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“Armed and Dangerous” a Half Century Later: Today’s Gun Rights Should Impact *Terry’s* Framework

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**“ARMED AND DANGEROUS” A HALF CENTURY
LATER: TODAY’S GUN RIGHTS SHOULD
IMPACT *TERRY*’S FRAMEWORK**

*Alexander Butwin**

Over fifty years ago, in Terry v. Ohio, the U.S. Supreme Court established a two-part framework in which police officers may, without a warrant, stop and search an individual for weapons without violating the Fourth Amendment’s protections against unreasonable searches and seizures. Officers must (1) suspect that criminal activity has occurred, or will soon occur, and (2) have a reasonable fear that the individual is “armed” and poses a threat to the responding officers or to others—i.e., “dangerous.” The second prong’s exact meaning is disputed and has created a split among the circuits as to whether merely being “armed” inherently makes a gun carrier “dangerous” and thereby justifies a search.

This Note examines how various courts have approached the issue, analyzes the split among these approaches, and ultimately argues that, in light of the significant developments in gun rights, state gun laws should dictate Terry’s interpretation. Because gun rights are considerably more expansive today than they were back in 1968, an individual carrying a firearm, without more, should be insufficient to justify a search under the Fourth Amendment in states that allow their citizens to publicly carry firearms.

INTRODUCTION.....	1034
I. THE CONSTITUTION, STATE GUN LAWS, AND THE POLICE’S AUTHORITY TO FRISK	1036
A. <i>The Second Amendment’s “Right to Bear Arms” Has Been Given Meaning</i>	1036
B. <i>The History and Purpose of the Fourth Amendment</i>	1039
C. <i>Balancing the Fourth Amendment with Public Safety: Terry v. Ohio</i>	1041

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II. THE CIRCUIT SPLIT: ARMED AND (THEREFORE) DANGEROUS?	1043
A. <i>The Difficulty in Rendering a Robinson Decision</i>	1043
1. <i>Robinson I</i>	1043
2. <i>Robinson II</i>	1044
3. <i>Robinson III</i>	1045
4. <i>Robinson IV</i>	1046
B. <i>Does “Armed” Mean “Dangerous”?</i>	1047
1. “Armed” Equals “Dangerous” Under <i>Terry</i>	1047
2. “Armed” Does Not Equal “Dangerous” Under <i>Terry</i>	1050
III. MERELY BEING “ARMED” SHOULD NOT MAKE ONE INHERENTLY “DANGEROUS” IN PUBLIC CARRY STATES	1053
A. <i>1968 to Today: Expanding Gun Rights</i>	1054
B. <i>The Threat a Gun Carrier Could Potentially Pose Is Not a Significantly Greater Public Policy Consideration Than Maintaining Constitutional Rights</i>	1056
CONCLUSION	1059

INTRODUCTION

Shaquille Robinson, a black male, entered his female friend’s Toyota Camry in the 7-Eleven parking lot on North Mildred Street—a notorious high-crime area in Ranson, West Virginia.¹ An anonymous tip alerted police that a black male, in a blue-green Toyota Camry with a white female, was carrying a loaded gun.² The officers pursued the vehicle, and upon finding it, noticed that neither the driver nor the passenger was wearing a seatbelt.³ The officers pulled the car over for the traffic violation, and instead of asking for identification, the officer who approached the passenger-side door ordered Robinson out of the car.⁴ Because of the tip received, the officer figured that asking Robinson to reach into his pocket would have been a bad idea.⁵ The officer then asked Robinson if he was carrying a firearm, to which Robinson did not verbally respond.⁶ Instead, he gave the officer a “weird look” that the officer interpreted to mean “I don’t want to lie to you, but I’m not going to tell you anything [either].”⁷

1. *United States v. Robinson (Robinson IV)*, 846 F.3d 694, 696 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

2. *Id.*

3. *Id.* at 697.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Because of this “weird look,” the officer ordered Robinson to put his hands on top of the car.⁸ He then frisked Robinson and found a firearm.⁹ After learning that Robinson illegally possessed the firearm, the officer arrested him.¹⁰ Robinson filed a motion to suppress the charges against him, contesting the legality of the officers’ search—he alleged specifically that the firearm was only discovered after his Fourth Amendment rights had been violated.¹¹

Robinson challenged the officer’s frisk in *United States v. Robinson*.¹² This case has a unique procedural history, consisting of four judgments, with each reversing the preceding one.¹³ They are each addressed in more detail in Part II to illustrate the difficulty courts face with regards to the “armed and dangerous” standard¹⁴ from *Terry v. Ohio*,¹⁵ which currently serves as the guiding authority in Fourth Amendment investigatory stop cases.¹⁶

This Note explores the circuit split concerning the “armed and dangerous” standard from *Terry* that permits police officers to frisk for weapons while conducting a temporary investigatory stop.¹⁷ More specifically, this Note addresses whether “armed” should be synonymous with “dangerous” in states that permit their citizens to publicly carry firearms, or whether treating the standard’s two terms synonymously constricts one’s Fourth Amendment right to be free from unreasonable searches and seizures¹⁸ merely because one’s Second Amendment and state-given rights to publicly carry firearms were exercised.¹⁹

Part I of this Note provides background on the relevant constitutional, state, and case law. Part I.A discusses the Second Amendment and current state law regarding publicly carrying firearms. Part I.B introduces the Fourth Amendment. And Part I.C explains *Terry*’s “armed and dangerous” standard for frisks, which courts have inconsistently interpreted and applied.

Part II addresses the competing interests underlying this circuit split. Part II.A revisits *Robinson*—a difficult Fourth Circuit case that highlights the issue. Through its procedural history, *Robinson* presents both positions of the split. Part II.B then discusses both sides of the aforementioned split with regards to whether “armed” inherently means “dangerous” for *Terry* frisk purposes.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. 846 F.3d 694 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

13. *See infra* Part II.A.

14. *See infra* Part I.C.

15. 392 U.S. 1 (1968).

16. *See, e.g.*, *United States v. Rodriguez*, 739 F.3d 481, 485 (10th Cir. 2013) (explaining that *Terry*’s framework outlines the protocol to legally conduct a search and seizure during an investigatory stop).

17. *See infra* Part I.C.

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

19. *See infra* Part I.A.

Part III argues that merely possessing a firearm should not inherently make a person dangerous for *Terry* purposes in states that permit their citizens to publicly carry firearms. Part III.A explains that gun laws have drastically changed since the *Terry* opinion was issued and that the standard—permitting a police officer to conduct a search that is seemingly outside the Fourth Amendment’s parameters—should consider the legality of carrying a gun. Finally, Part III.B maintains that equating “armed” with “dangerous” for *Terry* purposes violates a gun carrier’s constitutional rights. This Part also argues that a gun carrier’s potential threat to officer safety, while important, does not warrant compromising the integrity of constitutional rights and categorically labeling every gun carrier as “dangerous” regardless of the legality of their gun possession.

I. THE CONSTITUTION, STATE GUN LAWS, AND THE POLICE’S AUTHORITY TO FRISK

To understand how a “weird look” can justify a police frisk, it is important to understand both the legal framework governing police conduct during investigatory stops and the constitutional guarantees that police frisks of gun-carrying individuals implicate. Part I.A surveys the history, meaning, and purpose of the Second Amendment, as well as the current gun laws that allow Americans to carry firearms in public in certain states. Part I.B summarizes the history and purpose of the Fourth Amendment and its search and seizure protection. Part I.C introduces *Terry* and its two-part framework that permits a police officer to conduct a frisk.

