Armed and Not Dangerous? A Mistaken Treatment of Firearms in *Terry* Analyses*

I. Introduction

During the Renaissance, a popular French song went as follows:

French	English
L'homme armé doibt on doubter.	The armed man must be feared.
On a fait partout crier	Everywhere it is proclaimed
Que chascun se viegne armer	That everyone should arm himself
D'un aubregon de fer.	With a coat of [iron] mail.
L'homme armé doibt on doubter.[1]	The armed man must be feared.[2]

While *L'homme armé* does not itself explain why the armed man should be feared, the reason is plain to any sensible person—the armed man is dangerous.

Unfortunately, this sensible proposition—that one who is armed is necessarily dangerous—is beginning to be questioned by courts and judges across the nation.[3] Beginning with the Supreme Court's decision in *District*

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1. *See* Alejandro Enrique Planchart, *The Origins and Early History of 'L'homme armé'*, 20 J. MUSICOLOGY 305, 308 ex.1 (2003) (The text in this score contains many repetitions. I have taken the liberty of removing those repetitions for clarity's sake.).

2. Evan Eisenberg, *Arms and the Mass, or: Why Does this Liturgy Sound So Familiar?*, N.Y. TIMES (Feb. 26, 2006), http://www.nytimes.com/2006/02/26/arts/music/arms-and-the-mass-or-why-does-this-liturgy-sound-so-familiar.html?_r=0 [https://perma.cc/4TK4-X44M] (As before, I have taken the liberty of removing repetitions from the translation for clarity's sake.). For the curious, a recording of the song in the original French may be heard here: Ruey Yen, *L'homme Arme* [sic], YOUTUBE (Mar. 14, 2011), https://www.youtube.com/watch?v=t-E2_iNmYOE [https://perma.cc/C9T3-QP8H].

3. *See, e.g.*, United States v. Robinson (*Robinson I*), 814 F.3d 201, 208–09 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) (providing an example of such questioning by judges, even though the particular case was later reversed, by deciding that, in states permitting both the open and concealed carrying of firearms, a gun carrier may not be presumed dangerous during a *Terry* stop); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (holding that the *Terry* standard required the officer to have suspicion that the detainee "may have been [both] 'armed *and dangerous*.' Yet all he ever saw was that [the detainee] was armed." (quoting Sibron v. N.Y., 392 U.S. 40, 64 (1968) (emphasis added))); State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014) (holding that in "a state such as Arizona that freely permits its 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" for purposes of satisfying the second *Terry* prong).

of Columbia v. Heller[4] in 2008, federal constitutional law has expanded to recognize constitutional protections for the individual possession of firearms.[5] State law has followed suit, with many states deregulating firearm possession and the public carrying of firearms through both legislative and judicial measures.[6] These new Second Amendment protections have profoundly affected Fourth Amendment law as well, changing how courts treat the validity of searches for, and searches triggered by, the possession of firearms.[7]

Perhaps the most visible area of Fourth Amendment law in which the effects of expanded Second Amendment protections can be seen is in the two-pronged analysis for conducting an investigatory stop pursuant to *Terry v. Ohio*.[8] In the years immediately following the Supreme Court's decision in *Heller*, some commentators predicted that the "resulting increase in law enforcement's exposure to firearms may compel the [Supreme] Court to grant broader stop and frisk rights in order to preserve the lives of officers."[9] The opposite has been true. While the Supreme Court has not yet addressed the issue, lower courts have gone in the opposite direction, narrowing stop and frisk rights despite the risk that armed suspects present to officers' lives.

Police officers' ability to use the first *Terry* prong to stop a person on suspicion of carrying an illegal firearm has been greatly weakened. The first *Terry* prong allows an officer to seize a person for a brief investigatory stop if the officer has a reasonable suspicion that criminal activity is afoot.[10] As states have legalized the public possession of firearms, courts have consequently abandoned the "assumption that the mere possession of a firearm constitutes a crime,"[11] reducing the ability of officers to stop and investigate publicly armed persons. Given those developments, Professor

4. 554 U.S. 570 (2008).

5. *See Robinson I*, 814 F.3d at 208 ("Within the last decade, federal constitutional law has recognized new Second Amendment protections for individual possession of firearms."); Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 3 (2015) (commenting that the Supreme Court "opened the judicial front" for this expansion of Second Amendment rights with its decision in *Heller*).

6. *See* Bellin, *supra* note 5, at 17–19 (listing states whose courts and legislatures have eased state and local gun restrictions). This consequence was foreseen by Justice Breyer in *Heller*. In his dissent, Justice Breyer observed that "as many as 41 states" may preempt local gun control ordinances as a result of the majority's opinion. *Heller*, 554 U.S. at 713 (Breyer, J., dissenting).

7. Bellin, *supra* note 5, at 26 (noting that courts are now "hard-pressed to accept, as constituting 'reasonable suspicion' of a crime, an observation of an increasingly common activity that is not only lawful, but specifically protected by the Second Amendment").

8. 392 U.S. 1, 16–30 (1968).

9. George M. Dery III, *Unintended Consequences: The Supreme Court's Interpretation of the Second Amendment in* District of Columbia v. Heller *Could Water-Down Fourth Amendment Rights*, 13 J.L. & SOC. CHANGE 1, 24 (2010).

10. *Terry*, 392 U.S. at 30; *see also* Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (describing how, under *Terry*, an officer is authorized to "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot").

11. Bellin, *supra* note 5, at 17–20, 25–26, 31.

Bellin observes that, going forward, "[p]olice authority to disarm persons [will] regularly depend on *Terry*'s second ('frisk') prong."[12]

However, police officers' ability to protect themselves from armed, suspected criminals using the second *Terry* prong has also recently been weakened in several jurisdictions. The second *Terry* prong permits an officer to conduct a superficial search or "frisk" of one detained under the first *Terry* prong if the officer has "reason to believe that he is dealing with an armed and dangerous individual."[13] In the past, there was a "blanket assumption" that those who carried firearms were dangerous.[14] Thus, if an officer had reasonable suspicion that a person was both engaged in criminal activity and armed, the officer could frisk that person for weapons. This assumption is still strong, but the consensus around it has begun to crumble as state and federal courts across the nation have found that conducting a frisk under *Terry* requires that an officer have not only reasonable suspicion that the suspect is engaged in criminal activity and armed, but also additional indicia that the suspect is dangerous (i.e., likely to act violently),[15] creating both a circuit split[16] and a state–federal conflict.[17]

This Note analyzes the soundness of this trend towards treating "armed and dangerous" as two separate requirements in a *Terry* analysis. My main thesis is simple—this trend is a horrible mistake. Treating "armed and dangerous" as two separate requirements misinterprets the Supreme Court's treatment of firearms and the "armed and dangerous" standard in *Terry* and other contexts, mistakenly uses state criminal law as a measure for

12. *Id.* at 31.

13. *Terry*, 392 U.S. at 27.

14. Bellin, *supra* note 5, at 31–32.

15. *See, e.g.*, *Robinson I*, 814 F.3d 201, 208 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) (holding that "reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes"); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (holding that the *Terry* standard required the officer to have suspicion that the detainee "may have been both 'armed *and dangerous*.' Yet all he ever saw was that [the detainee] was armed." (quoting Sibron v. N.Y., 392 U.S. 40, 64 (1968))); State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014) (holding that "the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous").

