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What's Fear Got To Do With It?: The "Armed And Dangerous" Requirement Of Terry

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WHAT'S FEAR GOT TO DO WITH IT?: THE "ARMED AND DANGEROUS" REQUIREMENT OF *TERRY*

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I. INTRODUCTION

Rarely has a court's opinion, even one from the Supreme Court of the United States, so altered existing notions of constitutional criminal procedure law as did the opinion in *Terry v. Ohio*.[1] On several levels, the opinion dramatically shifted the way in which the Fourth Amendment was understood. Law students who had learned about the probable cause "requirement" and the warrant "requirement" were surprised to learn, especially in the case of the former, that these "requirements" were not required at all.[2] To continue to conceptualize the Fourth Amendment's single sentence guarantees as consisting of a "warrant clause" and a "reasonableness" clause in which "unreasonable" meant "lacking probable cause," was inconsistent with the Court's exposition in *Terry*.[3] These "requirements" apparently were to be viewed as desirable, but

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1. 392 U.S. 1 (1968); *see* Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 418 (2006) ("In terms of regulating police conduct on the streets of America, *Terry v. Ohio* is probably the most important Supreme Court decision in modern criminal procedure.").

2. It should be noted that the Court referred to the probable cause "requirement" and characterized it as "fully relevant" at the same time it was creating a lower, but also acceptable, standard of suspicion. *See Terry*, 392 U.S. at 20.

3. *See id.* at 20–21.

not essential, elements of a constitutional search or seizure.[4] According to the Court, the Fourth Amendment only requires that the search and seizure be reasonable; it does not require probable cause.[5] A warrant is still preferred, but exceptions—narrowly-drawn exceptions[6]—excuse prior judicial approval.

This seismic shift in the fundamental understanding of the Fourth Amendment was not the only transformative message of *Terry*, though. When it applied the new reasonableness standard to the facts of the case, the Court populated its new universe with specific applications and a new standard of suspicion.[7] The world created by the Court was no longer defined only by "search" or "no-search" and "arrest" or "no-arrest." Instead, there now existed what an advertising team might market as "Search Lite" and "Arrest Lite." An intermediate stage between the extremes of the pre-*Terry* paradigm, these waypoints still fell within the "search and seizure" language of the Fourth Amendment, but did not involve the level of intrusion of their respective predecessors, custodial arrest and full-blown search.[8] The seizure component ("Arrest Lite"),[9] while within the protections of the Fourth Amendment, was less intrusive than the usual handcuffs-transportation to jail-booking arrest. Lacking a more creative and less cumbersome description of this temporary seizure, the

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4. *See id.* at 24.

5. *See id.* at 27, 30–31. This transformation was made over the strong objection of Justice William O. Douglas, who warned that "[t]he infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him." *Id.* at 38 (Douglas, J., dissenting). The Justice feared that diminishing the role of probable cause would "take a long step down the totalitarian path." *Id.*

6. In light of the numerous cases interpreting the scope of these exceptions, describing them as "narrow" must now be seen as aspirational rather than descriptive. *See* Russell L. Weaver, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, 109 PENN ST. L. REV. 1205, 1206–09 (2005).

7. *See id.* at 1208.

8. The Court wrote:

> The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

Terry, 392 U.S. at 19.

9. Although the Court did not explicitly decide that an investigative seizure could be made on less than probable cause, it is implicit within the Court's expressed understanding of the relationship between suspicion and seizure. *See id.* at 19 n.16. Justice Douglas's dissent reflects agreement that the majority altered the standard for seizures, as well as for searches. *See id.* at 35–39 (Douglas, J., dissenting).

procedure came to be known as a "*Terry* stop."[10] More formally, it is referred to as a temporary investigative detention, or some combination of those descriptors.[11] Because it is less intrusive than the usual arrest based on probable cause, it is reasonable to conduct this form of seizure if "reasonable suspicion" exists, a standard requiring less suspicion than probable cause.[12]

"Search Lite" in the new regime also is based on less suspicion, and consequently permits a less intrusive search than could be undertaken pursuant to a warrant, or under most of the warrant exceptions. Referred to in *Terry* by the unwieldy phrase, "carefully limited search of the outer clothing,"[13] this procedure is known in the criminal justice community as a "frisk"[14] or "pat-down." Reasonable suspicion again was the standard adopted by the *Terry* court, but the kind of suspicion required for a "frisk" was not the same as that needed for a "stop."[15]

Even if reasonable suspicion is a fixed and knowable point on the continuum of suspicion, admittedly a dubious proposition, suspicion that a person is involved in criminal activity is not the same as suspicion that a person may be carrying a weapon and intending to use it. Unfortunately, courts have sometimes conflated these differing types of suspicion or, perhaps, simply ignored the difference.[16] When reasonable suspicion exists to believe a suspect is about to commit a crime, that suspect may, or may not, be armed. Participation in criminal activity is not necessarily indicative of dangerousness, although certain offenses would support that inference because of the nature of the crime.[17]

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10. *See, e.g.*, Griffin v. State, 215 S.W.3d 403, 410 (Tex. Crim. App. 2006); Woods v. State, 956 S.W.2d 33, 39 (Tex. Crim. App. 1997) (Overstreet, J., dissenting).

11. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 415 (2005) ("detention for investigation"); Rhodes v. State, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997) ("temporary investigative detention"); State v. Hall, 461 A.2d 1155, 1159 (N.J. 1983) ("investigative detentions").

12. Tying the degree of intrusion to the quantum of suspicion essentially created a "sliding scale" in which reasonableness means different things. If the government wants to intrude more, it must have stronger suspicion. If it has less, it can do less.

13. *Terry*, 392 U.S. at 30.

14. Justice Harlan, concurring in *Terry*, used the terms "stop" and "frisk" to identify the procedures described by the majority. *Id.* at 31 (Harlan, J., concurring).

15. *See id.* at 23 (majority opinion).

16. *See* Weaver, *supra* note 6, at 1215.

17. For example, a person reasonably suspected of committing or attempting armed robbery or assault with a deadly weapon may be believed to be armed and dangerous, while a person suspected of credit card abuse might not, or at least not solely on the basis of the type crime he is suspected of being engaged in. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §9.6(a), at 852–53 (5th ed. 2012) ("It is undoubtedly true, however, that in some cases the right to conduct a protective search must follow directly from the right to stop the suspect.").

The purpose of a frisk is not to discover evidence of a crime.[18] Its sole purpose is to protect the safety of the officer and others.[19] This goal, understandable and laudable, does not warrant a "search"—even a less intrusive one—in the absence of articulable, individualized suspicion, a constitutional reality that often is overlooked by judges and magistrates eager to protect officers from harm. Consequently, it often also is overlooked by law enforcement officers who encounter persons engaged in suspicious behavior.[20]

So how does this mix of goals, limitations, and degrees of suspicion play out on the streets and in the courts? Begin with the observation that requiring two similar and partly overlapping, but different, levels of suspicion virtually assures that one or the other, or both, will be given short shrift. Because reasonable suspicion to believe a suspect has committed, is committing, or is about to commit an offense must precede any inquiry about whether a person is armed and dangerous,[21] it is unsurprising that the "second-step" in the reasonableness calculation would be the one to suffer. After all, if a person is believed to be involved in criminal activity, wouldn't the prolonged exposure of the officer and presuppositions about the dangerousness of "criminals" dictate that measures be taken to safeguard that officer? And if a weapon or other evidence

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18. *See* Adams v. Williams, 407 U.S. 143, 146 (1972) (indicating that purpose of frisk is "not to discover evidence of crime"). Responding to the argument that an officer confronting a suspect may search for weapons only when the encounter has developed into a custodial arrest for which probable cause exists, Chief Justice Warren wrote for the *Terry* majority:

> There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, is also justified on other grounds, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

Terry, 392 U.S. at 25–26 (citations omitted).

19. *See Terry*, 392 U.S. at 29. It is not even for the purpose of seizing and safeguarding destructible evidence that may be in possession of the suspect, as is the case with search incident to arrest. *See id.* (noting that a protective search, unlike search incident to arrest, "is not justified by any need to prevent the disappearance or destruction of evidence of crime").

20. *See* Weaver, *supra* note 6, at 1216–17.

21. *See Terry*, 392 U.S. at 32 (Harlan, J., concurring) (explaining that "[i]n the first place . . . the officer must first have constitutional grounds to insist on an encounter . . .").

is discovered within the allowable scope of a frisk, aren't the hydraulic pressures to "water down constitutional guarantees and give the police the upper hand"[22] likely also to "water down" the scrutiny of the court determining whether a second, slightly different version of suspicion was satisfied prior to the pat-down being conducted?[23]

To make matters worse, the focus of inquiry sometimes seems to have shifted from whether a suspect is "armed and dangerous," to whether the officer "feared for his safety."[24] While related, these are very different questions. Inevitably, an officer encountering a person suspected of criminal activity will be apprehensive about his personal safety, so asking the question in that way invariably leads to "yes." As will be explored, the shift from an objectively suspected or actual state-of-being (armed and dangerous) to a subjective perception of danger undermines the constitutional underpinnings of the frisk and opens the door to expanded use of the procedure, often without any particular, individualized, suspicion. Substantial evidence exists that this shift already has occurred in at least some courts.[25]

II. BACK TO THE BASICS: TERRY REVISITED

The facts in *Terry v. Ohio* are straight-forward and simple: Detective Martin McFadden observed a trio of men walking back and forth in front of a particular store during the afternoon in such a way that he concluded they were "casing"[26] the establishment, probably in order to commit a robbery.[27] He didn't actually observe the men commit any crime,[28] but they "didn't look right" to Detective McFadden.[29]

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22. *Id.* at 39 (Douglas, J., dissenting) (expressing concern that the need for enhanced law enforcement options dilutes constitutional guarantees).

23. Not all courts have succumbed to the temptation to conflate the two kinds of suspicion or apply the second less rigorously. *See, e.g.*, State v. Avans, 444 S.W.3d 124, 127 (Tex. App. 2014) (stating that frisk of vehicle's interior during routine traffic stop in which a double-edged sword was seen when the officer approached the defendant's car was not supported by reason to believe the driver was armed and dangerous).