A. *The Second Amendment’s “Right to Bear Arms” Has Been Given Meaning*

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.”²⁰ This Amendment’s meaning, purpose, importance, and utility have been polarizing topics among scholars, political pundits, and ordinary citizens.²¹ Both sides of the debate have turned to the

20. U.S. CONST. amend. II.

21. Compare David Harsanyi, *The Second Amendment Has Always Been an Individual Right*, FEDERALIST (Nov. 29, 2018), <https://thefederalist.com/2018/11/29/second-amendment-always-individual-right/> [https://perma.cc/YS2K-K4U3] (arguing that the Second Amendment stands for an individual right to bear arms), and David Harsanyi, *You Can Try to Repeal the Second Amendment, but You Can’t Repeal History*, NAT’L REV. (Mar. 30, 2018), <https://www.nationalreview.com/2018/03/second-amendment-individual-gun-rights-strong-history/> (same), with Dennis Barron, Opinion, *Antonin Scalia Was Wrong About the Meaning of “Bear Arms,”* WASH. POST (May 21, 2018), https://www.washingtonpost.com/opinions/antonin-scalia-was-wrong-about-the-meaning-of-bear-arms/2018/05/21/9243ac66-5d11-11e8-b2b8-08a538d9dbd6_story.html [https://perma.cc/H49C-N3L2] (arguing that Justice Antonin Scalia’s majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008)—the seminal case that interprets the Second Amendment’s right to bear arms—misinterpreted the meaning of the Second Amendment), and John Paul Stevens, Opinion, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second->

framers’ intention when drafting the Amendment and to the text itself. The debate centers on whether the Amendment permits individuals to own and carry firearms for personal use and defense or whether the Amendment protects a collective right that may only be exercised through formal militia units.²²

Writers and scholars have tried to decode the framers’ original intention.²³ The framers knew that their government could one day have the authority to control its citizens’ access to firearms—something the British had attempted to do previously.²⁴ Thus, fearing the consequences and their inability to fight back to restore their freedoms, the framers included the Second Amendment to safeguard against a tyrannical, oppressive government.²⁵ Alexander Hamilton, writing in *The Federalist Papers*, acknowledged that a well-regulated militia could be “the most natural defense of a free country.”²⁶ In “John DeWitt V,”²⁷ anti-Federalists (who opposed Hamilton and the Federalists) also acknowledged, “a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people.”²⁸ Having a well-regulated militia that could be ready at a moment’s notice prevented the need for a standing army, as both Federalists and anti-Federalists believed a standing army to be an existential threat to the ideas of the revolution.²⁹

While the Second Amendment debate continues to be a hot topic in American politics, two U.S. Supreme Court decisions, *District of Columbia*

amendment.html [https://perma.cc/34PS-6PX9] (explaining that Justice John Paul Stevens strongly disagreed with *Heller* and believed that the Second Amendment should be repealed).

22. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008) (interpreting the Second Amendment to bestow an individual right—rather than a collective right—to bear arms); see also *supra* note 21 and accompanying text.

23. See, e.g., TJ Martinell, *2nd Amendment: Original Meaning and Purpose*, TENTH AMEND. CTR. (Sept. 22, 2014), <https://tenthamendmentcenter.com/2014/09/22/2nd-amendment-original-meaning-and-purpose/> [https://perma.cc/J8JH-HMHA]; *Second Amendment*, HISTORY, <https://www.history.com/topics/united-states-constitution/2nd-amendment> [https://perma.cc/V7EG-AWYU] (last updated June 7, 2019); Noah Shusterman, *What the Second Amendment Really Meant to the Founders*, WASH. POST (Feb. 22, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/02/22/what-the-second-amendment-really-meant-to-the-founders/> [https://perma.cc/89RJ-X3MW].

24. Martinell, *supra* note 23.

25. *Id.*

26. THE FEDERALIST NO. 29 (Alexander Hamilton).

27. John DeWitt was the author’s pseudonym for several key anti-Federalist papers.

28. Essay of John DeWitt V, AM. HERALD, Dec. 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST: MASSACHUSETTS AND NEW ENGLAND 34, 37 (Herbert J. Storing ed., 1981). On the issue, Federalists and anti-Federalists simply disagreed over who should have control over militias: the central government or the states. See Robert Longley, *Who Were the Anti-Federalists?*, THOUGHTCO (Jan. 25, 2019), <https://www.thoughtco.com/anti-federalists-4129289> [https://perma.cc/Q9VM-6U9R].

29. Shusterman, *supra* note 23. While the positions of Federalists and anti-Federalists on each issue regarding our nation’s founding are not important to provide context for this issue, it is significant that Federalists and anti-Federalists disagreed on most issues but appear to have agreed on a militia’s importance.

*v. Heller*³⁰ and *McDonald v. City of Chicago*,³¹ currently control the Amendment's legal status.³² Until *Heller*, courts relied on *United States v. Miller*,³³ which was thought to suggest that "the Second Amendment protects only a collective or militia-based right to possess firearms."³⁴

In *Heller*, a five-justice majority held that the Second Amendment confers an individual right to keep and bear arms and declared that any statute banning handguns in the home or prohibiting their lawful use violates the Second Amendment.³⁵ The *Heller* Court found that the Second Amendment permits having and carrying a firearm unconnected to the militia³⁶ and, in fact, extends "to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."³⁷

Throughout the detailed opinion, Justice Antonin Scalia, writing for the majority, examined founding-era legal scholars' interpretation of the Amendment, nineteenth-century case law, and state constitutions to reach the conclusion that the Amendment confers an individual right to bear arms in self-defense inside one's home, unconnected to militia service.³⁸

McDonald followed *Heller* and held that the Fourteenth Amendment incorporates the Second Amendment (as recently interpreted by *Heller*) against the states, meaning that the right to bear arms applies to state and local governments, in addition to the federal government.³⁹

Currently, there are only a handful of states that completely forbid their people from openly carrying firearms,⁴⁰ as the "right to openly carry a handgun is considered a protected right under" many state constitutions.⁴¹ In

30. 554 U.S. 570 (2008).

31. 561 U.S. 742 (2010).

32. See generally *McDonald*, 561 U.S. 742; *Heller*, 554 U.S. 570.

33. 307 U.S. 174 (1939).

34. Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007 CATO SUP. CT. REV. 127, 129.

35. *Heller*, 554 U.S. at 595, 635.

36. *Id.* at 610, 612.

37. *Id.* at 582.

38. See generally *id.* at 570. To reject the argument that arms are only permissible in a militia context, Justice Scalia adopted *Miller's* definition of "militia"—that is, "the Militia comprised all males physically capable of acting in concert for the common defense." *Id.* at 595 (quoting *Miller*, 307 U.S. at 179). Justice Scalia supported this definition's legitimacy by proclaiming that it comported with founding-era sources, including *Federalist No. 46*, *Webster's Dictionary* from 1828, and an 1811 letter written by Thomas Jefferson. *Id.* at 595. While *Miller* is thought to have adopted a collective rights theory of the Amendment, *Heller's* holding reinterprets *Miller* and adopts an individual right to possess firearms. *Id.* at 622–23.

39. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). Through this incorporation, states have passed their own laws to expand those rights, allowing firearms to be carried in public, rather than just inside the home. See *Robinson IV*, 846 F.3d 694, 708 (4th Cir. 2017) (Harris, J., dissenting) ("[S]tate law has followed [*Heller* and *McDonald*], providing expanded rights to carry guns in public.").

40. See NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATIONS, RIGHTS, AND POLICY 734–35 (Rachel E. Barkow et al. eds., 2d ed. 2018). Open carry of firearms refers to visibly carrying and exposing a firearm on a belt holster. See Justine E. Johnson-Makuch, Note, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 FORDHAM L. REV. 2757, 2767 (2015).

41. See JOHNSON ET AL., *supra* note 40, at 736.

fact, all but six state constitutions contain a provision similar to that of the Second Amendment.⁴² About half of states do not require a permit to legally carry a firearm, whereas approximately sixteen states require state-issued permits to openly carry a firearm in public.⁴³

Besides open carry regulations, there are also concealed carry laws, which enable a gun owner to stow a firearm in a holster that is typically hidden from view under clothing.⁴⁴ Concealed carry laws are made up of three categories: unrestricted (sometimes called “constitutional carry”), “shall issue,” and “may issue.”⁴⁵ These three categories vary in the number of requirements or steps one must take in order to obtain a license, with “unrestricted” being the easiest way to obtain a license and “may issue” being the most difficult.⁴⁶ Currently, there are only eight “may issue” states, but this category is slowly disappearing as courts have started to rule against “may issue” policies.⁴⁷

America’s “open carry” gun laws that permit citizens to carry guns in public contribute to the discord among the circuits when determining the dangerousness of a gun carrier for *Terry* purposes.⁴⁸ Regardless of one’s personal opinion on the Second Amendment,⁴⁹ *Heller* and *McDonald* have upheld the right to carry and led states to enact their own gun-carry laws. Therefore, these cases and laws must be followed until overruled or amended.

B. *The History and Purpose of the Fourth Amendment*

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁵⁰ Aggressive British search and seizure practices, including the

42. *Id.* at 737. For example, South Dakota’s constitution declares that “[t]he right of the citizens to bear arms in defense of themselves and the state shall not be denied.” S.D. CONST. art. VI, § 24. West Virginia’s constitution states that “[a] person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.” W. VA. CONST. art. III, § 22. And Ohio’s constitution maintains that “[t]he people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” OHIO CONST. art. I, § 4.

