Court may have further "opened the door for the carry laws we have today,"¹¹³ though as noted above that door had begun opening decades before *Heller*. Because the overwhelming majority of stop and frisk cases involve encounters between police officers and individuals in public, the Court's refusal to extend constitutional protections to public firearm possession renders *Heller* and *McDonald* of little use in helping officers determine whether reasonable suspicion exists to stop a public gun carrier. In other words, without a clear pronouncement that public gun possession is constitutionally-protected *per se*, the decisions should not change the calculus of an officer deciding whether to stop and frisk a public gun carrier.¹¹⁴

What should change the calculus instead are the public carry laws in force in the jurisdiction where the potential encounter takes place. In an unrestricted or "constitutional carry" jurisdiction where no state limits exist on the right to carry firearms in public, officers arguably cannot demonstrate reasonable suspicion of criminality based *solely* on firearm

111. See, e.g., *United States v. Leo*, 792 F.3d 742, 749–50 (7th Cir. 2015) (invalidating frisk of backpack on suspicion that it contained a gun in light of "important developments in Second Amendment law"); Bellin, *supra* note 20, at 26 (admonishing courts to require more in the "reasonable suspicion" analysis under *Terry*'s first prong given that mere gun possession as become an "increasingly common activity that is not only lawful, but specifically protected by the Second Amendment").

112. See *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (addressing a challenge to the State of New York's handgun licensing scheme, and "proceed[ing] on *this assumption*" that the Second Amendment right recognized in *Heller* "must have *some* application in the very different context of the public possession of firearms" (emphasis added)); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 226–27 (2008) (reviewing *Heller* and "finding substantial grounds in the opinion for *extending the holding to public possession* and some grounds for limiting it to the home" (emphasis added)).

113. Nadia Maraachli, *The Fourth Amendment Shall Prevail, Come Heller High Water*, 94 U. DET. MERCY L. REV. 75, 79 (2017).

114. At most, the individual could point to the general constitutional right to keep and bear arms for lawful purposes, including for self-defense, and argue that he publicly possessed his firearm in the exercise of that right. *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1172 (9th Cir. 2014) (striking down public handgun ban because *Heller* "does require that the states permit some form of carry for self-defense outside the home"). But whether he was doing so lawfully would depend on the public right-to-carry law of the individual state jurisdiction, not the Court's opinions in *Heller* and *McDonald*. See *id.* (recognizing state's authority to determine what type of public carry laws to implement).

possession.¹¹⁵ Likewise, in “shall-issue” and “may-issue” jurisdictions, it would appear difficult for an officer to determine with any reasonable particularity that a crime is or will be committed solely based on the actual or potential presence of a firearm.¹¹⁶ Without any other indicia of criminality giving rise to a reasonable suspicion that some non-weapons possession offense was being committed, the officer likely would have to resort to asking the individual for proof of a gun permit. But without reasonable suspicion to initiate a stop, what right under the first *Terry* prong would an officer have to demand such information?¹¹⁷

As laws authorizing public concealed carry of firearms become the norm rather than the exception, officers and courts must reexamine previously-held assumptions about reasonable suspicion to initiate a *Terry* stop and frisk based solely on suspected handgun possession. The next section articulates a balanced approach to this brave new world, one which requires additional indicia of criminality to initiate a stop but authorizes automatic frisks for (and temporary disarmaments of) firearms during a lawful stop.

II. THE CASE AGAINST AUTOMATIC STOPS OF GUN CARRIERS

To initiate a stop, an officer must have “reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot.’”¹¹⁸ For decades, the only “articulable fact” on which an officer needed to rely was the possession of a firearm, based on the assumption that the possession itself was unlawful.¹¹⁹ But gun possession alone no longer reasonably indicates unlawful activity in a concealed carry world, despite the low “reasonableness” standard articulated in *Terry*.¹²⁰

115. *United States v. King*, 990 F.2d 1552, 1559 (10th Cir. 1993) (stating that to allow stops of all armed persons in a permissive concealed carry jurisdiction “would effectively eliminate Fourth Amendment protections for lawfully armed persons”).

116. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1133 (6th Cir. 2015) (“While open-carry laws may put police officers . . . in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. The Toledo Police Department has no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every ‘gunman’ who lawfully possess a firearm.”).

117. *See Bellin*, *supra* note 20, at 38–39 (discussing constitutional problems with “gun-license inquir[y]” statutes).

118. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

119. *See State ex rel. H.B.*, 381 A.2d 759, 762 (N.J. 1977); *Bellin*, *supra* note 20, at 31.

120. *Bellin*, *supra* note 20, at 26 (“Courts will be hard-pressed to accept, as constituting ‘reasonable suspicion’ of a crime, an observation of an increasingly common [and lawful activity].”).

Therefore, reasonable suspicion to initiate a *Terry* stop requires more than the mere presence of a firearm.¹²¹ At a minimum, some other independent indicia of criminality should be present to justify a stop under *Terry*. An imperfect analogy can be drawn from *Illinois v. Wardlow*,¹²² where the Court found that neither presence in a high-crime neighborhood nor unprovoked flight standing alone created reasonable suspicion, but the two together did.¹²³ The suspicious activity of being in a “high crime area” is insufficient to conclude that a crime is being committed, as is the suspicious activity of evading police officers.¹²⁴ But in combination, what begins as “little more than a hunch”¹²⁵ becomes reasonable suspicion of criminal activity.¹²⁶

Likewise, courts should impose a “gun possession plus” requirement to justify a *Terry* stop. The presence of a firearm, standing alone, creates nothing more than a hunch that an individual possesses the gun unlawfully or otherwise is engaging in criminal activity.¹²⁷ But possession plus some other suspicious activity may very well create the necessary reasonable suspicion under *Wardlow* to stop the gun carrier.¹²⁸

121. See *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (finding unconstitutional search of individual based solely on tip that he was carrying a firearm and declining to adopt a “firearm exception” to *Terry* stops); *Pinner v. State*, 74 N.E.3d 226, 232 (Ind. 2017) (citing *J.L.* and finding inadequate as reasonable suspicion a “tip provided by the taxi driver [that] made no ‘assertion of illegality,’ [but] rather merely had a ‘tendency to identify a determinate person’ who was in possession of a handgun”).

122. 528 U.S. 119 (2000).

123. *Id.* at 124–25.

124. *Id.*

125. *United States v. Johnson*, 482 Fed. App’x 137, 150 (6th Cir. 2012) (finding that an officer who suspected criminal activity merely because the suspect had a prior criminal record had “little more than a hunch” of criminal activity); *United States v. Bennett*, 170 F.3d 632, 638 (6th Cir. 1999) (finding that officer conducting a credit check could have “little more than a hunch” that a box inside a vehicle contained contraband).

126. *Wardlow*, 528 U.S. at 124–25 (“[I]t was not merely respondent’s presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion, but his unprovoked flight upon noticing the police.”).

127. See, e.g., *United States v. Ubiles*, 224 F.3d 213, 217–18 (3d Cir. 2000) (invalidating *Terry* stop based on suspicion of gun possession in open-carry jurisdiction because such suspicion was nothing more than a “hunch”).

128. *United States v. Mayo*, 361 F.3d 802, 807–08 (4th Cir. 2004) (upholding stop based on suspicion of gun possession, furtive movements, flight, and presence in a high-crime area). Indeed, arguably even more should be required given the increasing legality of possessing guns in public, and thus the decreasing suspiciousness of that singular action. In any circumstance, unprovoked flight from police appears suspicious, even if standing alone it is insufficient to initiate a stop. *Wardlow*, 528 U.S. at 124 (“Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”). Possessing a handgun in public, at least in a constitutional carry or shall issue state, would appear less suspicious than unprovoked flight, as it does not carry with it any automatic suggestion of criminality.

A. *The Need for “Gun Possession Plus”*

In the age of concealed carry, mere public possession of a firearm cannot give rise to more than a hunch that criminal activity is afoot. As a Florida state court declared in invalidating a stop based solely on a civilian’s admission to a police officer that a nearby person had a handgun in his waistband, possessing a concealed weapon “is not illegal in Florida unless the person does not have a concealed weapons permit, a fact that an officer cannot glean by mere observation.”¹²⁹

Despite this fact, courts regularly uphold *Terry* stops on just such grounds.¹³⁰ On almost identical facts—a Florida civilian’s admission to a police officer that he had a gun in his waistband—the Eleventh Circuit upheld a stop and subsequent search of four men in a parking lot.¹³¹ In *United States v. Lewis*,¹³² two police officers approached four men in a parking and began what all parties agreed was a consensual encounter, in which the officers exchanged pleasantries with the men.¹³³ The officers then asked “whether any of the men were carrying guns,” to which two of the men answered in the affirmative.¹³⁴ “The deputies did not ask any follow up questions, such as whether [the men] had a valid permit for the firearms. Rather, the officers immediately drew their weapons and ordered all four men to sit down on the ground and show their hands.”¹³⁵ In invalidating the stop, the district court concluded that the officers “lacked any particularized and objective suspicion that any of the four men had been engaged in, or were about to engage in criminal activity at the time the officers ordered the men to the ground.”¹³⁶ In particular, “it was neither *per se* unlawful to possess a handgun nor illegal to admit to carrying one, and . . . the police had no reason to believe that [the men] did not have a concealed-weapons permit for the firearm.”¹³⁷

The Eleventh Circuit reversed, finding that “[b]ased on McRae’s admission that he was carrying a handgun in his waistband, the officers

129. *Regalado v. State*, 25 So.3d 600, 606 (Fla. Dist. Ct. App. 2009).

130. *Bellin*, *supra* note 20, at 28 (“The view that concealed handgun possession constitutes reasonable suspicion for a *Terry* stop finds broad support in the lower federal courts.”).

131. *United States v. Lewis*, 674 F.3d 1298, 1304–05 (11th Cir. 2012).

132. 674 F.3d 1298 (11th Cir. 2012).

133. *Id.* at 1300 (“Deputy Bojko asked ‘how you guys doing’ and tried to ‘start a casual conversation.’ Deputy Stiles similarly testified that the deputies introduced themselves and said, ‘Hey, gentlemen, how is it going.’”).

134. *Id.*

135. *Id.* at 1301.

136. *Id.* at 1302.

