AUTOMATIC AUTHORIZATION OF FRISKS IN *TERRY* STOPS FOR SUSPICION OF FIREARMS POSSESSION

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I. INTRODUCTION

The number of adults in the U.S. holding concealed firearms permits has grown explosively in recent years—according to a recent study, from "2.7 million in 1999 to 4.6 million in 2007, 11 million in 2014, and 14.5 million in 2016."[1] The study further reports "[O]ur findings suggest that nearly 9 million US adult handgun owners carry loaded handguns monthly, approximately 3 million of whom do so every day, and that most report protection as the primary reason for carrying regardless of carrying frequency."[2]

This increase has been accompanied by activist community engagement, in which advocates seek to advance firearms rights by openly **carrying firearms.[3] Growth in both forms of firearms possession**

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[1] Ali Rowhani-Rahbar et al., *Loaded Handgun Carrying Among US Adults, 2015*, 107 AM. J. PUB. HEALTH 1930, 1930 (2017).

A tally focused on persons licensed to possess concealed firearms would undercount the persons authorized. Jurisdictions are increasingly allowing the public possession of concealed firearms without permits. The jurisdictional counts are rapidly moving targets. The tally provided in 2013 in *Drake v. Filko*, 724 F.3d 426, 441 (3d Cir. 2013), is, "[F]our States and parts of Montana allow concealed carry without a permit and forty-four States allow concealed carry with a permit."

However, in 2016 alone, Idaho, Mississippi, Missouri and West Virginia eliminated the permit requirement to carry a concealed weapon. IDAHO CODE ANN. § 18–3302(4)(f) (Westlaw through 2016 Second Regular Session), *amended by* 2016 Idaho Senate Bill No. 1389, Idaho Sixty-Third Idaho Legislature, Second Regular Session–2016 (adding, "(f) A concealed handgun by a person who is: (i) Over twenty-one (21) years of age; (ii) A resident of Idaho; and (iii) Is not disqualified from being issued a license under subsection (11) of this section."); MISS. CODE. ANN. § 45–9–101(24) (Westlaw through 2016 First and Second Extraordinary Sessions and the 2016 Regular Session), *amended by* 2016 Miss. Laws, H.B. No. 786 (approved April 15, 2016); MO. ANN. STAT. § 571.030 (Westlaw through the end of the 2016 Regular Session and Veto Session of the 98th General Assembly), *amended by* 2016 Mo. Legis. Serv. S.B. 656 (amending MO. ANN. STAT. § 571.030(1), which defines "unlawful use of weapons" as including some carrying of a concealed weapon, to limit the offense of unlawful use of weapons arising from the carrying of a concealed weapon by adding the geographic limitation "into any area where firearms are restricted under section 571.107"); W. VA. CODE ANN. § 61–7–3 (Westlaw through legislation of the 2016 Regular Session), *amended by* West Virginia House Bill 4145, at 2 (passed Feb. 24, 2016).

New Hampshire and North Dakota eliminated their permit requirements in 2017. S.B. 12, 2017 N.H. Laws ch. 1; H.B. 1169, 2017 N.D. Legis. Serv. No. 161 (West). Missouri's neighbor to the West, Kansas, eliminated the permit requirement to possess a concealed firearm in 2015. *See* 2015 Kan. Sess. Laws 231, 237.

[2] *Id.* at 1935. The author's indicated methodology excluded police officers and those who did not identify their employment from the data set regarding the frequency of carrying a firearm. *Id.* at 1931.

[3] *E.g.*, Deffert v. Moe, 111 F. Supp. 3d 797, 810-12 (W.D. Mich. 2015) (finding reasonable suspicion to detain and temporarily disarm a person openly carrying a firearm across the street from a church service, while singing *Hakuna Matata*); Baker v. Schwarb, 40 F. Supp. 3d 881, 887–88 (E.D. Mich. 2014) (involving open carriers admittedly were walking to "desensitize the public to open carry, and to educate police officers with [sic] whom they may encounter on the legality of open carry"); Burgess v. Wallingford, No. 11–CV–112, 2013 WL 4494481, at *1 (D. Conn. May 15, 2013) (addressing an unsuccessful section 1983 lawsuit concerning a disorderly conduct arrest of an individual wearing a shirt quoting a state provision addressing the right to bear arms and carrying copies of a public interest group's brochure about the legality of carrying firearms), *aff'd sub nom.* Burgess v. Town of Wallingford, 569 F. App'x 21 (2d Cir. 2014); Lovett v. State, 523 S.W.3d 342, 346–350 (Tex. App.

(concealed and open) has increasingly drawn into focus the restrictions on officer interaction with those possessing firearms. The basic relevant aspects of the framework governing associated *Terry* stops is detailed in Part II.

One issue raised is whether reasonable suspicion of firearms possession is by itself sufficient for an officer to initiate a *Terry* stop.[4] That issue is the subject of a separate work (which concludes reasonable suspicion of mere firearms possession is not sufficient for an officer to initiate a *Terry* stop, rejecting contemporary authority that focuses on whether, in the relevant jurisdiction, licensure is an affirmative defense to a base firearms crime or non-licensure is an element to the crime).[5]

This Article examines the related issue of whether a *Terry* stop initiated for reasonable suspicion that a person is armed inherently authorizes treatment of the detainee as armed and dangerous (and thus authorizes a frisk). As shown in Part III, the U.S. Supreme Court jurisprudence is equivocal on the point. Part IV illustrates the conflicting approaches taken by contemporary lower courts. This Article concludes a frisk is not inherently authorized in such a stop, for two separate reasons.

First, and most fundamentally, insofar as the stop is authorized because it is supposed the stop is a mere inconvenience—it's merely to check for a license—and thus is not unduly burdensome, it is inconsistent to then conclude that the stop inherently authorizes the pointing of a firearm at the subject. (More detail is provided in Part V.) And, as shown in Part II.C, if a subject is treated as armed and dangerous—the criterion for authorizing the frisk—courts typically hold the subject can be frisked with weapons drawn. Such a stop is not a mere trifling inconvenience.

Second, more broadly, this Article sketches some factors relevant to any putative judicial balancing that might be recited as justifying frisks in this context. Part VI does so by first sketching the number of Terry stops that would be added simply focusing on stops of persons, not police officers, who carry firearms daily. We can easily conclude that even with relatively modest frequencies of stopping those persons, there would be a substantial increase in the most hazardous *Terry* stops.

In light of the controversy generated by the level of *Terry* stops in the recent past, a substantial benefit would be required in any balancing that found the increase in stops to be reasonable. However, as revealed in Part VI.B, prior Supreme Court authority in fact indicates the benefits of which a

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2017), *petition for discretionary review refused* (Oct. 18, 2017) (involving a person possessing a holstered antique pistol while spectating at a traffic stop, wearing a shirt with the slogan, "Keep Calm and Film the Police."). *See generally* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1521 (2009).

[4] *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

[5] Royce de R. Barondes, *Conditioning Exercise of Firearms Rights on Unlimited* Terry *Stops*, IDAHO L. REV. (forthcoming 2018).

court may take cognizance, when balancing stops where probable cause is absent, are limited to the possession and transport itself, and exclude remote consequences prevented by the stops.

As shown in Part VI.D, the rates at which persons are prosecuted by the federal government for lying in connection with seeking to obtain a firearm are minuscule. That suggests a low federal interest in curtailing the mere possession of a firearm by persons whose possession is unlawful.

This combination—a substantial increase in hazardous *Terry* stops that would need to be justified by curtailment of mere possession, which historical federal prosecution rates would indicate is a low federal priority—casts substantial doubt on any balancing justification for frisking one who is stopped for mere suspicion of firearms possession. One might assert that even though there is little federal stomach to prosecute these mere possession crimes, states have a greater interest. This inquiry poses something of a puzzle.

Virginia v. Moore[6] holds, "We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."[7] The principles of *Virginia v. Moore* have been extended to detentions short of arrests.[8] So we have the converse issue: Whether state interests in interdiction of crime can enhance the balancing in favor of the stop, where the activity is also a federal crime but one of low priority.

We are not here concerned with an ordinary case. That is because the search implicates more than general concerns protected by the Fourth Amendment against unreasonable searches. In addition, these hazardous searches can result in people foregoing[9] the exercise of what courts customarily treat as an enumerated federal constitutional right: the right to bear arms outside the home, which typically is treated in contemporary jurisprudence as protected by the Second Amendment.[10] And the contemporary Supreme Court jurisprudence recognizing that right rejects balancing in assessing its contours.[11]

It is not suggested that reference to these components or any discussion of "balancing" will compel a particular result. The balancing process does not yield conclusions compelled by deductive analysis. Rather, although courts ought to be involved in applying constitutional text, discussions framed in terms of balancing often involve justifications for conclusions that

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6 553 U.S. 164 (2008).

7 *Id.* at 176.

8 *E.g.*, State v. Slayton, 223 P.3d 337, 344, 347 (N.M. 2009); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.5(a) (5th ed. Westlaw through Oct. 2017) ("*Moore* is applicable to statutes limiting which state agents may make a *Terry* stop . . . .").

9 *See infra* notes 72–73 and accompanying text.

10 *See infra* notes 110, 146 and accompanying text.

11 *See infra* notes 149–150 and accompanying text.

are reached on policy considerations not operationally constrained by the constitutional language.

II. *TERRY* STOPS—THE PROCESS, ETC.

A. The Basic Legal Framework

Under *Terry v. Ohio*[12] and its progeny, "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop."[13] Significantly for our purposes, the Supreme Court has, in concluding a *Terry* stop was ***not*** justified in a particular context, relied on the fact that relevant factors alleged to support the stop "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[14] In 1985, the Court held the authorization to conduct a *Terry* stop is not limited to investigation of crimes in progress.[15]

The *Terry* court holds an officer may be entitled to search (commonly referenced as a "frisk"[16]) a subject detained during such a stop:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.[17]

Contemporary courts typically hold a *Terry* stop is not invalidated by the fact that it is pretextual.[18] In *Whren v. United States*, the Supreme Court holds that where there is probable cause a traffic violation has been committed, that the choice to detain a subject is pretextual, i.e., for purposes

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12 392 U.S. 1 (1968).

13 Florida v. Royer, 460 U.S. 491, 498 (1983).

14 Reid v. Georgia, 448 U.S. 438, 441 (1980) (discussing innocuous travel arrangements); *see also* United States v. Jones, 606 F.3d 964, 967–68 (8th Cir. 2010) (quoting *Reid*).

15 United States v. Hensley, 469 U.S. 221, 227 (1985). *Hensley* expressly reserves application of the principle beyond completed felonies. *Id.* at 229.

16 *Terry*, 392 U.S. at 10.

17 *Id.* at 27.

18 *See infra* note 22.

of investigating other potential crimes, does not make the stop unconstitutional.[19] There are occasional lower-court statements to the effect that the authorization of pretextual stops with probable cause allowed by *Whren* does not extend to pretextual *Terry* stops.[20] But there are statements to the contrary,[21] which appear to be the current majority.[22]

B. Statistics of Stops

New York City adopted policies governing stop-and-frisk practices that resulted in "[t]he number of stops per year r[ising] sharply from 314,000 in 2004 to a high of 686,000 in 2011."[23] In the following year, there were only

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19 *See* Whren v. United States, 517 U.S. 806, 814 (1996) ("Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent."). *See also* United States v. Roggeman, 279 F.3d 573, 581 (8th Cir. 2002) (citation omitted) (discussing *Whren* and other authority).
Of course, a pretextual stop may be prohibited under state law. *See, e.g.*, State v. Ladson, 979 P.2d 833, 836 (Wash. 1999); Michael Sievers, State v. Ochoa: *The End of Pretextual Stops in New Mexico?*, 42 N.M. L. REV. 595, 595 (2012) (identifying three jurisdictions).
Additionally, there is authority to the effect that the justifying pretextual circumstance must actually have been perceived. *See* United States v. Lewis, 672 F.3d 232, 237–40 (3d Cir. 2012). *But see* Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016) (holding the exclusionary rule did not prevent introduction of evidence discovered in an arrest following an invalid stop, where the person was subject to an outstanding warrant unknown to the detaining officer).
It is easy to identify circumstances where engaging in innocuous activity is sufficient to make a person subject to unbridled searches. *E.g.*, United States v. Winters, No. 16–CR–146–JPS, 2017 WL 2703527, at *5 (E.D. Wis. June 22, 2017) (including "blading" in a list of indicators of criminal conduct); State v. Norfolk, 366 S.W.3d 528, 532-34 (Mo. 2012) (quoting the following police officer testimony: "In the past of every weapons arrest I've been assisting or been on, a lot of individuals that carry weapons happen to adjust the weapon for some reason when the police come."); 4 LAFAVE, *supra* note 8, § 9.5(g) (collecting circumstances).