24. Some courts have concluded, quite correctly, that an officer's subjective lack of fear in a given situation does not invalidate a frisk. *See* United States v. Cummins, 920 F.2d 498, 502 (8th Cir. 1990) (indicating that absence of subjective fear that suspects were armed did not alter the court's conclusion that the frisk was objectively reasonable). Ironically, though, subjective fear has sometimes seemed to substitute for an objectively reasonable belief that a suspect is armed and dangerous.

25. *See* Weaver, *supra* note 6, at 1218–19.

26. Detective McFadden testified that he suspected the men of "casing a job, a stick-up." *See Terry*, 392 U.S. at 6.

27. *Id.* at 4–6.

28. *See id.* at 22 (conceding that the men's acts were "perhaps innocent").

29. *Id.* at 5.

Chief Justice Earl Warren, writing for the majority, explained that the officer's observations, taken with his lengthy experience,[30] warranted his suspicion that criminal activity was afoot.[31] This suspicion apparently justified a brief detention of the men in order to investigate those suspicions and confirm or dispel them, but the Court expressly held that it was deciding "nothing" regarding the "constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation."[32] The Court conceptualized this case as one in which the suspicion required for a frisk existed independently from that required for a detention, an important distinction.[33] Notwithstanding the Court's attempt to narrow the scope of its holding, it acknowledged that, "[i]f this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case."[34]

Whatever the Court may have intended regarding seizures without searches, it clearly recognized that the frisk is a "search" within the meaning of the Fourth Amendment,[35] and that it was supportable in this instance because Detective's McFadden's observations reasonably led him to suspect that Terry and his companions were about to commit a crime likely to involve weapons.[36] As the Court explained,

> The sole justification of the search in the present situation 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.[37]

Turning its attention to the scope of the "search" for weapons in these circumstances,[38] the *Terry* majority concluded that patting down the outer clothing

30. Detective McFadden had "30 years' experience in the detection of thievery from stores in this same neighborhood." *Id.* at 23.

31. *Id.*

32. *See id.* at 19 n.16.

33. *See id.*

34. *Id.* at 20.

35. *See id.* at 26 (arguing that, although frisk may be less than a "full" search, it remains a serious intrusion).

36. *Id.* at 28.

37. *Id.* at 29. No "general exploratory search" for "evidence" was conducted. *Id.* at 30.

38. The Court refused to generalize about "the limitations which the Fourth Amendment places upon a protective seizure and search for weapons," but reserved those questions for fact-specific development. *Id.* at 29.

of the three suspects presented "no serious problem."[39] It explained, however, that McFadden did not reach into the pockets of the men or reach under the surface of their clothing "until he had felt weapons, and then he merely reached for and removed the guns."[40]

Justices Harlan and White wrote concurring opinions reflecting somewhat different, but ultimately similar views of the necessary basis for a frisk.[41] For his part, Justice Harlan emphasized the basis for the detention—the "stop"—but believed that, once a detention was justified by suspicion of criminal activity, the right to frisk should be "immediate and automatic."[42] He qualified this view by limiting the automatic frisk to "a crime of violence," but he did not explain why he believed Terry's case to involve such a crime, or what characteristics of a crime would indicate violence and justify the automatic frisk.[43]

Justice White seemed to prefer avoiding thorny distinctions between violent and nonviolent crimes. His concurring opinion focused more on the detention component, which he concluded "chiefly justifies" the frisk.[44] The nature of the crime apparently was unimportant in Justice White's view because the stop itself serves useful ends: questions can be asked, and a weapon may be found, leading to an arrest.[45] Even if no weapon is discovered, the suspect understands from the act of frisking that "suspicion has been aroused," presumably deterring any planned criminal act.[46]

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39. *See id.*

40. *Id.* at 29–30. The Court observed that the officer "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." *Id.* at 30. Despite the majority's disclaimer about describing the scope of a frisk, its opinion actually established succinct and reasonably clear guidelines for officers conducting a pat-down.

41. *See id.* at 31–35 (Harlan and White, JJ., concurring).

42. *Id.* at 33. Justice Harlan acknowledged that Terry's responses to questions posed by Officer McFadden provided "no reason whatever to suppose that Terry might be armed, apart from the fact that [McFadden] suspected him of planning a violent crime." *Id.*

43. *See id.* at 33–34. As Professor Wayne LaFave has observed:

> Lower courts have been inclined to view the right to frisk as being "automatic" whenever the suspect has been stopped upon the suspicion that he has committed, was committing, or was about to commit a type of crime for which the offender would likely be armed, whether the weapon would be used to actually commit the crime, to escape if the scheme went awry, or for protection against the victim or others involved.

LAFAVE, *supra* note 17, §9.6(a), at 853.

44. *Terry*, 392 U.S. at 34 (White, J., concurring).

45. *See id.* at 34–35.

46. *Id.*

The sole dissenter, Justice Douglas, decried the abandonment of the probable cause standard.[47] The reasonableness requirement of the Fourth Amendment, according to Douglas, can be satisfied only by probable cause, and not some lesser standard.[48] In Justice Douglas's view, "common rumor or report, suspicion, or even 'strong reason to suspect'" was not sufficient to satisfy the original understanding of the Fourth Amendment.[49] If a magistrate could not issue an arrest warrant on the facts known to Officer McFadden, the Justice noted, police officers should not have the authority to search and seize without a warrant.[50]

While the "automatic" frisk interpretation preferred by Justices Harlan and White was not expressly accepted by the majority, the concept survives in some cases involving violent or potentially violent crimes.[51] Usually without explicitly adopting automatic frisk for these crimes, courts reviewing frisks undertaken where reasonable suspicion exists to believe a person is about to commit a violent crime—and sometimes a nonviolent one—may be unable to resist the temptation to ratify a pat-down based on no evidence that the suspect actually poses a particular threat.[52] This practice may be based on an implicit finding that all violent offenses carry potential danger to victims, but even if this is the unstated rationale of judges who approve frisks without evidentiary support for a finding that the suspect is armed and dangerous, it is not at all clear that *Terry* supports that practice.

While the *Terry* opinion initially drew a distinction between the "stop" and the "frisk" and the kinds of reasonable suspicion required for each, it concluded in a way that confused the issue:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the

47. *See id.* at 35–39 (Douglas, J., dissenting).

48. *See id.* at 37–38.

49. *Id.* (quoting Henry v. United States, 361 U.S. 98, 100–02 (1959)).

50. *See id.* at 35–36.

51. *See, e.g.*, Williams v. State, 27 S.W.3d 688, 694 (Tex. App. 2000).

52. *See, e.g., id.* at 694–95.

> outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[53]

Was the Court suggesting that suspicion of criminal activity and the *mere possibility* that the suspect may be armed and dangerous justify a frisk?[54] Or did the Court intend "unusual conduct which leads him reasonably to conclude" to modify two separate requirements: that "criminal activity may be afoot" and that "the persons with whom he is dealing may be armed and presently dangerous"?[55] A careful reading of the entire opinion suggests that the Court did not mean to approve "automatic frisk" without independent suspicion, but that question has remained, particularly when the suspected criminal activity even possibly includes a component of violence.

An example of both the difficulty of identifying a crime of violence and of how some courts have effectively ignored the armed and dangerous requirement can be found in *Griffin v. State*.[56] The defendant in that case had been arrested for possession of cocaine that was in a "long plastic tube" found on his person.[57] Two days later, Griffin was stopped and frisked because police had received a tip from a confidential informant that he was selling cocaine in a public place.[58] Officers located Griffin and, based on the tip and not on any observed wrongdoing, detained and frisked him for "officer safety," finding two cylindrical tubes containing cocaine in his pocket.[59]

The arresting officer testified at a suppression hearing that he had known Griffin for "[a] couple [of] years" and had never known him to carry a weapon.[60] At the time the suspect was frisked, the officer said he had no information indicating that Griffin was armed or that he might be dangerous.[61] Further, the officer conceded that he "knew [the long tubes] were not a weapon" when he felt them, and that they were not a danger to the officer.[62]

Despite this uncontroverted testimony, the trial court denied Griffin's suppression motion and he was convicted.[63] Affirming the denial, the appellate court held that the officer "was objectively justified in frisking appellant for

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53. *See Terry*, 392 U.S. at 30.
54. *See* LAFAVE, *supra* note 17, §9.6(a), at 846–47 (discussing this issue).
55. *Terry*, 392 U.S. at 30.
56. 215 S.W.3d 403 (Tex. Crim. App. 2006).
57. *Id.* at 405.
58. *Id.* at 405–06.
59. *Id.*
60. *Id.* at 407.
61. *See id.*
62. *See id.*
63. *Id.* at 408.

weapons" because "it is objectively reasonable for a police officer to believe that persons involved in the drug business are armed and dangerous,"[64] and that belief is unaffected by an officer's knowledge that the suspect has not carried weapons in the past, or is not believed to be dangerous, and "even though the officer conducting the frisk in the case at hand testifies that he was not subjectively afraid of the suspect."[65] On defendant's motion for rehearing, his claim was that the court's decision was "too broad to satisfy *Terry*" and was inconsistent with *Richards v. Wisconsin*[66] in that it treated drug dealers categorically as armed and dangerous without regard for the facts of the individual case.[67] After asserting that its prior opinion on original submission "should not be read as lessening the requirements of *Terry*," the appeals court denied appellant's motion for rehearing, citing again the nature of the suspected offense, the fact that the suspect had been arrested for the same crime two days before, and that "he moved his hand toward his pocket during the investigative detention."[68]

Setting aside what the officer *actually* knew about Griffin and his history

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64. *See id.* at 409. In support of its belief that drug crimes are inherently violent, the court noted an FBI press release claiming that in 2001, 23% of the police officers killed in the line of duty, other than on September 11th, were investigating "drug-related matters" or "suspicious persons." *Id.* at 409 n.7. Half of those deaths occurred during "drug-related matters" and half during unspecified "suspicious persons" investigations. *Id.* It certainly is questionable whether, by itself, eight officer deaths in a single year qualifies drug dealing as a "crime of violence" sufficient to impose an automatic right to search every suspected dealer, even if the Supreme Court had adopted Justice Harlan's view, which it did not. The Court previously had approved a frisk on similar grounds in *Carmouche v. State*, 10 S.W.3d 323, 329–30 (Tex. Crim. App. 2000).