43. See JOHNSON ET AL., *supra* note 40, at 735; *Which States Allow Open Carry?*, ALIEN GEAR HOLSTERS (Apr. 3, 2019), <http://aliengearholsters.com/blog/open-carry-states/> [<https://perma.cc/H7C3-TMM8>].

44. See JOHNSON ET AL., *supra* note 40, at 735. Concealed carry is by far the most common method of handgun carrying today. *Id.*

45. See *id.*

46. See *id.*

47. See Chris W. Cox, *Victory in D.C.!: Shall-Issue Concealed Carry Coming to the Nation’s Capital*, NRA-ILA (Nov. 20, 2017), <https://www.nra.org/articles/20171120/victory-in-dc-shall-issue-concealed-carry-coming-to-the-nation-s-capital> [<https://perma.cc/DE52-BMUX>]; see also *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 129, 152 (D.D.C. 2016) (holding that the District of Columbia’s “good reason requirement,” which requires concealed carry license applicants to “demonstrate a ‘good reason to fear injury to his or her person or property’ or ‘any other proper reason for carrying a pistol’” likely places an unconstitutional burden on the Second Amendment “right to carry firearms for self-defense both in and outside the home”).

48. See *infra* Part II.

49. See *supra* note 21 and accompanying text.

50. U.S. CONST. amend. IV.

use of general warrants,⁵¹ in England and the American colonies are viewed as the “catalysts” for the Fourth Amendment’s adoption.⁵² A general warrant is “unparticularized as to the place or things to be searched for or . . . lack[s] specific factual grounds justifying the search.”⁵³ It therefore gives law enforcement officers freedom to “[rummage] in a person’s belongings” and discover evidence of wrongdoing without specifying the exact things or places to be searched.⁵⁴ These British general warrant practices led states to adopt search and seizure provisions in their local constitutions soon after declaring independence.⁵⁵ In fact, after the U.S. Constitution was drafted in 1779 (without the Bill of Rights), some “states requested that the new Constitution be amended to provide protection against unjustified searches and seizures.”⁵⁶ This was the basis and background for what is now the Fourth Amendment.

Today’s Fourth Amendment includes a “warrant requirement.”⁵⁷ This requirement dictates that searches are generally considered reasonable if (1) a “neutral and detached magistrate”⁵⁸ issues a search warrant supported by

51. *See* *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817–18 (holding that the secretary of state’s general warrant to arrest Entick and seize his books and papers for authoring seditious papers constituted a trespass and that the secretary had no right to seize or inspect Entick’s property); *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 489 (declaring that the Crown’s general warrant permitting messengers to break in and search people’s homes and places of work, as well as seize papers and property without evidence that a crime had been committed, was a violation of English common law).

52. Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 980 (2011).

53. Thomas Y. Davies, *Can You Handle the Truth?: The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 55 (2010).

54. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

55. *See* Clancy, *supra* note 52, at 981. For example, Connecticut’s constitution currently states:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

CONN. CONST. art. I, § 7. And Massachusetts’s constitution currently states:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. pt. 1, art. XIV.

56. Clancy, *supra* note 52, at 981.

57. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

58. *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached

probable cause and (2) the warrant particularly describes the persons or places to be searched or seized.⁵⁹ Probable cause exists when the facts and circumstances within the officer’s knowledge provide a reasonably trustworthy basis for a person of reasonable caution to believe that a criminal offense has been committed or is about to take place.⁶⁰ The warrant requirement, however, is often inapplicable to searches for weapons after an investigatory stop or arrest.⁶¹ *Terry* outlines the steps police officers must take to avoid violating the Fourth Amendment.⁶² However, as this Note highlights, not all circuits agree as it relates to *Terry*’s standard—that is, when firearms are (thought to be) present during investigatory stops.⁶³

C. Balancing the Fourth Amendment with Public Safety: Terry v. Ohio

As discussed, the Fourth Amendment prohibits only *unreasonable* searches and seizures—not *all* searches and seizures.⁶⁴ In the Fourth Amendment context of stops and frisks, *Terry* reigns supreme.⁶⁵

In *Terry*, two men standing on a street corner caught Officer McFadden’s attention.⁶⁶ McFadden could not articulate what it was that drew him to the men but while on patrol for shoplifters and pickpockets, he grew suspicious.⁶⁷ McFadden watched one of the men leave the street corner, walk past a store, pause, look through the store window, walk a little further, and then turn back, look again through the store window, and finally return back to the original street corner.⁶⁸ Upon returning to the corner, he conferred with the other man, and then the other man went through the exact same motions, looking through the same store window and returning to confer.⁶⁹ The two men alternately repeated this ritual about six times each.⁷⁰ A third

magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”).

59. U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

60. *Carroll v. United States*, 267 U.S. 132, 162 (1925).

61. *See generally* *Terry v. Ohio* 392 U.S. 1 (1968) (demonstrating that the officer did not need a warrant to frisk the defendant for the investigatory stop). There are six main exceptions to the warrant requirement: searches incident to lawful arrest, the plain view exception, consent, stops and frisks, the automobile exception, and emergencies and hot pursuits. *Exceptions to the Warrant Requirement*, LAW SHELF EDUC. MEDIA, <https://lawshelf.com/courseware/entry/exceptions-to-the-warrant-requirement> [https://perma.cc/T72M-MTSD] (last visited Nov. 12, 2019). This Note only focuses on frisks for weapons during investigatory stops.

62. *See infra* Part I.C.

63. *See infra* Part II.

64. *Elkins v. United States*, 364 U.S. 206, 222 (1960) (“It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.”).

65. *See supra* note 16 and accompanying text.

66. *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

67. *Id.* at 5–6.

68. *Id.* at 6.

69. *Id.*

70. *Id.*

man at one point joined them on the street corner to chat but then walked away.⁷¹ After about ten-to-twelve minutes, the two men walked away in the same path taken earlier by the third man.⁷² McFadden suspected that the men planned to shoplift and considered it his duty as an officer to investigate.⁷³ Fearing they had a gun, McFadden approached the men, identified himself as a police officer, and asked for their names.⁷⁴ The men mumbled in response to the officer's inquiries, and McFadden then grabbed the petitioner and patted the outside of his clothing.⁷⁵ McFadden felt a gun and removed the petitioner's overcoat to extract the firearm.⁷⁶ He also frisked the two other men and found a firearm on one of them.⁷⁷

After being charged with carrying a concealed weapon, the petitioner challenged the legality of the officer's pat-down as a Fourth Amendment violation.⁷⁸ The Court, en route to affirming the petitioner's conviction, discussed the framework that courts would consult going forward.⁷⁹ According to *Terry*,

where a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled . . . 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.⁸⁰

This holding consists of two inquiries: (1) whether the officer has observed unusual conduct which leads him to conclude that criminal activity is afoot and (2) whether the officer believes the suspect is armed and dangerous.⁸¹ Therefore, unless these two inquiries are both answered in the affirmative, the Fourth Amendment precludes an officer from conducting a frisk.⁸²

This analysis is an objective one; the Court framed it as “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”⁸³ “[D]ue weight must be given, not to [the officer's] inchoate and unparticularized suspicion or

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 6–7.

75. *Id.* at 7.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 30.

80. *Id.*

81. Matthew J. Wilkins, Note, *Armed and Not Dangerous?: A Mistaken Treatment of Firearms in Terry Analyses*, 95 TEX. L. REV. 1165, 1166–67 (2017).

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

83. *Id.* at 27.

‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”⁸⁴

This Note focuses on the second *Terry* inquiry. Assuming an officer has observed unusual conduct and reasonably concluded that criminal activity might be afoot (thereby permitting him to proceed to the second prong), the dispute among the circuits is whether one must be both “armed” and “dangerous”—two separate requirements—or whether “armed and dangerous” is a unitary concept, implying that one is dangerous *because* he possesses a gun.⁸⁵ Because *Terry* was decided back in 1968, interpreting its framework today—in light of recent gun law developments enshrining the individual right to bear arms (i.e., *Heller* and *McDonald*) and instituting state “open carry” laws enabling public firearm possession—has proven problematic.

II. THE CIRCUIT SPLIT: ARMED AND (THEREFORE) DANGEROUS?

This Part discusses how courts have wrestled with the aforementioned problems surrounding the second *Terry* prong and the resulting circuit split. Part II.A revisits *Robinson* to demonstrate the difficulty in determining whether “armed and dangerous” should be a unitary concept or not. Part II.B presents the circuits involved in the split and explains each side’s reasons for their positions.