137. *Id.*

had reasonable suspicion to believe that McRae was committing a crime under Florida law—carrying a concealed weapon.”¹³⁸ It did not matter to the Court that the officers could have asked during the consensual encounter whether McRae had a concealed weapons permit; in fact, the officers’ ignorance of this fact weighed in favor of the detention.¹³⁹

While the Court emphasized that “reasonable suspicion analysis is not concerned with ‘hard certainties, but with probabilities,’”¹⁴⁰ it failed to explore what “probabilities” gave rise to the officers’ reasonable suspicion when all they observed was an activity that, on its face, is legal in Florida.¹⁴¹ Presumably, the Court would not uphold an officer’s detention of a motor vehicle driver based on nothing more than a suspicion that the driver did not have a license to operate the vehicle. But without more articulable facts, how does this hypothetical meaningfully differ? Both scenarios involve facially lawful conduct—possessing a concealed firearm and driving a motor vehicle—that requires a license. The only difference for practical purposes is that the former scenario involves an inherently dangerous instrument (a firearm) that poses a safety risk to the officer; but a safety risk alone cannot justify a stop under *Terry*.¹⁴²

However, while a bright line “gun possession plus” rule reflects a necessary adaptation of old post-*Terry* precedent to new factual realities, adopting the rule in practice may prove difficult. It can often be difficult for courts to discern after the fact whether a stop was made solely because of the presence of a firearm or because of additional articulable facts that may or may not have been part of the initial calculus. Moreover, defining

138. *Id.* at 1304.

139. *Id.* at 1305 (“[T]he officers did not know that McRae lawfully possessed his firearm at the time of the detention . . . the reasonable suspicion inquiry focuses on the information available to the officers at the time of the stop—here, when the officers pulled their guns and ordered the four men to the ground—not information that the officers might later discover.”).

140. *Id.* at 1304 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

141. *Id.* at 1312 n.4 (Wilson, J., dissenting) (“[I]n the State of Florida, pursuant to Fla. Stat. § 790.01(2), it is not illegal for a person to carry a concealed weapon, provided he is also in possession of a valid state issued carrying permit, as was the case with Mr. McRae.”).

142. *See United States v. Massenburg*, 654 F.3d 480, 485 (4th Cir. 2011) (finding that reasonable suspicion of criminal activity is “required prior to a [protective] frisk” for weapons); *In re Ilono H.*, 210 Ariz. 473, 477 (Ariz. Ct. App. 2005) (“[A]n officer’s right to conduct a patdown search should be predicated on the officer’s right to initiate an investigatory stop in the first instance.”); *Gomez v. United States*, 597 A.2d 884, 890–91 (D.C. 1991) (observing that, without reasonable suspicion, police could not justify a frisk based on officer safety concerns alone); *cf. Bellin, supra* note 20 at 30–31 (“[A] necessary implication of [Terry] is that guns can be seized, at least temporarily, under both prongs: either as part of the stop, if the gun possession is unlawful, or as part of the frisk, if the firearm makes the person ‘presently dangerous.’”).

these additional facts can be difficult, particularly in comparison to the dominant fact at issue—the presence of a firearm.¹⁴³

For example, in *Schubert v. City of Springfield*,¹⁴⁴ the First Circuit held that an officer observing “a prominent criminal defense attorney” walking towards a courthouse in a “high-crime area” with a “handgun in a holster” had reasonable suspicion to stop and frisk the attorney.¹⁴⁵ At some points in the opinion, the court appeared to justify the stop solely on the observation of the firearm: “[t]he officer observed Schubert walking toward the Springfield courthouse carrying a gun. This simple, undisputed fact provided a sufficient basis for Stern’s concern that Schubert may have been about to commit a criminal act.”¹⁴⁶ Elsewhere in the opinion, however, the court appeared to rely on the presence of additional articulable facts, including that “the officer saw a man carrying a gun in a high-crime area, walking toward an important public building,”¹⁴⁷ and that in the officer’s experience, “most people who carry firearms in Springfield are not licensed to do so.”¹⁴⁸ Importantly, while the opinion is unclear whether the officer suspected a mere weapons violation or something more serious, the court clearly contemplated something potentially more catastrophic: “A *Terry* stop is intended for just such a situation, where . . . immediate action is required to ensure that any criminal activity is stopped or prevented.”¹⁴⁹

Conversely, in *United States v. Mayo*,¹⁵⁰ the Fourth Circuit upheld the propriety of a *Terry* stop based solely on the suspicion that the individual illegally possessed a firearm.¹⁵¹ The court discussed in detail the variety of factors giving rise to the officers’ suspicion, including the “high-crime area” in which they found the suspect, the suspect’s placement of “his

143. See *Schubert v. City of Springfield*, 589 F.3d 496 (1st Cir. 2009).

144. *Id.*

145. *Id.* at 499.

146. *Id.* at 501, 502 n.4 (“The officer’s ground for suspicion was [sufficient] . . . as the officer here could confirm with his own eyes that Schubert indeed possessed a weapon.”).

147. *Id.* at 501–02.

148. *Id.* at 502 n.3.

149. *Id.* at 502 (“We need not outline in detail the obvious and potentially horrific events that could have transpired had an officer noted a man walking toward the courthouse with a gun and chosen not to intervene.”).

150. 361 F.3d 802 (4th Cir. 2004).

151. *Id.* at 803 (finding that the officers “had a reasonable suspicion supported by articulable facts that Mayo was possessing a concealed weapon”). While the opinion does not discuss Virginia’s concealed carry laws when this incident took place in 2003, Virginia became a mandatory, discretionless “shall issue” state in 1995. VA. CODE ANN. §§ 18.2-308.01–015, 18.2-283, 18.2-283.1, 18.2-287.01 (2018).

hand in his pocket and the appearance of something heavy in his pocket” upon viewing the marked patrol car, his evasive action upon seeing the vehicle, and his “unusually nervous” behavior upon being approached by the officers.¹⁵² While one of the factors pertained solely to his suspected firearm possession, the other three factors clearly existed independently of the “appearance of something heavy in his pocket.”¹⁵³ Indeed, it appears the court could have upheld the stop under *Wardlow* without the firearm-possession suspicion, because the suspect was seen in a high-crime area and he evaded the police.

The *Mayo* court’s careful articulation of indicia of criminality independent from the suspected presence of a firearm should become the norm for adjudicating the validity of *Terry* stops in the future.¹⁵⁴ But absent typically suspicious factors like evasion, furtive movements, flight, or presence in a high-crime area,¹⁵⁵ how are officers to discern which public gun carriers are in lawful possession of their firearms and which ones are committing felony weapons violations?

B. *What Is “Reasonable Suspicion” of a Firearms Violation?*

Officers can develop reasonable suspicion that any type of criminal activity—not just a firearms violation—is afoot based at least in part on an individual’s suspected firearms possession. The officer in *Terry*

152. *Mayo*, 361 F.3d at 805–06.

153. *Id.* at 807.

154. *See, e.g.*, *United States v. Hunter*, 291 F.3d 1302, 1306 (11th Cir. 2002) (upholding stop and frisk based in part on suspicion of gun possession because “(1) Mr. Hunter was in a high crime area, known for drug and firearm arrests; (2) Mr. Hunter was standing over and observing unlawful gambling; (3) Mr. Hunter saw the police approach and then began to walk quickly away; and (4) as Mr. Hunter turned to walk away, Officer Adams saw a bulge in his waistband.” (emphasis added)).

155. The “presence in a high-crime area” indicator is particularly troubling in the context of concealed carry for two reasons. First, one presumably should not be punished for taking precautions to protect herself in a high-crime area, particularly given that *Heller* and *McDonald* make clear that the Second Amendment’s individual firearm guarantees stem from an individual’s rights to self-protection. Second, and more fundamentally, the use of “presence in a high-crime area” as an indicator of criminal activity at all has the practical effect of criminalizing one’s presence in her own neighborhood. Moreover, several courts have recognized the danger in allowing “high-crime area designations [to] be permitted to serve as a proxy for race or ethnicity.” *United States v. Shank*, 543 F.3d 309, 322 (6th Cir. 2008); *United States v. Schirf*, No. 3:15-cr-00012-RRB-KFM, 2015 U.S. Dist. LEXIS 189190, at *12 (D. Ark. Aug. 18, 2015) (“[C]ourts have been instructed to carefully scrutinize claims that a particular area is a bad or high crime area to ensure the label is actually evidence-based, and not just a description that easily can serve as a proxy for race, ethnic, or socioeconomic profiling.”); *see also* Lewis R. Katz, *Terry v. Ohio at Thirty Five: A Revisionist’s View*, 74 *MISS. L.J.* 423, 493–94 (2004) (“By sanctioning investigative stops on little more than the area in which the stop takes place, the phrase ‘high crime area’ has the effect of criminalizing race.”).

suspected Mr. Terry was preparing to commit an armed robbery.¹⁵⁶ But much of the case law discussing whether reasonable suspicion existed to stop an individual based solely on the presence of a firearm involved an officer's suspicion that the suspect unlawfully possessed the weapon. For example, in the pre-*Heller* case *Adams v. Williams*,¹⁵⁷ the U.S. Supreme Court suggested that possession of a concealed handgun, standing alone, constituted at least "reasonable suspicion" for a *Terry* stop and frisk even though the jurisdiction in question allowed gun possession with a permit.¹⁵⁸ This reasoning needs reexamination. "Absent evidence that a person's firearm possession is unlicensed, the first prong of *Terry* no longer justifies" a stop.¹⁵⁹ So how does an officer determine whether a public gun carrier has the legal right to carry the firearm?

Some state and local governments have attempted to legislate around this constitutional quandary by giving law enforcement greater authority to investigate the lawfulness of public gun possession.¹⁶⁰ These governments have created a form of "gun-license inquiry" mechanism whereby, as a condition of receiving a concealed or open carry permit, firearms possessors agree to carry their licenses in public and willingly present them to police officers upon request.¹⁶¹ This approach has intuitive appeal, as it purports to create a voluntary, noninvasive encounter that allows officers to determine, at a minimum, whether a firearms licensing law has been violated.

"If the person produces a valid license, the officer's suspicions of a weapons-possession offense will be dispelled. If the person does not produce a valid license, the officer now possesses at least 'reasonable suspicion' of a violation of the firearm licensing laws. The officer could confiscate the firearm and arrest the suspected offender."¹⁶²

156. *Terry v. Ohio*, 392 U.S. 1, 6–7 (1968); see also *United States v. Robinson*, 846 F.3d 694, 714 (4th Cir. 2017) (Harris, J., dissenting) ("[U]nder certain circumstances, even a lawfully possessed firearm can give rise to a reasonable suspicion of dangerousness.").