20 Mason v. Commonwealth, 767 S.E.2d 726, 738–39 (Ct. App. Va. 2015) (Humphreys, J., dissenting) ("Moreover, while pretextual stops are permissible under the Supreme Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), that is only so if probable cause exists that an offense has been committed." (parallel citation omitted)), *aff'd*, 786 S.E.2d 148 (Va. 2016). *See generally* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 3:4 (3d ed. Westlaw through June 2017) ("Decisions are not entirely in agreement when there is evidence that the detention was pretextual. Most courts hold that if the officer could have detained the individual legitimately then her actual motivation is immaterial. A few courts, however, require the prosecution to show not only that the officer could have detained but that she would have detained the party absent the ulterior motive. In any event, if reasonable suspicion is present at the time of the stop, that it turns out to be ill-founded is inconsequential." (footnotes omitted)).

21 United States v. Miles, No. 3:05CR204 (EBB), 2006 WL 1405577, at *4 (D. Conn. May 18, 2006) ("As an initial matter, the subjective intent of an officer making a *Terry* stop is of no moment where the officer has an objectively reasonable basis for the stop."), *aff'd*, 263 F. App'x 77 (2d Cir. 2008) (discussing, however, a traffic stop and a traffic violation); State v. Heminover, 619 N.W.2d 353, 360–61 (Iowa 2000) ("[W]e think there should be no distinction between a stop based on probable cause and a stop based on reasonable suspicion, i.e., a *Terry* stop. . . . In other words, both tests are objective."), *abrogated in part by* State v. Turner, 630 N.W.2d 601 (Iowa 2001).

22 COOK, *supra* note 20, § 3:4.

23 Floyd v. City of New York, 959 F. Supp. 2d 540, 573 (S.D.N.Y. 2013). LaFave and his co-authors describe the subsequent history of the case as follows:

533,042 stops.[24] The New York City population was 8,175,133 in 2010.[25] So, ignoring any change in the rate arising from a change in the population over one or two years, that would translate to a rate of 0.084 *Terry* stops per person in 2011 and 0.065 in 2012.[26] Its practices were held unconstitutional in *Floyd v. City of New York*.[27]

Philadelphia somewhat astonishingly almost doubled that rate of *Terry* stops. The rate of stops in Philadelphia reached 0.158 per person in 2009.[28]

At least in the New York City experience, these stops do not seem to have been highly effective in identifying persons who possess firearms. "Evidence that the hit rates for weapons, guns in particular—the ostensible justification for this aggressive program of stop-and-frisk—are abysmally low."[29] *Floyd v. City of New York*[30] notes:

Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.

Contraband other than weapons was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.[31]

A *New York Times* article discussing "stops" identifies 1.55% and 1.29% of those of Blacks and whites involve officers "draw[ing] weapons,"

> Prior to argument on the appeal, New York elected a new mayor, who had strongly opposed the NYPD program (in contrast to the former mayor). The City then obtained a limited remand for the purpose of exploring a settlement, Ligon v. City of New York, 743 F.3d 362 (2d Cir. 2014). The City then entered into a settlement based on the remedies that had been imposed by the district court ruling, including a court-appointed monitor "overseeing the NYPD's reform of its stop and frisk policy."

WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.5(j) n.355 (4th ed. Westlaw through Dec. 2017) (citations omitted).

24 N.Y.C. Bar Ass'n, *Report on the NYPD's Stop-and-Frisk Policy* 5 (May 2013), https://www2.nycbar.org/pdf/report/uploads/20072495-StopFriskReport.pdf.

25 United States Census, *Population Estimates*, https://web.archive.org/web/20150915233910/http://www.census.gov:80/popest/data/cities/totals/2014/SUB-EST2014.html (last visited Apr. 24, 2018) (collecting population data for cities and states).

26 That is, *685,724 / 8,175,133 = 0.084*; and *533,042 / 8,175,133 = 0.065*. This author has concluded the utility of using a different denominator from the census-reported 2010 number, allowing annual variations, would involve unnecessary precision. For our purposes, we are interested in the general magnitude of the relationships. *Floyd* finds the process is invalid as racially discriminatory, *see infra* note 27 and accompanying text, which suggests that one seeking a greater level of precision would need to make some assessment of racial disparities and re-weight statistics in seeking to create rates that are comparable in New York City and Philadelphia and medium- and large-sized cities generally. This author has concluded that it is implausible that the level of precision required by that would alter the analysis, and thus would introduce unnecessary complexity in exposition.

27 959 F. Supp. 2d at 563.

28 David Rudovsky, Stop-and-Frisk: The Power of Data and the Decision in Floyd v. City of New York, 162 U. PA. L. REV. ONLINE 118, 123 (2013). See generally Aziz Z. Huq, The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing, 101 MINN. L. REV. 2397, 2398 (discussing additional statistics).

29 Barry Friedman, *Why Do Courts Defer to Cops?*, 130 HARV. L. REV. F. 323, 330 (2017).

30 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

31 *Id.* at 559.

respectively.[32] The article further reports a weapon is "point[ed]" approximately one-third of the stops in which a weapon is drawn.[33] So, perhaps one-third of the times a weapon is drawn in a *Terry* stop, it is pointed.

C. Dividing Line Separating Arrests

Use of force, including drawing a weapon, does not inherently convert a *Terry* stop into an arrest[34] requiring a higher threshold of proof of criminal activity be met. So, an officer's drawing a weapon on a person in a vehicle at a Veterans of Foreign Wars building alone did not convert a *Terry* stop into an arrest.[35] In fact, Alice Ristroph concludes, "For example, lower federal courts have widely endorsed the routine practices of drawing weapons and handcuffing suspects during *Terry* stops, on the grounds that such stops are dangerous."[36]

Additionally, that the use of force consists of pointing a firearm at a subject will not inherently transform a *Terry* stop into an arrest.[37] For

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[32] Quoctrung Bui & Amanda Cox, *Surprising New Evidence Shows Bias in Police Use of Force but Not in Shootings*, N.Y. TIMES (July 11, 2016), https://www.nytimes.com/2016/07/12/upshot/surprising-new-evidence-shows-bias-in-police-use-of-force-but-not-in-shootings.html. Bui and Cox's article cites by hyperlink to Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, (Nat'l Bureau of Econ. Research Working Paper No. 22399, 2016), http://www.nber.org/papers/w22399. An updated version of the paper, Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, at 4 (July 2017), https://scholar.harvard.edu/fryer/publications/empirical-analysis-racial-differences-police-use-force, states, "For instance, 0.26 percent of interactions between police and civilians involve an officer drawing a weapon . . . ." This author has been unable to link Bui and Cox's statistic to an underlying source.

For ease of exposition, this Article will proceed on the basis that Bui and Cox's statistic is accurate, as opposed to being overstated by perhaps an order of magnitude. For purposes of our exposition, our analysis is biased in favor of conservatism by using a rate that is higher.

[33] Bui & Cox, *supra* note 32.

[34] *E.g.*, United States v. Fisher, 364 F.3d 970, 973 (8th Cir. 2004) ("It is well established, however, that when officers are presented with serious danger in the course of carrying out an investigative detention, they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety.") United States v. Alvarez, 899 F.2d 833, 838 (9th Cir. 1990); People v. Glaser, 902 P.2d 729, 734 (Cal. 1995) (citing authority from the U.S. Courts of Appeals for the Sixth and Ninth Circuits).

[35] Billingsley v. State, 980 N.E.2d 402, 405, 407 (Ind. Ct. App. 2012) (distinguishing authority where there was not reasonable suspicion a subject was armed, and stating, "On these facts, Officer Lichtsinn withdrew his firearm only because he had a specific and reasonable belief that Billingsley may have been armed . . . [I]t would have been unreasonable to expect Officer Lichtsinn to approach Billingsley without his gun drawn because the risk to the officer's safety was simply too great."), *transfer granted, opinion vacated*, 984 N.E.2d 221 (Ind. 2013), *vacated and opinion reinstated*, 994 N.E.2d 1101 (Ind. 2013).

[36] Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1207 n.104 (2017).

[37] *See generally*, *e.g.*, United States v. Perdue, 8 F.3d 1455, 1462 (10th Cir. 1993) (noting, "[O]ther circuits have held that police officers may draw their weapons without transforming an otherwise valid *Terry* stop into an arrest."); Fuchs v. Sanders, 659 F. Supp. 2d 1136, 1139, 1148 (D. Colo. 2009) (validating a *Terry* a stop involving pointing a firearm at a woman, in an investigation of a recent burglary of golf clubs); Com. v. Alvarado, 693 N.E.2d 131, 136 (Mass. 1998) ("The armed

example, in *United States v. Howard*,[38] the Seventh Circuit justifies a *Terry* stop of a person accompanying one being arrested for a violent crime involving a firearm.[39] In the stop, the officer apparently pointed a firearm at the complaining subject.[40] The court concludes the dangerousness of the circumstances, involving a *Terry* stop of a person accompanying a subject of "dangerous arrest," was sufficient to authorize pointing a firearm at the subject of the detention analyzed under *Terry* principles. In reaching the conclusion, the court explicitly notes that officer "did not have any particular reason at that moment to believe [any of the subjects of *Terry* stops] was dangerous."[41]

Schubert v. City of Springfield[42] illustrates the officer-safety-centric structure of the way courts analyze the use of force in *Terry* stops. It notes, "[O]nce [the officer] had reasonable suspicion justifying a stop, he was permitted to take actions to ensure his own safety."[43]

Consider the circumstances. The case, according to the allegations, involves a prominent criminal defense lawyer, at least middle-aged and dressed in a suit jacket, who was licensed in Massachusetts to carry a firearm.[44] The lawyer was stopped in front of a city courthouse to investigate the lawyer's possession of a handgun.[45] For this, an officer pointed his firearm at the lawyer's face, disarmed the lawyer and, notwithstanding having seen the lawyer's license, which identified his status as a lawyer,

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show of force by the police in ordering the men out of the stopped car, frisking them for weapons, and then examining the interior of the car for weapons did not necessarily place the men under arrest. In a justified stop, as this was, the police may take reasonable precautions to protect themselves and the public, and these precautions will not turn an investigative inquiry into an arrest so long as the force used by the police is commensurate with the extent of the danger. Reliable information that the men may have possessed a sawed-off shotgun in their car provided the police with ample justification to draw their guns while ordering the men out of the car as a precaution against the use of that weapon by one of the men." (citation omitted)); Brown v. State, 944 P.2d 1168, 1170, 1172 (Wyo. 1997) (holding that ordering persons out of a vehicle at gunpoint did not transform the interaction into an arrest).

38 729 F.3d 655 (7th Cir. 2013).

39 *Id.* at 659.

40 *See id.* at 657 (stating the officer "turned his gun toward" the subject of the *Terry* stop and ordered him and others to the ground); *id.* at 660 (referencing the individual "[b]eing ordered to the ground at gunpoint"). The defendant's brief, citing a magistrate's finding of fact, explicitly states the firearm was pointed at the subject. Opening Brief and Short Appendix of Appellant Darius Howard at 4, United States v. Howard, 729 F.3d 655 (7th Cir. 2013) (No. 13–1256), 2013 WL 1095138, at *4.

41 *Howard*, 729 F.3d at 659.

42 589 F.3d 496 (1st Cir. 2009).