65. *See Griffin*, 215 S.W.3d at 409–10. In an earlier case, the same court had held that the validity of a frisk is not impaired by an officer's testimony that he was not afraid of the suspect, but a frisk also may not be conducted as a "matter of routine" alone. *See* O'Hara v. State, 27 S.W.3d 548, 553 (Tex. Crim. App. 2000).

66. 520 U.S. 385, 392–94 (1997); *see Griffin*, 215 S.W.3d at 410.

67. *See Griffin*, 215 S.W.3d at 410–11.

68. *See id.* at 411. The appellate court acknowledged that it was only Justice Harlan in his concurring opinion in *Terry* who favored the "automatic frisk" in cases of suspected violent crime. *See id.* at 411 n.4. The court also recognized that even Justice Harlan, concurring in *Sibron v. New York*, 392 U.S. 40, 74 (1968), the same day *Terry* was decided, wrote:

> First, although I think that, as in *Terry*, the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category. If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so.

Griffin, 215 S.W.3d at 411 n.4. (quoting *Sibron*, 392 U.S. at 74 (1968) (Harlan, J., concurring)); *see also* LAFAVE, *supra* note 17, §9.6(a), at 855–57 ("[T]rafficking in small quantities of narcotics" is among the crimes in which "other circumstances" must justify the belief that the suspect is armed and dangerous.).

of nonviolent encounters with the police—all of which militates against a finding that the suspect was armed and dangerous—the objective, observable circumstances of the encounter that remain were nonetheless scarce support for a frisk. No suggestion was made in the court's opinion that more than reasonable suspicion existed to believe the defendant was engaged in drug dealing. The officers saw nothing to support the tip other than the suspect's presence where they expected to find him, and only his prior arrest and the informant's tip tied him to selling drugs.[69] But at most, and assuming the informant and his tip were reliable, those facts gave officers reasonable suspicion to detain Griffin for further investigation, and not to believe he was armed and dangerous. Nothing they saw supported that belief other than a vague reference to "mov[ing] his hand toward his pocket" while detained, something that must be true for anyone wearing trousers with pockets when stopped.[70] What is left of the "armed and dangerous" finding in *Griffin* is the highly dubious proposition[71] that persons selling drugs are so frequently armed and violent[72] that everyone suspected of that offense must be searched. While that may seem to be so for those who are informed primarily by television crime dramas, the *Griffin* court's own thin authority for that proposition offers little support.

III. A TALE OF TWO CASES IN ONE COURT: CONFUSING THE USES OF SUSPICION

Setting aside the categorical treatment of certain offenses as potentially dangerous despite the *Terry* majority's rejection of that approach, the difficulty that courts have in discerning whether an officer reasonably believes a suspect to be armed and dangerous is illustrated by two Texas cases in which the same court treated very similar situations dissimilarly. In the first of these, *Crain v.*

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69. *See Griffin*, 215 S.W.3d at 408–09.

70. *See id.* at 409. A person responding to an officer's command to put his hands behind his back will move his hand toward his pocket, as will persons detained on a cold night who are simply trying to stay warm. *See* People v. Dotson, 345 N.E.2d 721, 722 (Ill. App. Ct. 1976) (holding a frisk invalid where suspect kept sticking his hands in his pockets on a cold day).

71. In its Uniform Crime Reporting Program (UCR), the U.S. Department of Justice and the FBI do not consider drug dealing to be a "violent crime." *See Crime in the United States—Violent Crime*, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/violent-crime [https://perma.cc/BXZ8-7Z63] (last visited Nov. 21, 2016).

72. Among federal and state prisoners who were armed when they committed the crime for which they were arrested, less than 9% were committing a drug offense, as opposed to 30–35% of those committing a violent crime, and 19–27% committing a "public-order" offense. *See* Caroline Wolf Harlow, *Firearm Use by Offenders, Survey of Inmates in State and Federal Correctional Facilities*, BUREAU OF JUST. STAT. SPECIAL REP. (Nov., 2001), http://bjs.gov/content/pub/pdf/fuo.pdf [https://perma.cc/U7CP-EY9H] (updated February 4, 2002).

State,[73] a police officer responded to a theft call just after midnight.[74] While he was on his way to the scene, the officer passed a man "walking in a residential area."[75] As the officer drove by, the man "grabb[ed] at his waist."[76] About ten minutes later, and after handing off the theft call to another officer, Officer Griffin returned to the area where he had seen the man and "found him walking across a yard."[77] Stopping his patrol car and shining his spotlight on the suspect, the officer either asked or told him to come over to the car and talk with the officer.[78]

Griffin later testified that he would have let the man go if he had refused to talk with the officer because he had not seen the suspect do anything criminal.[79] Nevertheless, the officer exited his patrol car and approached the suspect, telling him that he wanted to talk with him.[80] When he came close to the suspect, the officer smelled what he believed was an odor of "recently smoked marijuana" emanating from the man's clothes and breath.[81] Because the man appeared nervous, the officer thought he might be in possession of marijuana, and Griffin walked the suspect toward the patrol car, holding the man's hand behind his back.[82]

A back-up officer arrived at that time and both officers frisked the suspect.[83]

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73. 315 S.W.3d 43 (Tex. Crim. App. 2010).

74. *See id.* at 46.

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.* There was some disagreement among the judges about whether the officer ordered or requested the suspect to walk over to the patrol car. *See id.* at 52 n.39. Because the court focused considerable attention on whether this encounter was an investigative detention (i.e., a *Terry* stop) or was consensual, the finding regarding the nature of the officer's words took on considerable importance. *See id.* at 52.

79. *See id.* at 46–47. The fact that the officer would have let the suspect go about his business if he had refused to talk with the officer has no bearing on whether the initial contact was a detention or not. The point of a *Terry* stop is to allow the officer to maintain the status quo long enough to investigate and confirm or dispel the reasonable suspicion that justified the stop initially.

80. *See id.* at 47.

81. *Id.* Assuming that the officer's testimony regarding the smell of "recently smoked marihuana" was credible, continued detention or even arrest might be allowed, depending on whether a court would have seen that evidence as sufficient to establish that the suspect was likely to be in possession of the controlled substance. Potentially, a finding that the odor of marijuana created probable cause could have converted the subsequent frisk into a search incident to the man's arrest, and the increased scope of the search allowed following an arrest would have validated the search for, and discovery of, the pistol that was found later.

82. *See id.*

83. *See id.*

A bulge was detected under the suspect's shirt, and it turned out to be a pistol.[84] The man was arrested for possession of a firearm by a felon, but no other contraband was found in a search incident to arrest.[85] Officer Griffin testified that the defendant never offered any resistance or threatened the officers in any way.[86]

The trial court denied the defendant's suppression motion on the grounds that the initial encounter was consensual, a finding with which the appellate court disagreed.[87] After settling the issue of whether the Fourth Amendment was implicated by the detention of the suspect, the Texas Court of Criminal Appeals readily concluded that the pistol was a fruit of the unjustified detention and ordered it suppressed.[88] The non-consensual detention was, according to the court, not supported by reasonable suspicion, and therefore was unlawful.[89]

In finding an absence of reasonable suspicion for the detention, the Texas appellate court considered the same facts that would have been germane to a determination of whether the officer reasonably believed the suspect to be armed and dangerous. Writing for the majority, Judge Price noted that Officer Griffin had testified that there were "[a] hundred different things [the suspect] could have been doing" when he reached for his waistband as the officer drove by.[90] The opinion noted that the officer admitted that the man reaching for his waistband "did not necessarily mean that criminal activity was afoot."[91]

Whether "criminal activity was afoot" goes to the basis for the forcible detention, of course. But it might as easily be said that reaching for his waistband was not necessarily indicative of the presence of a weapon. Just as the suspect's action *might* have been related to criminal activity, it *might* have been an attempt to reach a weapon, but the court held the conduct was too ambiguous to support an inference of the former, and the same reasoning would prevent a finding of the latter.[92] Under Texas law at the time of the incident, if reaching for the waistband was sufficiently indicative of the carrying of a pistol, the officer would have had reasonable suspicion to detain the man for violating the

84. *Id.*

85. *See id.* at 46–47.

86. *Id.* at 47.

87. *See id.* at 53–54. Had the encounter been consensual, of course, there could have been no claim that an unlawful seizure of the person tainted the subsequent discovery of the contraband. That would not by itself have resolved the question of whether the search (frisk) was lawful, but it would have changed the analysis away from any consideration of whether the man was armed and dangerous.

88. *See id.* at 52–54.

89. *See id.*

90. *Id.* at 53 (first alteration in original).

91. *Id.*

92. *Id.*

law prohibiting the carrying of a pistol on or about the person.[93] It seems obvious that reasonable suspicion to believe that offense was being committed would simultaneously satisfy at least the "armed" portion of the "armed and dangerous" requirement.

Considering other factors that reasonably might have contributed to the officer's suspicion, the *Crain* majority observed:

> Neither time of day nor level of criminal activity in an area are suspicious in and of themselves; the two are merely factors to be considered in making a determination of reasonable suspicion. Neither fact proves that the suspect is engaged in any sort of criminal offense. In order for these facts to affect the assessment of the suspect's actions, the surroundings must raise a suspicion that the particular person is engaged in illegal behavior. Griffin did not offer any testimony that might have raised his suspicion that the appellant was engaged in criminal activity before he approached the appellant and smelled marihuana on him. We find no other indicia of reasonable suspicion on the record before us.[94]

Absent reasonable suspicion to detain the suspect, Officer Griffin also lacked legal authority to conduct even a limited search of his person.[95] But if he had possessed reasonable suspicion of wrongdoing, that suspicion by itself would not have supported a frisk for weapons. Reaching for the waistband,[96] the most suspicious act observed by the officer, was insufficient to establish reasonable suspicion of criminal activity for the same reasons it should have been insufficient to allow a frisk if the detention had been lawful. When the same court was presented an opportunity to decide the issue of potential danger on very similar facts less than a year after its ruling in *Crain*, it took a sharp analytical turn away from its prior holding.[97]

A police officer on patrol in the early hours of the morning in an area with "one of the 'higher crime rates,'" saw two men walking behind a business that was closed for the night.[98] Deciding to investigate "what they [were] doing back there at that time," the officer and his partner approached the men.[99] The officer who had seen the men initially, Officer Barrett, "probably asked them

93. *See* TEX. PENAL CODE ANN. § 46.02 (West 2006) (unlawful carrying weapon).