157. 407 U.S. 143 (1972).

158. *Id.* at 148–49.

159. *Bellin*, *supra* note 20, at 31; see also *Robinson*, 846 F.3d at 709 n.1 (Harris, J., dissenting) ("We have held that in jurisdictions generally allowing public gun possession, police testimony that few law-abiding citizens take advantage of that right is not enough to establish reasonable suspicion for a *Terry* stop when a gun is publicly displayed.").

160. See, e.g., *Bellin*, *supra* note 20, at 29–30 (discussing legislation in Georgia authorizing police officers to ask for documents confirming lawfulness of gun possession).

161. *Id.* at 38–39.

162. *Id.* at 39.

But this approach raises serious constitutional questions. While the licensing inquiry system arguably prevents a more invasive frisk from taking place, it assumes that the gun carrier has been lawfully stopped. Under a traditional *Terry* analysis, this would require the officer to have reasonable suspicion that a crime is being committed before being allowed to initiate the inquiry.¹⁶³ While courts have upheld the validity of drivers license inquiries during a motor vehicle stop, as well as the arrest of individuals who fail to produce a driver's license, in those cases the officers had a lawful reason to stop the individual—a suspected driving infraction.¹⁶⁴ Likewise, in states requiring individuals to identify themselves to police officers, arrests following a failure to do so are only upheld as long as the stop was “justified at its inception” and the request for information “has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop.”¹⁶⁵

Thus, under existing precedent, these gun-license inquiries can only survive constitutional scrutiny if the officer had some independent, lawful reason to initiate the *Terry* stop. “If the police cannot constitutionally require gun carriers to produce a license, officers cannot consider a failure to respond to a voluntary license inquiry as a basis for ‘reasonable suspicion.’”¹⁶⁶

It must also be considered whether a gun carrier has, by voluntarily agreeing to produce a gun permit upon request as a condition of the permit, effectively placed the interaction outside of *Terry* and into the voluntary innocent officer inquiry framework. Even if that were so, it does not solve the problem. A gun carrier can contract with the state to volunteer certain information to a police officer upon inquiry, but the police officer still will not know who has made such an agreement prior to asking the question. While of course a police officer is free to approach

163. *Id.* (“The framework’s constitutionality depends on whether police can compel gun carriers to stop what they are doing and produce a firearm license.”).

164. *See, e.g.,* *Rodriguez v. United States*, 575 U.S. ___, 135 S. Ct. 1609, 1615 (2015) (confirming propriety of “ordinary inquiries incident to [a] traffic stop,” such as “checking the driver’s license”); *Williams v. Vasquez*, 62 Fed. App’x 686, 690 (7th Cir. 2003) (upholding constitutionality of stop where officer possessed probable cause to arrest for “failure to produce a valid [driver’s] license”).

165. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 188 (2004); *see also* *Bellin, supra* note 20, at 40 (“Gun-license-inquiry provisions purport to authorize police to request a license prior to the officer’s development of ‘reasonable suspicion’ to suspect a gun carrier of any offense. The proper analogy would be to a police officer pulling over a driver who had not violated any traffic law and asking the driver to produce a license . . .”).

166. *Bellin, supra* note 20, at 40; *see also* *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that without “at least articulable and reasonable suspicion that a motorist is unlicensed . . . stopping an automobile and detaining the driver in order to check his driver’s license . . . [is] unreasonable under the Fourth Amendment”).

individuals and ask questions absent reasonable suspicion, individuals are free to refuse to cooperate.¹⁶⁷ But in a “gun-license inquiry” state, would not refusal to cooperate indicate unlawful gun possession as a matter of logic? Such a scenario seems likely in a gun-license inquiry regime, but it would also turn Fourth Amendment jurisprudence on its head. “[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”¹⁶⁸ But in a jurisdiction where every law-abiding gun carrier has consented to cooperate with authorities, it would appear that an individual’s refusal to cooperate, without more, would create reasonable suspicion of unlawful weapons possession.¹⁶⁹

In short, in the absence of an agreement to engage in a consensual encounter with an officer, an individual remains free under the Fourth Amendment not to answer any questions from the officer unless the officer has reasonable suspicion independent of the refusal to cooperate to stop the individual. The fact that other civilians have decided to initiate an encounter with police ought not compel others to do the same or face an investigatory stop.

However, officers still retain tools to develop reasonable suspicion of a weapons violation. In the absence of other indicia of criminality or the authority to demand proof of gun permits, officers can stop individuals who appear from specific and articulable facts not to meet the requirements to possess a concealed carry firearm.¹⁷⁰ In “may issue” or “shall issue” jurisdictions, officers can lawfully stop individuals who appear not to meet the objective licensing requirements, such as the minimum age requirement.¹⁷¹ Moreover, if officers know an armed

167. *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (“We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”).

168. *Id.*; see also *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) (“[T]he person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.”).

169. Concealed permit carriers are free to contract away certain Fourth Amendment rights. *Zap v. United States*, 328 U.S. 624, 628 (1946) (affirming surrender of Fourth Amendment rights); Jason S. Thaler, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 *FORDHAM L. REV.* 1777, 1794–95 (“The Supreme Court has affirmed the view that a person can surrender constitutional rights by contract. Individuals may voluntarily contract away Fourth Amendment rights.”). But their decision to do so should not strip away the robust Fourth Amendment protections of those who chose not to do so.

170. *GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE*, *supra* note 24 (noting that several concealed carry states have minimum age requirements between eighteen and twenty-one, while others require more discretionary showings such as “good moral character”).

171. *Id.*

individual falls into one of the disqualifying classes for state permitting requirements—if the individual is a convicted felon, a domestic violence misdemeanor, or an undocumented immigrant, for example—the officer not only possesses reasonable suspicion to initiate a stop but also likely probable cause for an arrest.¹⁷² Likewise, in all jurisdictions, including unrestricted jurisdictions, officers may develop reasonable suspicion to lawfully stop individuals if they suspect the individuals are in violation of federal firearms possession laws.¹⁷³

III. THE CASE FOR AUTOMATIC FRISKS OF GUN CARRIERS

As the previous section illustrates, where the state legislature “has decided its citizens may be entrusted with firearms on public streets,” the police have no authority to disregard this decision by subjecting law-abiding citizens to *Terry* stops based on nothing more than suspicion of gun possession.¹⁷⁴ But once a lawful *Terry* stop has been initiated, what level of reasonable suspicion is necessary to initiate a frisk? Must the officer determine through “specific and articulable facts” that the suspect is not only armed, but *also* dangerous?¹⁷⁵ Can the officer simply rely on the actual or suspected presence of a firearm to conclude that the individual is “armed, and thus dangerous?”¹⁷⁶ And should changing gun legislation and precedent affect the frisk analysis, as it does the stop analysis?

Officers can satisfy the second *Terry* prong and conduct an automatic frisk based solely on the suspected presence of a firearm, but not for the reason articulated by courts and scholars. Rather than concluding that a frisk is proper because the *individual* poses a *per se* danger to the officer and the public,¹⁷⁷ courts instead should conclude that a frisk is proper because the *firearm* poses an inherent and significant danger to the officer and the public. While the outcome remains the same, this subtle analytical

172. *See id.*

173. Federal law criminalizes firearm possession by juveniles (under age eighteen), fugitives, felons, domestic violence misdemeanants, drug users, certain persons with mental illness, and undocumented immigrants. 18 U.S.C. § 922(g), (x)(2), (x)(5) (2012) (defining juveniles as those under eighteen). An officer’s reasonable suspicion that a public gun possessor fits into one of these categories would qualify as the “gun possession plus” necessary to initiate a stop and should also satisfy the “armed and dangerous” frisk prong.

174. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1131–33 (6th Cir. 2015).

175. *United States v. Robinson*, 846 F.3d 694, 709 (4th Cir. 2017) (Harris, J., dissenting) (“[T]he Supreme Court for decades has adhered to the conjunctive ‘armed *and* dangerous’ formulation, giving no indication that ‘dangerous’ may be read out of the equation as an expendable redundancy.”).

176. *Id.* at 700 (observing that the Court in *Terry* concluded that the suspect was “armed *and thus presented a threat to the officer’s safety*”).

177. *Id.* at 705 (“[I]ndividuals who choose to carry firearms are inherently dangerous.”).

difference eliminates many normative value judgments about the individual while injecting some much-needed jurisprudential clarity about the inherent and potentially catastrophic danger posed by concealed firearms. It also dispenses with the implied requirement that officers rely on questionable and contradictory empirical data about the inherent dangerousness of concealed firearms carriers. In addition, by focusing the analysis on an objective fact—the presence of a firearm—rather than any subjective assessment of the gun carrier, this approach could help eliminate determinations made on the basis of invidious or implicit racial or social bias.

While creating an objective standard for frisks of gun carriers may help promote objective enforcement without regard to race, it would be foolhardy to ignore the data confirming that stop and frisk practices are both disproportionately employed against people of color¹⁷⁸ and are not particularly effective in creating community trust or efficiently fighting crime.¹⁷⁹ In recognition of these facts, while the law and logic of stop and frisk authorize automatic frisks of gun carriers, officers and police departments ought to consider whether employing an automatic frisk regime makes sense as a matter of sound and just policing.

A. *Recognizing the Inherent Dangerousness of Firearms*

With respect to the “armed and dangerous” second *Terry* prong, courts ought to shift focus from the potential dangerousness of the *individual* to the inherent dangerousness of the *firearm*. While the outcome of cases employing such a shift would largely align with those adopting a per se dangerous individual position, this shift in reasoning is important in three respects.

First, by refocusing the discussion on the inherent dangerousness of firearms in public places (which neither court rulings nor legislation has changed), courts can reaffirm the primary justification of limited weapons searches—to protect the officer and the public.¹⁸⁰ *Second*, this approach

178. See Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016, 3:09 PM), <https://www.vanityfair.com/news/2016/07/data-police-racial-bias> [https://perma.cc/56HD-DABK] (citing “eighteen academic studies, legal rulings, and media investigations” highlighting the disproportionate use of stop and frisk practices and police violence against communities of color, including studies finding that officers were more than twice as likely to stop black and Latino drivers than white drivers and more than four times as likely to search black and Latino suspects than white suspects, but less likely to find contraband on black and Latino suspects than on white suspects).