16. *Compare* United States v. Robinson (*Robinson II*), 846 F.3d 694, 701 (4th Cir. 2017) (en banc), *and* United States v. Rodriguez, 739 F.3d 481, 491–92 (10th Cir. 2013) (holding that firearm possession is inherently dangerous for purposes of justifying a *Terry* frisk), *with Robinson I*, 814 F.3d at 208 (holding that firearm possession is not inherently dangerous for purposes of a *Terry* frisk), *and Northrup*, 785 F.3d at 1132 (same).

17. *Compare* United States v. Orman, 486 F.3d 1170, 1171, 1176 (9th Cir. 2007) (holding, in a case originating from Arizona, that a police officer's "reasonable suspicion that [the suspect] was carrying a gun [is] all that is required for a protective search under *Terry*"), *with Serna*, 331 P.3d at 410–11 (holding that in "a state such as Arizona that freely permits its 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" for purposes of satisfying the second *Terry* prong).

dangerousness, and ignores the simple fact that guns are dangerous instruments used to kill people, including police officers.

II. The Legal Standard Under *Terry v. Ohio*

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause."[18] In *Terry v. Ohio*, the Supreme Court weighed whether lawful police encounters exist "which do[] not depend solely upon the voluntary cooperation of the citizen and yet which stop[] short of an arrest based upon probable cause."[19] In *Terry*, the Court determined that a police officer could, on less than probable cause, briefly detain an individual to investigate potential wrongdoing and conduct a limited weapons search for the officer's and others' safety without violating the Fourth Amendment.[20] The stop and the search are analyzed as two separate events, with each requiring its own justification.[21] Thus, *Terry* created a two-pronged analysis, with the first prong governing the propriety of the initial investigatory seizure and the second prong governing the propriety of any subsequent frisk.[22]

A. The Legal Standard for Initiating an Investigatory Seizure

In order to initiate an investigatory seizure, a police officer must have reasonable suspicion that the person being stopped "ha[s] engaged, or [is] about to engage, in criminal activity."[23] Exactly what level of probability constitutes "reasonable suspicion" is unknown, but the Supreme Court stated that the "level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of evidence,' and 'obviously less' than is necessary for probable cause."[24] Despite the low requirements for meeting the reasonable suspicion standard, the test is an objective one.[25] These objective grounds need not be an officer's personal observations, but may be based on tips from an informant.[26] Officers may not involuntarily detain individuals "even momentarily without reasonable, objective grounds

18. U.S. CONST. amend. IV.

19. Terry v. Ohio, 392 U.S. 1, 11 (1968).

20. *Id.* at 27.

21. Arizona v. Johnson, 555 U.S. 323, 326–27 (2009).

22. *Terry*, 392 U.S. at 27, 30.

23. *Johnson*, 555 U.S. at 332.

24. Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

25. United States v. Cortez, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").

26. Adams v. Williams, 407 U.S. 143, 147 (1972).

for doing so."[27] In evaluating the reasonableness of the grounds on which an officer claims reasonable suspicion, a court takes into account "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[28]

Before the Court's decision in *Heller*, there was a widely held "assumption that a person carrying a concealed weapon was engaged in the crime of unlawful weapons possession."[29] In the wake of *Heller*, however, as courts and state legislatures have deregulated the concealed and open possession of firearms, courts have been less willing to uphold *Terry* stops solely on the basis of possessing a weapon.[30] This is not true in all jurisdictions, as some courts have, post-*Heller*, continued to hold that the possession of a concealed firearm creates at least a reasonable suspicion that criminal activity is afoot.[31] However, the current role of firearms in establishing reasonable suspicion for a *Terry* stop, if one remains at all, is highly suspect.

B. The Legal Standard for Initiating a "Frisk"

A police officer is permitted to frisk the person seized under the first *Terry* prong if the officer has "reason to believe that he is dealing with an armed and dangerous individual."[32] The level of certainty that an officer needs to possess that the detainee is armed and dangerous is the same as that for the initial stop—reasonable suspicion.[33] In practice, the reliability of the information on which a frisk is conducted may be lower than the necessary reliability of the information on which the initial stop is performed.[34] But the test is an objective one,[35] and "the police officer must be able to point to

27. Florida v. Royer, 460 U.S. 491, 498 (1983) (White, J., plurality).

28. Ornelas v. United States, 517 U.S. 690, 695 (1996) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

29. Bellin, *supra* note 5, at 31.

30. *Id.* at 26 (observing that courts are "hard-pressed to accept, as constituting 'reasonable suspicion' of a crime, an observation of an increasingly common activity that is not only lawful, but specifically protected by the Second Amendment").

31. *E.g.*, United States v. Rodriguez, 739 F.3d 481, 490–91 (10th Cir. 2013); Schubert v. City of Springfield, 589 F.3d 496, 502 (1st Cir. 2009).

32. Terry v. Ohio, 392 U.S. 1, 27 (1968); *see also* State v. Serna, 331 P.3d 405, 408–10 (Ariz. 2014) (holding that the first *Terry* prong must necessarily be satisfied before a frisk may occur (quoting *Terry*, 392 U.S. at 32–33 (Harlan, J., concurring) ("[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. . . . I would make it perfectly clear that the right to frisk . . . depends upon the reasonableness of a forcible stop to investigate a suspected crime.")).

33. Arizona v. Johnson, 555 U.S. 323, 326–27 (2009).

34. 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.6(a) (5th ed. 2016) (describing the basis for initiating a "frisk").

35. *Id.*; United States v. Cortez, 449 U.S. 411, 417 (1981).

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the frisk.[36]

Exactly what circumstances give rise to a reasonable suspicion that a detainee is armed and dangerous depend on the crime being investigated. Most courts tend to treat the right of the officer to frisk the detainee as automatic when the detainee "has been stopped on the suspicion that he has committed, was committing, or was about to commit" a crime of violence "for which the offender would likely be armed."[37] When a suspect has been detained on suspicion of a less serious crime, however, there must be other circumstances arousing reasonable suspicion that the suspect is armed and dangerous before the officer may frisk the suspect.[38] These other circumstances could be, but are not limited to, "a characteristic bulge in the suspect's clothing; . . . awkward movements manifesting an apparent attempt to conceal something under [the suspect's] jacket; . . . awareness that the suspect had previously been armed; . . . [or] discovery of a weapon in the suspect's possession."[39]

Reasonable suspicion that a detainee is armed and dangerous may also arise from an informant's tip.[40] Once the officer has reasonable suspicion that the detainee is armed and dangerous, the officer is entitled to frisk the detainee "in an attempt to discover weapons which might be used to assault him."[41] However, as the frisk is a "serious intrusion upon the sanctity of the person,"[42] the frisk must be "a carefully limited search of the outer clothing."[43]

Before *Heller*, there was nearly unanimous agreement that to be armed was to be dangerous. In the words of one commentator, there seemed to be a "blanket assumption of dangerousness" when a police officer confronted

36. *Terry*, 392 U.S. at 21.

37. 4 LAFAVE, *supra* note 34, § 9.6(a) (citing lower court cases upholding an automatic right to frisk when the suspect has been detained on reasonable suspicion of "robbery, burglary, rape, assault with weapons, car theft, homicide, and dealing in large quantities of narcotics"). In his concurrence in *Terry*, Justice Harlan treated the fact that the suspects were detained on reasonable suspicion of planning a violent crime as sufficient to justify a frisk. Though the arresting officer "had no [other] reason whatever to suppose that [the suspect] might be armed," Justice Harlan said that the officer's actions were "illustrative of a proper stop and an incident frisk." *Terry*, 392 U.S. at 33 (Harlan, J., concurring).