A. The Difficulty in Rendering a Robinson Decision

To illustrate courts’ difficulty in applying *Terry*’s framework in investigatory stop cases, this Part outlines *Robinson*’s procedural history and details each court’s analysis and holding in turn. As previously discussed, each succeeding court overruled the previous one, with *Robinson* ultimately being convicted for illegally possessing a firearm—the fruit of the officer’s lawful search.⁸⁶

1. Robinson I

After a thorough analysis of the case’s relevant facts⁸⁷ and *Terry*’s framework,⁸⁸ Magistrate Judge Robert Trumble in *United States v. Robinson*⁸⁹ (*Robinson I*), recommended that *Robinson*’s motion to suppress be granted.⁹⁰ In his report and recommendation (“R & R”), Magistrate Judge

84. *Id.*; see also *United States v. Williams*, 731 F.3d 678, 683–84 (7th Cir. 2013) (“To find that reasonable suspicion existed” so as to justify a stop, “the Court must examine the totality of the circumstances in the situation at hand.”).

85. See *infra* Part II.

86. See *Robinson IV*, 846 F.3d 694, 701–02 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

87. See *supra* text accompanying notes 1–11.

88. See *supra* Part I.C.

89. No. 3:14-CR-28, 2014 WL 4064038, at *1 (N.D.W. Va. Aug. 8, 2014), *report and recommendation adopted in part and rejected in part*, No. 3:14-CR-28, 2014 WL 4064035 (N.D.W. Va. Aug. 14, 2014).

90. *Robinson I*, 2014 WL 4064038, at *14.

Trumble reasoned that accepting the government's position—that the anonymous tip, location within a high-crime area, and “weird look” were sufficient to prove that Robinson was “dangerous” and justify a frisk—would lead “every person legally carrying a gun” to “be at risk for invasion of their privacy” merely because the notion that they are “dangerous” would always follow if there is suspicion that they are “armed.”⁹¹ Judge Trumble thereby rejected the proposition that being “armed” automatically makes one “dangerous.”⁹² As such, something more than suspicion of a firearm would be needed for a police officer to legally conduct a frisk.⁹³

2. *Robinson II*

In *United States v. Robinson*⁹⁴ (*Robinson II*), the District Court considered *Robinson I*'s R & R. The prosecution objected to the magistrate judge's R & R, and so, District Judge Gina Groh reevaluated the case.⁹⁵ The district court “review[ed] those portions of the R & R to which the United States object[ed] *de novo* and the remainder of the R & R for clear error.”⁹⁶

The district court disagreed with *Robinson I*, holding that when looking at the totality of the circumstances, “there [were] objective and particularized facts giving rise to reasonable suspicion that [Robinson] was armed and dangerous.”⁹⁷ The district court found that because the officers located “the vehicle in the same high-crime area as the 7-Eleven mere minutes removed from the tip,” and because the officers believed that Robinson “looked weird when asked if he was armed” rather than verbally responding, a “reasonably prudent officer . . . [would] believe that the officer's safety or that of others was in danger.”⁹⁸

In his response to the government's objection to the R & R, Robinson argued that “some sort of facial expression” and a tip indicating that he merely possessed a loaded gun failed to supply any evidence of actual knowledge that Robinson's actions constituted a crime and thus were insufficient grounds for conviction.⁹⁹ But while he was able to convince the magistrate judge, he could not convince the district court.¹⁰⁰ Robinson's motion to suppress was denied.¹⁰¹

91. *Id.*

92. *Id.*

93. *See id.*

94. No. 3:14-CR-28, 2014 WL 4064035 (N.D.W. Va. Aug. 14, 2014), *rev'd*, 814 F.3d 201 (4th Cir. 2016).

95. *Id.* at *4.

96. *Id.* at *1.

97. *Id.* at *4.

98. *Id.*

99. Response to United States' Objections to Report and Recommendation That the Motion to Suppress Be Granted at 2, 5–6, *Robinson II*, No. 3:14-CR-28, 2014 WL 4064035 (Aug. 14, 2014).

100. *See Robinson II*, 2014 WL 4064035, at *1.

101. *See id.* at *4.

3. *Robinson III*

Robinson appealed the district court’s findings, and the case made its way to the United States Court of Appeals for the Fourth Circuit. In *United States v. Robinson*¹⁰² (*Robinson III*), Circuit Judge Pamela Harris reversed the district court and granted the motion to suppress.¹⁰³

The Fourth Circuit first held that “in states like West Virginia, which broadly allow public possession of firearms, reasonable suspicion that a person . . . is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes.”¹⁰⁴ West Virginia permits its citizens to carry firearms; thus, possession alone is insufficient to deem someone “dangerous.”¹⁰⁵

Second, Robinson’s failure to immediately respond to the police officer’s questions did not provide an objective indication of dangerousness, especially since “West Virginia does not appear to require that people carrying firearms inform the police of their guns during traffic or other stops.”¹⁰⁶ The officers unreasonably attributed dangerousness to a “weird look.”¹⁰⁷

And third, while Robinson was seen loading a firearm and was subsequently stopped in a high-crime area, the Fourth Circuit found that the totality of the circumstances failed to provide an objective indication that Robinson was dangerous.¹⁰⁸ The fact that the events took place in a high-crime area, while occasionally relevant, “does not lend support to an inference that Robinson was a danger to the police.”¹⁰⁹ To support this notion, Judge Harris explained, “[w]here public gun possession is legal, high-crime areas are precisely the setting in which we should most expect to see law-abiding citizens who present no threat to officers carrying guns; there is more, not less, reason to arm oneself lawfully for self-defense in a high-crime area.”¹¹⁰

The Fourth Circuit concluded that *Terry* did not authorize the police officer to frisk Robinson and so the firearm, which was found to have been possessed illegally, was the inadmissible fruit of a Fourth Amendment violation.¹¹¹

102. 814 F.3d 201 (4th Cir. 2016), *rev’d on reh’g*, 846 F.3d 694 (4th Cir. 2017).

103. *Id.* at 213.

104. *Id.* at 216.

105. *Id.* at 204.

106. *Id.* at 211.

107. *Id.*

108. *Id.* at 212–13.

109. *Id.* at 212 (“Whether or not a high-crime environment might make other ambiguous conduct—for instance, fleeing from a police officer—more likely to be criminal or dangerous, we conclude that it sheds no light on the likelihood that an individual’s gun possession poses a danger to the police.” (citation omitted)).

110. *Id.* “[O]nce a state legalizes the public possession of firearms, unchecked police discretion to single out anyone carrying a gun gives rise to ‘the potential for intentional or unintentional discrimination based on *neighborhood*, class, race, or ethnicity.’” *Id.* at 209 (emphasis added) (quoting *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013)).

111. *Id.* at 213.

In dissent, Circuit Judge Paul Niemeyer disagreed with the circuit court's holding for three main reasons: (1) he interpreted *Terry*'s "armed and thus dangerous" language to require that an officer need only reasonably believe that Robinson possesses a firearm to conduct a legal frisk;¹¹² (2) the fact that Robinson might be legally carrying his firearm did not diminish the potential dangerousness of the situation;¹¹³ and (3) the reasonable suspicion standard "need not rule out the possibility of innocent conduct"¹¹⁴—just because someone might turn out to be innocent does not automatically mean an officer is unreasonable and prohibited from conducting a search.¹¹⁵

4. *Robinson IV*

The case was then reheard en banc in *United States v. Robinson (Robinson IV)*, and the Fourth Circuit affirmed the district court's ruling in *Robinson II* that there was reasonable suspicion of dangerousness, and therefore, the officer's frisk of Robinson was justified and complied with *Terry*'s requirements.¹¹⁶ Writing for the majority, Judge Niemeyer reasoned "that traffic stops alone are inherently dangerous for police officers" and that "traffic stops of persons who are armed, whether legally or illegally, pose yet a greater safety risk to police officers."¹¹⁷ It concluded that because the officers lawfully stopped Robinson for failing to wear a seatbelt and there was reasonable suspicion to believe he was "armed" (from the anonymous tip, which was deemed credible), the officers justifiably frisked him—thereby adopting the notion that "armed" inherently means "dangerous."¹¹⁸ The Fourth Circuit gave greater credence to possible police officer danger than to the potential legitimacy of Robinson's gun possession under West Virginia law.¹¹⁹ Robinson's petition for certiorari to the Supreme Court was denied.¹²⁰

Through its procedural history, this case has shown judges arguing among themselves regarding what characteristics of a *Terry* frisk situation are most important in assessing an officer's conduct. The importance of West Virginia's gun laws, the high-crime area in which the events took place, a "weird look," and police officer safety were all considered and given differing weights in the analysis, leading judges to reach different conclusions. This case epitomizes *Terry*'s disputed framework and illustrates how conflicting holdings among circuit and state courts have come to be.¹²¹

112. *Id.* (Niemeyer, J., dissenting).