43 *Id.* at 503; *see also, e.g.*, Embody v. Ward, 695 F.3d 577 (6th Cir. 2012) (stating, "Ordering [the firearm possessor] to the ground at gun point was not an excessive intrusion given the existence of a loaded weapon, the risk to officer (or public) safety if [he] had been up to no good and the danger to law enforcement whenever it disarms an individual suspected of crime.").

44 *Schubert*, 589 F.3d at 499.

45 *Id.*

partially Mirandized him and placed him in the back of a cruiser.[46] The officer reportedly told the lawyer that "he[, the officer,] was the only person allowed to carry a weapon on his beat."[47]

In concluding the manner of the stop was reasonable, the court continues:

> The officer took several reasonable steps given that [the lawyer] was an unknown armed man walking in that particular location: he emerged quickly from his vehicle, drew his gun, executed a pat-frisk, requested identification and a gun license, attempted to confirm the validity of the licenses, and escorted [the lawyer] into the cruiser after [the lawyer] moved from the position in which the officer had instructed him to remain. All these actions were related in scope to the circumstances that justified the initial stop, namely, [the lawyer]'s open possession of a weapon in front of a courthouse. [The officer's] concern for his own safety and for the safety of others was the context for this stop. It is "clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[48]

A variety of cases concentrate the analysis on what the officer reasonably believes necessary to assure his safety, de-emphasizing the impact on the subject, in addressing whether a particular level of force

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[46] *Id.* at 499–500.

[47] *Id.* at 500.

[48] *Id.* at 503 (quoting United States v. Stanley, 915 F.2d 54, 57 (1st Cir. 1990) (quoting Terry v. Ohio, 392 U.S. 1, 24 (1968)).

is authorized.[49] In United States v. Taylor,[50] the Ninth Circuit articulates the following rationale for concluding officers were authorized to point weapons at a detainee, analyzed under[51] Terry principles. The detainee in question, one Pressler, was accompanying one Taylor, whose residence was the subject of a search warrant associated with suspicion of manufacturing amphetamines.[52] The court supports the conclusion that a determination a person should be considered dangerous is sufficient to point a weapon at him during a Terry stop:

> The Supreme Court has recognized "that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." The purpose of a Terry stop is "to allow the officer to pursue his investigation without fear of violence". Earlier on the day in question, Agent Dick and the other officers on the scene had attended a briefing

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[49] This type of deference is not limited to the fact of taking some intrusive, allegedly excessive action putatively to protect officer safety. In addition, it can result in objections that precautionary activity taken on behalf of an officer lasted too long. Here as well one can encounter substantial deference to the officer.

> For example, *Maney v. Garrison*, 681 F. App'x. 210 (4th Cir. 2017), examines a canine officer's detention of a person hiding behind a bush. During a search for a robbery suspect, the officer's dog found and started biting a person obviously not the suspect—he was of a different race. *Id.* at 212–13. The case addresses whether clearly established law did not allow the officer to await stopping a dog biting an innocent detainee not matching the sought-for subject's description, pending the detainee's showing his hands. *Id.* at 212. The court holds allowing the biting of the innocent, pending display of his hands, was not identified, under clearly established law, as unreasonable. *Id.* at 212. The opinion notes, "Indeed, given that [the police dog] confused Appellant's scent for the suspect's, we think a reasonable officer could have believed the two were hiding together or had recently been in close contact."

Id. at 219–20. A footnote continues:

> This point bears emphasis. Some police dogs are trained to bite the first person they encounter, making no distinction between suspects and bystanders. But [the officer] repeatedly testified, and it is undisputed in the record, that, unless he is ordered to do so or responding to an attack, [this dog] will not bite unless he smells the scent of the subject he is tracking. Given this distinction, we think a reasonable officer would be entitled to draw certain inferences from [this dog's] actions that could not be drawn from the actions of a less discerning dog.

Id. at 220 n.4 (citations omitted).

The court quotes prior authority as follows, "[A] jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites his scrotum." *Id.* at 217 (quoting Kopf v. Wing, 942 F.2d 265, 268 (4th Cir. 1991)). To this author, one should suppose the conclusion is more clear than merely that a jury might so find. The equivocation suggests an unsuitable balancing contrary to the interests of the public at large.

[50] 716 F.2d 701 (9th Cir. 1983).

[51] The detainee was accompanying a person whose residence was the subject of a search warrant. *Id.* at 705.

[52] *Id.* at 705, 708.

> where they had been told that Taylor was dangerous and were warned that others with Taylor should also be considered dangerous.[53]

A footnote in *Taylor* cites discussion in *Terry* stating, inter alia:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.[54]

The focus on officer safety in ascertaining whether it was reasonable to point a firearm at a person during a *Terry* stop is reflected in this discussion: "Consequently, we must consider the totality of the circumstances to determine if the means used by the police, including detention at gunpoint, were justified by the need of a 'reasonably prudent' officer to protect himself and others involved in the search."[55]

The tenor of the analyses is reflected in a string of citations provided in *Howard v. Ealing*.[56] We may focus on a three-sentence paragraph in the opinion that is supported by assorted citations to authority. The language, excluding citations, is as follows:

> And when performing a valid investigatory stop, an officer's pointing a gun at a person is not per se unreasonable. Rather, "[s]ome force may be reasonable during an investigatory stop when the circumstances give rise to a justifiable fear for personal safety on the part of the officer." An officer has "a right to protect himself, and to pursue his investigation without fear of violence."[57]

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53 *Id.* at 708 (footnote omitted) (quoting Adams v. Williams, 407 U.S. 143, 146 (1972); and *Adams*, 407 U.S. at 146)).

54 *Id.* at 708 n.4 (quoting Terry v. Ohio, 392 U.S. 1, 23 (1968)).

55 People v. Glaser, 902 P.2d 729, 734 (Cal. 1995) (citations omitted).

56 876 F. Supp. 2d 1056 (N.D. Ind. 2012).

57 *Id.* at 1066–67 (quoting Whitehead v. Bond, 680 F.3d 919, 932 n.1 (7th Cir. 2012); and Johnson v. City of Milwaukee, 41 F. Supp. 2d 917, 925 (E.D.Wis.1999)).

The second sentence in this quotation is followed by parenthetical summaries of prior cases, including:

> (a) "noting that once the officers had reasonable suspicion to suspect that the plaintiff had threatened someone with a pistol, they were justified in drawing their weapons for their own protection as they effectuated the stop;"[58] and
> (b) "It is well established . . . that when officers are presented with serious danger in the course of carrying out an investigative detention, they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety."[59]

The citation for the third sentence in this quotation includes the following parenthetical summary:

> holding that an officer's act of drawing his gun was reasonable where officer had just observed what he reasonably believed was a battery and individuals involved could have been armed, regardless of whether officer intended only to detain rather than arrest the suspect.[60]

D. Danger Arising from Pointing a Weapon in a Terry Stop

Dangerous conditions are created by encounters in which officers point loaded firearms at subjects who do not otherwise present danger of inflicting serious bodily injury. Pointing a loaded firearm at a person is not simply threatening61 but is, in fact, a dangerous activity. A pistol, when carried by police, typically has a cartridge chambered,62 in a condition that allows a

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58 *Id.* at 1066 (citing Paige v. City of Fort Wayne, No. 1:09–cv–143, 2010 WL 3522526, at *6 (N.D. Ind. Sept. 2, 2010).

59 *Id.* at 1066–67 (alteration in original) (quoting United States v. Fisher, 364 F.3d 970, 973 (8th Cir.2004)) (citations omitted in *Ealing*).

60 *Id*. at 1067 (summarizing Johnson v. City of Milwaukee, 41 F. Supp. 2d 917, 925 (E.D. Wis. 1999)).

61 *See generally* Christian v. Orr, No. CIV.A. 08–2397, 2011 WL 710209, at *16 (E.D. Pa. Mar. 1, 2011) (summarizing prior authority, Robinson v. Solano County, 278 F.3d 1007, 1015 (9th Cir.2002), as supporting the proposition that "'brandishing a cocked gun' in front of an individual's face lays 'the building blocks for a § 1983 claim' even in the absence of any physical injury"), *aff'd as amended*, 512 F. App'x 242 (3d Cir. 2013).

62 *E.g.*, Transcript of Testimony of John Cerar at 70–71, Colo. Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050 (D. Colo. 2014) (No. 13–cv–01300–MSK–MJW), 2014 WL 11369690 ("Q. All right. Do you know the magazine capacity in the firearms that NYPD officers carry today? A. Yes. It's 15-round magazines. Officers are also required on patrol to carry two additional magazines. So *a New York City police officer would have* fifteen rounds in a magazine, *one round in the chamber*,

bullet to be discharged by the single act of moving the trigger (unless the firearm has a thumb safety that must be disengaged).[63]

An unanticipated interruption or disturbance can cause an involuntary movement of a finger, firing the weapon. Or there may be an unintentional sympathetic reaction[64]—moving a hand that is not holding a pistol may produce unintentional movement in the hand holding a pistol.[65] Or a person who has a firearm trained on another may lose his balance and, in the process, discharge the pistol.

By way of illustration, consider the circumstances of *Stamps v. Town of Framingham*.[66] An officer accidentally shot and killed an elderly subject who was lying in a hallway.[67] The officer claimed that he lost his balance and, in the process, his rifle discharged.[68]

Thus, ordinary rules of firearm safety include, "Never point the gun at anything you are not prepared to see destroyed."[69] This principle, familiar to recreational shooters, is also part of training for law enforcement.[70]

There are, of course, more broadly-expressed concerns about the danger created by officer stops. "In the past several years alone, there has been a rash of police shootings and other uses of excessive force against individuals who were either unarmed or presented no threat of physical harm to the officers."[71]

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and thirty additional rounds. So all uniformed police officers are required to carry 46 rounds of ammunition." (emphasis added)), *vacated and remanded*, 823 F.3d 537 (10th Cir. 2016); Report of Affidavit of Capt. George Stoner et al. at 5, Amin-Helton v. City of Tucson, No. C2006 5129, 2010 WL 2019637 (Ariz. Super. Ct. Apr. 7, 2010), 2006 WL 6609375 (noting, "General Order 2051.45 - Firearms Carrying states in relevant part '. . . All members shall maintain a clean, charged and fully loaded firearm. . .'" (omissions in original)).

63 *See generally* Telephonic Examination of Michael Shain at 34–40, Mantooth v. Glock, Inc., No. 2:09–cv–13125. (E.D. Mich. Aug. 7, 2009), 2011 WL 7430676 (involving an expert discussing the relative merits of thumb safeties on firearms, stating, "And there is lots of studies and reports and documentation about law enforcement agencies that have looked at the issue of whether or not it's desirable to have a manual safety on their duty weapons. And far and away the response and results of those have been no, it's not a desirable feature.").

64 John O'Neill et al., Toward at Taxonomy of the Unintentional Discharge of Firearms in Law Enforcement, 59 APPLIED ERGONOMICS 283, 283 (2017).

65 See id.

66 813 F.3d 27 (1st Cir. 2016).

67 *Id.* at 29–30.

68 Expert Report of Kim R. Windup at 2–3, Stamps v. Town of Framingham, 38 F. Supp. 3d 146 (D. Mass. 2014) (Civil No. 12–11908–FDS), *aff'd*, 813 F.3d 27 (1st Cir. 2016).

69 MASSAD AYOOB, GUN DIGEST BOOK OF CONCEALED CARRY at 254 (2d ed. 2012). *See* Perez v. City of Los Angeles, 83 Cal. Rptr. 3d 821, 825–26 (Cal. Ct. App. 2008) (identifying this rule as one of the "four cardinal rules of firearm safety").

70 *E.g.*, Expert Report of John J. Ryan at 17, Sollman v. Renninger, No. 07–1183, 2008 WL 5156617 (E.D. Pa. Dec. 5, 2008), 2009 WL 6686033.