94. *Crain*, 315 S.W.3d at 53 (footnote omitted).

95. *Id.* at 52–53.

96. *Id.* at 53.

97. *See* State v. Castleberry, 332 S.W.3d 460 (Tex. Crim. App. 2011).

98. *Id.* at 462.

99. One officer approached from the men's front while his partner, Officer Barrett, approached them from the rear. *See id.*

for ID [and] questioned them why they were walking through there."[100] When the men were asked for identification by Officer Barrett, one of the men, Cory Castleberry, "was kind of reaching for his waistband."[101] Barrett later testified that he "d[id not] know, if he ha[d] a gun or knife."[102] He went on to explain, regarding the possible significance of the suspect's move toward his waistband, that, "[t]hat's commonly where weapons are carried, in the front waistband, underneath an untucked shirt."[103]

As soon as Castleberry began to reach toward his waistband, Officer Barrett ordered him to put his hands above his head, something he testified he "commonly" did to "gain control" in order to "do a patdown."[104] When the suspect reached for his waistband again, the officer told him to put his hands behind his back so the officer could frisk him, but Castleberry "[p]ull[ed] his right hand away from [Officer Barrett's] control back towards the front of his waistband . . . ."[105] He was able to gain access to a baggie of cocaine, perhaps from his waistband,[106] and throw it.[107] The cocaine was recovered by the officers, and Castleberry was charged with possession.[108]

Significantly, Officer Barrett testified later that when he first saw the two suspects, neither was carrying any bag or tool, or anything that could be used in a burglary.[109] He also conceded that there was nothing about them that was out of the ordinary.[110] According to Castleberry's testimony, he was walking to his apartment from a bar, which was about a block from where he was stopped.[111] The area, Castleberry said, was "not dangerous at all," and he always walked through the parking lot behind the restaurant where he had been detained.[112] He had a compact disc in his waistband, Castleberry testified, and

100. *Id.*

101. *Id.* at 462–63.

102. *Id.* at 463.

103. *Id.*

104. *Id.*

105. *Id.* (first alteration in original).

106. The court's opinion does not indicate where the cocaine had been before Castleberry threw it, presumably because that fact was unknown to the officers.

107. *Id.*

108. *Id.* at 462–63.

109. *Id.* at 463.

110. *Id.*

111. *Id.*

112. *See id.* The defendant testified at his suppression hearing that there was "quite a bit" of foot traffic through the area at 3:00 a.m. *Id.*

no weapon was found in his possession when Officer Barrett searched him following his arrest.[113]

The trial court and the intermediate court of appeals in *State v. Castleberry* found that the detention was not supported by reasonable suspicion.[114] The Texas Court of Criminal Appeals, however, disagreed, holding—contrary to what one might expect in light of its decision in *Crain v. State*—that Castleberry's act of reaching for his waistband provided the necessary support for transforming a consensual encounter into an investigative detention.[115]

In his opinion for the majority, Judge Keasler found that Castleberry and his companion "would have felt free to decline Officer Barrett's request for identification" when they were first approached by the two officers.[116] After observing that "an officer is just as free as anyone to question, and request identification from, a fellow citizen," Judge Keasler concluded that "the interaction was a consensual encounter."[117]

Nothing was said in the majority's opinion about whether a person being approached by two uniformed officers, one in front and one in back, would feel free to push past them and continue on his way home.[118] The *Castleberry* majority acknowledged its prior language in *Garcia-Cantu v. State*, in which the court observed that a "reasonable person would feel freer to terminate or ignore a police encounter in the middle of the day in a public place where other people are nearby than he would when parked on a deserted, dead-end street at 4:00 a.m."[119] The situation in *Castleberry* was different, according to Judge Keasler, because the defendant was walking in an area reasonably well-lit with "quite a bit" of foot traffic, facts that the Court believed freed the suspect to say "no" and continue to his apartment.[120]

Having concluded that the encounter did not fall under Fourth Amendment

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113. *Id.*

114. *See id.* at 463–65. The opinion from the Dallas court of appeals was not designated for publication.

115. *See id.* at 469.

116. *Id.* at 467.

117. *See id.* at 468. In the absence of reasonable suspicion of criminal wrongdoing, an officer may not demand and require a person to produce identification. *See* Brown v. Texas, 443 U.S. 47, 52 (1979). In *Brown*, officers stopped two men seen walking away from each other in an alley. *Id.* at 48–49. Despite having no reason to suspect Brown of any specific misconduct, or to believe that he was armed, the officers asked for identification and an explanation of Brown's presence. *See id.* Instead of producing either, Brown refused and "angrily asserted that the officers had no right to stop him." *Id.* at 49. He was frisked before being arrested for failing to identify himself. *See id.*

118. *See Castleberry*, 332 S.W.3d at 468.

119. *Id.* at 468 (quoting State v. Garcia-Cantu, 253 S.W.3d 236, 245 n.42 (Tex. Crim. App. 2008)).

120. *See id.*

protection, the Court turned its attention to whether Castleberry's act of reaching toward his waistband was innocent behavior, as the trial court and lower court of appeals held.[121] Again, the court of criminal appeals disagreed with the lower courts. Those courts had reasoned that when Barrett asked Castleberry for identification and he reached for his waistband, he might have been complying with the officer's request or command, a finding consistent with the court of criminal appeals' holding in *Crain*.[122] Judge Keasler, writing for the majority, noted a passage from a 1997 opinion in which the court of criminal appeals wrote that "[t]he possibility of an innocent explanation does not deprive the officer of the capacity to entertain reasonable suspicion of criminal conduct. Indeed, the principal function of [an] investigation is to resolve that very ambiguity."[123]

While the quoted language from *Woods v. State* expresses an obvious legal truism—that reasonable suspicion and a possible innocent explanation are not mutually exclusive—it certainly does not lessen the prosecution's burden to show reasonable suspicion that the suspect is armed and dangerous. Citing *Glazner v. State*,[124] a case in which "the officer saw what looked like a knife in [the suspect's] pocket" and proceeded to frisk him, the *Castleberry* majority reasoned that, although Officer Barrett "had no reason to believe Castleberry was a threat, nor did the officer immediately observe any weapons," he nevertheless was entitled to believe that "his . . . safety may be in danger" because the suspect reached for his waistband.[125] To bolster its finding that the officer's belief was reasonable, the Court noted that Castleberry was found in a high crime area and behind a closed restaurant.[126]

Of course, the *Glazner* case was inapposite in deciding whether Officer Barrett had reasonable suspicion that Castleberry was armed and dangerous. Seeing what appeared to be a knife in a suspect's pocket would have provided ample suspicion of potential danger, whereas Barrett admitted that, other than a general concern about waistbands as potential hiding places for weapons, he

121. *See id.*

122. *Id.*; *see also* Crain v. State, 315 S.W.3d 43, 53 (Tex. Crim. App. 2010).

123. *Castleberry*, 332 S.W.3d at 468 (quoting Woods v. State, 956 S.W.2d 33, 37 (Tex. Crim. App. 1997)).

124. 175 S.W.3d 262 (Tex. Crim. App. 2005).

125. *Castleberry*, 332 S.W.3d at 469.

126. *See id.* Reliance on the character of a location says little about whether persons in that neighborhood will be armed. As the U.S. Court of Appeals for the First Circuit said in *United States v. Villanueva*, "we remind police that the character of a neighborhood does not provide automatic permission [to frisk]; every case must be considered on its own reasons for suspicion of danger." United States v. Villanueva, 15 F.3d 197, 199 (1st Cir. 1994) (citation omitted).

had no reason to believe that the suspect was armed or dangerous,[127] a point conceded in Judge Keasler's majority opinion.[128]

It is noteworthy in two respects that the *Castleberry* court resorted to the phrase "his or her safety may be in danger" to support its conclusion that the detention was reasonable.[129] Firstly, safety concerns are not relevant to the initial determination in a *Terry* stop. Prior to any consideration of whether to frisk, an officer must determine whether a suspect may be "seized" by detaining him or her for investigation.[130] That decision turns on whether there is reasonable suspicion to believe a crime has been, is being, or is about to be, committed.[131] The focus for the detention is criminal activity, not danger to the officer or others.[132] A "stop and frisk" is divided into two separate activities: the "stop" (seizure of the person) and the "frisk" (search of the person).[133] For the former, safety is not the motivating governmental interest.[134]

Secondly, there was no factual support for the safety concerns that the Court believed to be present. While a "possible" innocent explanation for Castleberry's movement toward his waistband would not negate a reasonable suspicion that he was armed, reaching toward his waistband also would not, by itself, provide more than the most speculative link. Officer Barrett requested identification, and the suspect immediately moved his hand in the general direction of his waistband.[135] On a list of possible explanations for that action, it is hard to see how obtaining a weapon would rank as highly as the more obvious and logical explanation: that he was producing the requested identification.[136]

Judge Cochran, writing for the majority in *Wade v. State*,[137] a 2013 decision

127. *See Castleberry*, 332 S.W.3d at 463, 469.

128. *See id.* The majority opinion plainly states that "[a]t that point, [the point at which Castleberry reached for his waistband], Officer Barrett did not know if Castleberry was carrying a weapon." *Id.*

129. *Id.*

130. Terry v. Ohio, 392 U.S. 1, 16 (1968).

131. *See id.* at 26.

132. *Id.* at 22.

133. *See* Carmouche v. State, 10 S.W.3d 323, 329 (Tex. Crim. App. 2000) (distinguishing between suspicion required for detention and safety concern justifying frisk).