113. *Id.* at 213–14 ("The frisk authorized by *Terry* is justified by dangerousness, not by criminal conduct.").

114. *Id.* at 214 (quoting *Navarette v. California*, 572 U.S. 393, 403 (2014)).

115. *See id.*

116. *See id.* at 701 (holding that the officer was justified in frisking Robinson).

117. *Id.* at 698.

118. *See id.* at 701; *see also infra* Part II.B.1.

119. *See Robinson IV*, 846 F.3d at 698, 701.

120. *Robinson v. United States*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

121. *See infra* Part II.B.

B. Does “Armed” Mean “Dangerous”?

The difficulty courts have had in interpreting “armed and dangerous” likely stems from *Terry*’s precise language.¹²² While the standard on its face implies two separate requirements—“armed *and* dangerous”—certain phrases within the opinion appear to make reasonable the presumption that “armed” might inherently mean “dangerous.”¹²³ The interpretation of “armed and dangerous” has thus led to a split among courts.

In addition to the Fourth Circuit in *Robinson IV*, the Ninth¹²⁴ and Tenth¹²⁵ Circuits also consider a firearm to be inherently dangerous and sufficient to satisfy the second *Terry* prong. Part II.B.1 considers these circuits’ views and relevant holdings.

On the other hand, the Sixth¹²⁶ and Seventh¹²⁷ Circuits, as well as the supreme courts of Arizona,¹²⁸ Idaho,¹²⁹ and New Mexico,¹³⁰ have stated that possession of a firearm, on its own, is insufficient to conclude that an individual is dangerous (analogous to the holdings of *Robinson I* and *III*). According to these courts, a *Terry* frisk violates the Fourth Amendment when there is nothing more than a reasonable suspicion that one possesses a firearm.¹³¹ Part II.B.2 discusses these courts’ views and relevant holdings.

1. “Armed” Equals “Dangerous” Under *Terry*

In *Robinson IV*, the Fourth Circuit asserted that possession of a firearm inherently makes one dangerous under *Terry*.¹³² Regardless of whether the police officers in *Robinson IV* actually had reasonable suspicion to believe Robinson was armed, there was little discussion regarding whether Robinson was also dangerous—the court simply concluded that because Robinson was armed, the situation posed a risk to the officers’ safety, and so, Robinson was dangerous.¹³³ In support of its determination, the court relied on both *Terry* and *Pennsylvania v. Mimms*,¹³⁴ stating:

122. *See supra* Part II.A.

123. For example, the phrase “armed and dangerous” is predominantly used, but Chief Justice Earl Warren also mixes in “armed and *presently* dangerous,” which could imply that the petitioner was dangerous because he was armed. *Terry v. Ohio*, 392 U.S. 1, 24, 30 (1968) (emphasis added). Additionally, the fact that the Court believed that the petitioner was “armed and *thus presented a threat* to the officer’s safety” furthers the notion that one must be dangerous *because* one is armed. *Id.* at 28 (emphasis added).

124. *United States v. Orman*, 486 F.3d 1170, 1176–77 (9th Cir. 2007).

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

126. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132–33 (6th Cir. 2015).

127. *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2015).

128. *State v. Serna*, 331 P.3d 405, 411–12 (Ariz. 2014).

129. *State v. Bishop*, 203 P.3d 1203, 1218 (Idaho 2009).

130. *State v. Vandenberg*, 81 P.3d 19, 25 (N.M. 2003).

131. *See, e.g., Leo*, 792 F.3d at 748; *Northrup*, 785 F.3d at 1131; *Serna*, 331 P.3d at 412; *Bishop*, 203 P.3d at 1215; *Vandenberg*, 81 P.3d at 26.

132. *See Robinson IV*, 846 F.3d 694, 698, 701 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

133. *Id.* at 698.

134. 434 U.S. 106 (1977). In *Mimms*, a driver was rightfully pulled over for driving with an expired license plate. *Id.* at 107. An officer approached the car and asked the driver to step

In both *Terry* and *Mimms*, the Court deliberately linked “armed” and “dangerous,” recognizing that the frisks in those cases were lawful because the stops were valid and the officer reasonably believed that the person stopped “was armed *and thus*” dangerous. The use of “and thus” recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed.¹³⁵

The court effectively took a shortcut when determining Robinson’s “dangerousness” by reading into *Terry*’s and *Mimms*’s precise language. The court analyzed an apparent link between “armed” and “dangerous” to conclude that “armed” equals “dangerous” in this case and in every case.¹³⁶

Similarly, the Ninth Circuit, in *United States v. Orman*,¹³⁷ claimed that “reasonable suspicion that [the defendant] was carrying a gun . . . is all that is required for a protective search under *Terry*.”¹³⁸ Consequently, the court believed that an officer, who was informed that the defendant had carried a handgun into a mall and who subsequently retrieved the gun from the defendant’s waistband, did not violate the Fourth Amendment because he had reason to suspect that the defendant was armed, thereby rendering the defendant dangerous for *Terry* purposes.¹³⁹

Although the defendant thought he was complying with state law¹⁴⁰ and was described by the officers as “calm,” “cooperative,” and “cordial,” the court still found that there was reasonable suspicion to believe that criminal activity was afoot and that the defendant was armed and (therefore) dangerous.¹⁴¹

In the Tenth Circuit, the court in *United States v. Rodriguez*¹⁴² held that if an officer sees an individual carrying a concealed handgun, he can conduct a

out of the vehicle and produce his owner’s card and operator’s license. *Id.* Upon exiting the vehicle, the officer noticed a large bulge in the driver’s jacket, frisked the driver, and removed a firearm from his pocket. *Id.* The driver was arrested for illegally carrying a concealed firearm and unlawfully carrying a firearm without a license. *Id.* In holding that the firearm was not the fruit of an unlawful search, the Supreme Court concluded that “[t]he bulge in the jacket permitted the officer to conclude that [the driver] was armed, and thus posed a serious and present danger to the safety of the officer.” *Id.* at 112.

135. *Robinson IV*, 846 F.3d at 700 (citations omitted).

136. The need to rely on *Terry*’s precise wording underscores the difficulty in interpreting *Terry*’s true standard. While Chief Justice Warren predominantly uses “armed and dangerous” as the standard, there are enough instances in which he and other courts have diverged from that language that calls into question the intended meaning of the “armed and dangerous” standard.

137. 486 F.3d 1170 (9th Cir. 2007).

138. *Id.* at 1176.

139. *See generally id.*

140. While it is not illegal to carry a gun in Arizona, the specific shopping mall in which these events took place prohibits guns, and the defendant at the time was considered a “prohibited possessor” due to previous crimes he committed. *Id.*

141. *See id.* at 1172–73, 1176. While Robinson’s “weird look” arguably gave the impression of dangerousness, the defendant in *Orman* was characterized in such a way that seemingly would not give an impression of dangerousness. *See id.* at 1176. Yet, he was found to be “dangerous” solely because he was armed. *See id.* at 1176–77. This highlights this side of the split’s position—the only relevant factor in determining if someone is “dangerous” is whether the responding officer has reasonable suspicion to believe that a firearm is present.

142. 739 F.3d 481 (10th Cir. 2013).

frisk, despite the state’s gun possession laws.¹⁴³ In *Rodriguez*, the officer was notified via dispatch that two men in a convenience store were showing each other their handguns.¹⁴⁴ Upon arriving at the scene, the officer directed them to step outside, and when the defendant pushed the door open, his shirt came up, exposing his waist, and the officer saw the gun and removed it from the defendant’s waistband.¹⁴⁵ Once outside, the officer directed the defendant to turn around and place his hands in a frisk position on a nearby truck, and he proceeded to pat the defendant down, presumably to determine whether the defendant possessed any other firearms.¹⁴⁶ Because the officer saw the firearm in the defendant’s waistband as they exited the store, the officer knew that the defendant was “armed.”¹⁴⁷ Therefore, the officer believed that the defendant posed a threat and that he could consequently remove the firearm.¹⁴⁸

In its holding, the Tenth Circuit essentially adopted the broad proposition that an officer’s knowledge of one’s possession of a firearm is sufficient for an officer to conduct a legal frisk,¹⁴⁹ regardless of the state’s gun laws.¹⁵⁰

Officer safety is the driving force behind these courts’ holdings. They rely on *Terry*’s observation that an officer may conduct a frisk when “nothing in the initial stages of the encounter serves to dispel [the officer’s] reasonable fear for his own or others’ safety.”¹⁵¹ Because firearms *can* be used to assault officers, officers should be permitted to conduct frisks regardless of the legality of possessing and carrying a firearm in that particular state.¹⁵²

143. *Id.* at 490–91.