71 Thornton v. City of Columbus, No. 2:15–CV–1337, 2017 WL 2573252, at *12 n.10 (S.D. Ohio June 14, 2017). *See generally id.* (providing as one of a number of illustrations, "Philando Castile, lawfully registered to carry a firearm, was shot and killed by an officer who suspected him of a robbery based on his appearance. Mr. Castile's girlfriend, present at the time of the shooting, stated

One can encounter anecdotal evidence that concern generated by these types of events may alter whether persons exercise the right to bear arms.[72] So, one can see such statements as the following by a person identified as a certified pistol instructor:

> And I have a duty to inform any officer who stops me that I am carrying and that I have a permit for it. But how they react to that, I can't say. And that scares me. So I would rather not have a firearm on me and give someone a reason, even in their minds, to shoot.[73]

III. SUPREME COURT GUIDANCE CONCERNING AUTHORIZATION OF A FRISK

Part II has detailed background statistics of *Terry* stops. It also has explored the danger created by initiating a *Terry* stop if the subject is treated as armed and dangerous. This Part examines the indeterminate Supreme Court authority bearing on what is necessary for an officer to conclude the subject is dangerous. The following Part addresses contemporary lower court authority.

At times, the language in *Terry* references reasonable suspicion a person is armed and dangerous, which would apparently mean that both are required. On the other hand, at times it might be read, in isolation, to suggest that reasonable suspicion one is armed is, by itself, sufficient to initiate a frisk during a proper *Terry* stop. Relevant language may be parsed in the following

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that the officer fired his weapon four times after Mr. Castile attempted to get his ID and wallet."). *See also, e.g.*, Schaefer v. Whitted, 121 F. Supp. 3d 701 (W.D. Tex. 2015) (involving a resident shot and killed on his property by an officer who sought to disarm him by surprise).

72 *E.g.*, Lisa Marie Pane, *Black Women Picking up Firearms for Self-Defense*, U.S. NEWS & WORLD REP. (July 24, 2017), https://www.usnews.com/news/politics/articles/2017-07-24/black-women-picking-up-firearms-for-self-defense ("'It's disheartening to think that you have everything in order: Your license to carry. You comply. You're not breaking the law. You're not doing anything wrong. And there's a possibility you could be shot and killed,' said Laura Manning, a 50-year-old payroll specialist for ADP from Atlanta.").

73 Julia Craven, *Why Black People Own Guns*, HUFFPOST (Dec. 26, 2017), https://www.huffingtonpost.com/entry/black-gun-ownership_us_5a33fc38e4b040881bea2f37. *See also* Tracy Mumford, *To Be Black and Armed in Minnesota*, MPRNEWS (June 23, 2017), https://www.mprnews.org/story/2017/06/23/black-gun-owners-on-yanez-verdict (reporting discussion between a Black trainer and a former student concerning whether the former student should continue to carry a firearm). *Cf.* Philip Smith, *Is Open Carry Too Dangerous For African Americans?*, AMMOLAND (Mar. 7, 2016), https://www.ammoland.com/2016/03/is-open-carry-too-dangerous-for-african-americans/#axzz53PLuv1nh ("The second school of thought is that if you 'Open Carry' you put yourself in harms way with the public as an African American because you have a gun and it can be a big problem for some local law enforcement and the general public. . . . Why put yourself in that type of problem when you can avoid it all together.").

way (the referenced language being quoted is in the margin, annotated to show language corresponding to the components listed in body text):[74]

> (i) As to initiating a frisk, the discussion in *Terry* initially requires the individual be armed and dangerous.
> (ii) It then indicates absolute certainty is not required. For our purposes, that does not assist in determining the number of components of the analysis.
> (iii) It then expresses a test focusing on apprehension of danger—not referencing the individual being armed.
> (iv) In the third sentence of the second paragraph quoted in the margin, the language references whether "a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat." That would suggest a determination the individual was armed is sufficient to initiate a frisk.

However, that fourth statement (i.e., the statement annotated "(iv)") follows reference to the suspected crime being a "stick-up." The suspected crime matters. The suspected crime at issue in *Terry* is one where one can have an apprehension of physical violence if the perpetrator is armed. Thus, after recognizing the context in which the phrase is used, all one can conclude from the usage of "armed and thus presented a threat" is that if a person is suspected to be engaging in activity that is dangerous to others if done while armed, and that person is suspected of being armed—then that person can be suspected of being armed and dangerous.[75]

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[74] Terry v. Ohio, 392 U.S. 1, 27–28 (1968), states in part:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, [(i)] where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer [(ii)] need not be absolutely certain that the individual is armed; the issue is [(iii)] whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger . . .We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a 'stick-up.' We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing [(iv)] petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior.

Id.

[75] One can therefore summarily reject an argument such as:

> The Court stated in its majority opinion that the frisk in that case was warranted because the officer reasonably believed the detainee "was armed *and thus* presented a threat to the officer's safety while he was investigating his suspicious behavior." This language, "armed and thus," on which the Fourth Circuit in *Robinson II* rightly placed great emphasis, shows that the *Terry* court believed that danger flowed from the fact that the suspect was armed and did not exist as a separate factor.

Moreover, the opinion at the end, in language purportedly describing what the Court "hold[s]," uses the phrase "armed and presently dangerous,"[76] which makes it difficult to assert plausibly that the *holding* involves allowing a frisk on reasonable suspicion one is armed *or* presently dangerous.

Turning to subsequent authority, *Adams v. Williams*[77] involves a *Terry* stop and frisk following an officer's receipt of a tip that a person in a vehicle in a high-crime area at 2:15 a.m. possessed narcotics and a firearm.[78] The opinion notes that when the occupant rolled-down the window, the officer reached into the vehicle and removed a firearm from the subject's waistband—a firearm that had not been visible.[79] The case validates the stop and frisk.[80]

The case does not inherently validate a frisk for mere suspicion of firearms possession. The circumstances, from the time of day and the activity and the tip itself, indicate suspicion of trafficking in controlled substances. A variety of courts have expressed the view that dealing in narcotics is a crime that gives rise to suspicion of dangerousness.[81]

Matthew J. Wilkins, Note, *Armed and Not Dangerous? A Mistaken Treatment of Firearms in* Terry *Analyses*, 95 TEX. L. REV. 1165, 1176 (2017) (emphasis supplied by Wilkins) (footnotes omitted) (quoting *Terry*, 392 U.S. at 28) (citing United States v. Robinson, 846 F.3d 694 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 379 (2017)).

[76] The opinion explicitly describes its holding as follows:

> 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 outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Terry, 392 U.S. at 30–31 (emphasis added).

[77] 407 U.S. 143 (1972).

[78] *Id.* at 144–45.

[79] *Id.* at 144.

[80] *Id.* at 148.

[81] For example, *Commonwealth v. Patterson*, 591 A.2d 1075, 1078–79 (Pa. Super. Ct. 1991) (citation style conformed), states:

> Today we additionally join the growing number of courts who have taken judicial notice of the fact drug dealers are likely to be armed and dangerous. See United States v. Adams, 759 F.2d 1099, 1109 (3d Cir.1985); Commonwealth v. Davidson, 566 A.2d 897 (Pa. Super. Ct. 1989) (it is well known that the distribution of narcotics is often punctuated by acts of violence involving various lethal weapons); United States v. Morales, 549 F. Supp. 217 (S.D.N.Y. 1982) (to substantial dealers in narcotics, firearms are as much tools of the trade as are most commonly recognized articles of narcotics paraphernalia); United States v. Wiener, 534 F.2d 15 (2d Cir. 1976); United States v.

Moreover, the Court expressly references factors in addition to firearms possession in concluding there was reasonable suspicion of dangerousness—discussion that would be irrelevant were mere suspicion of firearms possession sufficient to initiate a frisk.[82]

Michigan v. Long[83] stands for the following: If a person, when outside a vehicle and encountering police following a traffic accident,[84] appears to be under the "influence of something,"[85] balks at providing a license and registration[86] and approaches a drivers' compartment where a hunting knife is on the floor,[87] the officers can seize the knife and pat-down the subject.[88] In that context, the court states:

> Long also argues that there cannot be a legitimate *Terry* search based on the discovery of the hunting knife because Long possessed that weapon legally. Assuming arguendo that Long possessed the knife lawfully, we have expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law.[89]

This says nothing about whether the presence of a weapon, by itself—by a person who is not balking at complying with a lawful officer request, who is not apparently under the influence of a substance and who does not then move to a location allowing the weapon to be grasped—is sufficient to conclude the individual is armed and dangerous.

Barlin, 686 F.2d 81 (2d Cir. 1982) (an officer's actions should be measured against a background which includes the violent nature of narcotics crimes).

Id. United States v. Oates, 560 F.2d 45, 62 (2d Cir. 1977), describes firearms as "tools of the trade" of substantial dealers of narcotics: "[W]e have recognized that to 'substantial dealers in narcotics' firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia." This supports concluding a 1970s conceptualization of narcotics trafficking with firearms implicates use of the firearms as part of that illegal activity.

82 The opinion states:

While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear for his safety. When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable.

Adams, 407 U.S. at 147–48 (footnote omitted).

83 463 U.S. 1032 (1983).

84 *Id.* at 1035.

85 *Id.* at 1036.

86 *Id.*

87 *Id.*

88 *Id.* at 1050–51.

89 *Id.* at 1052 n.16 (citation omitted).

Additional Supreme Court authority includes *Pennsylvania v. Mimms*,[90] where the court in a per curiam opinion issued without merits briefing[91] primarily focuses on whether an officer who has stopped a motorist for a traffic violation may order the driver to exit the vehicle.[92] The Court's discussion of the ancillary issue of whether the observation of a bulge entitled the officer to frisk the motorist is in the margin.[93]

As to the relevant issue, the *Mimms* opinion is conclusory—it does not indicate what aspects of the context indicate the officer was entitled to conclude the motorist presented a danger. Although there was not briefing on the merits,[94] the briefing on petition for certiorari would indicate a reason.

The state's briefing asserts, "Pertinent statistics indicate that routine traffic stops involve at least as much danger to police officers as arrests for violent crimes."[95] It further references language from *Adams v. Williams*[96] indicating approximately thirty percent of officer shootings occurred in interactions with persons seated in automobiles.[97] The briefing then continues, "It is readily apparent that *every time* a police officer approaches a vehicle he is potentially placing his life on the line."[98] So, from the context, it would appear that *Mimms* is dispositive only as to searches in traffic stops in which there is reasonable suspicion an undisclosed firearm is present (and

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90 434 U.S. 106 (1977).

91 The docket in *Mimms* reveals the following sequence: A petition for writ of certiorari, a brief in opposition of that petition for certiorari and the petitioner's reply were filed from June 1977 through October 1977. Without further briefing, on December 5, 1977, the Supreme Court granted the petition for certiorari and simultaneously issued an opinion disposing of the merits, reversing the Supreme Court of Pennsylvania. Docket, *Mimms*, 434 U.S. 106 (No. 76–1830–CSY).

92 *Mimms*, 434 U.S. at 108–11.

93 The opinion states:

> There remains the second question of the propriety of the search once the bulge in the jacket was observed. We have as little doubt on this point as on the first; the answer is controlled by *Terry v. Ohio, supra*. In that case we thought the officer justified in conducting a limited search for weapons once he had reasonable concluded that the person whom he had legitimately stopped might be armed and presently dangerous. Under the standard enunciated in that case—whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate"—there is little question the officer was justified. The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of "reasonable caution" would likely have conducted the "pat down."

Id. at 111–12 (footnote omitted).

94 *See supra* note 91 and accompanying text.

95 Petition for Writ of Certiorari to the Supreme Court of Pennsylvania at 8, *Mimms*, 434 U.S. 106 (No. 76–1830).

96 407 U.S. 143 (1972).

97 Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, *supra* note 95, at 8 (citing Adams v. Williams, 407 U.S. 143, 148–49 (1972)).

98 *Id.* at 9.

at that, only to the extent the safety implications, and implications of suspicion of firearms possession, remain comparable forty years later).