134. *Terry*, 392 U.S. at 21–23.

135. State v. Castleberry, 332 S.W.3d 460, 462–63 (Tex. Crim. App. 2011).

136. Castleberry may, for example, have been reaching for his back pocket to retrieve his wallet and identification, or for his pocket, or even for his waistband, all in an effort to comply with the officer's request. Virtually any movement of his hands in a direction other than straight up would have been a movement toward his waistband. The Court's narrow inference that he was trying to obtain a weapon presupposes that waistbands are where weapons usually are kept, and that movements toward a waistband are likely to be motivated by a desire to obtain a weapon.

137. 422 S.W.3d 661 (Tex. Crim. App. 2013).

by the Texas Court of Criminal Appeals and discussing *Castleberry*—a case in which she dissented—offered the explanation that "when asked for his identification, Castleberry reached for his waistband (as opposed to his pocket where a wallet would normally be kept), an act that could be reasonably construed as reaching for a weapon."[138] This *post-hoc* speculation about where a male suspect might keep his belongings is as close as the Court ever came to justifying the "reasonableness" of the officer's belief.

As to the *Castleberry* court's possible reliance on the "high crime" nature of the neighborhood and the location of the stop, neither factor related logically to the ultimate question preceding a frisk: Was there reasonable suspicion that the suspect was both armed and dangerous?[139] And it must be remembered that the same court, just a year earlier in *Crain*, had said that:

> Neither time of day nor level of criminal activity in an area are suspicious in and of themselves; the two are merely factors to be considered in making a determination of reasonable suspicion. Neither fact proves that the suspect is engaged in any sort of criminal offense. In order for these facts to affect the assessment of the suspect's actions, the surroundings must raise a suspicion that the particular person is engaged in illegal behavior.[140]

Admittedly, the court was not dealing with the propriety of a frisk, both because a frisk never actually occurred and because the judges already had decided that the encounter was consensual.[141] But the court's observations and reasoning regarding whether reasonable suspicion of criminal activity was created by the circumstances, especially the suspect's reaching for his waistband, are very instructive in understanding its view on that unanswered question of whether a frisk might be justified.[142]

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138. *See id.* at 675 (citing State v. Castleberry, 332 S.W.3d 460, 469 (Tex. Crim. App. 2011)).

139. In *People v. Linley*, 903 N.E.2d 791 (Ill. App. Ct. 2009), the Appellate Court of Illinois considered a situation not unlike that in *Castleberry*. An officer responding to a shots-fired call saw the defendant standing outside a residence in a high-crime area. *Id.* at 794. According to the officer's testimony, the suspect appeared to be considering fleeing when he saw the officer approaching, so the officer immediately frisked him. *Id.* The appeals court, unlike the *Castleberry* court, described the propriety of the stop as of "purely academic interest" as it readily concluded the frisk was unlawful. *Id.* at 798. Despite finding the suspect in a high-crime area to which he had been dispatched on a report of shots being fired, and concluding that the suspect was considering fleeing, the officer observed nothing particularly unusual according to the court, and certainly nothing that would justify a reasonable belief that the suspect was armed and dangerous. *Id.*

140. *See* Crain v. State, 315 S.W.3d 43, 53 (Tex. Crim. App. 2010) (footnotes omitted).

141. *See* State v. Castleberry, 332 S.W.3d 460, 468 (Tex. Crim. App. 1991).

142. *State v. Castleberry* was briefly revisited in *Wade*, 422 S.W.3d 661. The majority opinion,

IV. A NEW YORK STATE OF MIND: ON AUTOMATIC FRISKS

The holdings in *Crain* and *Castleberry* suggest a need for close scrutiny of the justifications proffered for investigative detentions, and particularly of the bases for the additional intrusion of frisking suspects. Those opinions, however, serve only as relatively unknown examples of the inconsistent ways in which courts treat this procedure. Stop-and-frisk, a term and concept very familiar within the world of criminal justice, came to the public's attention with unprecedented force in the case of *Floyd v. City of New York*.[143] *Floyd* was a class-action suit filed in 2008 against New York City challenging the police department's wide-spread, and allegedly racially motivated, use of stop-and-frisk as a crime control measure.[144]

The litigation in *Floyd* focused primarily on the claim that minority residents of New York City, particularly African-American and Latino residents, were being targeted by the police for detention in an effort to reduce the incidence of crime and reverse the city's reputational decline by focusing on greatly increased police contact with low-level offenders.[145] And crime levels did fall substantially during the period in which the NYPD's use of stop-and-frisk rose dramatically.[146]

Not surprisingly, racial profiling and the startling increase in stops of "suspects" were the issues that predominated news accounts of the litigation and, eventually, of the lengthy opinion of Judge Shira Scheindlin, who found for the plaintiffs in the case.[147] Judge Scheindlin's opinion and the evidence produced in *Floyd* contained a wealth of data on the use of stop-and-frisk by the police, including statistics on frisks—as opposed to the stops that preceded them—and the "success" rates for those frisks.[148]

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penned by Judge Cochran who had dissented in *Castleberry*, took an arguably narrower view of reasonable suspicion to detain, and especially of what constitutes a consensual encounter. Citing Brown v. Texas, 443 U.S. 47, 52 (1979), the court held that the totality of suspicious circumstances on which an officer relies "must be sufficiently distinguishable from that of innocent people under the same circumstances as to clearly, if not conclusively, set the suspect apart from them." *See* Wade v. State, 422 S.W.3d 661, 670 (Tex. Crim. App. 2013).

143. 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

144. *See* Stephanie Francis Ward, *Stopping Stop-and-Frisk*, 100 A.B.A.J. 38, 39–40 (Mar. 2014).

145. *See id.* at 39.

146. Between 1990 and 2014, murders declined by 85% and rapes by more than half. *Id.* Burglaries decreased nearly 86% and robberies fell by 80%. *Id.*

147. *See, e.g.*, Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html?_r=0 [https://perma.cc/Y8QX-VE73] (chronicling the racial implications of New York's stop-and-frisk policy).

148. *See Floyd*, 959 F. Supp. 2d at 558–59.

Thanks to a settlement reached in the 2003 case of *Daniels v. City of New York*,[149] a class action lawsuit also challenging the stop-and-frisk policy and practice of the NYPD, detailed reporting data were available to the *Floyd* plaintiffs for the years leading up to their own attack on the procedure. Those data reflected that, "[t]he number of stops per year rose sharply from 314,000 in 2004 to a high of 686,000 in 2011."[150] Reporting on the *Floyd* decision, the New York Times observed that, "the stops were not the end of the problem, Judge Scheindlin found. After officers stopped people, they often conducted frisks for weapons, or searched the subjects' pockets for contraband, like drugs, without any legal grounds for doing so."[151]

The New York Civil Liberties Union, using data from quarterly reports released by the NYPD, analyzed the practice of stop-and-frisk in New York City in 2012.[152] Discussing unwarranted frisks, the NYCLU report concluded that,

> Data from 2012 stops indicate that NYPD officers are routinely frisking people without suspicion that the person has a weapon. Of the 532,911 stops last year[], officers conducted frisks in 297,244 of them, or 55.8 percent of all stops. While this figure alone strongly suggests that officers are engaging in far too many frisks, the concern that officers are unjustifiably frisking people is clearly demonstrated by the fact that weapons were found in only 2 percent of the instances in which frisks were conducted in 2012.[153]

That same report noted that the 110th Precinct in Queens had the highest frisk rate in 2012, with 81.4 percent of stops including frisks.[154] Blacks and Latinos were far more likely than whites to be frisked throughout the city,[155] but whites were much more likely to be found in possession of a weapon when frisked.[156] As for the recovery of guns, as opposed to all kinds of weapons, the NYCLU report found only a marginal increase in guns found when the number of frisks increased greatly.[157] In 2003, 160,851 people were stopped and 633

149. *See* Ward, *supra* note 144, at 40.

150. *See Floyd*, 959 F. Supp. 2d at 558.

151. *See* Goldstein, *supra* note 147.

152. Christopher Dunn, *Stop-And-Frisk 2012*, NYCLU BRIEFING (May 2013), http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf [https://perma.cc/DM9Q-BH7X].

153. *See id.* at 8 (footnote omitted).

154. *See id.*

155. 89.2% of all frisks in New York City in 2012 were of blacks and Latinos, only 7.6% were of whites. *Id.* at 9.

156. Only 1.8% of blacks and Latinos were carrying weapons when frisked, while 3.9% of whites were armed. *Id.* at 10.

157. *See id.* at 13.

guns were recovered, while in 2012, 532,911 people were stopped but only 729 of those produced guns, an additional 96 guns for more than 372,000 additional stops.[158]

The New York City data certainly call into question the effectiveness of frisk during that period in the city's history to make police officers safer during encounters with suspects. It is not possible, however, to conclude more from these data than they will bear. If, as Judge Scheindlin found, the culprit here was racially based detentions for which inadequate, or no, suspicion of wrongdoing existed, one would expect the rate of gun recovery, for example, to be very low. Were these data indicative of a general overestimation of the danger in most encounters? Were they the product of excessively zealous and aggressive pursuit of statistics-driven benchmarks? Or did they reflect a widespread tolerance by courts, or maybe indifference by defense counsel, of a very broad and unfounded suspicion by the police that people are armed and up to no good?

V. IF IT'S ONE, THEN IT'S TWO

Consideration of specific cases in which courts have found circumstantial support for the "armed and dangerous" prerequisite to a frisk cannot yield a definitive answer as to whether courts generally are rigorous in their assessments of the second-prong of *Terry*. It can, however, highlight the difficulties courts encounter in making this important decision, and these cases sometimes can illustrate the ways in which judges conducting after-the-fact analysis while possessed of full knowledge of what the frisk uncovered succumb to the temptation to validate.

Two cases from the U.S. Court of Appeals for the Ninth Circuit, for example, reflect the struggle that trial courts, and ultimately appeals courts, have with the "armed and dangerous" requirement. In the first of these, *United States v. Thompson*,[159] officers stopped a vehicle for minor traffic offenses.[160] When the driver, Hewey Lee Thompson, was unable to produce his driver's license, he was asked for anything that might confirm the name he had given the police.[161] He gave the officers an envelope in his car that was addressed to him.[162]

Officer Ault asked the driver to step out of his car and come to the police car while his license was checked through the police dispatcher, something that

158. *Id.* at 14.