179. See *infra* note 222.

180. See, e.g., *Robinson*, 846 F.3d at 700 (confirming that the original *Terry* frisk formulation centered on the officer’s safety and not on any evidentiary search or normative value judgments about the propriety of public weapons possession).

eliminates the need for officers to make split-second reasonableness decisions based on complex empirical data regarding the ubiquity of concealed and open carry permits, the prevalence of lawful versus unlawful weapons possession in a given jurisdiction, and the incidence of violence and criminality among the concealed carry permit population. *Third*, focusing on the objective fact that a weapon exists and not any subjective assessments of the individual injects a level of much-needed objectivity to the *Terry* analysis and eliminates the need to rely on ad hoc judgments grounded in implicit (or explicit) bias.

1. *Acknowledging the Inherent Dangerousness of Firearms*

Much of the discussion related to the second *Terry* prong in post-*Heller* cases centers on whether the armed *individual* stopped is dangerous. Courts have split over the issue whether an armed individual is automatically dangerous, or if an officer must show both that the individual is armed and also dangerous. For example, in *United States v. Robinson*,¹⁸¹ the Fourth Circuit held that any individual who the police suspect possesses a firearm becomes a dangerous individual per se for *Terry* purposes.¹⁸² The Ninth and Tenth Circuits, in more limited discussions, similarly found that police had an automatic right to assume that an armed individual was necessarily dangerous.¹⁸³ In contrast, in *Northrup v. City of Toledo Police Department*,¹⁸⁴ the Sixth Circuit held that, “[c]learly established law require[s] [officers] to point to evidence” that suspects are both “armed *and dangerous*.”¹⁸⁵ Only in *Robinson* did the court discuss the dangerousness of the *firearm*, but the Court’s holding ultimately rested on the risk the *individual* posed to the police.¹⁸⁶

This focus on the individual is consistent with the language of *Terry* and its progeny, which asks whether the officer has “reason to believe that

181. 846 F.3d 694 (4th Cir. 2017).

182. *Id.* at 704 (“[T]he officer reasonably believed that the person stopped ‘was armed *and thus*’ dangerous.”); *cf. id.* at 709 (Harris, J., dissenting) (explaining that “armed” and “dangerous” are two separate prongs of a conjunctive test).

183. *United States v. Rodriguez*, 739 F.3d 481, 489 (10th Cir. 2013) (upholding frisk justified on nothing more than the presence of a firearm); *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007) (same).

184. 785 F.3d 1128 (6th Cir. 2015).

185. *Id.* at 1132.

186. *Robinson*, 846 F.3d at 705 (collecting cases observing the “inherently violent nature of firearms,” but concluding that “lawfully-stopped *individuals* armed with firearms are categorically dangerous” (emphasis added)).

he is dealing with an armed and dangerous individual.”¹⁸⁷ Scholars on both sides of the argument also focus on the potential dangerousness of the individual holding the weapon rather than the weapon itself.¹⁸⁸ Supporters of the per se dangerousness approach focus on the precise language of *Terry* “for the proposition that all armed persons are inherently dangerous,” and that an officer must “tak[e] steps to assure himself that the person with whom he was dealing was not armed with a weapon that could unexpectedly and fatally be used against him.”¹⁸⁹ Critics of the per se dangerousness approach scoff at any suggestion that an armed individual in a concealed carry state is automatically dangerous, claiming that “there is general consensus that licensed gun possessors rarely use their firearms to commit violent street crimes such as robberies or murders.”¹⁹⁰

While neither position inherently lacks merit, each highlights the charged and philosophically opposed worldviews of gun ownership and possession—one in which gun owners are among the most reckless and dangerous members of society and one in which gun owners are among the most responsible and peaceful.¹⁹¹ These group-based conclusions about a class of individuals oversimplify the issue and obscure the undeniable objective fact that a firearm is an inherently dangerous device created specifically and solely to inflict damage, and thus, that the

187. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

188. *See, e.g.*, Bellin, *supra* note 20, at 32–33 (arguing against the automatic frisks of gun carriers, with reference to “the relatively small danger posed by gun carriers”); Wilkins, *supra* note 22, at 1176 (advocating for automatic frisks and arguing that “[f]irearms—and the [p]ersons [w]ho [p]ossess [t]hem—[a]re [i]nherently [d]angerous for *Terry* [p]urposes”).

189. Wilkins, *supra* note 22, at 1176–77.

190. Bellin, *supra* note 20, at 32. While this may be true, to get to the second *Terry* prong an officer must already have developed a reasonable suspicion that criminal activity is afoot. Thus, even if in the aggregate licensed conceal gun carriers are law abiding, in the individual instance where the “armed and dangerousness” prong becomes a factor, that presumption of law abidingness no longer exists.

191. *See, e.g.*, David Rothkopf, *Mad Men*, FOREIGN POL’Y (Apr. 9, 2013, 11:30 PM), <http://foreignpolicy.com/2013/04/09/mad-men/> [<https://perma.cc/SX4U-H5SN>] (calling then-Senate Minority Leader Mitch McConnell and other gun rights supporters more dangerous than Kim Jong Un for supporting “America’s out-of-control gun culture”); Jeb Golinkin, *The Left’s Demonization of Gun Owners Has Gotten Out of Hand*, WEEK (Apr. 11, 2013), <http://theweek.com/articles/465638/lefts-demonization-gun-owners-gotten-hand> (last visited Oct. 12, 2018); Matt Vespa, *Study: Law-Abiding Firearms Owners Really Don’t Commit Gun Crimes (Which Is What We’ve Been Telling You All Along)*, TOWNHALL (July 31, 2016, 9:00 AM), <https://townhall.com/tipsheet/mattvespa/2016/07/31/study-lawabiding-firearm-owners-really-dont-commit-gun-crimes-which-is-what-weve-been-telling-you-n2198793> [<https://perma.cc/R2LV-NZDJ>].

presence of a firearm in a law enforcement encounter inherently increases the risks to public and officer safety.

Many gun rights activists bristle at this notion, claiming that guns are only as dangerous as the people who use them.¹⁹² The argument often proceeds that devices should not be banned or otherwise tightly regulated just because those devices can be misused, such as a computer in the hands of a hacker.¹⁹³ But a firearm differs in meaningful ways from a computer or other devices with multiple primary purposes beyond inflicting damage. In tort law, a firearm is considered an inherently dangerous instrumentality because it creates a substantial risk of harm just by its mere existence or use, irrespective of whether it is or can be misused.¹⁹⁴ A computer does not create such a substantial risk of harm, even if some risk does exist from its use. While constitutional doctrine ought not be determined solely by reference to private tort law principles, the analogy further highlights the recognized danger posed by a firearm regardless of the person in possession of it. Indeed, even when one court criticized a *Terry* stop based “solely on the ground that an individual possesses a gun,” it acknowledged “the obvious potential danger to officers and the public by a person in possession of a concealed gun in a crowd.”¹⁹⁵

Perhaps most telling, law enforcement training manuals themselves require officers to recognize the inherent dangerousness and lethal

192. See, e.g., *Firearms Are NOT Inherently Dangerous!*, GUNLINK BLOG (Jan. 12, 2012), <http://blog.gunlink.info/2012/01/12/firearms-are-not-inherently-dangerous/> [<https://perma.cc/3YMH-R7HX>] (noting “that you are 25 times more likely to be injured while riding a bicycle than while hunting . . . [s]o next time someone makes the claim that firearms are inherently dangerous or that guns cause or enable crime, steer them to these facts”); DENNIS A. HENIGAN, “GUNS DON’T KILL PEOPLE, PEOPLE KILL PEOPLE” AND OTHER MYTHS ABOUT GUNS AND GUN CONTROL 1–5 (2016) (“[O]n radio or TV talk shows . . . [, o]ver and over again, I would hear, ‘Guns don’t kill people. People kill people.’ I would hear, ‘When guns are outlawed, only outlaws will have guns.’”).

193. *Firearms Are NOT Inherently Dangerous!*, *supra* note 192 (“[Y]our chances of getting injured playing soccer are 34 times that of getting injured while hunting. And football? Forget about it! You’re over 100 times more likely to get injured playing tackle football than you are while hunting.”).

194. See *In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1066 (N.D. Cal. 2005) (noting the affirmative duties of care imposed on “manufacturers of firearms, an inherently dangerous instrumentality”); *Smith v. Brooks*, 545 S.E.2d 135, 137 (Ga. Ct. App. 2001) (observing that “a higher standard of care” applies because “a loaded firearm . . . amounted to an inherently dangerous instrumentality”). Courts in criminal cases have long referred to firearms as “inherently dangerous instrumentality[ies]” for purposes of inferring intent. See, e.g., *State v. Widner*, 69 Ohio St. 2d 267, 270, 431 N.E.2d 1025, 1028 (1982) (finding that a jury can infer intent to kill when a firearm is used, “[g]iven the fact that a firearm is an inherently dangerous instrumentality, the use of which is reasonably likely to produce death . . .”); *State v. Clark*, 8th Dist. Cuyahoga No. 89371, 2008–Ohio–1404 (Ohio Ct. App. Mar. 27, 2008) (“A jury can infer intent to kill by the defendant’s use of a firearm, an inherently dangerous instrumentality . . .”).

195. *Regalado v. State*, 25 So. 3d 600, 606 (Fla. Dist. Ct. App. 2009).

capabilities of the firearms they carry.¹⁹⁶ If a trained law enforcement officer is required to recognize the inherent dangerousness of her own firearm, then surely the law should allow her to recognize the inherent dangerousness of a firearm in the hands of a potentially untrained civilian.