38. 4 LAFAVE, *supra* note 34, § 9.6(a).

39. *Id.* (citing cases for each "other circumstance" listed).

40. Adams v. Williams, 407 U.S. 143, 147 (1972).

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

42. *Id.* at 17.

43. *Id.* at 30.

an armed person.[44] This assumption has always had detractors.[45] These detractors were, however, a minority, and as recently as 2007[46] (pre-*Heller*) and 2017[47] (post-*Heller*) circuit courts across the nation have reaffirmed the blanket assumption of dangerousness that came with being armed during a *Terry* stop.

III. Courts Across the Nation Are Split on the Question of Whether Persons Carrying Firearms Are Inherently Dangerous for Purposes of a *Terry* Analysis

During the past decade, holes have begun to appear in the blanket assumption of dangerousness that courts used to apply to firearms and their carriers. As a result of these holes, a split has developed between the nation's courts regarding the inherent dangerousness of firearms for purposes of the second *Terry* prong. The Fourth,[48] Ninth,[49] and Tenth Circuits[50] have held that firearms are per se dangerous for purposes of the second *Terry* prong regardless of the permissiveness of a state's gun laws. The Sixth Circuit[51] and the Supreme Court of Arizona[52] have held that firearms cannot be considered per se dangerous for *Terry* purposes, at least in states that broadly permit the public possession of firearms. The split could not be more clear.

Out of all these cases, I shall only describe the Fourth Circuit's decision in *United States v. Robinson*[53] in depth. I do this for several reasons. First, in the course of coming to its final decision, the Fourth Circuit at various times considered and held for both sides of this debate. Initially, a panel of Fourth Circuit judges rendered a decision (which I shall call *Robinson I*[54])

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44. Bellin, *supra* note 5, at 34. It is also interesting to note that in LaFave's well-respected treatise on searches and seizures, updated as recently as October 2015, many of the additional indicia of dangerousness that LaFave cites as justifying a frisk during *Terry* stops on suspicion of lesser crimes are only indicia that the suspect is armed, not necessarily that he is dangerous. *See supra* note 37 and accompanying text.

45. *See, e.g.*, *Adams*, 407 U.S. at 159 (Marshall, J., dissenting) (arguing, unsuccessfully, that "*Terry* requires . . . that the reliable information in the officer's possession demonstrate that the suspect is both armed and dangerous"(emphasis omitted)) ; David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 58 (1996) (arguing that police cannot "assume the existence of danger just because a person carries a gun").

46. *See, e.g.*, United States v. Orman, 486 F.3d 1170, 1176 (9th Cir. 2007) ("Officer Ferragamo's reasonable suspicion that Orman was carrying a gun [is] all that is required for a protective search under *Terry*.").

47. *See, e.g.*, *Robinson II*, 846 F.3d 694, 701 (4th Cir. 2017) (en banc).

48. *Id.*

49. *Orman*, 486 F.3d at 1176 (9th Cir. 2007).

50. United States v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013).

51. Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015).

52. State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014).

53. 846 F.3d 694 (4th Cir. 2017) (en banc).

54. *Robinson I*, 814 F.3d 201, 208 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017).

holding that "reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes" in states that "broadly allow public possession of firearms."[55] Later, the en banc Fourth Circuit (in a decision I shall call *Robinson II*[56]) reversed the panel's decision, holding as a matter of law that police officers may frisk a lawfully stopped suspect whom they reasonably suspect is armed because danger is inherent "in the presence of a weapon during a forced police encounter."[57] Therefore, focusing on the *Robinson* case allows me to show both sides of this issue within the context of a single factual scenario.

Second, both *Robinson* decisions provide thorough overviews of their respective positions, treating the subject far more thoroughly than other cases on either side of the issue did. Third, proceedings in *Robinson* are ongoing—the Fourth Circuit entered its en banc judgment on January 23, 2017, so Robinson (the losing party) has until April 23, 2017, to petition the Supreme Court for a writ of certiorari.[58] As such, *Robinson II* is the most likely vehicle for any developments in the law that will occur in the immediate future and focusing on its particulars is currently relevant.

A. Robinson I*: Moving Away from the Blanket Assumption of Dangerousness*

Robinson I held that "reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes" in states that "broadly allow public possession of firearms."[59] In *Robinson I*, West Virginia police received an anonymous tip (which was assumed to be credible for purposes of the appeal)[60] that a black male loaded a gun in a 7-Eleven parking lot before driving off as the passenger in a blue–green Toyota Camry.[61] The anonymous tip also indicated to police the direction in which the suspicious vehicle was travelling.[62] Based upon this information, police located the vehicle within three minutes.[63] The officers noticed that the vehicle's occupants were not wearing seatbelts (a violation of West Virginia traffic law) and pulled the car over.[64]

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55. *Id.* at 208.

56. 846 F.3d 694 (4th Cir. 2017).

57. *Id.* at 700–01.

58. *See* SUP. CT. R. 13(1) (providing that a petition for a writ of certiorari is timely if filed within ninety days after the entry of judgment in the court of appeals).

59. *Robinson I*, 814 F.3d at 208.

60. *Id.* at 203–04.

61. *Id.* at 204.

62. *Id.*

63. *Id.*

64. *Id.*

Once the car had pulled over, the officers asked the passenger (Robinson, the defendant) to step outside of the car.[65] Once Robinson exited the vehicle, the police investigated whether he had any weapons.[66] The officers first asked Robinson whether he had any weapons, in response to which Robinson said nothing, but instead "gave a 'weird look.'"[67] An officer then frisked Robinson and found a gun in his pocket, right where the tipster had said it would be.[68] After discovering the weapon, the officers confirmed that Robinson was a convicted felon and arrested him.[69] Robinson was cooperative, made no threatening gestures, and gave no indications of resistance throughout this process.[70]

Following his arrest, Robinson was indicted with violating 18 U.S.C. § 922(g)(1), which prohibits convicted felons from possessing firearms or ammunition.[71] Robinson filed a motion to suppress evidence of the gun, arguing that the police officer's frisk was unconstitutional.[72] The district court denied this motion.[73] Robinson then entered a conditional guilty plea and appealed the denial of his motion to suppress.[74] On appeal, Robinson conceded that the police had the right to stop the car he was in, that the police had the right to ask him to exit the vehicle, that the tip on which the police relied was reliable, and that the police had reasonable suspicion that he was armed.[75] Therefore the only issue on appeal was whether reasonable suspicion that Robinson was armed is enough to constitute reasonable suspicion that Robinson was dangerous.[76]

On appeal, a panel of Fourth Circuit judges, with one dissenting vote, reversed the district court's denial of Robinson's motion to suppress.[77] The court began its analysis by considering "whether reasonable suspicion that Robinson was armed, in and of itself, generated reasonable suspicion of dangerousness."[78] The answer to this question, the court decided, lay in the recent expansion of Second Amendment protections for individuals

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. 18 U.S.C. § 922(g)(1) (2012); *Robinson I*, 814 F.3d at 205.
72. *Robinson I*, 814 F.3d at 205.
73. *Id.*
74. *Id.*
75. *Robinson II*, 846 F.3d 694, 697–98 (4th Cir. 2017) (en banc).
76. *Id.* at 698–99.
77. *Robinson I*, 814 F.3d at 203.
78. *Id.* at 207.