159. 597 F.2d 187 (9th Cir. 1979).

160. *Id.* at 188. The car had a broken taillight lens, and the driver was "slightly" exceeding the speed limit and had rolled through a stop sign. *Id.*

161. *Id.* at 188.

162. *Id.* at 188–89.

was later said to be standard procedure.[163] Because Mr. Thompson was going to be put in the police car during this check, standard police procedure required that he be frisked for weapons, and he was.[164]

Nothing was found during the frisk, but as it was occurring, Thompson "removed his left hand from the police car three or four times and attempted to reach for his inside coat pocket 'as if [he were] going for something.'"[165] Officer Ault later testified that Thompson was wearing a bulky overcoat and "[j]ust to pat it you couldn't feel sufficiently to find anything out."[166] Because Thompson continued to try to reach his pocket, he was handcuffed and the pocket was searched.[167] Inside was an envelope that contained checks stolen from the mail.[168]

The Ninth Circuit concluded that Thompson's failure to produce a driver's license, "justified the request that he get out of his car and sit in the police car while a standard police identification process took place."[169] The court's entire analysis of the initial frisk consisted of the holding that "[u]nder the circumstances, the actions of the officers, including the pat-down, were also reasonable under *Terry*."[170] The court then turned its attention to Thompson's repeated attempts to reach inside his pocket *during the frisk*, and decided that Officer Ault was entitled to put his hand into the pocket and retrieve the envelope, although he went too far when he looked inside the envelope and saw the checks that were determined to be stolen.[171]

Viewed more rigorously, the circumstances *at the inception of the frisk* support only a reasonable suspicion that the defendant had committed traffic offenses, along with the crime of failing to produce a license, none of which bear the slightest suggestion that he was armed and dangerous. It was at the insistence of Officer Ault that Thompson sat inside the police car, necessitating the frisk. Had Thompson been offered that option instead of being directed to do so, even if it was conditioned on submitting to a frisk, his consent would have obviated any need for a search analysis, but the opinion contains nothing indicating that Thompson had a choice.[172] In the absence of his consent, and of

163. *Id.* at 189.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 190.
170. *Id.*
171. *Id.* at 190–91.
172. It seems reasonable to allow police officers to require anyone being offered a seat in a patrol

some facts—any facts—hinting at the possibility that he was a threat to the officers or others, Thompson never should have been frisked. And, of course, if he had not been frisked, he would not have been reaching for the pocket where the envelope and checks were found, leaving the officers no reason at all to inspect the contents of that pocket.

Although the *Thompson* court ultimately reached the right result, it did so by glossing over the critical issue that would have yielded that result sooner and more directly: The frisk of Thompson was unlawful at its inception because there was no evidence that he was armed and dangerous.[173] Simply asserting that unspecified "circumstances" justified a pat-down fails even to address *Terry*'s required type and level of suspicion.

Thompson stands in stark contrast to *United States v. Thomas*,[174] another Ninth Circuit frisk case. The police were notified by a storeowner that two men were offering counterfeit money to passers-by on a certain street.[175] The storeowner described the men, and their descriptions and location were broadcast to officers, including Officer Siegel who was about a block away from the scene.[176] Siegel saw a car trying to exit through a parking lot entrance across the street from the place where the men had been reported to be passing counterfeit money, so he pulled his patrol vehicle in front of the car and signaled for it to stop.[177]

The driver, Robert Thomas, stopped his car and got out, walking back toward the officer who was out of his car and approaching on foot.[178] Thomas explained that he had been in the parking lot waiting for his wife to come out of a nearby bank.[179] At Officer Siegel's request, Mr. Thomas produced his

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vehicle to be frisked as a condition of entering the vehicle. If, however, an officer can order a person to sit in a police car, a frisk should be conducted only with either the consent of the civilian or reasonable suspicion that the person is armed and dangerous. To do otherwise is to allow the police in effect to frisk anyone simply by ordering that person to sit in their vehicle.

173. *See Thompson*, 597 F.2d at 191. In *United States v. AM*, the court of appeals dealt with a case in which a suspect who was approached by the police "did an 'about face' and thrust his hand into his pocket." United States v. AM, 564 F.3d 25, 32 (1st Cir. 2009). The Court approved the frisk, not only—as in *Thompson*—because the man put his hand in his pocket when he saw the police, but because the officers knew the suspect had a criminal history and was affiliated with a gang, he was on probation, and was known to carry guns. *Id.* He also was found walking alone in the territory of a rival gang, an area that was known as a high-crime area. *Id.* In *Thompson*, none of those factors were known to the officers.

174. 863 F.2d 622 (9th Cir. 1988).

175. *Id.* at 624.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

driver's license.[180] Without returning the license, Siegel then asked Thomas if he had any weapons, and Thomas gave no response.[181] The officer patted down the man's clothing and felt what he thought was a handgun in a jacket pocket.[182] Thomas and a passenger in his car subsequently were arrested and charged with an armed bank robbery that had occurred earlier in the day.[183] Evidence of that crime was found in the defendant's car.[184]

The propriety of the frisk was the issue in the case, and that issue was not confused with the reasonableness of the initial stop, for which the court found reasonable suspicion.[185] Acknowledging that "[a] lawful frisk does not always flow from a justified stop,"[186] the appeals court held that there was nothing "inherently suspicious" about the fact that Thomas got out of his car without being asked to do so.[187] In fact, once Thomas was out of the vehicle, Officer Siegel could see that he did not match the description of either counterfeiting suspect.[188] Asking why Thomas was leaving the parking lot, and requesting his license, were reasonable, the court held, but Thomas responded in a way that was not suspicious.[189]

Officer Siegel's testimony at the suppression hearing shed light on his motivation for frisking Robert Thomas:

> Q. Officer Siegel, why did you pat Mr. Thomas down?
> A. Basically for my own safety. I was by myself. I was investigating a felony. There were two of them, one of me. I didn't want any surprises. So I patted down just about everything under that kind of circumstance.
> Q. Did the size or appearance of Mr. Thomas in any way contribute to your decision to patting him down?
> A. Well, he is a pretty big guy. I patted him down because I

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 624–25.
185. *Id.* at 627–28.
186. *Id.* at 628.
187. *Id.* Earlier in my experience as a licensed driver, getting out of the car during a traffic stop before being asked to was considered a cooperative, non-threatening gesture. It subsequently became common practice for officers to instruct drivers and passengers to stay in the vehicle. Either routine carries its own safety risks and benefits for the officer making the stop. Regardless of whether the driver exits the vehicle without being asked to do so, it is difficult to interpret either response as threatening in and of itself. *See* State v. Warren, 2003 UT 36, ¶ 29, 78 P.3d 590 ("[O]rdering the occupants out of the vehicle may remove or substantially reduce the inherent dangerousness of a traffic stop.").
188. *Thomas*, 863 F.2d at 628.
189. *See id.* at 628–29.

> didn't want to get in any trouble. I wanted to see what was in front of me, make sure they didn't have a weapon on them.[190]

While the officer's apprehension was understandable and, as it turned out, confirmed by finding not one, but two pistols during the search of Thomas and his companion, the continued detention necessary to conduct the frisk, or even to ask Thomas whether he had any weapons, was not based *at that time* on reasonable suspicion of criminal activity or danger.[191] In short, the officer was taking a precaution not prompted by any actual evidence that would have satisfied the Fourth Amendment's requirement that searches be supported by "reasonable" suspicion rather than fear, a hunch, or caution.

The government argued, in essence, that Officer Siegel had no choice in deciding to frisk Thomas: "He surely couldn't turn his back and walk away. If it was reasonable for him to investigate further by asking questions, it was reasonable for [Siegel] to pat-down the exterior of [Thomas'] clothing."[192] This argument was no more than an expression of a common sentiment among law enforcement officers that continued close contact with a person suspected of crime entails risks that can by lessened in part by checking for weapons.[193] The fallacy of this approach, however, is that it seeks to explain and rationalize police behavior that, while perhaps prudent, is based not only on fear of the unknown, but on fear of the unsuspected. In responding to the government's argument in *Thomas*, the Ninth Circuit concluded:

> If we followed the government's logic, all investigatory stops

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190. *Id.* at 629.

191. The court noted that,

> Officer Siegel had no reason to continue the detention after he had asked his initial investigatory questions, and yet he asked Thomas whether he had any weapons. Under the circumstances of this case, the question concerning weapons was not prompted by Officer Siegel's reasonable belief that Thomas might be armed and presently dangerous, and therefore, the question was not justified.

Id. Nothing in the record suggested that anything about the defendant's appearance supported a concern that he was armed. *See id.* As the court observed, "[a]n officer cannot simply frisk all 'pretty big' guys without more specific objective reasons why the suspect posed a risk to the safety of the officer." *Id.* In this case, the officer's action reflected a "perfunctory attitude towards frisking a suspect once a justified stop has occurred." *Id.*

192. *Id.* at 629–30 (second alteration in original).

193. In my own experience as a police legal advisor and consultant, I very often have observed officers doing everything possible to ensure their safety during an encounter with anyone who is not another law enforcement officer. This safety consciousness is particularly acute in cases in which the officer is dealing with someone suspected of having committed a crime, even if that crime was not an inherently dangerous one, or one in which weapons typically are used. As a matter of training and practice, this hyper-caution may be entirely appropriate, but it can lead—as in the *Thomas* case—to the use of procedures not countenanced by law.

> would necessarily include a frisk. Without any reason whatsoever, a police officer could routinely ask about weapons and frisk the individual under suspicion. Such a result would not only destroy the necessary distinction between the stop and frisk, but would indiscriminately subject countless individuals to the humiliation and invasiveness of a bodily frisk. We cannot allow the protections afforded by the Fourth Amendment to be tampered with so carelessly.[194]

This government argument and court response neatly capture the crux of the problem: The dictates of safety may be inconsistent with the demands of individual rights. Striking the right balance between these competing interests can be agonizingly difficult for courts genuinely sympathetic to the safety concerns of law enforcement, but committed to protecting the liberty interests essential in maintaining a free society.