Lastly, the Court's discussion in *Arizona v. Johnson*[99] supports the view that suspicion of dangerousness does not inherently follow from having a suspicion a person is armed. The Court notes:

> Based on [the officer's] observations and [the subject's] answers to her questions while he was still seated in the car, [the officer] suspected that 'he might have a weapon on him.' When he exited the vehicle, [the officer] therefore "patted him down for officer safety." During the patdown, [the officer] felt the butt of a gun near [the subject's] waist. At that point [the subject] began to struggle, and [the officer] placed him in handcuffs.[100]

Suspicion the individual was armed arose from factors such as admission of prior incarceration for burglary, possession of a scanner (potentially indicative of a desire to evade police), wearing clothing consistent with gang membership and being from a location where that gang was present.[101]

Notwithstanding these premises, the Court, in remanding, concluded that it still remained for the court below to determine whether there was reasonable suspicion the detained individual was "armed and dangerous."[102] If the Court had understood reasonable suspicion a person was armed is sufficient to frisk any detained person, it is not clear why it would then repeat the reference to a required finding the detained person was "armed *and* dangerous."

In sum, extant Supreme Court authority does not unequivocally indicate whether reasonable suspicion a *Terry* subject is armed authorizes a frisk.

IV. CONTEMPORARY LOWER COURT AUTHORITY

A. Contemporary Authority Finding Authorization for a *Terry* Stop for Firearms Possession Automatically Authorizes a Frisk

There is a split in the contemporary lower court authority concerning whether a frisk may be initiated following a stop on the basis of suspicion merely that an individual is armed—without additional evidence the possession is unlawful and without other

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99 555 U.S. 323 (2009).

100 *Id.* at 328.

101 *Id.*

102 Arizona v. Johnson, 555 U.S. 323, 334 n.2 (2009) ("The Arizona Court of Appeals assumed, 'without deciding, that [the officer] had reasonable suspicion that [the detained person] was armed and dangerous.' We do not foreclose the appeals court's consideration of that issue on remand.").

evidence of criminal activity. In *United States v. Robinson*,[103] the court examines under *Terry* principles[104] a frisk of a passenger in a vehicle stopped for a traffic offense (a seatbelt violation).[105] The court en banc reverses a panel decision; the court purports to hold that where "the police officers had reasonable suspicion to believe that [the subject] was armed, the officers were, as a matter of law, justified in frisking him and, in doing so, did not violate [the subject's] Fourth Amendment rights."[106]

That the court should not have addressed this issue is the reason for the immediately preceding reference to what the court "purports" to hold. Under principles of constitutional avoidance, "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'"[107] After a lengthy analysis concluding that the mere suspicion a subject detained under *Terry* principles is armed gives rise to authorization to frisk,[108] the *Robinson* court then proceeds to indicate there were additional facts increasing the level of suspicion of dangerousness—that the subject was suspected of loading a firearm in a location popular for drug-trafficking, and that the subject was evasive when asked whether he had a weapon.[109]

So we here have another manifestation of the idiosyncratic approach some lower courts take to deny development of firearms rights. Courts denying Second Amendment protection for actions outside the home often will assume, without deciding, that the benefits of the Second Amendment extend outside the home,[110] thereby avoiding a holding to that effect, securing

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103 846 F.3d 694 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 379 (2017).

104 *Id.* at 699–701.

105 *Id.* at 695.

106 *Id.* at 701. The en banc decision produced a dissent representing the views of four judges, and a separate concurrence that would apply a special rule for firearms possession. 846 F.3d at 706 (Wynn, J., concurring).

107 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y. & Phila. Steamship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

108 *Id.* at 697–701.

109 *Id.* at 701–02.

110 *E.g.*, Drake v. Filko, 724 F.3d 426, 434 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) ("[T]he Amendment must have some application in the very different context of the public possession of firearms. Our analysis proceeds on this assumption." (citation omitted)); Hightower v. City of Boston, 693 F.3d 61, 74 (1st Cir. 2012) ("We agree with Judge Wilkinson's cautionary holding in *United States v. Masciandaro*, that we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home, including as to 'what sliding scales of scrutiny might apply.' As he said, the whole matter is a 'vast terra incognita that courts should enter only upon necessity and only then by small degree.'") (citation omitted) (quoting United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011)).
The issue is often elided when the claim involves a challenge under 42 U.S.C. § 1983 to a more limited restriction that can be addressed by concluding that any such right is not "clearly established." *See generally* Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("The judges of the

Second Amendment rights. But here, where the issue need not be decided, the Fourth Circuit unnecessarily focuses on matters that are dicta in pronouncing a restrictive outcome.

Other cases following this approach include *United States v. Orman*,[111] where the court states, "Here Officer Ferragamo's reasonable suspicion that Orman was carrying a gun, *which is all that is required for a protective search* under *Terry*, quickly rose to a certainty when Orman confirmed that he was carrying a gun."[112] The court additionally notes, "Although he also testified that Orman 'acted perfectly—very cordial,' under *Terry* and its progeny a reasonably prudent man in [the officer's] circumstances would be warranted in retrieving the gun for his safety and the safety of the mall patrons."[113]

United States v. Rodriguez[114] authorizes a frisk and temporary disarmament of a convenience store employee solely on the basis that the employee was possessing a concealed firearm on store premises. The court states:

> Defendant acknowledges he was armed, but claims Officer Munoz had no reason to believe he was dangerous. We have already observed that a prudent officer could reasonably suspect Defendant's handgun was loaded. That alone is enough to justify Officer Munoz's action in removing the handgun from Defendant's waistband for the protection of himself and others. . . We will not deny an officer making a lawful investigatory stop the ability to protect himself from an armed suspect whose propensities are unknown. Officer Munoz did no more than was required to retrieve the gun. Officer Munoz was entitled to remove Defendant's handgun, not to discover evidence of a crime, but to permit him and Officer Miller to pursue their investigation without fear of violence.[115] In a footnote, the court observes,

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district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."); Deffert v. Moe, 111 F. Supp. 3d 797, 811–12 (W.D. Mich. 2015) (citing *Pearson*); Jefferson v. Lewis, 594 F.3d 454, 460 (6th Cir. 2010). Courts often elide developing affirmative Second Amendment rights by proceeding to the step in which they conclude any such right was not clearly established. *E.g.*, Burgess v. Town of Wallingford, 569 F. App'x 21, 23 (2d Cir. 2014) ("Thus, the protection that Burgess claims he deserves under the Second Amendment—the right to carry a firearm openly outside the home—is not clearly established law.").

111 486 F.3d 1170 (9th Cir. 2007).

112 *Id.* at 1176.

113 *Id.*

114 739 F.3d 481 (10th Cir. 2013).

115 *Id.* at 491 (citation omitted). Had the court wanted to do so (or thought it suitable to avoid the constitutional issue), it could have cabined its holding by relying on the fact, referenced elsewhere in the opinion, that the investigation was prompted by a tip that employees, "in a reportedly 'high crime' area, were showing each other handguns," *id.* at 483, which might give rise to reasonable

> "We note that Defendant has never challenged Officer Munoz's actions, or the state law applicable thereto, as contrary to the Second Amendment."[116]

B. Contemporary Authority Finding Authorization for a *Terry* Stop for Firearms Possession Does Not Automatically Authorize a Frisk

There is authority that takes the other approach—that does not apply a restated test for frisking a seized person in terms of whether he is armed *or* dangerous. In *State v. Serna*, the Arizona Supreme Court states:

> We also disagree with the Ninth Circuit's determination that mere knowledge or suspicion that a person is carrying a firearm satisfies the second prong of *Terry*, which itself involves a dual inquiry; it requires that a suspect be "armed and presently dangerous." In a state such as Arizona that freely permits citizens to carry weapons, both visible and concealed, the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous.[117]

United States v. House[118] is something of an unusual case. The court approves the lower court's determination the case involves a consensual stop.[119] The government argued "that no reasonable, articulable suspicion of criminal activity is necessary when a search is incident to a consensual stop, and there need be only a reasonable, articulable suspicion that a person is armed and dangerous."[120] The court assumed, without deciding, that to be the case.[121] So, although not involving a *Terry* seizure, the court's opinion provides content to whether mere knowledge a person is armed is sufficient to initiate a frisk.

The case holds there is not an adequate basis to initiate a frisk where an officer observes that a person possesses a folded pocket knife (of the type the officer carries on duty) and has a suspicious bulge under his jacket, but denies having a weapon.[122] The court expressly requires each of the "armed" and

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suspicion of a miscellaneous crime such as disorderly conduct. N.M. STAT. ANN. § 30–20–1 (Westlaw through First Regular and Special Sessions of the 53rd Legislature (2017)).

116 *Id.* at 484 n.1.

117 331 P.3d 405, 410 (Ariz. 2014).

118 463 F. App'x 783 (10th Cir. 2012).

119 *Id.* at 786.

120 *Id.*

121 *Id.* at 787.

122 *Id.* at 785, 788 (quoting the concurring opinion in *United States v. Johnson*, 246 F. App'x 982, 988 (6th Cir. 2007) (Cole, J., concurring), and stating, "But there was no indication that he was presently

"dangerous" components be separately met.[123] Although concluding a reasonable officer could determine the subject was armed,[124] the court concludes there was not an adequate basis to find the subject was dangerous,[125] thereby invalidating the frisk.[126]

The subject denied being armed, although the officer saw he had a knife in his pocket.[127] The court concludes:

> It is likely that many law-abiding citizens would not consider themselves armed with a weapon, while carrying a folded pocket knife, when approached on the street and questioned unexpectedly by an officer. To allow a search based on the hunch that a citizen walking down the street is illegally carrying a firearm, without more, serves to erode the precious protections of the Second and Fourth Amendments.[128]

Lastly, the opinion in *Northrup v. City of Toledo Police Department*[129] has language that would support this approach—indicating that a conclusion that one is armed does not inherently indicate the person is dangerous in the context of a stop (although, in that case, the disposition is based on the stop being invalid).[130] The defendants made the following argument to justify the stop:

> Perhaps Shawn Northrup wished that we lived in a world where the sight of armed gunmen walking down the road was a common and accepted as the sight of a man walking his dog. But, Toledo, Ohio is not Syria, or the Ukraine, or Iraq. Toledo is in America and in America mass shootings have been on a recent and dramatic rise. Given this troubling and deadly historical backdrop, Officer

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dangerous to Officer Daley or other citizens. Being armed does not ineluctably equate with dangerousness."). *See also House*, 463 F. App'x at 794 (Baldock, J., dissenting) ("Officers must have reasonable suspicion the subject is 'armed *and presently dangerous*.' A citizen walking down the street carrying a knife or gun on his person does not necessarily present a danger to police or the public." (emphasis added in *House*) (quoting Terry v. Ohio, 392 U.S. 392 1, 24 (1968) (citing *Terry*, 392 U.S. at 30) (citation omitted).

123 *Id.* at 788.

124 *Id.*

125 *Id.* at 790.

126 *Id.* at 789.

127 *Id.* at 788.

128 *Id.* at 789.

129 785 F.3d 1128 (6th Cir. 2015).

130 The opinion states:

> Nothing in the Fourth Amendment prohibited Officer Bright from responding to the call and ascertaining through a consensual encounter whether Northrup appeared dangerous. Until any such suspicion emerged, however, Bright's hope that Northrup "was not about to start shooting" remains another word for the trust that Ohioans have placed in their State's approach to gun licensure and gun possession.

Id. at 1133.

> Bright and Sergeant Ray were faced with a choice: respond to the communities' fear and the appearance of the gunman by performing an investigatory stop, or do nothing while Northrup continued walking down Rochelle and hope that he was not about to start shooting. Officers Bright and Ray chose the first option and any other reasonable officer given the totality of the circumstances in this case would have done likewise.[131]

After that in the briefing, under a heading referencing "the Nature of the Investigatory Stop was Limited in Scope and Duration . . .," the defendants make the conclusory statement that the officer was entitled to disarm the plaintiff: "Both Officer Bright's and the public's safety required that the Plaintiff's weapon be secured so that he could not potentially cause injury."[132]

The appellate court affirms denial of summary judgment for officers as to Fourth Amendment claims, stating, "We thus affirm the district court's conclusion that, after reading the factual inferences in the record in Northrup's favor, Officer Bright could not reasonably suspect that Northrup needed to be disarmed."[133] As is often the case, the structure of the court's opinion leaves some uncertainty concerning the precise contours of the court's analysis. In summary, the opinion states:

> (i) "To allow stops in this setting 'would effectively eliminate Fourth Amendment protections for lawfully armed persons.' "[134]
>
> (ii) The alleged suspected crime being investigated, inducing panic, "does not cover what happened."[135]

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131 Brief of Defendant-Appellants Officer David Bright and Sergeant Daniel Ray at 16, *Northrup*, 785 F.3d 1128 (No. 14–4050).