2. *Limiting Reliance on Variable Data About Licensed Gun Carriers*

By allowing an officer to automatically frisk an individual upon reasonable suspicion that the individual possesses a firearm, this approach also absolves officers of any responsibility to take into account the imperfect and changing empirical data about the purported peaceful and law-abiding nature of licensed gun carriers. Such empirical data is often relied on by gun rights activists and litigants who argue that concealed carry permit holders deserve a presumption of law-abidingness.¹⁹⁷ But such data only applies in the small remaining number of restrictive “may issue” jurisdictions and quickly becomes outdated as states relax or strengthen licensing requirements. Moreover, the very reliability of these studies is widely disputed by longitudinal studies linking public gun possession to violent behavior.¹⁹⁸ Most importantly, requiring officers to make such real-time calculations based on data sets conflicts with *Terry*’s command that courts consider the perspective of the “policeman who in the course of an investigation ha[s] to make a quick decision as to how to protect himself and others from possible danger,” lest the “answer to [a] question propounded by the policeman . . . be a bullet.”¹⁹⁹

196. See, e.g., CITY OF CINCINNATI, THE CINCINNATI POLICE DEPARTMENT PROCEDURE MANUAL, <https://www.cincinnati-oh.gov/police/assets/File/procman.pdf> [<https://perma.cc/P6H6-K7P2>] ; DIV. OF CRIMINAL JUSTICE POLICE TRAINING COMM’N, N.J. DEP’T OF LAW & PUB. SAFETY, BASIC COURSE FIREARMS MANUAL <http://www.state.nj.us/lps/dcj/njptc/manuals/BasicCourseFirearmsManual.pdf> [<https://perma.cc/QK39-JN6B>] (requiring all firearms trainers to “stress [that] relevant safety shall be maintained by keeping all firearms’ muzzles pointed towards the ground” and requiring all trainees to “describe . . . the lethal capabilities of the agency handgun(s) and shotgun(s)"); OR. DEP’T OF PUB. SAFETY STANDARDS AND TRAINING, POLICE OFFICER FIELD TRAINING MANUAL, <https://www.ci.medford.or.us/files/Police%20Field%20Training%20Manual%206-14-2013.pdf> [<https://perma.cc/5X7X-7AXX>].

197. See, e.g., Brief for the Governors of Texas, Arizona et al. as Amici Curiae in Support of Petitioners at 9–12, *Peruta v. California*, 582 U.S. ___, 137 S. Ct. 1995 (2017) (No. 16-894) (citing multiple studies purporting to show that concealed carry permit holders are “more than 10 times less likely to commit a crime in Texas as compared to the general population”).

198. See Michael C. Monuteaux et al., *Firearm Ownership and Violent Crime in the U.S.*, 49 AM. J. OF PREVENTIVE MEDICINE 207, 207–08 (2015).

199. *Terry v. Ohio*, 392 U.S. 1, 28 (1968); *Sibron v. New York*, 392 U.S. 40, 63–64 (1968) (quoting *People v. Rivera*, 14 N.Y. 2d 441, 446 (1964), cert. denied, 379 U.S. 978 (1965)) (decided on the same day as *Terry*).

Critics of the automatic frisk approach to public firearms possessors point to “the empirical data on the relative rarity of crimes committed by licensed gun carriers.”²⁰⁰ These critics contend that officers should not automatically determine that an armed person poses a danger to them or others because data about licensed gun carriers suggests the opposite.²⁰¹ Studies suggest that licensed gun possessors commit far fewer violent crimes than the citizenry at large, and that evidence combined with the heightened background check requirements necessary to procure a concealed carry permit ought to provide licensed gun carriers with an enhanced presumption of law abidingness.²⁰² As Professor Jeffrey Bellin argues:

Although there is a robust debate about the effect of gun carrying on crime, there is general consensus that licensed gun possessors rarely use their firearms to commit violent street crimes such as robberies or murders. Thus, even if licensed gun carriers swarm streets in the wake of the legal changes chronicled above, strategies to suppress murders and robberies through gun detection may remain viable so long as police can lawfully distinguish licensed from unlicensed gun carriers and disarm only the latter group.²⁰³

This argument may support the claim that the presence of a gun alone should not justify a *stop* (because licensed gun possessors are less likely than average to commit a violent crime). But it misses the mark with respect to whether the presence of a gun should justify a *frisk*. First, the purpose of a frisk is to protect the officer and the nearby public, not to ferret out a potential violent crime plot.²⁰⁴ Searches based on less than

200. Bellin, *supra* note 20, at 32–33 (“Statistics published by the State of Texas reflect that people with concealed handgun licenses (CHL) commit only a small fraction of the street crime associated with public weapons possession. For example, of the roughly 4,000 people convicted for robbery or aggravated robbery in Texas in 2011, only two possessed a CHL. The same 2011 Texas data shows that CHL carriers included four (of over 500) convicted murderers, three (of 112) people convicted of manslaughter, and three (of 2,765) people convicted of assault with a deadly weapon.”).

201. *Id.*

202. Moore v. Madigan, 702 F.3d 933, 937–38 (7th Cir. 2012) (“The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders.”); *Reconciling Stop and Frisk with Concealed Carry Laws*, DUQ CRIM (Apr. 2, 2014, 12:57 PM), <http://www.duqlawblogs.org/duqcrim/2014/04/reconciling-stop-and-frisk-with-conceal-carry-laws/> [https://perma.cc/Y7TM-Y5AJ] (“As a conceal-carry permit holder . . . this signals to the officer that the individual passed a background check within the last 5 years which should afford the individual some presumption of law abidingness.”).

203. Bellin, *supra* note 20, at 32–33.

204. *Terry*, 392 U.S. at 32 (Harlan, J., concurring) (emphasizing that a frisk “is justified in order to protect the officer during an encounter”).

probable cause—such as *Terry* stops based on reasonable suspicion—cannot be evidentiary in nature but are allowed only to the extent necessary to protect the officer and public. The officer already made that determination when she concluded there was reasonable suspicion of criminal activity sufficient to initiate the stop. The presence of a firearm alone should justify the frisk, regardless of the presumptive law abidingness of a licensed gun carrier. Indeed, this presumption of law abidingness necessarily diminishes upon the officer’s development of reasonable suspicion that the armed individual is engaged in criminal activity.

Second, empirical data about the incidence of crime for concealed carry permit holders has no relevance in unrestricted or “constitutional carry” jurisdictions where no permit is required. Indeed, to the extent the empirical data about the law abidingness of permit holders depends on the heightened background check requirements necessary to receive the permit, such findings could arguably weigh in favor of *more expansive searches* in unrestricted jurisdictions.²⁰⁵ If officers must give a presumption of peaceful law abidingness to permit holders in restrictive “may issue” states, no such presumption need be given in unrestricted states where anyone can carry a gun in public, subject to certain federal restrictions.²⁰⁶

Third, the ongoing reliability of empirical data about licensed gun carriers depends on the static nature of the requirements for obtaining a gun license. In other words, an empirical study observing the violent tendencies of licensed concealed carry permit holders in Illinois would necessarily rely on a pool of licensed individuals who met the particular background check and other permit requirements in Illinois. Presumably, the more restrictive the requirements, the more law-abiding the pool of permit holders. By the same logic, as soon as Illinois changes its permitting requirements, the empirical data set becomes obsolete, at least to the Chicago beat cop charged with assessing dangerousness. As

205. *Moore*, 702 F.3d 933. Indeed, “[a] few studies find that states that allow concealed carriage of guns outside the home and impose minimal restrictions on obtaining a gun permit have experienced increases in assault rates.” See Ian Ayres & John J. Donohue III, *More Guns, Less Crime Fails Again: The Latest Evidence From 1977-2006*, 6 *ECON. J. WATCH* 218, 224 (2009).

206. Legislation introduced in the U.S. House of Representatives in December 2017, if passed, would further complicate the analysis for officers. The Concealed Carry Reciprocity Act would allow holders of a concealed carry permit in one state to carry loaded concealed firearms in all fifty states. It would allow people with permits “from states with weak permitting rules to carry into states with strict rules, like New York and California.” Melissa Jeltsen, *The GOP’s Latest Gun Bill Would Be Catastrophic for Women Fleeing Abuse*, HUFFPOST (Dec. 6, 2017, 5:47 AM) https://www.huffingtonpost.com/entry/concealed-carry-gun-bill-domestic-violence_us_5a26d1cce4b06d807b4f8a63 [<https://perma.cc/34BH-Q5UX>].

discussed above, states routinely change their permitting rules, and in the last three decades those changes have uniformly come in the form of relaxing permitting requirements.²⁰⁷ Thus, reliance on potentially outdated data about a more rigorously vetted pool of concealed carry permit holders would not only would be improper, but also dangerous.

Fourth, significant studies directly contradict the data concerning the purported law abidingness of gun owners. One study, co-authored by Stanford Law professor John Donohue, found that “[l]aws in all 50 states permitting people to carry concealed firearms in public have been connected to a rise in violent crimes,” including “‘substantially higher rates’ of aggravated assault, rape, and robbery.”²⁰⁸ The study also found that from 1999 to 2010, firearm-related murder rates rose in eight states that adopted right-to-carry laws.²⁰⁹ Another study, more broadly considering the correlation between private legal gun ownership and violent tendencies (with or without a permit), concluded that firearms in the United States are “disproportionately owned by people who are prone to angry, impulsive behavior and have a potentially dangerous habit of keeping their guns close at hand.”²¹⁰

Advocates on both sides of the gun control debate have much ammunition in the form of conflicting studies to justify their preexisting positions. The Seventh Circuit nobly attempted to wade through the conflicting empirical data in *Moore v. Madigan*,²¹¹ in which it cited conflicting contemporary studies finding alternatively that an increase in

207. See *supra* section II.C.1.

208. See Shadee Ashtari, *Right-To-Carry Gun Laws Linked to Rise in Violent Crimes: Study*, HUFFPOST (Nov. 14, 2014, 5:48 PM) (citing Ayres & Donohue, *supra* note 205, at 225), https://www.huffingtonpost.com/2014/11/14/right-to-carry-laws-crime_n_6160414.html [<https://perma.cc/7D4W-V2GE>].

209. *Id.*; see also Clifton B. Parker, *Right-to-Carry Gun Laws Linked to Increase in Violent Crime, Stanford Research Shows*, STANFORD REP. (Nov. 14, 2014), <https://news.stanford.edu/news/2014/november/donohue-guns-study-111414.html> [<https://perma.cc/262J-5L9S>] (“Now, Donohue and his colleagues have shown that extending the data yet another decade (1999-2010) provides the most convincing evidence to date that right-to-carry laws are associated with an increase in violent crime.”).

210. Douglas Perry, *Gun Ownership and Uncontrollable Anger Go Hand in Hand, New Study Concludes*, OREGONIAN (Apr. 9, 2015, 7:18 PM), http://www.oregonlive.com/today/index.ssf/2015/04/gun_ownership_and_uncontrollab.html [<https://perma.cc/CDR8-8A5T>]; see also Melissa Healy, *Nearly 9% of Americans are Angry, Impulsive — and Have a Gun, Study Says*, L.A. TIMES (Apr. 8, 2015, 5:50 PM), http://www.latimes.com/science/sciencenow/la-sci-sn-angry-impulsive-gun-access-20150408-story.html?lang=en&utm_campaign=SendToFriend&uid=0&utm_content=article&utm_source=email&part=sendtofriend&utm_medium=article&position=0&china_variant=False [<https://perma.cc/M2AQ-Q32E>] (citing study concluding that “people owning six or more guns were more likely to fall into both of these categories than people who owned a single gun”).