The temptation facing all courts trying to untie this Gordian knot is to sever it by playing fast and loose with the characterization of facts and what reasonable inferences can be drawn from them, or by ignoring the logical and probable significance of circumstances altogether. Both the trial and appeals courts in *United States v. Thompson*[195] could be seen as succumbing to this temptation, while the trial and appeals courts in *United States v. Thomas*[196] resisted it.

This quandary is acknowledged and discussed with refreshing candor by a state appeals court in Texas.[197] In that case, *Williams v. State*, two officers stopped a car for not having a working license plate light.[198] The driver got out of his car, as did the officers.[199] One of the officers, Officer Meaux, took the driver's license from Mr. Williams to run a warrant check.[200] As he did so, the officer turned his back to the motorist, a move his partner, Officer Wasser, characterized as a "violation of officer safety."[201]

Because the driver was "dressed in clothing that . . . was unusual for the weather temperature,"[202] Officer Wasser testified that he "conducted a pat-

194. *Id.* at 630.

195. 597 F.2d 187 (9th Cir. 1979).

196. 863 F.2d 622 (9th Cir. 1988).

197. *See* Williams v. State, 27 S.W.3d 688 (Tex. App. 2000).

198. *Id.* at 690.

199. *Id.*

200. *See id.*

201. *See id.* Officer Wasser was a field-training officer with whom Officer Meaux was riding. *See id.* at 695.

202. *Id.* at 690. In his testimony at the suppression hearing, Officer Wasser said, "I was in short sleeves, and I believe Officer Meaux was also in short sleeves. This subject had on a heavy, black coat, also a toboggan on his head . . . ." *Id.*

down of the subject's outer clothing for both my safety and for Officer Meaux's safety."[203] His testimony continued with the following exchange:

> Q. And why did you feel that that was necessary for your and Officer Meaux's safety?
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> A. As I said, Officer Meaux committed what I call an officer safety violation, in my opinion. He turned his back. So, I'm the only officer speaking with the violator. It's normal routine whenever I do remove a subject or a violator from a vehicle or anybody, any occupant of a vehicle which is in a violator vehicle, when I make contact, to pat down their outer clothing for my safety.[204]

In further questioning, Officer Wasser said that Williams' "unusual" dress, the fact that he got out of his car rather than sitting and waiting for the officers to approach, and "signs of nervousness"—looking around instead of making eye-to-eye contact—were the reasons that he frisked the driver.[205] But he also confirmed that "there wasn't any indication before [he] started to put [his] hands on Mr. Williams of any weapons besides he just had baggy clothes and nervousness . . . ."[206]

During the frisk, Officer Wasser felt an object in Williams' pocket and asked him what it was.[207] Without replying, Williams took a matchbox out of his pocket and opened it, revealing the cocaine that was inside.[208] The defendant's suppression argument was that the frisk was not justified, and not that the initial traffic stop was not warranted or that the frisk exceeded its lawful scope, but the trial court rejected that argument.[209]

The appeals court[210] began its analysis of the frisk issue in the usual way, by citing, quoting, and emphasizing *Terry v. Ohio* and the requirements for and purposes of the pat-down.[211] But the *Williams* court then took an unusually candid turn, writing that "[j]udging by recent cases where the issue focuses on

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203. *Id.* at 691.

204. *Id.*

205. *See id.* at 691–92.

206. *Id.* at 692.

207. *Id.* at 690 n.1.

208. *Id.*

209. *See id.* at 690.

210. Texas is one of only two states to have a bifurcated appellate system. The highest court for criminal appeals is the Texas Court of Criminal Appeals, and not the Texas Supreme Court, which hears only civil matters. Texas has fourteen intermediate courts of appeals which hear both civil and criminal cases. *See* Ben L. Mesches, *Bifurcated Appellate Review: The Texas Story of Two High Courts,* 53 THE JUDGES' J. 30 (2014). The *Williams* appeal was heard by one of these intermediate courts, the one sitting in Beaumont. *See Williams*, 27 S.W.3d 688.

211. *See Williams*, 27 S.W.3d at 692–93.

the propriety of a *Terry* pat-down, it would appear that so long as the officer involved utters the talismanic words 'officer safety,' the pat-down will [be] held to be reasonable."[212]

In considering the facts of the case before it, the court also acknowledged that the offense of driving with an inoperable license plate light was not the sort of offense "that would rise to the level of implicit danger . . . so as to permit Wasser to *reasonably* believe that appellant was presently armed and dangerous."[213] Notwithstanding the danger inherent in any traffic stop, which was duly noted in *Williams*, the court concluded its opinion with remarkable candor:

> Thus, we are placed on a rather precarious perch regarding the nature of the facts in the instant case. By the plain language in *Terry* and *Carmouche*, Officer Wasser's belief that appellant was "presently armed and dangerous" was *unreasonable*. On the other hand, we have great difficulty in saying that Officer Wasser's admitted usual practice of patting-down virtually everyone he encounters during routine traffic stops is, "in light of his experience," unreasonable. It is common knowledge that America is awash in a sea of handguns, and the inherent danger to police officers when confronting individuals following "routine" traffic stops is certainly not lost on this Court. While we cannot say that Officer Wasser's belief of appellant's present dangerousness, under the *Terry* and *Carmouche* "reasonableness" construct, was valid, we are not going to second guess an officer who has legitimately made a stop for a traffic violation, without a hint of pretext, and find he acted unreasonably in patting the motorist down for the officer's protection. Therefore, in light of his experience as a patrol officer and a field training officer, Officer Wasser's actions in patting appellant down for his safety and the safety of Officer Meaux were reasonable notwithstanding the fact that at the time the pat-down took place there was no indication appellant was "armed and presently dangerous."[214]

VI. HEADS, THE POLICE WIN; TAILS, YOU LOSE

One might say, not that it is the rare exception that citizens stopped by the police are frisked, but rather that it is relatively easy for the police to frisk without concern that a court will disapprove. Consider what the cases examined in this article demonstrate:

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212. *Id.* at 693.
213. *Id.* at 694.
214. *Id.* at 694–95.

1. The kinds of reasonable suspicion required by the Supreme Court in *Terry* are sometimes undifferentiated. Suspicion that criminal activity is afoot seems simultaneously to authorize both the temporary investigative detention (seizure of the person) and the pat-down, or frisk, of the outer clothing (search).[215]
2. Suspicion of certain kinds of criminal wrongdoing (e.g., drug dealing) automatically satisfies the "armed and dangerous" requirement for a frisk because those activities are considered inherently dangerous and likely to involve weapons.[216]
3. Ambiguous, and often quite innocent, gestures and reactions to being detained are deemed to be indicative of the possible presence of a weapon, even though neither the suspected crime nor the surrounding circumstances suggest that any danger exists, and the law enforcement officer is not threatened by the suspect's actions.[217]
4. A frisk can be necessitated by requiring a person to sit in a police vehicle while certain administrative tasks are being completed.[218]
5. When a police officer invokes "officer safety," and frisks a suspect during a detention, the frisk will not be disapproved, even if no objectively reasonable belief that the suspect is armed and dangerous exists.[219]

There are, of course, also many cases in which a pat-down was held not to be justified by sufficient suspicion.[220] But it is hard to escape the conclusion that the balance, probably more at the trial level than on appeal, is tilted in favor of allowing the search.[221]

No one can doubt that policing is sometimes dangerous work, and the public's and government's interests in keeping law enforcement officers as safe as possible is both strong and undisputed. Surely the need for officer safety has

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215. *See supra* Part I.

216. *See supra* Part II.

217. *See supra* Part III.

218. *See supra* Part V.

219. *See supra* Part V.

220. *See, e.g.*, Wade v. State, 422 S.W.3d 661, 670 (Tex. Crim. App. 2013); Crain v. State, 315 S.W.3d 43, 53 (Tex. Crim. App. 2010).

221. My own experience as a police legal advisor and long-time law enforcement educator certainly supports the notion that trial courts are especially solicitous of the safety concerns expressed by officers in support of a decision to frisk. Most of my experience has been in Texas, a state that continues to elect judges at all levels. It is possible, too, that elected judges are more reluctant to be seen to be questioning or "second-guessing" the decisions of officers in the field. Or, their decisions may simply reflect an unfamiliarity with police work and the actual, as opposed to the possible or theoretical, dangers inherent in encounters with suspicious persons.

been reiterated most forcefully and tragically by the rash of officer shootings the United States has experienced.[222] It must be acknowledged, however, that the frisk procedure created by *Terry* embodies the age-old attempt to balance the need for security with that of personal freedom. In this context, "freedom" is not some malleable vision defined by the interested observer. It is the constitutionally guaranteed kind of freedom that, while not distinctly formed, is nevertheless not formless. Following the guidance of the *Terry* opinion, at least some things can be said about frisks with a measure of confidence—or at least with clear textual support.

To begin, *Terry* undoubtedly distinguishes between the two types of reasonable suspicion it requires for detentions and frisks.[223] Courts would do well to observe that distinction and rigorously examine each kind of suspicion separately before any frisk is approved. There will be cases like *Crain* and *Castleberry* in which reasonable suspicion for a detention seems to have something, and perhaps a great deal, to do with whether the detained suspect is armed and dangerous.[224] But blurring the line, even when genuine overlap exists, is analytically suspect and disserves courts, lawyers, and law enforcement officers trying to apply the Fourth Amendment consistently and correctly. Evaluating "stop" and "frisk" separately, mindful of the different purposes that support each, best reinforces the protection from indiscriminate search that the Court created.