132 *Id.* at 17.

133 *Northrup*, 785 F.3d at 1133.

134 *Id.* at 1132 (quoting United States v. King, 990 F.2d 1552, 1559 (10th Cir. 1993)).

135 *Id.*

The defendants reply briefing makes the troubling assertion that there was reasonable suspicion there was an emergency, justifying the stop, because "To report an emergency through the 9–1–1 system when no emergency exists is a criminal offense. It was therefore, only logical for Officer Bright to conclude that an emergency of a criminal nature involving a gun had taken place . . . ." Reply Brief of Defendant-Appellants Officer David Bright and Sergeant Daniel Ray at 9, *Northrup*, 785 F.3d 1128 (No. 14–4050). The "odd news" section of newspapers and websites would suggest use of the 9–1–1 system is not in practice restricted to emergencies. *E.g.*, *Connecticut Man Calls 911 over Beef about Sandwich*, MACOMB DAILY NATION-WORLD (June 16, 2012), http://www.macombdaily.com/article/MD/20120616/NEWS04/120619620 ("A man angry that a deli had fouled up his sandwich order decided to take his beef to police. The man . . . called 911 on Wednesday and complained that he 'specifically asked for little turkey and little ham, a lot of cheese and a lot of mayonnaise,' and the Grateful Deli in East Hartford got it wrong."); John Snell, *Aloha Man Calls 9–1–1 over Botched Fast-Food Order*, OREGONIAN (May 27, 2009), http://www.oregonlive.com/washingtoncounty/index.ssf/2009/05/aloha_man_calls_911_over_

> (iii) Ohio law permits openly carrying firearms[136] (although at one location the opinion notes a dispatcher's statement that this is the case if one has a concealed carry weapons permit[137] and later discusses the possibility the individual "was not licensed to carry a gun"[138]), and does not require owners to produce licenses.[139]
> (iv) As to the possibility the plaintiff was not licensed to carry a gun or that he was a felon prohibited from possessing a gun, "Where it is lawful to possess a firearm, unlawful possession 'is not the default status.' There is no 'automatic firearm exception' to the *Terry* rule."[140]
> (v) In conclusion, the court states:
> And it has long been clearly established that an officer needs evidence of criminality or dangerousness before he may detain and disarm a law-abiding citizen. We thus affirm the district court's conclusion that, after reading the factual inferences in the record in Northrup's favor, Officer Bright could not reasonably suspect that Northrup needed to be disarmed.[141]

In sum, the court's discussion rejects the conclusion that one can be stopped and disarmed merely for possessing a firearm. However, the opinion is not as detailed as one might like concerning the interplay between the preconditions to the stop and the preconditions to a frisk following a stop.

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botch.html ("Raibin Raof Osman isn't most people. The 20-year-old Aloha man had a sleep-over at the Washington County Jail on Memorial Day after calling 9–1–1 to complain that McDonald's left out a box of orange juice from his drive-thru order."); *Police: Man Called 911 Ten Times to Complain about Chili Restaurant*, FOX 19 NOW, http://www.fox19.com/story/18904054/man-called-911-ten-times-to-complain-about-chili-restaurant ("A Clifton man is facing charges after police say he called 911 multiple times to complain about the service at a Skyline Chili restaurant.").

136 *Northrup*, 785 F.3d at 1131.

137 *Id.* at 1130.

138 *Id.* at 1132. On the other hand, the office of the Ohio Attorney General, in a 2012 booklet, under the caption, "Open Carry," states, "Ohio's concealed carry laws do not regulate 'open' carry of firearms. If you openly carry, use caution. The open carry of firearms is a legal activity in Ohio." Office of the Ohio Attorney Gen., Ohio's Concealed Carry Laws and License Application at 17 (Apr. 27, 2012), https://web.archive.org/web/20120705074236/http://www.ohioattorneygeneral.gov:80/getattachment/02ff1ca7-b17e-46e2-9f1f-505beac65926/Concealed-Carry-Laws-Booklet.aspx. The identical language is reproduced in the 2017 version of this document. Office of the Ohio Attorney Gen., Ohio's Concealed Carry Laws and License Application at 15 (Mar. 21, 2017),http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Law-Enforcement/Concealed-Carry-Publications/Concealed-Carry-Laws-Manual-(PDF).aspx.

139 *Northrup*, 785 F.3d at 1132.

140 *Id.* (quoting United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013); and Florida v. J.L., 529 U.S. 266, 272 (2000)).

141 *Id.* at 1133.

V. INCOHERENT AGGREGATE TREATMENT ARISING FROM BIFURCATION

Stops of armed persons are dangerous.[142] We are examining the ability to frisk a person whose stop was authorized only by the fact of reasonable suspicion he possessed a weapon, i.e., excluding some additional reasonable suspicion of imminent unlawful use of the weapon (as well as either evidence the possession is criminal or evidence of another crime). It is thus only the occurrence of the stop itself that gives rise to the danger.

As demonstrated in Part II.C, allowing an automatic conclusion an armed person is dangerous, thereby automatically authorizing a frisk and disarmament, then grants the officer great latitude to take defensive actions under principles that do not brook restrictions on actions putatively enhancing the officer's safety. As demonstrated in Parts II.C–.D, such stops create substantial safety hazards.

The Supreme Court has indicated that the variation between (x) a stop at a checkpoint, where there are "visible signs of authority," and (y) a "roving-patrol stop," amounts to a constitutionally cognizable quantum of difference—it is a differential that has constitutional import. In *Michigan Department of State Police v. Sitz*,[143] the Court asserts stops at checkpoints generate less concern or fright to lawful travelers, because one stopped at a checkpoint "can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."[144] The Court, on the other hand, has stated, "[C]ircumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop."[145]

We thus know that the difference in the intrusion on liberty between a police officer checkpoint and one involving moving officers in police cars is of constitutional import in the balancing. The further step to allowing stops authorizing the substantial risk to life arising from firearms being pointed at innocents, for mere exercise of a constitutional right,[146] is overwhelmingly more consequential. It is inherently inconsistent for a court simultaneously

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142 *See supra* Parts II.C–.D.

143 496 U.S. 444 (1990).

144 *Id.* at 452–53 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)).

145 *Martinez-Fuerte*, 428 U.S. at 558.

146 As noted above, *see supra* note 110, courts often assume that the right protected by the Second Amendment extends outside the home. Or they may so hold. *E.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 659 (D.C. Cir. 2017) ("[T]he Amendment's core generally covers carrying in public for self-defense."); Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012) ("A right to bear arms thus implies a right to carry a loaded gun outside the home."); People v. Aguilar, 2 N.E.3d 321, 327 (Ill. 2013) (noting a conclusion "that the second amendment protects the right to possess and use a firearm for self-defense outside the home"). For ease of exposition, this Article will reference the right to bear arms outside the home as a constitutional one, although the issue is not formally resolved under current Supreme Court jurisprudence.

to assert (x) a *Terry* stop for mere firearms possession is authorized, because the stop is innocuous, and (y) the subjects can, for exercise of a constitutional right, be treated as armed and dangerous and thus be subjected to pretextual, oppressive searches in which weapons can be pointed at them. The former conclusion negates the latter.

This is the fundamental point. It is easy for legal doctrine to develop building on outcomes of prior authority while eliding the underlying premises. We now have a couplet of issues developing in the lower courts: (x) whether reasonable suspicion a person is armed can authorize a *Terry* stop and (y) if so, whether a frisk is inherently authorized. The collective resolution must be based on internally consistent application of principles.

VI. BALANCING THE COMPONENTS

A. Overview

Turning to application of any balancing test, as a preliminary matter, we can conclude that if a frisk would otherwise be unconstitutional, it cannot be validated by imposing a condition on the constitutionally-protected possession of a firearm. That would be an unconstitutional condition.[147]

In this author's view, judicial retreat to balancing in this context does not result in a deductive process that yields a compelled outcome. Rather, reference to balancing obscures that the decision is produced by latent value judgments unconstrained by the dictates of the relevant constitutional language.

The benefits of freedom from an oppressive government that can engage in suspicionless, hazardous and pretextual searches cannot be "balanced" against safety impacts of those searches and any cognizable harm arising from persons foregoing exercising a constitutional right for fear that doing so will subject them to hazardous seizures. The factors are of qualitatively different types—have different dimensions. The outcome is unpredictable unless, on all relevant dimensions, a case at-hand presents a more compelling case than prior precedent relied-upon in support, in which case "balancing" yields an outcome.

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147 *Cf., e.g.*, Kittle-Aikeley v. Strong, 844 F.3d 727 (8th Cir. 2016) (en banc) (noting that consent to enrolling in a higher education program cannot be conditioned on consent to a search; quoting McDonell v. Hunter, 809 F.2d 1302, 1319 (8th Cir. 1987) (discussing conditions on government employment)), *cert. denied*, 137 S. Ct. 2216 (2017); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1424–25 (1989) (describing regulatory exemptions as occupying a "twilight zone between the forbidden and the compelled," and stating, "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.").

Policymaking requires some form of comparing disadvantages and benefits that cannot be reduced to a single scale. The point, simply, is that retreating into "balancing" in construing the language of an adopted constitutional provision, at least in this circumstance, takes judges out of a cabined, analytic judicial role and puts them into a more legislative one.

For the constitutional provisions to have meaning, they need to be interpreted in a way that does not allow judges to reach the result favored by their alternative policy preferences. The Court has noted, "[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.'"[148] The same can be said about a constitutional provision.

This observation is supported by the *District of Columbia v. Heller*[149] opinion. Justice Scalia there suggests that as to the Second Amendment, the balancing has already been effected by the adoption of the amendment.[150] This view, although not generating a positive construct governing interpretation, may nevertheless be valuable.

Allowing stops and frisks for mere firearms possession will result in some segment of the public foregoing exercise of the right, finding the restriction makes exercise of the right unsafe.[151] For example, one might assert that if the interpretative approach allows a construction that compels abandonment of a constitutional right by persons exceeding some threshold, it is invalid. What that threshold might be, this author cannot say. Nicholas Johnson's analogizing Second Amendment jurisprudence to the abortion

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148 Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827 (1978) (quoting United States v. Sisson, 399 U.S. 267, 297 (1970)).

149 554 U.S. 570 (2008).

150 The opinion states:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id. at 634–35 (citation omitted).

151 *See supra* notes 72–73 and accompanying text.

jurisprudence would suggest a very low threshold.[152] That conclusion might be further urged, whether consciously or otherwise, if there are racial disparities, which may well be the case.[153]

Insofar as the implicit compelled forfeiture of constitutional rights is insufficient to dispose of the issue, from a commentator's perspective, one can merely identify circumstances that the court would need to address in any "balancing." In that regard, the following observations come to mind:

First, *Terry* stops of law-abiding citizens for suspicion of firearms possession are, as noted,[154] fraught with danger. As noted above,[155] most *Terry* stops do not involve an officer withdrawing a weapon. So, authorizing these stops for mere suspicion of firearms and possession and inherently authorizing a frisk would not simply increase the number *Terry* stops and produce a proportionate increase in the adverse consequences of hazardous stops. Rather, the impact would be substantially amplified (more than proportional to the increase in stops themselves), because all the additionally authorized stops would involve ones in which the officers would be justified in drawing weapons.

Second, extant authority suggests that the benefits of which a court may take cognizance are less than one would expect. For reasons detailed in Part VI.B, below, they appear limited to the harm from the transportation divorced from suppression of crime remote from the transport itself. And the minimal frequency with which persons are prosecuted for failure of Brady Act

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152 He writes:

> In *Stenberg v. Carhart*, the Supreme Court engaged an abortion claim that closely tracks the assault weapons question. *Stenberg* dealt with a challenge to Nebraska's partial-birth abortion ban. The question was whether a woman could demand access to a particular abortion methodology known alternately as dilation and extraction ("D&X") or intact dilation and evacuation ("intact D&E"). The majority decision, advanced by the liberal wing of the Court, affirmed a woman's right to the abortion *methodology best suited to protect life and health*, even when lesser but still safe alternatives are available. This, in principle, is the assault weapons question. Particularly, can the state ban guns that in some circumstances are the best self-defense options, on the excuse that other guns remain available?