possessing firearms provided by Supreme Court cases such as *Heller* and by West Virginia law.[79]

In the view of the court, these changes in the law required a "reevaluat[ion of] what counts as suspicious or dangerous under *Terry*."[80] In a different (pre-*Heller*) time and in a different legal regime where the carrying of weapons in public was tightly regulated and largely prohibited, "there [would be] precious little space between 'armed' and 'dangerous.'"[81] However, in jurisdictions like West Virginia, where the carrying of weapons is legal and widespread, courts cannot assume that "firearms inherently pose a danger" to law enforcement or that those who publicly carry firearms are "anything but . . . law-abiding citizen[s] who pose[] no danger to the authorities."[82] Such an assumption, the court reasoned, would be inappropriate given the state legislature's decision that "its citizens [could] safely arm themselves in public."[83] As such, mere possession of a firearm could not be enough to raise reasonable suspicion of dangerousness and justify a *Terry* stop and frisk[84]—additional objective indicia of dangerousness were required.[85]

After making these findings of law, the Fourth Circuit analyzed whether Robinson had presented any additional objective indicia that he was dangerous aside from his being armed.[86] It decided there were none, reversed the district court's denial of Robinson's motion to suppress, and vacated his conditional guilty plea.[87]

B. Robinson II*: The Fourth Circuit Decides Guns Are Dangerous*

Roughly two months after judgment was handed down in *Robinson I*, the Fourth Circuit vacated the opinion and "granted the government's petition for rehearing *en banc*."[88] The en banc opinion reversed the panel's decision, holding instead that "the reasonable suspicion that [Robinson] was armed justified the frisk" despite West Virginia's permissive concealed-carry laws.[89]

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79. *Id.* at 207–08; *see also* W. VA. CODE ANN. § 61-7-4 (West 2017) (describing the procedures for obtaining a license to carry a firearm).

80. *Robinson I*, 814 F.3d at 208.

81. *Id.* at 207.

82. *Id.* at 208.

83. *Id.* at 213.

84. *Id.*

85. *See id.* at 210 n.5 (stating that a *Terry* frisk may be justified where "there is not only reasonable suspicion that a person is armed, but also . . . there are other objective indicia of danger" such as concurrent involvement in a serious crime).

86. *Id.* at 210–13.

87. *Id.* at 213.

88. *Robinson II*, 846 F.3d 694, 697 (4th Cir. 2017) (en banc).

89. *Id.* at 701.

In coming to its conclusion, the Fourth Circuit first observed that "whenever police officers use their authority to effect a stop," be it a street stop or a motor-vehicle stop, "they subject themselves to a risk of harm."[90] On its own, the court reasoned, this risk is not enough to justify a frisk of the stopped person.[91] Relying on the language of *Terry* and subsequent cases, however, the court found that when the stopped person is armed the risk of harm rises to the level of dangerousness that justifies a frisk.[92] The court placed great weight on the fact that the Supreme Court twice used the phrase "armed *and thus*" dangerous in upholding frisks as reasonable searches,[93] reasoning that this language "recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed."[94]

Having examined the text of the Supreme Court's precedents, the Fourth Circuit turned its attention to Robinson's argument that those precedents could be distinguished from his case because West Virginia—unlike Ohio at the time of *Terry* and Pennsylvania at the time of *Mimms*—"generally permits its citizens to carry firearms."[95] The court found Robinson's argument unconvincing[96] given what it deemed "the Supreme Court's express recognition that the legality of the frisk does not depend on the illegality of the firearm's possession."[97] Therefore, the court concluded that "given Robinson's concession that he was lawfully stopped and that the police officers had reasonable suspicion to believe that he was armed, the officers were, as a matter of law, justified in frisking him" notwithstanding West Virginia's permissive concealed-carry laws.[98]

Strangely, the *Robinson II* majority opinion omits any discussion of the Supreme Court's decision in *Heller*. Considering that the panel's *Robinson I* decision leaned heavily on *Heller* and subsequent developments in the law, one would expect that the en banc Fourth Circuit would have taken time to address the implications—if any—of *Heller* in its opinion. However, it did not.

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90. *Id.* at 698–99.

91. *Id.* at 699.

92. *Id.* at 699–700.

93. *Id.* at 700 (quoting Terry v. Ohio, 392 U.S. 1, 28 (1968), and Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977)).

94. *Id.*

95. *Id.*

96. Unconvincing may be putting it lightly. The Fourth Circuit went so far as to say that Robinson was acting "illogically" in making this argument. *Id.* at 698.

97. *Id.* at 701 (citing Adams v. Williams, 407 U.S. 143, 146 (1972), and Michigan v. Long, 463 U.S. 1032, 1052 n.16 (1983)).

98. *Id.*

IV. Firearms—and the Persons Who Possess Them—Are Inherently Dangerous for *Terry* Purposes

With the basic arguments on each side of this debate laid out (as illustrated by *Robinson I* and *Robinson II*), we can now ask which side is right. Does the second *Terry* prong require that a stopped person be "armed and *also* dangerous" as the Sixth Circuit and the Supreme Court of Arizona would have us believe? Or does it require that the stopped person be "armed, and *therefore* dangerous," as the Fourth, Ninth, and Tenth Circuits would have us believe?

The Sixth Circuit and the Supreme Court of Arizona are on the wrong side of this debate. I argue that these courts' decisions are incorrect for three reasons. First, these recent decisions run counter to consistent U.S. Supreme Court rulings, from *Terry* to the present day, that armed persons are inherently dangerous. Second, these decisions incorrectly use state criminal law to define what is dangerous for purposes of a *Terry* frisk rather than only what is illegal for purposes of a *Terry* stop. These decisions also misconstrue the policy decisions behind the state laws they use to support their conclusions. And third, these decisions divorce legal from real danger and ignore the simple fact that guns are dangerous and are increasingly being used to kill police officers. Thus, the law has always assumed, and should continue to assume, that armed persons are inherently dangerous for *Terry* purposes.

A. The Supreme Court Has, Since Deciding Terry, *Always Treated Firearms and the People Who Possess Them as Inherently Dangerous, and* Heller *Is No Exception*

Terry, correctly read, stands for the proposition that all armed persons are inherently dangerous for purposes of a stop and frisk. 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."[99] This language, "armed and thus," on which the Fourth Circuit in *Robinson II* rightly placed great emphasis,[100] 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.

Further evidence that the Court created no distinction between "armed" and "dangerous" is found in the majority's reasoning that the frisk under consideration was justified by the "immediate interest of the police officer in taking steps to assure himself that the person with whom he [was] dealing [was] not armed with a weapon that could unexpectedly and fatally be used

99. Terry v. Ohio, 392 U.S. 1, 28 (1968) (emphasis added).
100. *Robinson II*, 846 F.3d at 700.

against him."[101] Creating an independent requirement that an officer have reasonable suspicion that the detainee be dangerous in addition to armed renders the "unexpectedly" in the previous sentence meaningless. If an officer reasonably suspects that a suspect is dangerous—for reasons other than the fact that the person might be, or is, armed—then there is little risk that a weapon could be used "unexpectedly" because the officer already suspects—even expects—foul play and violence. The "unexpectedly" that the Court mentions seems designed to prevent the scenario in which an armed suspect uses the weapon on the officer having given no previous indication that he was independently "dangerous" aside from being armed.[102]

Justice Harlan's concurrence also supports this interpretation. Justice Harlan, whose concurrence in *Terry* foreshadowed subsequent developments in stop-and-frisk law,[103] opined that any justified "forced encounter" between an officer and a suspect creates an automatic dangerousness concern that justifies a frisk.[104] This premise, he stated, was implicit in the Court's reasoning.[105] Justice Harlan also categorically stated that "[c]oncealed weapons create an immediate and severe danger to the public."[106]

If *Terry* left the question unclear, however, later Supreme Court cases clarified the matter. Four years after *Terry*, the Court decided *Adams v. Williams*,[107] in which it upheld the constitutionality of a frisk without a separate showing of dangerousness.[108] This would be unremarkable were it not for the fact that the frisk was held constitutional over the dissent of two Justices who argued that "*Terry* requires . . . that the reliable information in the officer's possession demonstrate that the suspect is both armed and *dangerous*."[109] That argument did not even persuade all of the dissenting

101. *Terry*, 392 U.S. at 23.