211. 702 F.3d 933 (7th Cir. 2012).

gun ownership correlated with an increase in homicide rates, an increase in concealed carry permits correlated with an increase in assault rates but not homicide rates, and an increase in concealed carry permits correlated with a decrease in both homicide and assault rates.

Based on findings from national law assessments, cross-national comparisons, and index studies, evidence is insufficient to determine whether the degree or intensity of firearms regulation is associated with decreased (or increased) violence. . . .

Some studies have found that an increase in gun *ownership* causes an increase in homicide rates. . . .

A few studies find that states that allow concealed carriage of guns outside the home and impose minimal restrictions on obtaining a gun permit have experienced increases in assault rates, though not in homicide rates. But it has not been shown that those increases persist. Of another, similar paper . . . it has been said that if they “had extended their analysis by one more year, they would have concluded that these laws [laws allowing concealed handguns to be carried in public] reduce crime.” . . . [B]ut they admit that data and modeling problems prevent a strong claim that they *increase crime*.²¹²

Putting aside the dueling data sets, the larger point for stop and frisk purposes is that officers should not be required to wade through these conflicting studies to come to a conclusion about the reasonable likelihood that an armed person might be dangerous.²¹³ Nor should they be subjected to a post hoc argument by a litigant challenging the protective frisk with reference to such data. Placing the frisk analysis on the presence of the inherently dangerous firearm eliminates these unfair and unworkable scenarios.

3. *Reducing Reliance on Implicit (and Explicit) Bias*

One of the most consistent and vociferous criticisms of *Terry* and the implications of its “reasonable suspicion” standard has been its potential for abuse by racist cops seeking to harass people of color on pretextual

212. *Id.* at 937–39.

213. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (“In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”).

grounds.²¹⁴ For example, an officer can use something as minor as an apparent crack in a vehicle windshield as justification to stop a person of color on the ground that it constitutes reasonable suspicion the driver is violating a statute prohibiting driving “in an unsafe condition as to endanger any person.”²¹⁵ The officer might then develop manufactured reasonable suspicion of dangerousness to justify a search for weapons based on preconceived notions about African Americans, Hispanics, or other minority groups.²¹⁶

This scenario is far from theoretical. In Maryland, from 1995 to 1997, a survey indicated that “70% of drivers stopped on Interstate 95 were African Americans,” although 17.5% of the drivers on the road were black.²¹⁷ Videotapes in one Florida county demonstrated that 5% of the drivers appeared to be dark-skinned, but 70% of the drivers stopped were African American or Hispanic, and more than 80% of the cars searched on the highway belonged to persons of color.²¹⁸ Moreover, traffic tickets were given in less than 1% of these stops.²¹⁹ This appalling disparity does not result only from individual racist cops; explicit racial profiling tactics implemented by police forces across the country encourage aggressively focusing on people of color.²²⁰

214. Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 569–70 (1997) (summarizing empirical data demonstrating disproportionate impact of *Terry* stops on minority groups and lamenting that *Terry* allows the use of “pretext stops, [letting] police avoid having to defend their use of race altogether”); Maclin, *supra* note 8, at 1287 (criticizing *Terry* as reflecting the Warren Court’s reluctance to “fight to ensure that blacks, the poor, and other ‘undesirables,’ would enjoy the same constitutional privileges possessed by the elite of American society”).

215. *Muse v. State*, 807 A.2d 113, 119 (Md. Ct. Spec. App. 2002).

216. See, e.g., Judith Zaccaria, *Police Video Draws Critics*, COWLEY COURIER TRAVELER (May 17, 2018), http://www.ctnewsonline.com/news/article_fdf3b7d6-5969-11e8-a0b4-ef2e98922bb3.html [https://perma.cc/FC6B-MY5D] (describing police officer’s decision to stop an African American man because “he had not turned on his signal 100 feet before a turn,” and proceeding to justify a search of his car because he saw “some kind of vegetation in the window well”); Yesha Callahan, *#DrivingWhileBlackWithLeavesOnTheWindshield: Kansas Man Detained for Having ‘Vegetation’ on Window*, ROOT (May 20, 2018, 8:44 AM), <https://www.theroot.com/drivingwhileblackwithleavesonthewindshield-kansas-man-1826176285> [https://perma.cc/3M78-XBQG] (describing same incident and showing video recorded by suspect confirming that officer demanded suspect exit his vehicle purportedly because tree debris was stuck under his windshield wiper).

217. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 36 (1999).

218. *Id.* at 36–37.

219. *Id.*

220. Joseph Goldstein, *Bronx Inspector Secretly Recorded, Suggests Race Is a Factor in a Police Tactic*, N.Y. TIMES, Mar. 22, 2013, at A1–A21 (summarizing recording where commanding officer told his officers to frisk “the right people at the right time,” and later clarifying, “I have no problem

Explicit bias against communities of color is not the only cause of this disparate treatment. The groundbreaking science of implicit bias—the study of the “attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner”²²¹—has shed an uncomfortable light on the widespread implicit biases held by law enforcement personnel towards African American men and other people of color.²²² While these implicit associations “do not necessarily align with [the] declared beliefs”²²³ of police officers, these “pervasive”²²⁴ biases have been linked to disproportionate stops, searches, arrests, and killings of people of color by police officers.²²⁵ One study analyzing data from the police department in Oakland, California, found that “while black residents make up 28 percent of the Oakland population, they accounted for 60 percent of police stops . . . [and] black men were four times more likely than white men to be searched during a traffic stop, even though officers were no more likely to recover contraband when searching black suspects.”²²⁶

So what can automatic frisks for weapons do to reduce racial bias? In one respect, nothing. Authorizing automatic searches of individuals *suspected* of carrying firearms will do nothing to reduce this disturbing trend. An officer who stops a person of color may be more likely to *suspect* implicitly or explicitly that the person is armed and search that individual in a situation where he might not search a white suspect.²²⁷ But in situations where the officer *knows* the individual is carrying a firearm—either through visual observation or the suspect’s own admission—an automatic protective frisk rule eliminates the possibility for implicit bias to affect the officer’s assessment of the “dangerousness” of the individual.

telling you this, male blacks 14, to 20, 21”); *see also* *Floyd v. City of New York*, 959 F. Supp. 540, 577 (S.D.N.Y. 2013) (finding NYPD stop and frisk practices unconstitutional because they disproportionately targeted African-American and Hispanic men).

221. *Understanding Implicit Bias*, OHIO ST. U. KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> [https://perma.cc/YQK7-A8LC].

222. Kirsten Weir, *Policing in Black & White*, AM. PSYCHOLOGY ASS’N (Dec. 2016), <http://www.apa.org/monitor/2016/12/cover-policing.aspx> [https://perma.cc/8ZG-DFXK].

223. OHIO ST. U. KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, *supra* note 221.

224. *Id.*

225. Weir, *supra* note 222.

226. *Id.*

227. *See, e.g.*, Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1012 (2007) (discussing implicit bias research suggesting unconscious racial bias harbored by law enforcement against African American men as reflected by officers’ faster response rates in shooting unarmed black men than unarmed white men).

In other words, if the analysis of whether to frisk turns on the objective presence of a firearm and not the subjective dangerousness of the individual, then any concern that the officer frisked the individual because he implicitly believes “black men are more dangerous” dissipates.²²⁸ This enhanced level of objectivity in the frisk analysis can thus promote the reduction of at least some of the subjective and pervasive biases implicitly projected towards groups of color.²²⁹

B. Acknowledging the Consequences of an Automatic Frisk Regime

But even if making frisks of gun carriers automatic may promote objectivity, civil rights activists may nonetheless scoff at the notion that lowering the burden for lawful frisks will benefit communities of color. This concern is valid and requires careful consideration. As noted above, these communities historically have been subjected to discriminatory over-policing, including racially charged stop and frisk practices.²³⁰ By advocating for a system wherein frisks become *per se* permissible in the presence of a firearm, this Article opens the door to more frisks—and more intrusive frisks—particularly in this lawful concealed carry age. The logical question then becomes whether expanding an often-misused law enforcement tool simply invites more abuses.

More broadly, valid concerns have been raised about the efficacy of widespread stop and frisk practices, period.²³¹ The most infamous stop

228. See Jenee Desmond-Harris, *How Racist Stereotypes Make Police Bias Almost Impossible to Fight*, VOX (May 5, 2015, 4:20 PM), <https://www.vox.com/2015/5/5/8547473/police-racial-bias-research> [<https://perma.cc/N6HU-NSYR>] (interviewing Joshua Correll about his research on implicit bias, who summarized it thusly: “We think this represents an awareness of a cultural stereotype—not that our participants believe necessarily that black men are more dangerous than white men, but by virtue of movies they watch, music they listen to, etc., they’re getting the idea that black male goes with violent. The group and the idea are linked together in their minds whether they agree with that stereotype or not”).

229. This position finds strong critics, who believe lower frisk standards for weapons will exacerbate racial profiling and discrimination. See *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring) (warning that once a state legalizes the public possession of firearms, unchecked police discretion to single out anyone carrying a gun gives rise to “the potential for intentional or unintentional discrimination based on neighborhood, class, race, or ethnicity”); *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) (harshly criticizing other purportedly “objective” factors such as “presence in a high crime area at night,” which, if “sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people”).