Nicholas J. Johnson, Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique, 60 HASTINGS L.J. 1285, 1287 (2009) (footnotes omitted) (citing Stenberg v. Carhart, 530 U.S. 914, 920–23 (2000)).

153 *See infra* note 161 and accompanying text. *See generally* Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 7–11, Robinson v. United States, No. 16–1532, 2017 WL 3189042 (U.S. July 24, 2017) (providing a discussion under a heading, "The per se rule endorsed below allows for unchecked racial profiling, as officers encounter more citizens who are—or may be—legally armed.").

154 *See supra* Parts II.C–.D.

155 *See supra* note 32 and accompanying text.

checks[156] indicates that there is not a strong federal interest in preventing that mere possession.[157]

Third, any substantial efforts to engage in this type of *Terry* stop cannot be expected to be successful. Criminals transporting firearms to use at other locations can easily carry them so that they are not perceivable, e.g., inside backpacks that do not reveal the outline of contents. Not so for those carrying firearms for self-defense, because they need immediate access. So, substantial enforcement efforts would increasingly target innocuous conduct.

Fourth, the best way to present a tractable framing of the issue is to begin with the premise that a *Terry* stop and frisk is given to everyone who encounters a police officer and is suspected of possession of a firearm. If balancing is failed in that circumstance, then one needs to demonstrate the benefits to stopping and frisking persons diminish as the number of stops increases.

There is a strong argument that any balancing would be failed with only modest frequencies of drawing of firearms in these stops of persons presumed dangerous. However, there is a potentially unexpected justification for considering, in the balancing, that firearms are drawn in each of these justified stops of persons suspected of being armed who are presumed dangerous. The crucial point is that the transition from stopping all, in stops in which weapons are drawn, to intermittent stops with weapons drawn does not involve random omissions. Rather, because pretextual stops[158] are authorized,[159] we are discussing a pretext-infused filter to exclude some from intimidation and hazard.

Odious rationales for the pretextual determinations cannot be assured to be provable.[160] So, the pretext-infused filter will incorporate odious

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156 *See generally* 18 U.S.C. § 922(t) (Westlaw through Pub. L. No. 115–140; and 115–158 to 115–163, 115–167 and 115–168).

157 *See infra* note 197 and accompanying text.

158 Although one may initially focus on racial or ethnic bases for pretextual stops, there can be other odious reasons. *See, e.g.*, Complaint, Picard v. Torneo, No. 3:16–cv–01564–WWE, at 5, 9 (D. Conn. Sept. 15, 2016) (alleging manufactured allegations that "'someone called in' a complaint about a man 'waving a gun and pointing it at people'" in connection with the arrest of an open carrier protesting at a DUI stop, further alleging, "Defendant Torneo said that the defendants should issue Mr. Picard a public disturbance charge, 'then we claim that in backup we had multiple [motorists] stopped to complain about' a man waving a gun, 'but that no one wanted to stop and give a statement.' Torneo emphasized the words 'then' and 'multiple' when speaking, as if formulating the defendants' cover story aloud.").

159 *See supra* notes 21–22 and accompanying text.

160 More formally, one might argue the ratio:

$$\frac{law\ enforcement\ benefits}{societal\ harm}$$

increases as one considers moving from stopping and pointing weapons at all to doing so only sometimes. But the more complete assessment compares:

motives. Avoidance of diminishing returns to enforcement, by stopping some, is only realized at the expense of selections increasingly dominated by odious pretextual determinations.

Researchers assert current findings on the relationship between police use of force and subject race are mixed.[161] Thus, one cannot eliminate the possibility that odious criteria, such as race or other improper criteria, will influence the likelihood of pretextual stops involving drawing of weapons. And reliance on these criteria cannot easily be proved. So, the possibility these problematic factors will underlie the inconsistent drawing of weapons may produce circumstances worse than drawing weapons in all cases.

B. "General Interest in Crime Control" Disregarded

Whatever balancing rubric is being applied to weigh the safety hazards to the innocent, and any forfeiture of the right to bear arms in self-defense, would need to be compared to the alleged benefits. If one is to "balance" these factors, the other side of the ledger would only include the benefit from halting the mere transport—not the benefit of elimination of remote crime. The Supreme Court indicates in *City of Indianapolis v. Edmond*[162] that the "balanced" benefits of stops for less than probable cause are limited to the suspected unlawful activity justifying the stop. In particular, as to stops for alleged possession of what is, to the subject, contraband, one does not take cognizance of the benefits of crime control beyond the mere transport. The Court states:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited

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$$\frac{\textit{law enforcement benefits given a hazardous stop for all}}{\textit{societal harm given a hazardous stop for all}}$$

to

$$\frac{\textit{law enforcement benefits given a hazardous stop for some}}{\textit{societal harm to those stopped given a hazardous stop for them} \text{ plus } \textit{societal harm arising from odious, improper pretextual hazardous stops}}$$

161 E.g., Lorie Fridell & Hyeyoung Lim, Assessing the Racial Aspects of Police Force Using the Implicit- and Counter-Bias Perspectives, 44 J. Crim. Just. 36, 37 (2016) (stating, "The modern, more sophisticated multivariate research has produced mixed findings;" and summarizing assorted prior research as (i) finding "no impact of subject race on police use of force;" (ii) finding "that the positive relationship between suspect race as Black and whether officers used force disappeared when they controlled for suspect resistance;" and (iii) finding "that police were more likely to use force or more force against minorities, even when the appropriate variables are controlled."). *See generally* Lois James et al., *Testing the Impact of Citizen Characteristics and Demeanor on Police Officer Behavior in Potentially Violent Encounters*, 41 POLICING 24, 24 (2017) (concluding in simulations that demeanor was the significant factor in whether encounters escalated to a deadly outcome).

162 531 U.S. 32 (2000).

> exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in Prouse that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.[163]

The court reaches this conclusion, even though it identifies the societal harms sought to be addressed as "severe and intractable," "creat[ing] social harms of the first magnitude."[164]

Edmond involves checkpoints, using *neutral criteria*,[165] to find contraband (illegal narcotics).[166] However, the principle that one does not take cognizance of suppression of remote future criminal activity—the principle that the "general interest in crime control" is disregarded—in justifying a stop also applies to stops not involving neutral criteria. *Delaware v. Prouse*,[167] which *Edmond* cites, demonstrates that. *Prouse* invalidates traffic stops not involving neutral criteria. The court there notes:

> It has been urged that additional state interests are the apprehension of stolen motor vehicles and of drivers under the influence of alcohol or narcotics. The latter interest is subsumed by the interest in roadway safety, as may be the former interest to some extent. The remaining governmental interest in controlling automobile thefts is not distinguishable from the general interest in crime control.

The precise contours of this limit—exclusion of reference to the "general interest in crime control"—are unclear. Illicit drug use requires transport of the contraband. If the contraband could not be transported, the use would be eliminated. But the benefits of that are not considered in assessing stops, lacking probable cause, to find transport of the contraband. So, the analysis clearly excludes consideration, in the analogous context at

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163 *Id.* at 41–42 (citation omitted) (citing Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979)).
164 *Id.* at 42.
165 *Id.* at 53 (Rehnquist, J., dissenting).
166 *Id.* at 34 (majority opinion).
167 440 U.S. 648 (1979).

hand, of the benefits, for example, of interdicting firearm transport to a location where mass casualties are planned to be inflicted.

Nothing about the articulated examination of the identified general interest in crime control hinges on whether, or the extent to which, the property may be contraband to some and not others. So, there is not a basis for a different approach in considering firearms possession that may be lawful for some but not others.

C. No Special Rule for Firearms Possession

One might assert investigations of claims of firearms possession are different, by virtue of the nature of the harm to be prevented. The Supreme Court in *Florida v. J.L.*[168] indicates that is not the case:

> Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an automatic firearm exception to our established reliability analysis would rove too far.[169]

That discussion concerns the reliability of information authorizing a stop.[170] The principle, however, is that the fact that the putative harm involves mere firearms possession is, by itself, insufficient to substantially alter the balancing that otherwise ought to apply. One does not put a heavy thumb on the scale, in favor of validating the imposition, merely because the subject activity involves suspicion of firearms possession. To say that harm associated with firearm crime does not, in balancing, increase the benefits of searches applies equally where, on the other side of the balance, the focus of the concern is either (x) harm to innocents arising from unreliable information, as in *J.L.*, or (y) harm to innocents arising from dangerous searches of innocents for mere exercise of a constitutional right, in the case at hand.

Note the Court in *J.L.* does not conclude no activity would be subject to such an adjustment in the balancing. It explicitly, by way of illustration, reserves that issue as to a "report of a person carrying a bomb."[171] Rather, that the activity involves mere firearms possession is not enough.

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168 529 U.S. 266 (2000).
169 *Id.* at 272.
170 *Id.* at 273.
171 *Id.*

Reference to the number of crimes involving death from firearms and from controlled substances would similarly support that the magnitude of the harm associated with firearms is not qualitatively different from that involving possession of controlled substances. Drug overdose deaths in 2016 within the United States tallied over 63,600.[172] That compares to firearms deaths in 2015 of 36,252,[173] a majority of which were not from murder.[174] Moreover, the Supreme Court expressly referenced the problem associated with illegal narcotics as "severe and intractable," "creat[ing] social harms of the first magnitude."[175] So, if at least one focused on deaths, the harms associated with criminal firearms possession generally do not dominate those of another context in which the Court holds ordinary Fourth Amendment analysis applies.

In sum, neither Supreme Court precedent nor statistics concerning deaths suggests ordinary principles should be altered to facilitate stops where the alleged crime involves mere firearms possession.

D. Estimating the Frequencies

1. Frequencies of Stops.

Let us now turn to statistics that will reveal the extent of hazardous stops that would be authorized if a frisk is inherently permitted in a *Terry* stop for mere suspicion of firearms possession. As noted above,[176] it is estimated there are three million persons, not police officers, who carry firearms daily. Let us, to produce a conservative assessment, focus solely of stops of them. If each encounters an officer and is subject to a stop on average once per month, there would be about thirty million *Terry* stops of these individuals alone.

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172 Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control & Prevention, Drug Overdose Deaths in the United States, 1999–2016 (Dec. 21, 2017), https://www.cdc.gov/nchs/products/databriefs/db294.htm.

173 Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control & Prevention, *Deaths: Final Data for 2015*, at tbl. I–3, 66 NAT'L VITAL STATISTICS REP. (Nov. 27, 2017) https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_06_tables.pdf#%5B%7B%22num%22%3A35%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22FitH%22%7D%2C556%5D.

174 The FBI's web site reports 2015 crime statistics showing 9,616 firearms murders in the United States, including Guam and the U.S. Virgin Islands. See FBI, 2015 Crime in the United States, Murder by State, Types of Weapons, 2015, tbl. 20, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-20 (last visited Oct. 14, 2017). However, the table excludes data from Florida. A different table shows a total of 1,041 murders in Florida, with any instrumentality, in 2015. *Id.* tbl. 4, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-4 (last visited Oct. 14, 2017). So, the comparable statistics vary by less than four percent.

175 City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

176 *See supra* note 2 and accompanying text.

Let us now assess how much of an increase in *Terry* stops involving officers drawing firearms—high-risk *Terry* stops—this would be. A very conservative estimate can be found by then comparing the number of *Terry* stops in a big city, and extrapolating it to the entire population of medium- and large-sized cities.