102. *Cf.* Arizona v. Johnson, 555 U.S. 323, 334 (2009) (remarking that the frisking officer "was not constitutionally required to give [the defendant] an opportunity to depart the scene . . . without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her").

103. *See* 4 LAFAVE, *supra* note 34, § 9.6(a) & n.25 (providing several instances where Justice Harlan's concurrence later became the dominant view either as embraced by the Supreme Court itself or as practiced in lower courts).

104. *Terry*, 392 U.S. at 33–34 (Harlan, J., concurring) ("Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically."); *see also* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1692 (1998) (interpreting *Terry* to suggest that "the stop of a suspect is itself a critical event that almost automatically generates a dangerousness concern that authorizes a weapons frisk of the suspect").

105. *Terry*, 392 U.S. at 33–34 (Harlan, J., concurring).

106. *Id.* at 31–32. Some courts have, however, not given credence to this remark as Justice Harlan made it "at a time when handgun possession was illegal" in Ohio. *Robinson I*, 814 F.3d 201, 207 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017).

107. 407 U.S. 143 (1972).

108. *Id.* at 149.

109. *Id.* at 159 (Marshall, J., dissenting).

Justices.[110] The proposition that *Terry* might require a suspect to be both armed and dangerous before an officer may frisk him was clearly before the Court and rejected—indicating that, in the Court's view, being armed alone is equivalent to being dangerous.

That the Supreme Court views the possession of firearms as categorically dangerous is further reinforced by the Court's decision in *McLaughlin v. United States*.[111] *McLaughlin* was not a Fourth Amendment case, but a case that asked whether an unloaded handgun, for purposes of sentence enhancement under the federal bank robbery statute, is a deadly weapon.[112] Despite this difference, however, the case illustrates the Court's view of firearms as inherently dangerous objects. The Court answered the question quickly—the entire analysis is a single paragraph.[113] I quote the entire analysis that the Court saw fit to give this question:

> Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a "dangerous weapon." First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.[114]

Not all of these circumstances will apply in every situation, and the second and third justifications would surely be deemed dangerous even by the courts that have recently held that firearms are not categorically dangerous for *Terry* purposes—displaying a firearm in a threatening manner

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110. Only Justices Marshall and Douglas argued that *Terry* requires reliable indicia that the suspect is *both* armed and dangerous. *Id.* at 153, 159 (Marshall, J., dissenting). Justice Brennan filed a separate dissent. *Id.* at 151 (Brennan, J., dissenting). Justice Douglas issued the only dissenting opinion in *Terry*, so his dissent in *Adams* flows naturally from that. *See Terry*, 392 U.S. at 35 (Douglas, J., dissenting). Interestingly, in the four years that passed between the Court's decisions in *Terry* and *Adams*, four Justices changed; Chief Justice Warren and Justices Black, Harlan, and Fortas in the *Terry* majority were replaced with Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist in *Adams*. *See Members of the Supreme Court of the United States*, SUP. CT. U.S., https://www.supremecourt.gov/about/members.pdf [https://perma.cc/B89X-DDNM] (showing a list of Supreme Court Justices and their dates of service). Thus, of the five remaining Justices from the *Terry* Court, more dissented than joined the majority by a margin of 3–2, while more implicitly rejected the proposition that *Terry* requires a showing that a suspect is *both* armed and dangerous by a margin of 3–2.

111. 476 U.S. 16 (1986).

112. *Id.*; *see* 18 U.S.C. § 2113(d) (1982) (providing for a potential fifteen-year increase of the maximum possible prison sentence and a potentially doubled fine for bank robberies in which a deadly weapon is used as opposed to bank robberies involving no deadly weapon or violence).

113. *McLaughlin*, 476 U.S. at 17–18.

114. *Id.* (footnote omitted).

or using it as a bludgeon would certainly seem to be additional indicia of dangerousness beyond merely being armed.

However, the Court noted that each of the three reasons was independently sufficient, and the first states that guns—and, by implication, the persons possessing them—are "typically and characteristically dangerous."[115] The Court does not derive the dangerousness of the firearm from the conduct of the person possessing the firearm (which, in this context, bank robbery, would have been easy to do), but instead focuses on the inherent potential for harm within the firearm itself.[116] This focus on potential is something that the modern courts deciding that firearms are not inherently dangerous for *Terry* purposes lack. And by shifting the focus of their inquiry from the inherent destructive potential in the firearm to the demeanor of the person and the external circumstances, these courts subtly change the question of the second *Terry* prong from "is this person armed and dangerous (i.e., capable of harming the officer due to the dangerousness of that instrument)?" to "is this person armed and violent?" Nothing in the Court's history of *Terry* decisions discussing dangerousness justifies this shift.

The Court's *Heller* decision did not change the Court's view of firearms as inherently dangerous for *Terry* purposes. To begin, the majority's opinion in *Heller* does not rest upon considerations of dangerousness, devoting only two paragraphs to a discussion of certain classes of weapons that may be banned because they are "dangerous and unusual."[117] Instead, the majority's decision rests on what it views as the original scope of the right protected by the Second Amendment as understood in the eighteenth century,[118] which cannot be curtailed by modern developments in firearms technology.[119] As the second *Terry* prong relies on considerations of dangerousness, it is inappropriate to argue that *Heller*, which relied on no such considerations, somehow changed what is and is not dangerous for purposes of *Terry*.

In fairness, however, the two paragraphs in the *Heller* majority opinion that discuss dangerousness could cause confusion regarding the constitutional status of firearms as inherently dangerous. The majority clearly states that certain firearms may be banned.[120] This class of firearms includes M-16 rifles, machineguns, tanks, and other "weapons that are most useful in military service."[121] The Government may ban the possession of these weapons, the Court says, because these are "dangerous and unusual

115. *Id.* at 17.

116. *See id.* at 17–18 (uncoupling the dangerousness inherent in the firearm from the behavior of the possessor).

117. District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

118. *Id.* at 576, 581.

119. *Id.* at 627–28.

120. *Id.* at 626–27.

121. *Id.* at 624, 627.

weapons"[122] that are "not typically possessed by law-abiding citizens for lawful purposes."[123] If these weapons may be banned because they are dangerous, then one can argue that those weapons which may not be flatly banned must not be dangerous for constitutional purposes.