230. See *supra* section IV.A.3.

231. Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City’s “Stop and Frisk”*, 94 B.U. L. REV. 1495, 1550 (2014) (contending that stop and frisk in New York “was an inherently unconstitutional approach to crime fighting that probably ‘worked’ precisely because of the very aspects that render it unconstitutional”); cf. Scott Pilutik, *Frisk*

and frisk practices existed in New York City during the early 2000s, when NYPD officers consciously and dramatically increased their use of on-the-street stops and frisks to crack down on petty crimes.²³² From 2004 to 2012, over 4.4 million people were stopped and frisked, including over 685,000 in 2011 alone.²³³ Several studies have concluded that the type of quasi-dragnet style practices employed by the NYPD and other large departments have resulted in a significant misallocation of precious resources focused on harassing innocent people and nonviolent misdemeanants at the expense of apprehending serious criminals.²³⁴ In addition, these invasive practices may exacerbate distrust and antagonism between police and communities police depend on in gathering evidence and fighting crime.²³⁵

Assessment, SLATE (Aug. 19, 2013, 5:49 PM), <https://slate.com/news-and-politics/2013/08/new-yorks-stop-and-frisk-policy-is-neither-effective-nor-constitutional.html> [https://perma.cc/R3Q3-U772] (arguing that stop and frisk in New York was ineffective because contraband was rarely found during stops); Emily Badger, *12 Years of Data from New York City Suggest Stop-and-Frisk Wasn't That Effective*, WASH. POST (Aug. 21, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/21/12-years-of-data-from-new-york-city-suggest-stop-and-frisk-wasnt-that-effective/?noredirect=on&utm_term=.66b4b4886a69 [https://perma.cc/KRZ2-F6EQ]; David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 853, 866 (2013) (“The fact that almost ninety percent of stops and frisks [by the NYPD] produced nothing showed just how ineffective the tactic was.”); Dennis C. Smith, *Stop and Frisk Has Lowered Crime in Other Cities*, N.Y. TIMES (July 19, 2012, 2:03 PM), <https://www.nytimes.com/roomfordebate/2012/07/17/does-stop-and-frisk-reduce-crime/stop-and-frisk-has-lowered-crime-in-other-cities> [https://perma.cc/79YE-MMXG] (“Research has converged on the conclusion that a shift from reactive to proactive policing [such as stop and frisk] by the N.Y.P.D. has played the crucial role in what the criminologist Franklin Zimring called a ‘Guinness Book of World Records crime drop.’”).

232. Editorial, *Stop and Frisk Works*, NAT'L REV. (July 2, 2013, 8:00 AM), <https://www.nationalreview.com/2013/07/stop-and-frisk-works-editors/> [https://perma.cc/8G53-KR74] (defending NYPD's stop and frisk practices).

233. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013).

234. Ivladimirova, *Stop-and-Frisk: Out of 1,324 Local Searches at Sheepshead-Nostrand Houses, Zero Guns Are Found*, BKLYNER (July 24, 2012), <https://bklyner.com/stop-and-frisk-sheepshead-nostrand-houses-sheepshead-bay/> [https://perma.cc/QYB7-77BT] (suggesting that police officers' saturation of low-income housing projects without finding any guns amounts to “a major waste of public resources”); *cf. id.* (“Supporters of the stop-and-frisk procedures say that the police concentrate their hubs of activity where violent crimes are most often reported . . . because police saturate certain areas, this becomes a deterrent for carrying a firearm.”).

235. See Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689, 732 (2016) (“There is a large cost to current policing methods. Current policing creates distrust of law enforcement among the individuals targeted and in the community at large. Although stop-and-frisk is supposed to be a method of reducing crime, ironically, the distrust generated by stop-and-frisk makes it harder for police to solve or prevent crimes. Police aggression risks undermining a young person's trust in all government institutions . . . the evidence is conclusive that stop-and-frisk, as practiced in cities such as St. Louis, Chicago, and New York, leads to a breakdown in trust by both the person subjected to one or more unwanted encounters, and by those who witness them.”).

This Article offers two observations in response to these legitimate concerns. First, many of the ills connected to stop and frisk misuse stem from the exceedingly low reasonable suspicion standard first articulated in *Terry* and lowered further in the last half century. Prior to *Terry*, the Fourth Amendment generally required that absent exigent circumstances, police were required to obtain a warrant based on probable cause to conduct a search; this provided both a heightened evidentiary showing and a judicial check to ensure the showing had been made.²³⁶ By making warrantless searches not only generally permissible but permissible based on a much lower standard,²³⁷ the Warren Court virtually assured that policing would become more invasive, more discretionary, and less subject to judicial checks. With far greater latitude to seize and conduct limited searches of individuals, officers have been afforded far more opportunities to overreach, abuse stop and frisk, and unfairly discriminate—consciously, unconsciously, in good faith, and in bad faith. Combined with the Court’s numerous exceptions to the exclusionary rule²³⁸ and ever-expanding qualified immunity doctrine,²³⁹ these abuses often go completely unchecked, even after the fact.

Many have made convincing and passionate arguments that *Terry* was wrongly decided,²⁴⁰ that the concept of “reasonable suspicion” contradicts

236. See Dressler & Thomas, *supra* note 2.

237. *Terry v. Ohio*, 362 U.S. 1, 30 (1968).

238. See *United States v. Cusumano*, 67 F.3d 1497, 1515 (10th Cir. 1995) (Kane, J., concurring) (“The questionable deterrent effect and the increasing number of exceptions to it transform the exclusionary rule into a doctrine without substance.”); K. Dawn Milam, *The Shifting Sands of Deterrence Theory and the Sixth Circuit’s Trouble with Suppression in United States v. Fofana*, 92 N.C. L. REV. 1426, 1439 (2014) (observing that “the Court’s increasing propensity to apply a proportionality test[] has resulted in a proliferation of exceptions to the exclusionary rule. *Fofana* illustrates the uncertainty that results from an analysis that heavily favors exceptions, which in turn decreases deterrence”); Pamela F. Mucklow, *The Admissibility of Evidence of the Pre-Trial Exercise of Constitutional Rights*, 37 COLO. LAW. 81, 84 (2008) (“There are a number of exceptions, and the number seems to be increasing as the U.S. Supreme Court becomes increasingly skeptical of the exclusionary rule.”).

239. See *Valdez v. Roybal*, 186 F. Supp. 3d 1197, 1272 (D. N.M. 2016) (“[W]hile the Supreme Court may be expanding the qualified-immunity analysis in the Fourth Amendment context, it has not limited the doctrine in other areas. If anything, the Court’s survey of the Supreme Court’s qualified immunity precedent demonstrates the Supreme Court’s general expansion of qualified immunity in all areas.”); Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62, 64 (2016) (“[T]he Court has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own.”).

240. See, e.g., Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1286 (1998) (articulating view that “*Terry* was wrongly decided,” in part because “the Fourth Amendment required probable cause of criminal conduct before officers could search the inside of a car,” and “clear thinking recognizes that the respect and privacy

the original meaning of the Fourth Amendment,²⁴¹ and that a return to probable cause and the warrant requirement is necessary to reclaim the protections of the Fourth Amendment.²⁴² While these arguments are compelling, this Article situates itself within the reality of contemporary Court precedent and works within that framework. Many have forcefully and compellingly argued that stop and frisk itself represents an unconstitutional watering down of the Fourth Amendment's primary purpose of requiring warrants based on probable cause. This position, while valid, fails to account for the jurisprudential world in which we live. By declining to recommend upending fifty years of post-*Terry* case law, this Article ponders not whether stop and frisk should exist at all, but how the reality of stop and frisk can and should adapt to our new concealed carry world.

Second, one would be wise to remember that something may be legally permissible without necessarily being wise as a practice or policy. Under the current two-pronged test for reasonable suspicion, courts should recognize an officer's ability to lawfully frisk any armed individual who was lawfully stopped under reasonable suspicion of criminal activity. But while an officer *may* exercise this ability, she *need* not do so. Indeed, given the invasiveness of thorough officer pat-downs,²⁴³ the indignity

associated with our bodies at least matches the privacy accorded automobiles"); *Addressing Declining Rights in an Era of Declining Crime*, 9 J.L. & POL'Y. 215, 230 (2001) (remarks of Professor Maclin) ("I think *Terry* was wrongly decided from the start in 1968, even when probable cause had more teeth to it. The problem with *Terry* is not that there was reasonable suspicion there, but that a police suspicion standard was used.").

241. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192 (2016) (arguing that the original meaning and intent of the Fourth Amendment equated "reasonableness" with a warrant).

242. See Ross, *supra* note 235, at 732–33 ("It has been almost fifty years since *Terry v. Ohio* created the stop-and-frisk exception to the Fourth Amendment's probable cause standard, and it did so based on a cost-benefit analysis There is now data available for a Court to test its assumptions about the benefits and harms of stop-and-frisk Although *Terry v. Ohio* was decided almost fifty years ago, the doctrine is ripe for review.").

243. The invasiveness and emotional toll of a frisk in particular should garner careful scrutiny as police departments consider whether to implement large scale stop and frisk practices, as it is this intrusion that helps create lasting distrust between police and citizens. As Justice Scalia noted in a concurring opinion in *Minnesota v. Dickerson*, 508 U.S. 366, 381–82 (1993):

I frankly doubt . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity—which is described as follows in a police manual: Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked. . . . A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs

often experienced by those subjected to frisks, and the attendant antagonism and distrust that frisking engenders within communities,²⁴⁴ police departments should consider whether adopting an automatic frisk regime when weapons are present makes sound policy.²⁴⁵

Many have proposed alternatives to traditionally invasive stop and frisk policing as a way of building trust within communities while still keeping the peace and investigating crime, such as community policing,²⁴⁶ focused deterrence,²⁴⁷ and infrastructure improvements.²⁴⁸ These alternatives should be explored further. While frisking an armed individual is justified by the Court's current reasonable suspicion analysis, and in some circumstances certainly remains the safest and soundest approach, this Article by no means suggests that automatic frisks always reflect the best option.

should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject. J. Moynahan, *Police Searching Procedures* 7 (1963) (citations omitted).

Id. (Scalia, J. Concurring).

244. See Ross, *supra* note 235 at 722–23; Maclin, *supra* note 8.

245. Ross, *supra* note 235 at 732; see also Tara Culp-Ressler, *Why Stop-and-Frisk Could Be Bad for Americans' Health*, THINKPROGRESS (Oct. 17, 2014, 1:24 PM), <https://thinkprogress.org/why-stop-and-frisk-could-be-bad-for-americans-health-ca403b384520/> [<https://perma.cc/YB4T-TNDT>] (summarizing studies finding that individuals “who frequently have intrusive encounters with the police report increased levels of anxiety and trauma”); Joshua Rhett Miller, *Man Sues Cop for Anal Probe on Sidewalk*, N.Y. POST (July 19, 2018, 9:40 AM), <https://nypost.com/2018/07/19/man-sues-cop-for-anal-probe-on-sidewalk/> [<https://perma.cc/DH2F-5MW9>] (“A man in Washington, DC, is suing a police officer for probing his anus and grabbing his genitals in an invasive body search during a stop-and-frisk last year.”).

246. Graham Kates, *Examining Alternatives to “Stop-and-Frisk”*, CRIME REPORT (Nov. 15, 2013), <https://thecrimereport.org/2013/11/15/2013-11-examining-alternatives-to-stop-and-frisk/#> [<https://perma.cc/6D5E-FGNT>] (describing “a series of unorthodox initiatives” taken by the Orlando Police Department to combat crime in one complex, including “sponsor[ing] GED classes, counseling for emotionally-scarred kids too used to the sounds of gunfire; [and] police help[ing] residents ‘spruce up’ the buildings with new shrubbery and paint. Crime at the complex dropped 32 percent”).