144. *Id.* at 483.

145. *Id.* at 483–84. The defendant alleged that his Fourth Amendment rights were violated when the officer removed the gun from his waistband. *Id.* at 484.

146. *Id.*

147. *Id.*

148. *Id.* at 490–91.

149. *See id.*

150. “[T]he frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.” *Id.* at 491 (quoting *Adams v. Williams*, 407 U.S. 143 (1972)). In New Mexico, carrying a concealed handgun is legal with a license. N.M. STAT. ANN. § 30-7-2 (2019) (“Unlawful carrying of a deadly weapon consists of carrying a concealed loaded firearm . . . anywhere, except . . . by a person in possession of a valid concealed handgun license issued to him by the department of public safety pursuant to the provisions of the Concealed Handgun Carry Act.”). However, “the New Mexico Court of Appeals [has] held that once a suspect acknowledged he was carrying a concealed loaded handgun, officers had *probable cause* to believe he was ‘committing the crime of unlawfully carrying a deadly weapon’ in violation of N.M. Stat. Ann. § 30–7–2, ‘and could arrest him.’” *Rodriguez*, 739 F.3d at 487 (quoting *State v. Madsen*, 5 P.3d 573, 578 (N.M. Ct. App. 2000)). Accordingly, since the officer directly observed the defendant concealing a handgun, he was permitted to assume it was illegally concealed and could therefore search and seize the defendant. *See id.* at 488.

151. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

152. *See, e.g., Robinson IV*, 846 F.3d 694, 701 (4th Cir. 2017) (“The presumptive lawfulness of an individual’s gun possession in a particular State does next to nothing to negate the reasonable concern an officer has for his own safety when forcing an encounter with an individual who is armed with a gun . . .”), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.); *Rodriguez*, 739 F.3d at 491 (“We will not deny an officer making a lawful investigatory stop the ability to protect himself from an armed suspect whose propensities are unknown.”); *United States v. Orman*, 486 F.3d 1170, 1176–77 (9th Cir. 2007) (“[A]

Officers may even assume that a suspected gun carrier is illegally carrying the firearm.¹⁵³ Because guns can inflict serious harm, the need for officers to promote public safety and complete their duties with limited fear outweighs permissive state gun laws and a gun carrier's right to carry.¹⁵⁴ The "armed and dangerous" standard can therefore be altered to simply read "armed"—an officer can conduct a search when the officer suspects that the person with whom the officer is dealing is armed.

While this side of the split weighs officer safety most heavily, the other side of the split, while acknowledging the importance of officer safety, gives more credence to whether or not the frisked individual was potentially abiding by, or breaking, the particular state's gun laws when carrying the firearm.¹⁵⁵

2. "Armed" Does Not Equal "Dangerous" Under *Terry*

On the other side of the split stand the Sixth and Seventh Circuits, as well as the supreme courts of Arizona, Idaho, and New Mexico, which have held that the "armed and dangerous" standard requires more than simply possessing a firearm or suspicion that a firearm is present.¹⁵⁶

Judge Jeffrey Sutton, writing for the Sixth Circuit in *Northrup v. City of Toledo Police Department*,¹⁵⁷ explained that merely being armed does not make a person "armed and dangerous" in a state that permits public carrying of firearms.¹⁵⁸ In defending his position, Judge Sutton explained:

While open-carry laws may put police officers . . . in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets The Toledo Police Department has no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every "gunman" who lawfully possesses a firearm.¹⁵⁹

Here, the court suggests that the reason the plaintiff cannot be deemed "armed and dangerous" based solely on his possession of a firearm in public is because such possession is entirely legal.¹⁶⁰

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 [The officer] needed to see that the gun was removed from the premises without endangering his safety or the safety of the mall patrons.").

153. See *Rodriguez*, 739 F.3d at 487.

154. See, e.g., *Robinson IV*, 846 F.3d at 701.

155. See *infra* Part II.B.2.

156. See *supra* notes 126–32.

157. 785 F.3d 1128 (6th Cir. 2015).

158. See *id.* at 1132 ("[E]stablished law required [the police officer] to point to evidence that [the plaintiff] may have been 'armed and dangerous.' Yet all [the officer] ever saw was that [the plaintiff] was armed—and legally so." (citation omitted) (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968))).

159. *Id.* at 1133.

160. *Id.*

The Seventh Circuit in *United States v. Leo*¹⁶¹ explained that, given the right to carry a gun in public, courts must resist the suggestion that the possible presence of a weapon inevitably poses a threat justifying a search.¹⁶² Further, the court in *United States v. Williams*¹⁶³ was faced with similar facts to those presented in *Robinson* but held differently; whereas in *Robinson* the court found an anonymous tip in a high-crime area in conjunction with the defendant’s “weird look” to raise reasonable suspicion that the defendant was armed and dangerous (thereby justifying a frisk),¹⁶⁴ here, a 911 call reporting weapons in a high-crime area and the defendant’s avoidance of eye contact with the police officer did *not* justify a frisk.¹⁶⁵ In reaching its decision, the Seventh Circuit explained, “[m]ost people, when confronted by a police officer, are likely to act nervous [and] avoid eye contact . . . thus making such behaviors of very little import to a reasonable suspicion determination”¹⁶⁶ and acknowledged that while a high-crime area might be a factor under *Terry*, it is an insignificant one in this case.¹⁶⁷

In *State v. Serna*,¹⁶⁸ the Arizona Supreme Court emphasized that the second *Terry* prong “involves a dual inquiry; it requires that a suspect be ‘armed *and* presently dangerous.’”¹⁶⁹ However, in *Serna*, the defendant was only “armed,” and possession of a firearm, on its own, is insufficient to label an individual “dangerous.”¹⁷⁰

In this case, two police officers were patrolling a “gang neighborhood” when they observed the defendant and a woman in the middle of the street.¹⁷¹ One of the officers called the defendant over, and he obeyed, acting “cooperative[ly] and polite[ly].”¹⁷² After observing a bulge on the defendant’s waist, the officer asked if he had any firearms, to which the defendant replied that he had a gun.¹⁷³ Subsequently, the officer ordered the defendant to raise his hands above his head, and the officer removed the gun from the defendant’s waistband.¹⁷⁴ The officers then discovered that the defendant was a convicted felon and “arrested him as a prohibited possessor

161. 792 F.3d 742, 748 (7th Cir. 2015).

162. *Id.* at 752.

163. 731 F.3d 678 (7th Cir. 2013).

164. *See generally Robinson IV*, 846 F.3d 694 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

165. *See generally Williams*, 731 F.3d 687.

166. *Id.*

167. *Id.* (“Additionally, while we understand that the fact that a stop occurs in a high-crime area may be a factor under *Terry*, we believe that the rest of the case for a frisk, here, was so weak that this factor cannot save the frisk.”).

168. 331 P.3d 405 (Ariz. 2014).

169. *Id.* at 410 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

170. *Id.* at 410–11.

171. *Id.* at 406–07.

172. *Id.* at 407. In both *Serna* and *Orman*, the defendants, in a consensual encounter in which they agreed to converse with police officers, were characterized as cooperative—not suspect or dubious, which might reasonably put the officers on higher alert. However, the two cases had vastly different outcomes, mostly because of the courts’ interpretation of the *Terry* standard.