Such a reading, however, stretches the language of *Heller* too far. While *Heller* did say that certain classes of weapons could be flatly banned due to their extreme dangerousness,[124] it did not say that firearms not included in these classes are "not dangerous" at all. While common sense is enough to conclude that a handgun of the sort at the heart of *Heller* is not as dangerous as a tank, it is also sufficient to recognize that said handgun is still dangerous and capable of taking a human life. Banning may be appropriate for the more dangerous class of firearms, but not for the less dangerous class.[125] Just because this less dangerous class is not dangerous *enough* to ban, however, does not mean that it is not sufficiently dangerous to merit less intrusive impositions—such as being a justification for a frisk and a temporary confiscation during a *Terry* stop based on reasonable suspicion of criminal activity.[126] Read this way, the language in *Heller* in no way reflects a determination that firearms are not inherently "dangerous" for purposes of *Terry* and other constitutional analyses. Therefore, the recent trend of courts holding that firearms are not inherently dangerous for *Terry* purposes is inconsistent with the Supreme Court's view of firearms dating from *Terry* all the way to *Heller*.

B. The Courts that Abandoned the Presumption of Inherent Dangerousness Improperly Relied on State Criminal Law to Decide What Is and Is Not Dangerous for Terry *Purposes*

The Fourth Circuit panel, the Sixth Circuit, and the Supreme Court of Arizona all relied on underlying state firearm regulations as a central feature of their determinations that firearm possession is not per se dangerous for purposes of a *Terry* analysis.[127] I argue, however, that in doing so these courts made two interrelated errors. First, they assigned too much importance to state law for purposes of the second *Terry* prong. Second, the courts

122. *Id.* at 627.

123. *Id.* at 625.

124. *Id.* at 627. Note also that the Court discusses the dangerousness of the weapons as inherent in the weapons themselves, independent of their possessor. *Id.*

125. *See id.* at 627–28 (stating that the Second Amendment allows limitations on dangerous and military-style weapons).

126. *See* Bellin, *supra* note 5, at 30–31 ("Weapons seizures are not an explicit part of the *Terry* framework, but a necessary implication of the case is that guns can be seized, at least temporarily, . . . as part of the frisk, if the firearm makes the person 'presently dangerous.'").

127. *Robinson I*, 814 F.3d 201, 208 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1131–33 (6th Cir. 2015); State v. Serna, 331 P.3d 405, 410–11 (Ariz. 2014).

misconstrued the policy choices underlying the permissive firearm possession laws in the states in question.

1. While State Law Is a Necessary Consideration in the First Terry *Prong, It Has No Place in the Second* Terry *Prong.*—State law should have no bearing on the second *Terry* prong; the proper place for state law is in the first *Terry* prong. The question asked in the first *Terry* prong is whether there is reasonable suspicion that one is engaging in criminal activity.[128] That courts should consider state law closely when evaluating an officer's actions under the first *Terry* prong is entirely logical. The only way to know whether an activity is criminal is by reference to the criminal law, which states have the power to create and change. By defining what actions are and are not criminal, the state decides the actions for which a police officer may stop a person. When a state makes the public possession of a firearm legal, it makes *Terry* stops, on the suspicion of carrying a firearm in public, unconstitutional.[129] As such, state criminal law must be of paramount importance when a court decides whether a police officer's actions in detaining a person are appropriate under the first *Terry* prong.

Such a connection does not exist between state criminal law and the second *Terry* prong. The question asked by the second *Terry* prong is whether the officer has reasonable suspicion that the suspect is armed and dangerous.[130] While a state clearly has the authority to legislate what is criminal, it hardly seems clear that a state may legislate what is armed and dangerous. That an activity such as skydiving, driving an automobile, working on an oil rig, or playing tackle football is legal does not mean the activity is not dangerous. A state may decide that a dangerous activity or thing is not worth the price (either in treasure or freedom) of making and enforcing a ban, but such legislative inaction does not thereby eliminate the inherent danger.

The Supreme Court recognized this in *Adams v. Williams*. The frisk in question in *Adams* occurred in Connecticut, which at the time had permissive firearm laws allowing "its citizens to carry weapons, concealed or otherwise, at will, provided they have a permit. Connecticut law [gave] its police no authority to frisk a person for a permit."[131] These permissive firearm laws had no bearing on the eventual outcome of the case, and the Court dismissed any consideration that they should.[132] The Court reasoned that because the purpose of a frisk is "not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, [a] frisk for weapons might be equally necessary and reasonable, *whether or not carrying*

128. Terry v. Ohio, 392 U.S. 1, 30 (1968).
129. Bellin, *supra* note 5, at 30–31.
130. *Terry*, 392 U.S. at 27.
131. Adams v. Williams, 407 U.S. 143, 149 (1972) (Douglas, J., dissenting).
132. *Id.* at 146 (majority opinion).

a concealed weapon violated any applicable state law."[133] The implication is clear—while state law defines what is evidence of a crime, it does not define the contours of what constitutes an armed-and-dangerous person.[134] This may be what the Fourth Circuit was referring to in *Robinson II*, when it opined that "Robinson confuse[d] the standard for making stops . . . with the standard for conducting a frisk."[135]

Heller does not change this. *Heller* did not decide that firearms are not dangerous from a constitutional perspective. Because the *Heller* decision does not rest on considerations of dangerousness, which are the foundation of the second *Terry* prong, *Heller* does not provide any insight into what "armed and dangerous" means for *Terry* purposes.[136] Thus, the shifts in state firearms laws that have occurred post-*Heller* should have no effect on what is considered dangerous under the second *Terry* prong, and courts ought to follow *Adams* in determining that the propriety of a weapons frisk should be evaluated without regard to state law.

2. State Decisions to Permit Public Possession of Firearms Do Not Reflect a Decision that Firearms and the Persons Carrying Them Are Not Dangerous.—State law has no place in the second *Terry* prong, but even if it did, it is incorrect to assume that a state legislature's decision to permit the public possession of firearms implies a legislative determination that firearms, and those carrying them, are not dangerous. Nonetheless, such an assumption guided many of the courts that have strayed from following the rule of per se firearm dangerousness during *Terry* stops—it is the intellectual link courts grasped at to move from the legislative decision permitting firearms in public to the conclusion that the legislative decision bears on the second *Terry* prong.[137] The political discussion surrounding the recently enacted "constitutional carry" bill in West Virginia[138] demonstrates that this assumption is incorrect.

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133. *Id.* (emphasis added).

134. *See also* Michigan v. Long, 463 U.S. 1032, 1052 n.16 (1983) ("[W]e have expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law." (citing *Adams*, 407 U.S. at 146)).

135. *Robinson II*, 846 F.3d 694, 698 (4th Cir. 2017) (en banc).

136. *See supra* subpart IV(A).

137. *See, e.g.*, *Robinson I*, 814 F.3d 201, 208–09 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) ("Where the state legislature has decided that its citizens may be entrusted to carry firearms on public streets, we may not make the contrary assumption that those firearms inherently pose a danger justifying their seizure by law enforcement officers without consent."); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (highlighting the difficulties of reconciling the "armed and dangerous" requirement with open-carry laws).

138. I could provide many other examples, but for the sake of brevity and because *Robinson I* and *II* revolved around West Virginian law, I will only write of West Virginia here.