For the same reasons, courts do well to avoid creating what amount to exceptions to the armed and dangerous requirement. When a court announces that a certain kind of crime is so inherently likely to involve a weapon that even a total absence of objective evidence of danger is no impediment to frisk, it detaches the intrusion of the search from the very purpose that justifies it. The *Terry* Court did not ignore or overlook the violent nature of some crimes.[225] The issue was raised in *Terry* itself by what Officer McFadden saw and sus-

222. Manny Fernandez, Richard Pérez-Peña & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says,* N.Y. TIMES (July 8, 2016), http://nytimes.com/2016/07/09/us/dallas-police-shooting.html?_r=0 [https://perma.cc/RL3X-H4BU] (five police officers were killed and seven were wounded by lone gunman targeting the police); Erica Evans & Razzan Nakhlawi, *It's not just Dallas or Baton Rouge—police officers have been killed across the country,* L.A. TIMES (July 17, 2016), http://www.latimes.com/nation/la-na-police-killings-20160713-snap-story.html [https: perma.cc/P82A-S828] (chronicling killing of three police officers in Baton Rouge, Louisiana, bringing total of law enforcement officers killed to date in 2016 to thirty-one).

223. *See* Terry v. Ohio, 392 U.S. 1, 19–20 (1968).

224. *See supra* Part III.

225. *See Terry*, 392 U.S. at 23–34.

pected, that the men he was watching were about to commit a daytime robbery.[226] Justice Harlan proposed to his colleagues that such crimes automatically warrant a frisk for the safety of the officer and others, and Justice White would have allowed a frisk in any case in which a suspect is detained.[227] Neither of these views prevailed, though, and the requirement of an independent inquiry into dangerousness remains part of *Terry*.[228] To be sure, it sometimes will be possible to reasonably infer from the nature of the crime that a suspect is likely to be armed and dangerous, but that likelihood should not, without further indications, suffice to warrant a search unless the inference is virtually inescapable, as in the case that an armed robbery is about to occur.

It is simply too difficult to discern which crimes will necessarily involve weapons, and which will not.[229] Drug offenses, for example, are not all of a kind. Possession of a small quantity of a drug probably doesn't indicate that the possessor is armed and dangerous, whereas possession of a much larger quantity of the same kind of drug increases the probability.[230] But even drug traffickers often are not armed because commission of the crime does not require it.[231] So, is drug dealing, by itself, a sufficient indicator that the dealer is armed? It is no answer to cite statistics showing that *sometimes* drug deals involve armed participants, especially if those statistics also show that they usually do not. The reality is that even the most innocent conduct may involve persons legally carrying weapons who pose no threat to police officers they encounter, and the most violent crimes may be committed by persons who are unarmed.

The nature of the crime and the way in which it is usually committed may be factors in the calculus, but they should not be given undue weight. Other circumstances, like location, actions of the suspect, the presence or absence of persons who might resist the crime, time of day, and many others, may be of equal or greater importance in gauging the threat from a suspect.[232] As the

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226. *Id.* at 28.

227. *Id.* at 33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring).

228. *See id.* at 27.

229. *See* LAFAVE, *supra* note 17, §9.6(a), at 852–57 (explaining that for some crimes "the right to conduct a protective search must follow directly from the right to stop the suspect," but many crimes require "other circumstances" than the nature of the crime in order to justify frisk).

230. *See* State v. Wilkinson, 2009 UT App 202, ¶ 13, 216 P.3d 97. In *State v. Wilkinson*, the Utah appeals court observed: "'[D]ealing in large quantities of narcotics' is one example of a crime that would permit a frisk as a matter of routine based on its inherent nature. . . . However, a mere allegation of drug use, possession, or small-scale distribution would not justify an automatic frisk." *Id.* (first alteration in original).

231. *See* Harlow *supra* note 72, tbl.4.

232. It is the combination of circumstances, and not any single factor, that produces the requisite

Terry Court observed:

> No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.[233]

The "protean variety" that limits the scope of judicial mandate also precludes a bright-line determination that persons who commit certain crimes must be carrying weapons to do so. Controlling the use of intrusive and embarrassing frisks—or "over-bearing or harassing" police conduct—begins with rigorous evaluation of what inferences can reasonably be drawn from all of the facts known to the officer, and not just a single factor in the equation.

The opinion in *Williams v. State*[234] may be seen as an aberration because the court so blatantly ignored the requirement that a reasonable belief of dangerousness must precede a frisk.[235] But the aberrant element may be only the honesty of the decision.[236] When courts give little attention to testimony that

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reasonable suspicion. *See* Commonwealth v. Mercado, 663 N.E.2d 243, 246 (1996) ("Neither evasive behavior, proximity to a crime scene, nor matching a general description is alone sufficient to support the reasonable suspicion necessary to justify a stop and frisk.").

233. *See* Terry v. Ohio, 392 U.S. 1, 15 (1968).

234. 27 S.W.3d 688 (Tex. App. 2000).

235. *See id.* at 694–95.

236. Compare an Alabama Court of Criminal Appeals opinion in a case in which the police received information from an informant that the defendant was attempting to *buy* drugs in an area where drug transactions occurred. *See* Riddlesprigger v. State, 803 So. 2d 579, 580 (Ala. Crim. App. 2001). Although there was no evidence that the suspect was armed and dangerous, he was frisked. *Id.* During that frisk, cocaine and marijuana were discovered inside the man's baseball cap. *Id.* at 580–81. The defendant complained that the frisk exceeded the allowable scope of a cursory search for weapons, an argument the appeals court rejected following a discussion of whether a baseball cap could be "frisked" or patted-down due to its material and stiffness. *Id.* at 583–84. Nothing was said of any circumstance that would lead the officer to suspect the defendant was armed and dangerous in the first place, but the appeals court summarily approved the frisk, apparently on the grounds that the officer testified suspects sometimes hide razor blades in the lining of a cap. *See id.* at 582. The Alabama court's opinion lacked the directness and honesty of the *Williams* opinion in that it either overlooked or deliberately ignored the absence of evidence that would have justified a frisk in the first place. *See id.* at 584. The only "evidence" on which the court expressly relied was testimony related to the prudence of searching hat bands, and not on whether drug buyers in general or the defendant in particular were likely to be armed. *See id.* Obviously, nothing was said about the additional issue of whether a razor blade in a hat band

the officer did not believe the suspect to be armed, or when the only evidence supporting a belief that there is danger is ambiguous or dubious,[237] they also ignore the requirement of *Terry*, but do so less forthrightly.

As the court said in *Williams*, it is perhaps not unreasonable for an officer to routinely frisk a motorist stopped for a traffic violation.[238] That judgment, however, has everything to do with prudence, and nothing to do with the degree to which objective fact supports a belief that the motorist is armed and dangerous. It may be reasonable and prudent for a person to insure his house against loss, while at the same time there is no objective reason to believe the house is likely to be destroyed.

If there were no counterbalance to prudence, no loss to be suffered by another person, a routine frisk approach would be appropriate. There is a counterbalance, though, in the form of intrusion and loss of liberty to the person being frisked. And this intrusion, while less than a full-blown search of the kind that accompanies arrest, is not inconsequential. Consider a police-citizen encounter in which the officer asks for consent to search and consent is given. The request by the officer seems prudent, and the citizen can choose whether to give up Fourth Amendment protections and submit. When a frisk is conducted by a prudent officer who just wants to be sure the citizen isn't armed, the "loss" to the citizen is constitutionally equivalent to the consent search but he or she was forced by the government agent to suffer it, and has no choice in the matter.

Were prudence—the desire to reduce risk as much as possible—to be the only consideration, every police–citizen encounter would begin with a frisk, a real temptation for the police in contemporary American society. As the First Circuit said in *United States v. Villanueva*,[239] "With the plethora of gun carrying, particularly by the young, we must have sympathy, to an extent, with police

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poses any practical threat to an armed officer engaged in a brief encounter, even if the suspect is carrying such a thing. *See id.*

237. Movements of the hand toward a pocket or waistband of the sort discussed in *Griffin* and *Thompson*, for example, by themselves tell an officer very little about whether a person may be armed unless surrounding circumstances support a reasonable belief that the suspect is dangerous. *See* United States v. Thompson, 597 F.2d 187, 191 (9th Cir. 1979); *see also* Griffin v. State, 215 S.W.3d 403, 409 (Tex. Crim. App. 2006).

238. *See Williams*, 27 S.W.3d at 694; *see also* United States v. Thomas, 863 F.2d 622, 629 (9th Cir. 1988) (despite lack of evidence that men in car were dangerous or involved in a violent crime, officer frisked driver).

239. 15 F.3d 197 (1st Cir. 1994). The defendant in *Villanueva* was stopped initially because he and his companions were involved in disorderly conduct at a transit facility, conduct that did not involve any indication of a weapon. *See id.* at 198.

officers' apprehensions."[240] But the court continued, "as there may be degrees of apprehension, so may there be degrees of invasion upon privacy."[241] But a police officer's subjective apprehension or fear is not, and cannot be, the sole motivation for a frisk.[242]

It is important when striking the proper balance between personal liberty and security to bear in mind that the level of intrusion for a pat-down may be diminished from that of a custodial arrest, but so too is the degree of suspicion required to justify it. In an age in which so many law-abiding citizens may be carrying weapons legally, prudence, no matter how desirable, cannot trump the minimal privacy protections of *Terry* without imposing on an entire society yet one more burden for the actions of a relative few.

For every frisk that uncovers a weapon or contraband, there may be hundreds or even thousands that do not. Unless those innocent persons seek legal or administrative redress for an unjustified search—and nearly none of them will—the exclusionary rule cannot serve its deterrence function, leaving the frisked persons essentially without redress, frustrated or contemptuous of the criminal justice system, and leaving the errant officers free to continue to frisk unimpeded by the requisite need for evidence-based suspicion. As we think about the things we should fear, unfounded frisk must be added to that list.

240. *See id.* at 199. The appeals court in Williams v. State also observed that America is "awash in a sea of handguns." *See* Williams v. State, 27 S.W.3d 688, 694 (Tex. Crim. App. 2000).

241. *See Villanueva*, 15 F.3d at 199.

242. As Professor Wayne LaFave wrote:

> The police are frequently cautioned to assume that every person encountered may be armed, which is sound advice if it means only that the officer should remain alert in every case; but it cannot mean and has not been interpreted by the police to mean that a search for weapons may be undertaken in every case.

LAFAVE, *supra* note 17, §9.6(a), at 852 (footnote omitted).

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