173. *Id.*

174. *Id.*

of a firearm.”¹⁷⁵ The defendant “moved to suppress the gun as the fruit of a search that violated his Fourth Amendment rights.”¹⁷⁶

Agreeing with the defendant, the court explained that “[i]n a state such as Arizona that freely permits citizens to carry weapons . . . the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous.”¹⁷⁷ In fact, “[t]o conclude otherwise would potentially subject countless law-abiding persons to patdowns solely for exercising their right to carry a firearm.”¹⁷⁸

Like the Sixth Circuit in *Northrup*, the Arizona Supreme Court acknowledged and sympathized with the need for police officers to protect themselves; however, in light of the legislature’s gun laws, the constitutional and state rights guaranteed to all citizens must not be infringed.¹⁷⁹

Similarly, in *State v. Bishop*,¹⁸⁰ the Idaho Supreme Court acknowledged that “weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger.”¹⁸¹ Here, the police officer thought that the defendant’s “physical body language, [and] everything about [the situation] made [him] *feel* that [Bishop] *could possibly* have a weapon on him.”¹⁸² But the court found that the defendant was not dangerous, as “he did not act threatening, did not have a reputation for violence, did not make any furtive movements, and was cooperative and polite.”¹⁸³ Therefore, the court held the officer’s search unconstitutional and warned that, in a state that permits its citizens to carry firearms, holding an individual in possession to be “dangerous” for *Terry* purposes would justify a police officer frisking anyone he thinks *might* have a gun.¹⁸⁴

Finally, in *State v. Vandenberg*,¹⁸⁵ the New Mexico Supreme Court noted, “[t]o justify a frisk for weapons, an officer must have a sufficient degree of articulable suspicion that the person being frisked is both armed *and* presently dangerous.”¹⁸⁶ Indeed, the court explained that “[a]ny indication in previous cases that an officer need only suspect that a party is either armed *or* dangerous is expressly disavowed.”¹⁸⁷ While this case upholds the defendant’s conviction for illegally possessing marijuana after the police

175. *Id.*

176. *Id.*

177. *Id.* at 410.

178. *Id.*

179. *See id.* at 411 (“While we understand the need for officers to protect themselves in the course of their duties, we must balance that weighty interest against the ‘inestimable right’ of citizens to be free from unreasonable governmental searches and seizures.” (citing *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968))).

180. 203 P.3d 1203 (Idaho 2009).

181. *Id.* at 1218 (citing *State v. Henage*, 152 P.3d 16, 23 (Idaho 2007)).

182. *Id.* at 1218–19.

183. *Id.* at 1218.

184. *See id.* at 1219 n.13 (“If an officer’s bare assertion that a suspect ‘could possibly’ be carrying a weapon was enough to establish that a person posed a risk of danger, officers could frisk any person with whom they come into contact.”).

185. 81 P.3d 19 (N.M. 2003).

186. *Id.* at 25.

187. *Id.*

officer’s legal frisk, it made clear its understanding that, on its own, suspicion of a gun is not sufficient to deem someone “dangerous” under *Terry*.¹⁸⁸

The primary argument underlying this understanding of *Terry* is that a state’s decision to permit its citizens to carry firearms in public should prevent an officer from conducting a frisk merely out of fear that anyone carrying a gun *could* pose a threat to the officer and those in the immediate vicinity.¹⁸⁹ That is not to say that these courts disregard the importance of public safety. They acknowledge it and give it due weight in the analysis but appear to dislike the notion that a law-abiding citizen can be inherently dangerous for doing what the state has given him the freedom to do—that is, carry a firearm in public.¹⁹⁰ The courts defer to the legislature’s decision to permit the state’s citizens to carry firearms and avoid weakening the significance of that decision by holding in a way that materially reduces the freedom that the decision was intended to afford.¹⁹¹

The “armed and dangerous” standard can therefore be altered to simply read “dangerous”—an officer can conduct a search when the officer reasonably believes that the person with whom the officer is dealing is dangerous. And possessing a firearm, on its own, does not make a person dangerous for *Terry* purposes.

III. MERELY BEING “ARMED” SHOULD NOT MAKE ONE INHERENTLY “DANGEROUS” IN PUBLIC CARRY STATES

Federal circuit and state supreme courts have inconsistently determined whether armed individuals in states with lenient “public carry” laws are inherently dangerous based solely on the fact that they are armed.¹⁹² Consequently, individuals exercising their Second Amendment and state-given rights, via *Heller* and *McDonald*, are at risk of having their Fourth Amendment rights to be free from unreasonable searches and seizures restricted. Therefore, *Terry*’s “armed and dangerous” standard should not be interpreted as “armed and *therefore* dangerous” in states that permit citizens to carry firearms, whether concealed or openly, in public. While *Terry* controls Fourth Amendment investigatory stop inquiries, its standard needs to be interpreted and applied in light of evolving understandings of the Second Amendment and state gun laws, which have drastically changed since the 1968 *Terry* opinion.

Part III.A argues that *Terry*’s standard must be reevaluated in light of Second Amendment and state gun law developments that have occurred over the last fifty years. Part III.B explains how “armed and *therefore* dangerous” might require gun carriers to sacrifice one constitutional right to exercise

188. *See generally id.*

189. *See United States v. Leo*, 792 F.3d 742, 752 (7th Cir. 2015); *Bishop*, 203 P.3d at 1218–19.

190. *See Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1133 (6th Cir. 2015); *State v. Serna* 331 P.3d 405, 411 (Ariz. 2014).

191. *See Northrup*, 785 F.3d at 1133.

192. *See supra* Part II.

another and argues that the potential for a legal gun carrier to pose a threat is not significantly more important than maintaining the integrity of constitutional rights.

A. 1968 to Today: Expanding Gun Rights

As this Note highlights, *Terry*, decided in 1968, has led to inconsistent results around the country regarding the inherent dangerousness of an individual possessing a firearm in a state legally permitting its citizens to possess one.¹⁹³ But over fifty years has passed since *Terry*, and the legal landscape of the Second Amendment and gun ownership rights has changed.¹⁹⁴ *Heller*, decided in 2008, gave Americans the individual right to possess firearms in the home for self-defense, and two years later, *McDonald* extended the Second Amendment rights recognized by *Heller* to the states.¹⁹⁵

In 1968, it was illegal for anyone other than a police officer to carry a concealed firearm in Ohio.¹⁹⁶ Under these circumstances, as soon as the officer had reasonable suspicion to believe the defendant was armed, he technically also had reason to believe that his life or that of others was in danger.¹⁹⁷ But today, Ohio is a “shall issue” state, which means that the state must issue a concealed carry license to anyone who applies for a license, meets certain criteria, and passes certain courses.¹⁹⁸ Therefore, while the presumption that holds anyone possessing a firearm to be inherently dangerous made sense under the 1968 law, it does not make sense today—reasonable suspicion that an individual is “armed” does not mean that he illegally possesses the firearm or is otherwise breaking the law.¹⁹⁹ Presently, people have more expansive gun possession rights than in the past,²⁰⁰ and these rights should play a larger role in *Terry* analyses.

Northrup exemplifies how today’s gun laws should be considered in comparison to a *Terry* analysis occurring in 1968. The case, like *Terry*, took place in Ohio, and the Sixth Circuit focused on the legality of firearm possession in the state to adopt a baseline assumption that one’s possession of a firearm is not illegal until an officer proves that it is.²⁰¹ In requiring

193. See *supra* Part II.

194. See *supra* Part I.A.

195. See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

196. *Terry v. Ohio*, 392 U.S. 1, 4 n.1 (1968).

197. Because the law forbade citizens from carrying a concealed firearm, it follows that anyone breaking this law and concealing a firearm poses a threat to the officer’s safety or to the safety of others since the officer would not ordinarily expect an individual to conceal a firearm.

198. See JOHNSON ET AL., *supra* note 40, at 735.

199. See *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (“[A]s public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt.”).

200. See *supra* Part I.A.

201. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132 (6th Cir. 2015) (“Where it is lawful to possess a firearm, unlawful possession ‘is not the default status.’” (quoting *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013))).

officers to highlight environmental factors other than firearm possession in search analyses, the court explained that Ohioans have placed their trust in “their State’s approach to gun licensure and gun possession,” and therefore, the state’s lenient stance on gun possession signifies that an individual cannot be “dangerous” for *Terry* purposes solely because an individual is “armed.”²⁰²

Comparing these two Ohio cases is critical, as it demonstrates the differences in judicial analysis based on the relevant status of gun laws at the time. Between 1968 and 2015, Ohio’s stance on gun laws changed.²⁰³ Interestingly, but not surprisingly, the two courts’ holdings aligned with the state’s gun laws at the time. But the Fourth Circuit in *Robinson*, on the other hand, held in an unexpected way. West Virginia, like Ohio, is a “shall issue” state and allows open carry;²⁰⁴ yet, the Fourth Circuit still essentially held that “armed” equals “dangerous.”²⁰⁵ Therefore, not only is *Terry*’s standard *inconsistently* interpreted nationwide (as evidenced by the circuit split) but it is also *unpredictably* interpreted—courts’ interpretations of *Terry* do not always align with the particular state’s gun laws.²⁰⁶ To complicate matters further, in some states, state courts hold one way while federal courts hold another.²⁰⁷ It is therefore clear that something needs to be done to remedy the confusion.