In March of 2016, West Virginia passed HB 4145, which permits West Virginians to carry concealed weapons anywhere without a permit.[139] The bill was passed over the veto of West Virginia Governor Earl Tomblin.[140] The law-enforcement community in West Virginia staunchly opposed the bill.[141] Nonetheless, the bill passed both the West Virginia House and Senate with the necessary majority to override the Governor's veto.[142] Defending the bill, Senate Majority Leader Mitch Carmichael stated that he understood law enforcement's concerns, "but the constitutional authority to carry a weapon is inherent in our Second Amendment."[143] Another legislator, Senator Craig Blair, cited self-defense and crime deterrence as the motivations behind the bill, stating "[w]e're giving the people the ability to protect themselves without paying a fee."[144] And while encouraging the legislature to override the Governor's veto, West Virginia Attorney General Patrick Morrisey stated, "I know that this legislation will not impact public safety. If this bill is enacted, we will not only expand freedom, but we will keep our citizens protected."[145]

These statements reveal that the legislative motivation behind HB 4145 in West Virginia was expanding Second Amendment rights and bolstering the ability of the law-abiding public to defend itself—by making the law-abiding public more dangerous. The only public official whose statement mentioned "safety" was the Attorney General, and the safety of which he spoke plainly was not the lack of dangerous potential in armed persons, but the safety of the general public secured by an armed populace.[146] Senator Blair's statement likewise indicates the legislature's belief that armed persons are inherently dangerous, for the only crime deterrent in HB 4145 is the risk of danger associated with provoking an armed person.[147] And Senator Carmichael's statement shows that he was aware of law enforcement's opposition to the bill. But he did not respond to that opposition by saying that law enforcement officers' fears for their own and

139. W. VA. CODE ANN. §§ 61-7-3–-4a (West 2017); *see also West Virginia Overrides a Governor's Veto to Pass Radical NRA-Backed Gun Law*, THINKPROGRESS (Mar. 6, 2016), https://thinkprogress.org/west-virginia-overrides-governors-veto-to-pass-radical-nra-backed-gun-law-86cd434ec9b0#.ybppzxeue [https://perma.cc/4RM4-83SE] (describing the bill and noting that West Virginians would no longer need a permit to carry a concealed weapon).

140. David Gutman, *Legislature Overrides Tomblin, Allows Permitless Hidden Guns*, CHARLESTON GAZETTE-MAIL (Mar. 5, 2016), http://www.wvgazettemail.com/news/20160305/legislature-overrides-tomblin-allows-permitless-hidden-guns [https://perma.cc/UTQ6-HKEX].

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *West Virginia Legislature Overrides Veto on HB 4145*, NRA-ILA (Mar. 5, 2016), https://www.nraila.org/articles/20160305/west-virginia-legislature-overrides-veto-on-hb-4145 [https://perma.cc/GK5R-YA6R].

146. *Id.*

147. *See supra* note 144 and accompanying text.

others' safety were unfounded or overstated. Instead, he resorted immediately to the language of rights and the Second Amendment.[148]

This is not a criticism of Senator Carmichael or the Second Amendment (additional Second Amendment protections may well be worth the risks associated with having them),[149] but it does show that the police officers' safety was not at the forefront of the legislature's mind when it passed this bill and that the bill's passage in no way constitutes a decision that armed persons are not dangerous. If anything, it shows the opposite—the legislature passed HB 4145 precisely because armed persons are dangerous (hopefully to criminals), and the legislature wants a dangerous, law-abiding citizenry.

I could go through the political discussions in other states to demonstrate the same point, but for the sake of brevity I will not. As such, the Fourth Circuit panel, the Sixth Circuit, and the Supreme Court of all incorrectly concluded that state laws permitting the public possession of firearms made public possession of firearms "not dangerous" for *Terry* purposes. A person who is armed, be it for purposes of assault or self-defense, has extreme, inherent, dangerous potential and poses an unacceptably high risk to police officers during a forced encounter on suspicion of criminal activity—no legislative decree can change that fact.

C. Guns Are Dangerous and Pose a Threat to Police Officers

If we briefly put aside the legal tests and precedents and look instead at statistics and newsreels, it is clear that guns are dangerous and that police officers have reason to fear an encounter with an armed citizen whether the citizen legally possesses his weapon or not. Hundreds of police have been feloniously killed with firearms over the past decade.[150] Between 2006 and 2015, more than 500 law enforcement officers were shot to death, which is more than the number of law enforcement deaths caused by automobile crashes, beatings, stabbings, strangling, and terrorist attacks combined over the same period.[151] The FBI's latest Uniform Crime Report reveals that, of the 505 law enforcement officers feloniously killed between 2005 and 2014, 128 (roughly 25%) were killed either investigating a suspicious person/ circumstance or during a routine, traffic-violation stop.[152] These are *Terry*-

148. *See supra* note 143 and accompanying text.

149. As Thomas Jefferson wrote to James Madison, "*Malo periculosam, libertatem quam quietam servitutem*" (I prefer dangerous freedom over peaceful slavery). Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), *in* JEFFERSON'S LETTERS 61, 62 (Willson Whitman ed., 1940).

150. *Causes of Law Enforcement Deaths Over the Past Decade (2006–2015)*, NAT'L L. ENFORCEMENT OFFICERS MEMORIAL FUND (July 18, 2016), http://www.nleomf.org/facts/officer-fatalities-data/causes.html [https://perma.cc/2VSL-DH5N].

151. *Id.*

152. U.S. Dep't of Justice, Fed. Bureau of Investigation, *Table 21: Law Enforcement Officers Feloniously Killed, Circumstance at Scene of Incident, 2005–2014*, FBI: UCR, https://ucr.fbi.gov/leoka/2014/tables/table_21_leos_fk_circumstance_at_scene_of_incident_2005-

type situations. By comparing the FBI's Uniform Crime Report with the National Law Enforcement Officer's Memorial Fund (NLEOMF) statistics, it can be deduced that the vast majority of the officers killed in *Terry*-type situations were shot to death.[153]

These statistics do not include more recent cases from the past year. "The number of law enforcement officers shot and killed in the line of duty increased sharply in 2016 relative to 2015 . . ."[154] According to the NLEOMF, "64 officers were killed in firearm-related incidents in 2016."[155] This is a dramatic 56% increase over the number of officers who were shot and killed in 2015.[156]

Even worse than the statistics, however, is the sheer sense of tragedy that has accompanied the horrific police shootings of this past summer. Two examples will suffice. On July 7, 2016, during a peaceful protest in downtown Dallas, Micah Johnson, an Afghanistan War veteran who had been honorably discharged from the U.S. Army, set out to kill police officers from a sniper's nest.[157] Before he was killed by police, Johnson succeeded in killing five law enforcement officers and wounding seven more.[158] Ten days later, on July 17, 2016, Gavin Long likewise targeted police officers on the streets of Baton Rouge, killing three and wounding three others before he was finally killed by police.[159]

Admittedly, nothing about the old, blanket assumption that an armed person is also dangerous for *Terry* purposes would have stopped Johnson or

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2014.xls [https://perma.cc/XS36-86RB]. The FBI separates felony vehicle stops from traffic-violation stops. *Id.* As such, we know that all 60 of the law enforcement officers listed as killed during traffic-violation stops (roughly two-thirds of the officers killed in vehicle pursuits and stops over the time span) were killed during routine stops of the sort that have been compared to *Terry* stops. *See* Berkemer v. McCarty, 468 U.S. 420, 439 n.29 (1984) ("[M]ost traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*.").

153. The years in the two data sets do not align perfectly. However, there is substantial overlap, and the NLEOMF data set reveals that, of all the causes of death that would likely be the result of felonious actions, shootings were by far the most common. *Causes of Law Enforcement Deaths*, *supra* note 150. This would certainly carry over to the 128 deaths reported as occurring during *Terry*-like circumstances in the FBI's report—deaths that occurred while investigating suspicious person/circumstance and during traffic-violation stops. U.S. Dep't of Justice, *supra* note 152.