247. James Forman, Jr. & Trevor Stutz, *Beyond Stop-and-Frisk*, N.Y. TIMES, Apr. 20, 2012, at A23 (“[F]ocused deterrence is in many ways the opposite of stopping and frisking large sections of the population. Beginning with the recognition that a small cohort of young men are responsible for most of the violent crime in minority neighborhoods, it targets the worst culprits for intensive investigation and criminal prosecution. Focused deterrence also builds up community trust in the police, who are now going after the real bad guys instead of harassing innocent bystanders in an effort to score easy arrests.”).

248. Conor Friedersdorf, *How to Stop Violent Crime Without Stop and Frisk*, ATLANTIC (Aug. 23, 2013), <https://www.theatlantic.com/politics/archive/2013/08/how-to-stop-violent-crime-without-stop-and-frisk/278975/> [<https://perma.cc/824U-94CH>] (“Infrastructure improvements as varied as better-lit streets and air-conditioned community centers open late in dangerous neighborhoods during the summer seem like they’re worth trying.”).

C. *To Disarm or Not Disarm?*

A final question requires consideration: even an automatic frisk for firearms during a *Terry* stop is justifiable, should the officer be allowed to physically disarm the individual? “Weapons seizures are not an explicit part of the *Terry* framework, but a necessary implication of the case is that guns can be seized, at least temporarily, . . . if the firearm makes the person ‘presently dangerous.’”²⁴⁹ Although the past assumption “that a person carrying a concealed weapon was engaged in the crime of unlawful weapons possession” no longer suffices to disarm an individual “with little analysis,” a recognition of the inherent dangerousness of guns should allow for an automatic temporary disarming of the individual during a lawful stop.²⁵⁰ Indeed, “[c]ourts may agree that the inherent dangers of firearms makes this showing essentially automatic whenever officers encounter armed persons in public.”²⁵¹

Critics of this approach point to *Terry*’s requirement that there be “specific, articulable” facts to justify a stop and that pointing merely to the presence of a firearm is insufficiently specific or articulable.²⁵² But why? A single objective indicator of criminality (such as the possession of heroin) is more than sufficiently specific and articulable to justify a stop because a stop is warranted when there is suspicion of criminal activity. It follows then that a single objective indicator of dangerousness (such as a concealed firearm) ought to be sufficiently specific and articulable to justify a frisk. In other words, if the analysis turns on the objective presence of a firearm and the recognition of its inherent danger, as it should, then these facts alone should be specific enough to justify both a weapons frisk and a temporary disarmament if firearms are found.²⁵³

This does not mean the “specific and articulable facts” threshold becomes obsolete in the second prong *Terry* analysis. Rather, courts will focus on the specific and articulable facts giving rise to a reasonable

249. Bellin, *supra* note 20, at 30–31 (quoting *United States v. Fisher*, 364 F.3d 970, 974 (8th Cir. 2004)).

250. *Id.* at 31.

251. *Id.* at 31; *see also* *United States v. Robinson*, 846 F.3d 694, 705 (4th Cir. 2014).

252. *See Robinson*, 846 F.3d at 713–14 (Harris, J., dissenting) (“Absent some ‘specific, articulable suspicion of danger’ in a particular case . . . West Virginia’s citizens, including its police officers, must trust their state’s considered judgment that the benefits of its approach to public gun possession outweigh the risks.” (quoting *United States v. Sakyi*, 160 F.3d 164, 168–69 (4th Cir. 1998))).

253. *United States v. Rodriguez*, 739 F.3d 481, 489 (10th Cir. 2013) (“No officer reasonably suspecting criminal activity . . . should have to ask one question and take the risk that the answer might be a bullet.” (quoting *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring))).

suspicion that the individual *possessed* a firearm, not on whether the armed individual was *dangerous*.²⁵⁴ This shift from whether certain indicators suggested that the armed person is dangerous to whether certain indicators suggested that the person was armed may help eliminate the subjectivity of *Terry* stops and frisks so frequently cited as a reason to rein in the doctrine or overrule *Terry* altogether. While subjective assessments and conscious or unconscious biases of police officers can never be eliminated entirely, requiring officers to articulate facts as to why they believed a suspect was armed rather than why a suspect was dangerous at least moves the analysis away from the potentially troublesome assessments of the person and towards the objective presence of the firearm.²⁵⁵

Indeed, even those who criticize this blanket approach admit that, absent some enhanced law enforcement authority to frisk and disarm, “officers will be forced to interact with armed citizens on equal terms That fact itself may discourage investigations of armed individuals The most common reaction of officers in the new gun-friendly era to tips, observations, or discoveries of concealed weapons may be to steer clear.”²⁵⁶ In an increasingly concealed carry world, civil society needs the opposite reaction from its peace officers. We need increased engagement from police officers to ensure the safety of all citizens—both armed and unarmed—where, in this concealed carry world, public streets, restaurants, banks, bars, parades, and protests are flooded with lethal and inherently dangerous weapons.

CONCLUSION

The number of private firearms in this country now exceed the number of people physically present in the country.²⁵⁷ All fifty states and the District of Columbia authorize public concealed carry of these firearms

254. *Id.* at 488 (“Officer Munoz saw the handgun because Defendant was bending over stocking shelves . . . providing the officer all the suspicion he needed”); *United States v. Mayo*, 361 F.3d 802, 803 (4th Cir. 2004) (“Officer Cornett observed that Mayo ‘either . . . had something heavy in [his] pocket or he was pushing his hand down’ into the pocket, a movement that Officer Cornett believed was consistent with an individual’s effort to maintain control of a weapon while moving.”).

255. *Cf.* Goldstein, *supra* note 220.

256. Bellin, *supra* note 20, at 32.

257. Christopher Ingraham, *There Are Now More Guns Than People in the United States*, WASH. POST (Oct. 5, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm_term=.7fa1031d06f1 [<https://perma.cc/9HNY-84E7>].

by civilians.²⁵⁸ Forty-two of these states impose little or no restrictions on who can carry these weapons or where they can carry them.²⁵⁹ The U.S. Supreme Court's recent recognition of a fundamental right to keep and bear arms for self-defense further colors the changing national landscape and conversation surrounding the public possession of firearms.²⁶⁰

This changing landscape poses obvious and significant challenges for police officers, who have traditionally initiated lawful stops and frisks of publicly armed individuals on the assumption that a crime was being committed by a dangerous person. That assumption seems increasingly unreliable. In this brave new world, officers should develop other indicia of suspected criminality beyond mere gun possession to satisfy the "reasonable suspicion" of criminality standard to initiate a stop under *Terry*. But once that lawful stop has been initiated, officers should have the right to automatically frisk and disarm a public gun carrier, regardless of the suspected dangerousness of the individual, in recognition of the need to protect the officer and nearby public from the possible use of the inherently dangerous and destructive firearm.

In making these recommendations, the author recognizes that "the framework described above would place a unique burden on handgun carriers,"²⁶¹ one that should receive careful scrutiny in light of the framework's infringement on recognized Second Amendment rights and the intrusion into the "sanctity of the person" entailed by frisks. But while the abridgement of constitutional rights should not be taken lightly, the Second Amendment right to keep and bear arms for personal protection does not (yet) encompass the right to be free from inquiries regarding firearms, pat downs and other temporary searches to identify the presence of firearms, or even brief relinquishment of firearms during the course of a lawful investigatory stop.²⁶²

258. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 24 ("Every state—as well as the District of Columbia—allows the carrying of concealed weapons in some form.").

259. *Id.* (listing twelve states where no permit is required, fifteen "no discretion" shall issue states, and fifteen "limited discretion" shall issue states).

260. *See* section II.C.2.

261. Bellin, *supra* note 20, at 42.

262. Miller, *supra* note 100, at 1295 ("Part of the problem is *Heller*'s imprecision on what it means by 'self-defense.'"); *cf.* Peruta v. Cty. of San Diego, 742 F.3d 1144, 1172 (9th Cir. 2014) (holding that *Heller* "does require that the states permit *some form* of carry for self-defense outside the home To put it simply, concealed carry *per se* does not fall outside the scope of the right to bear arms; but insistence upon a particular mode of carry does"); Bellin, *supra* note 20, at 30 ("Expanding gun rights also restrict the actions police can take when interacting with armed citizens. The widespread assumption in urban areas that armed people can be, at least temporarily, disarmed during police encounters may no longer hold sway in a post-*Heller* world.").

Moreover, the exercise of one's Second Amendment right inherently carries with it the exercise of enormous power. The right to carry a loaded firearm gives an individual the right to carry an instrument designed to inflict incredible damage and with the ability of ending numerous lives in a matter of seconds.²⁶³ Moreover, because the exercise of one's Second Amendment right includes carrying a loaded firearm, the Constitution grants an individual the right to carry an instrument designed to inflict incredible damage and capable of ending numerous lives in a matter of seconds. The exercise of this right inherently carries with it the exercise of enormous power, and "with great power comes great responsibility."²⁶⁴ Part of that responsibility ought to include, at a minimum, the ability of a peace officer to protect herself and the public by frisking, temporarily disarming, and determining the dangerousness of the individual exercising the right. A civilian relying on police officers to maintain their safety in public should demand no less.

263. *McLaughlin v. United States*, 476 U.S. 16, 17 (1986) ("[A] gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous"); *United States v. Copening*, 506 F.3d 1241, 1248 (10th Cir. 2007) (characterizing a "loaded gun [as] by any measure an inherently dangerous weapon"); *Pelissero v. Thompson*, 170 F.3d 442, 447 (4th Cir. 1999) (recognizing "the substantial risk of danger and the inherently violent nature of firearms"); *Love v. Tippy*, 133 F.3d 1066, 1069 (8th Cir. 1998) (recognizing "the inherently violent nature of firearms, and the danger firearms pose to all members of society"); *United States v. Allah*, 130 F.3d 33, 40 (2nd Cir. 1997) ("[F]irearms are inherently dangerous devices").

264. Zachary L. Weaver, *Florida's Stand Your Ground Law: The Actual Effects and the Need for Clarification*, U. MIAMI L. REV. 395, 426 (2008) ("The power to take another human life" with a firearm entails with it enormous responsibility).