At the height of the intrusive and now invalidated[177] *Terry* stop regime in New York City, the frequency was approximately 0.084 stops per person. The peak involved 685,724 stops in 2011 in New York City.[178] The New York City population was 8,175,133 in 2010.[179] So, ignoring any variation in the rate arising from a change in the population, that would translate to a rate of 0.084 *Terry* stops per person.[180]

Although that rate was highly controversial, and gave rise to ultimately successful challenge in litigation,[181] let us instead turn to Philadelphia, where the City of Brotherly Love somewhat astonishingly almost doubled that rate of *Terry* stops. The rate of stops in Philadelphia reached 0.158 per person in 2009.[182]

The total population in 2010 of all cities with a population of at least 100,000 was 84,133,628.[183] So, one might aggressively estimate the extant frequency of *Terry* stops (and thus produce a conservative estimate of the percent increase arising from stopping licensed persons who carry firearms daily) by extrapolating the Philadelphia peak rate to all medium and large cities. That would yield an estimated 13 million *Terry* stops.[184]

But the extant *Terry* stops are primarily not as hazardous as those to be added in the balancing. The *New York Times* reports approximately 1 in 70 *Terry* stops in New York City resulted in a weapon being withdrawn (one in sixty-five and one in seventy-one for stops of Blacks and whites, respectively).[185] In approximately one-third of the stops where a weapon was drawn it also was "point[ed]." If one of seventy of our estimated extant *Terry* stops (extrapolating nationwide the peak Philadelphia rate) involve a weapon being pointed, that would equate to approximately 200,000 *Terry* stops per year involving police officers' firearms being drawn.[186] Using the number of

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177 *See supra* note 23 and accompanying text.

178 N.Y.C. Bar Ass'n, *supra* note 24, at 4 n.11.

179 U.S. Census, *Population Estimates*, https://web.archive.org/web/20150915233910/http://www.census.gov:80/popest/data/cities/totals/2014/SUB-EST2014.html (last visited Apr. 24, 2018) (collecting population data for cities and states).

180 That is, 685,724 / 8,175,133 = 0.084.

181 *See supra* note 23 and accompanying text.

182 David Rudovsky, *Stop-and-Frisk: The Power of Data and the Decision in* Floyd v. City of New York, 162 U. PA. L. REV. ONLINE 118, 123 (2013).

183 *Cf.* U.S. Census, *supra* note 179 (providing the data).

184 That is, 84,133,628 x 0.158 = 13,293,113.

185 *See supra* note 32 and accompanying text.

186 That is, 13,293,113 / 70 = 189,902.

stops in 2012 in New York City, 533,042,[187] and conservatively taking the 2010 population, we would have 0.065 stops per person.[188] That rate, extended to all large and medium-sized cities, would equate to approximately 80,000 *Terry* stops involving firearms being drawn by police officers.[189]

So, we can create pairs of assumptions that might be relevant to any "balancing." Panel A in the below table shows rates of stopping persons (other than police officers) who are licensed to carry firearms and do so daily, and the frequencies in which those stops would need to involve an officer drawing a firearm essentially to double the city *Terry* stops in which firearms are drawn.[190]

The first column identifies the relevant base rate being assumed. Both are high (creating conservative assumptions). One is the peak Philadelphia rate and the other is the New York City rate in 2012.

The second column indicates the frequency with which these daily carriers would be stopped. The third indicates the frequency with which the *Terry* stop would need to involve drawing a firearm to produce essentially a doubling of the city dangerous *Terry* stop numbers.[191] The fourth column compares that third column to the frequency with which a weapon is drawn in general *Terry* stops, i.e., not limited to the stops where a subject is reasonably suspected of possessing a firearm.[192]

Panel B shows the comparable information for the stops that would equate to adding a number of *Terry* stops with a firearm drawn equal to ten times the number in medium- and large-sized cities.[193] Panel C shows the comparable information for a one hundred times increase.[194]

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187 N.Y.C. Bar Ass'n, *supra* note 24, at 4 n.11.

188 That is, 8,175,133 x 533,042 = 0.065.

189 That is, 84,133,628 x 0.065 = 78,124.

190 For ease of exposition, this phrase is used to reference adding to the United States' *Terry* stops in which officers draw firearms a number equal to the estimate of such stops in medium- and large-sized cities currently (estimated by extrapolating high rates).

191 The rates are computed as follows:

Panel A:
3,000,000 x 0.067 = 201,000.
3,000,000 x 10 x 0.0067 = 201,000.
3,000,000 x 0.027 = 81,000.
3,000,000 x 10 x 0.0027 = 81,000.

192 The rates are computed by multiplying the figure in the preceding column by 70, i.e., dividing it by the New York City rate of 1/70.

193 The computations are:

10 x 200,000 / (3,000,000 x 5) = 13.3%
10 x 200,000 / (3,000,000 x 10) = 6.7%
10 x 80,000 / (3,000,000 x 5) = 5.3%
10 x 80,000 / (3,000,000 x 10) = 2.7%

194 The computations are:

100 x 200,000 / (3,000,000 x 10) = 66.7%
100 x 80,000 / (3,000,000 x 10) = 27.7%

	Stop Each Licensed Person Who Carries Daily:	Weapon Drawn by Officer in the Percent of Stops	Frequency Drawn Compared to All NYC Stops
Panel A: Adding the Extant Medium- and Large-Sized City Stops w/ Firearms			
Philadelphia Rate (0.158)	Once per year	6.7%	4.69
Philadelphia Rate (0.158)	Ten times per year	0.67%	0.469
NYC 2012 Rate (0.065)	Once per year	2.7%	1.89
NYC 2012 Rate (0.065)	Ten times per year	0.27%	0.189
Panel B: Adding Ten Times the Medium- and Large-Sized City Stops w/ Firearms			
Philadelphia Rate (0.158)	Five times per year	13.3%	9.38
Philadelphia Rate (0.158)	Ten times per year	6.7%	4.69
NYC 2012 Rate (0.065)	Five times per year	5.3%	3.73
NYC 2012 Rate (0.065)	Ten times per year	2.7%	1.87
Panel C: Adding One Hundred Times the Medium- and Large-Sized City Stops w/ Firearms			
Philadelphia Rate (0.158)	Ten times per year	66.7%	46.7
NYC 2012 Rate (0.065)	Ten times per year	26.7%	18.7

Note—Computations are rounded to eliminate false precision.

These arithmetic computations allow us to phrase the balancing in the following way:

> Do we believe:
> (i) the benefit associated with a scheme of stopping persons reasonably suspected of firearms possession, with a frequency that results in each licensee who carries daily being stopped ***once per year***, exceeds

> (ii) the burden arising from increasing the number of *Terry* stops in which a firearm is drawn, essentially doubling the non-small city frequency—

if officers in these *Terry* stops assumed to be high-risk are expected to draw weapons only ***4.69*** times or ***1.89*** times more frequently than in *Terry* stops generally?

If the scheme of enforcement contemplates stopping these licensees materially more than once per year, the benefits would need to outweigh the above-referenced essential doubling of the number of *Terry* stops in which an officer draws a firearm. That is because the implied rate of drawing a firearm in these stops is so close to the ordinary rate for all *Terry* stops that a lower rate of officers drawing firearms would be implausible.

Some surely would conclude the scope of dangerous *Terry* stops was sufficiently noxious, at the Philadelphia or New York City rates. For them, doubling *Terry* stops at each medium- and large-sized city would require a quite compelling benefit.

Because extant *Terry* stop frequencies have been highly controversial, it is submitted that there would need to be a strong showing for an approach that merely doubled the extant rate of *Terry* stops in which a weapon was withdrawn. That would involve, as noted, stopping each lawful daily licensee once per year, if one takes as the current baseline the very peak rate in Philadelphia or the 2012 rate in New York City, if 6.7% or 2.7% of the stops result in an officer drawing a firearm, respectively—modest rates in light of those for *Terry* stops generally.

There is in fact a basis to conclude a much higher rate of drawing a firearm ought to be contemplated in balancing. We are considering what the relevant theory authorizes government agents to do. If a frisk is automatically authorized because the subjects are necessarily classified as reasonably suspected of being armed and dangerous, then the government agents are inherently authorized to draw a weapon.[195]

Pretexual *Terry* stops are apparently authorized,[196] and one supposes pretextual searches are worse than non-pretextual ones (but merely are not so much worse that the possibility of pretextual searches can, in the typical case, negate the validity of a stop). So, it is not at all clear that if stopping and drawing weapons on everyone possessing a firearm is unreasonable, stopping some, using potentially odious filters, should be more favorably viewed. And the comparison is stark if one takes that vantage point of stopping and drawing a weapon on all firearms possessors.

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195 *See supra* Part II.C.

196 *See supra* note 22 and accompanying text.

To put it another way, it would be a burden on the government to identify a reason why a reduction in the drawing of a weapon can be justified as making the stops and searches less burdensome. And, because these stops can be pretextual, and wide latitude is granted officers in these self-defense determinations, there is not an apparent way that burden could be met.

2. The Balancing Rubric—a Low Priority.

It is also submitted that these mere possession crimes are not a high priority and thus, eliminating them does not adequately authorize a substantial increase in *Terry* stops involving drawn weapons. Frandsen found that only 0.16% (1.6 per 1,000) of Brady Act check denials resulted in prosecutions.[197] The denials can, of course, be because the federal database is wrong. But, absent errors, these denials would inherently involve criminal acts as part of seeking firearm possession, as the check is initiated by affirmation the firearms possession is lawful under federal law. The process requires information from the applicant's identification be recorded and stored for at least five years.[198] Nevertheless, this low-hanging fruit for prosecution is only rarely harvested.

That is the case even if one concludes database errors are overwhelmingly responsible for denials. For example, if 95% of the denials are from database or other processing errors, we would still be considering federal prosecution of only 0.16% / 5%—3%—of the folks for whom the denial was not a database error. Such a low rate belies the claim that prosecuting the mere possession is a high priority.

VII. CONCLUSION

This Article examines whether a *Terry* stop initiated for reasonable suspicion a person is armed inherently authorizes treatment of the detainee as armed and dangerous (and thus authorizes a frisk). The relevant Supreme Court jurisprudence is equivocal; and contemporary lower court jurisprudence is in conflict. This Article concludes not.

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197 Ronald J. Frandsen, Enforcement of the Brady Act, 2007: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2007, at 5, 7 (Nat'l Criminal Justice Reference Serv. Doc. 227604, July 2009), https://www.ncjrs.gov/pdffiles1/bjs/grants/227604.pdf (indicating that of 73,992 FBI denials referred to ATF Brady Operations, there were 122 or fewer that were not declined for prosecution, a rate of 0.16%).

198 The instructions on the form state: "The transferee/buyer must provide a valid government-issued photo identification document to the transferor/seller that contains the transferee's/buyer's name, residence address, and date of birth." Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF E–Form 4473, OMB No. 1140-0020, at 5 (Oct. 2016) (providing instruction to Question 18a). The identification information is required to be recorded on a form. Id. at 2 (question 18a). The form is required to be kept by the dealer for at least five years. 27 C.F.R. § 478.129(b) (Westlaw through Nov. 22, 2017). The retention period for completed transactions is longer. Id.

Most fundamentally, insofar as the stop is authorized because it is supposed the stop is a mere inconvenience and thus is not unduly burdensome, it is inconsistent to then conclude that the stop inherently authorizes the pointing of firearms at the subject. Such stops are not mere inconveniences.

More broadly, this Article sketches some factors relevant to any putative judicial balancing that might be recited as justifying frisks in this context. One approach to balancing whether such seizures are reasonable would involve first examining the scope of what would be authorized—namely, the seizure at gunpoint of each person lawfully possessing a firearm each and every time he encountered an officer.

Of course, that is not what would happen. And one might object to framing the issue in terms of what is authorized. Insofar as what is authorized is found unreasonable, transitioning the focus to what will happen requires one assess the manner in which persons will be filtered for these intrusive stops. It appears pretextual stops are authorized. So, if stopping all is unreasonable, that then requires the government to justify that:

> (x) the benefits of transitioning to searching only some outweigh
> (y) the loss of efficacy (arising from more limited stops) *plus* the disadvantages of the filtering of those subjected to search by odious criteria that allowing pretextual *Terry* stops accommodates.

It is submitted that even modest frequencies of searching people who lawfully possess firearms will result in large percentage increases in the most hazardous *Terry* stops. And because the extant hazardous *Terry* stops have been quite controversial, it is unsound to authorize a substantial increase in them, in a context that allows full reign for odious pretextualism.