154. Camila Domonoske, *Number of Police Officers Killed by Firearms Rose in 2016, Study Finds*, NPR (Dec. 30, 2016), http://www.npr.org/sections/thetwo-way/2016/12/30/507536360/number-of-police-officers-killed-by-firearms-rose-in-2016-study-finds [https://perma.cc/TS7C-ZLQ7]

155. *Id.*

156. *Id.*

157. Faith Karimi et al., *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (July 9, 2016), http://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests/ [https://perma.cc/2QJD-KJB8].

158. *Id.*

159. Molly Hennessy-Fiske et al., *Marine Corps Veteran Identified as Gunman in Fatal Shooting of Three Police Officers in Baton Rouge*, L.A. TIMES (July 17, 2016), http://www.latimes.com/nation/nationnow/la-na-baton-rouge-police-shooting-20160717-snap-story.html [https://perma.cc/QC3C-WVVE].

Long from committing their atrocities.[160] The point is that these police-shooting statistics and the charged atmosphere provided by tragedies like these are among the "factual and practical considerations of everyday life on which reasonable and prudent men" base their decisions.[161]

Also among those "practical considerations" is the fact that the suspect, who is already under investigation for suspected involvement in criminal activity, is forcibly detained against his will by the police officer. To deny the inherent tension, even danger, of that situation is absurd.[162] Even if the suspect is polite or cooperative, the police officer ultimately does not know the propensity of the armed suspect,[163] or what else the suspect may want to conceal from the officer during the investigatory stop.[164] Thus, while a police officer cannot necessarily know whether an armed detainee will become violent at a moment's notice and use his weapon against the officer, the officer does necessarily know that an armed suspect possesses an inherently dangerous device capable of killing the officer. And with these facts in mind, and with the memories of recent tragedies still fresh, it is only reasonable that a police officer should expect that possessing a firearm, even legally[165] makes one dangerous. If courts do not recognize and respect the very real danger law enforcement officers face during *Terry* stops from any armed person, then officers' lives are put needlessly at risk and public safety is compromised on the basis of a baseless and incorrect interpretation of "armed and dangerous."[166]

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160. However, some commentators have observed that Louisiana's open-carry law likely resulted in police downplaying the threat Long presented as he legally walked down the street with his weapons. Maya Lau & Jim Mustian, *Baton Rouge Police Shooting Brings Renewed Attention to Louisiana's 'Open Carry' Rights*, ADVOCATE (Aug. 6, 2016), http://www.theadvocate.com/baton_rouge/news/baton_rouge_officer_shooting/article_83d7317a-5b60-11e6-84b4-13cf89c9f22f.html [https://perma.cc/4SA9-GJ29].

161. Ornelas v. United States, 517 U.S. 690, 695 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)).

162. Colb, *supra* note 104, at 1692 ("[T]he stop of a suspect is itself a critical event that almost automatically generates a dangerousness concern that authorizes a weapons frisk of the suspect.").

163. *See* United States v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013) (noting that an officer's observation that a suspect possessed a loaded firearm was enough to justify a stop under *Terry*).

164. *Cf.* Arizona v. Johnson, 555 U.S. 323, 331 (2009) (describing how the risk of a violent encounter during a traffic stop, which justifies a frisk of the vehicle's occupants, comes from "the fact that evidence of a more serious crime might be uncovered during the stop" even though the officer does not know of that evidence at the outset of the stop (quoting Maryland v. Wilson, 519 U.S. 408, 414 (1997))).

165. Johnson legally owned the weapons he used. Dan Frosch & Ben Kesling, *Dallas Shooter Purchased Guns Legally, Official Says*, WALL STREET J. (July 11, 2016), http://www.wsj.com/articles/dallas-shooter-purchased-guns-legally-official-says-1468269720 [https://perma.cc/5MBL-MQBV]. I can find no credible source stating whether Long legally owned the weapons he used.

166. *See Robinson I*, 814 F.3d 201, 208, 210 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017) (acknowledging that "recent legal developments regarding gun possession have made the work of the police more dangerous as well as more difficult," but then proceeding to make the work even more dangerous and difficult by holding that not all armed persons are dangerous for

V. Conclusion

As states and courts across the nation have expanded the Second Amendment rights of those within their jurisdictions to carry firearms in public in the wake of *District of Columbia v. Heller*, decades-old assumptions concerning the interactions of firearms and the Fourth Amendment have come into question. In the past three years, courts around the country have called into question the assumption—as old as *Terry v. Ohio* itself—that armed persons are inherently dangerous for purposes of justifying a weapons frisk during a *Terry* stop. Multiple courts around the nation have rejected this assumption, reasoning that state legislative decisions to broadly permit the public possession of firearms somehow make the persons carrying those firearms not dangerous for constitutional purposes. Yet we have seen, for the reasons explained in Part IV of this Note, that these courts are mistaken. The Fourth, Ninth, and Tenth Circuits are correct in upholding the old assumption that "armed means dangerous" during *Terry* stops. The path going forward is clear. *Robinson II* was decided very recently and may—until April 23, 2017—be appealed to the Supreme Court.[167] Although the en banc Fourth Circuit came to the correct decision, my hope is that Robinson will petition for a writ of certiorari with the Supreme Court. The Supreme Court should then grant certiorari, as *Robinson II* is an ideal vehicle with which to resolve the circuit split and to resolve the state–federal conflict between Arizona and the Ninth Circuit.[168] The Court should then hold, in line with its past

Terry purposes, thus depriving officers of the ability to disarm all persons with whom the police force an encounter on suspicion of criminal activity).

167. *See* SUP. CT. R. 13(1) (providing that a petition for a writ of certiorari is timely within 90 days after the entry of judgment in the court of appeals—April 23, 2017, is 90 days after January 23, 2017, the date on which judgment in *Robinson II* was entered).

168. *United States v. Robinson* is an ideal case for appeal to the Supreme Court. The case revolves around a single, isolated legal issue with stipulated facts, making it a proper vehicle. *See* RICHARD SEAMON ET AL., THE SUPREME COURT SOURCEBOOK 188–89 (2013) (discussing the Court's preference for hearing cases that revolve around legal, rather than factual, issues). There is a clear conflict between the Circuits regarding that legal issue. *See id.* at 185 (observing that the "presence of a 'conflict'" is one of "the two most important factors in determining whether the Court will grant certiorari"). Rule 10(b) of the United States Supreme Court provides that another compelling reason for granting certiorari exists when "a state court of last resort has decided an important federal question in a way that conflicts with the decision . . . of a United States court of appeals." SUP. CT. R. 10(b). Thus, the conflict between the Ninth Circuit and the Supreme Court of Arizona—a state within the jurisdiction of the Ninth Circuit—provides yet another compelling reason to grant certiorari. Finally, the issue at hand is extremely important—law enforcement officers' lives are clearly at stake, as are policing practices in cities across the country. *See* SEAMON ET AL., *supra*, at 185 (stating that "the importance of the issues presented" is the other of "the two most important factors in determining whether the Court will grant certiorari").

decisions, that the law presumes the armed man to be dangerous—especially for *Terry* purposes, where police officers face the constant threat of weapons unexpectedly being used against them. In this way, the Court can promote both police and public safety.

—Matthew J. Wilkins