Terry’s framework might not be insufficient, but its interpretation cannot be arbitrary—especially in the modern era wherein gun possession is a right freely exercised and permitted in many states. Because the U.S. Supreme Court has granted Americans the right to possess firearms,²⁰⁸ and further

202. *Id.* at 1133. This Note does not intend to debate whether a particular state’s stance on gun possession is correct. Rather, it intends to interpret and apply a standard with significant Fourth Amendment privacy implications in a just and constitutional fashion. Therefore, if a state has lenient gun laws, then those laws must protect the rights they enshrine (e.g., gun rights), rather than allowing other laws or judicial interpretations (e.g., “armed” equals “dangerous”) to attack those rights.

203. *Terry* elucidates that nobody could carry a concealed firearm in 1968. *See supra* notes 196–98. Currently, Ohio is a “shall issue” state, which allows its citizens to carry a concealed firearm with a permit. JOHNSON ET AL., *supra* note 40, at 735.

204. *See Ohio*, OPENCARRY.ORG, <https://opencarry.org/state-info-n-s/ohio/> [<https://perma.cc/7T7J-RB4C>] (last visited Nov. 12, 2019) (summarizing Ohio’s open carry policy); *West Virginia Gun Carry Laws: Updated Concealed Carry Guide*, GUNS TO CARRY, <https://www.gunstocarry.com/gun-laws-state/west-virginia-gun-laws/> [<https://perma.cc/XJ6J-3P8G>] (last visited Nov. 12, 2019) (outlining West Virginia’s “shall issue” and open carry policies).

205. *See Robinson IV*, 846 F.3d 694, 701 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

206. *See generally id.*

207. *Compare* *United States v. Rodriguez*, 739 F.3d 481 (10th Cir. 2013) (holding that “armed” equals “dangerous” at the Tenth Circuit, which has jurisdiction over the District of New Mexico), *and* *United States v. Orman*, 486 F.3d 1170 (9th Cir. 2007) (holding that “armed” equals “dangerous” according to the Ninth Circuit, which has jurisdiction over the District of Arizona), *with* *State v. Serna*, 331 P.3d 405 (Ariz. 2014) (holding that “armed” does not inherently mean “dangerous” at the Arizona Supreme Court), *and* *State v. Vandenberg*, 81 P.3d 19 (N.M. 2003) (stating that “armed” does not inherently mean “dangerous” at the New Mexico Supreme Court).

208. *See generally* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

incorporated that right against the states,²⁰⁹ which are each comprised of elected officials supposedly representative of each state's interests, it follows that states are in the best position to either interpret *Terry* and apply its standard or weigh in as to the inherent dangerousness of gun possessors. Courts, therefore, should consult the state's gun laws when determining the inherent dangerousness of a gun possessor in that particular state.

Moreover, "[s]tates [have] great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."²¹⁰ Consequently, considering that many states *did* legislate to allow for the public carrying of firearms,²¹¹ neither the federal government nor the judiciary should categorically deem every gun carrier "dangerous." States have entrusted their citizens to carry guns safely,²¹² and, as such, the inherent dangerousness of a gun carrier should reflect those states' decisions. While allowing people to publicly carry firearms cannot change Fourth Amendment law, "it does change the facts on the ground to which Fourth Amendment standards apply."²¹³ And given that circumstances have changed to the point that publicly carrying firearms is not illegal or unusual, "courts must take into account that changed circumstance in applying the familiar *Terry* standard."²¹⁴

Therefore, *Terry*'s disputed, unclear language regarding the inherent dangerousness of a gun carrier should be interpreted to reflect the states' views towards gun possession. In states that broadly permit their citizens to carry firearms, like West Virginia, "armed" should be distinct from "dangerous," especially when the police confrontation stems primarily from a routine traffic violation, like in *Robinson*. Thus, given the evolution of gun rights and the current arbitrariness in courts' views towards a gun carrier,²¹⁵ the leniency or strictness of a state's public carry gun laws should dictate a court's decision on the issue.

B. The Threat a Gun Carrier Could Potentially Pose Is Not a Significantly Greater Public Policy Consideration Than Maintaining Constitutional Rights

If gun carriers are deemed inherently dangerous, then the Fourth Amendment does little to protect them against searches and seizures. As of now, it is apparently not unreasonable for an officer to search a law-abiding,

209. See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

210. *Robinson IV*, 846 F.3d at 706 (Wynn, J., concurring) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006)).

211. See *supra* notes 40–47 and accompanying text.

212. *Robinson IV*, 846 F.3d at 708 (Harris, J., dissenting).

213. *Id.*

214. *Id.* These changed circumstances should sway courts away from adopting such a bright-line rule that *Terry*'s "armed and dangerous" standard is a unitary concept, wherein an "armed" individual is "per se dangerous" in states that permit their citizens to carry firearms in public. *Id.* at 707.

215. See *supra* notes 202–08 and accompanying text.

gun-carrying individual without further inquiry in some states.²¹⁶ The Fourth Amendment, therefore, is not guaranteed to gun carriers—it is a protection that they may need to sacrifice if they want to exercise their Second Amendment and state-given rights to publicly carry firearms.²¹⁷ On the other hand, to preserve Fourth Amendment protections, they may need to sacrifice their rights to carry firearms. Americans should not have to opt out of one right to opt into another—the two rights should be exercisable concurrently.²¹⁸ But that does not appear to occur with the “armed and therefore dangerous” understanding of *Terry*.²¹⁹ Relying on a state’s gun laws to determine the inherent dangerousness of a gun carrier would help resolve this issue.

Promoting police protection and public safety are important public policy considerations.²²⁰ Guns undoubtedly have the potential to inflict serious harm, and so, reducing the already small probability of a legal gun carrier using his or her firearm inappropriately²²¹ to zero likely makes police officers feel more secure.²²² But the potential to inflict serious harm is a central reason that firearms are carried in the first place—for self-defense.²²³

The undisputed point of a police officer’s authority to conduct a limited search of an individual suspected of carrying a firearm is to protect the officer and surrounding area from a potentially dangerous situation.²²⁴ And the inquiry has always been an objective one that takes into account the totality

216. See, e.g., *Robinson IV*, 846 F.3d at 701 (holding a gun possessor to be inherently dangerous for *Terry* purposes); *United States v. Rodriguez*, 739 F.3d 481, 491–92 (10th Cir. 2013) (same); *United States v. Orman*, 486 F.3d 1170, 1176–77 (9th Cir. 2007) (same).

217. See *Robinson IV*, 846 F.3d at 706 (Wynn, J., concurring) (“[T]he majority decision today necessarily leads to the conclusion that individuals who elect to carry firearms forego other constitutional rights, like the Fourth Amendment”); *id.* at 711 (Harris, J., dissenting) (“[B]y equating ‘armed’ with ‘dangerous’ even in states where the carrying of guns is widely permitted, the majority’s [‘armed’ is per se ‘dangerous’] rule has the effect of depriving countless law-abiding citizens of what otherwise would be their Fourth Amendment and other constitutional rights.”).

218. As seen in Part I.B, *Entick*—although an old British case—illustrates the point. See *supra* note 51 and accompanying text. The holding in that case, although not directly, protects the exercise of one constitutional right from eliminating another. See *supra* note 51 and accompanying text. What would be *Entick*’s freedom of speech and press rights under the First Amendment (had this been an American case after the adoption of the Bill of Rights) does not infringe on what would be his Fourth Amendment protections prohibiting general warrants. See *supra* note 51 and accompanying text. This means that he would not need to sacrifice his Fourth Amendment protection to exercise his freedom of speech and press rights, and vice versa. See *supra* note 51 and accompanying text. The same should be the case here—one should not sacrifice Fourth Amendment search and seizure protections for exercising the state-given and Second Amendment right—emanating from *Heller* and *McDonald*—to publicly carry a gun, and vice versa.

219. See *State v. Serna*, 331 P.3d 405, 410 (Ariz. 2014).

220. See *supra* Part II.B.1.

221. See Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 32–33 (2015) (explaining that legally licensed gun possessors rarely use their firearms to commit violent crimes).

222. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

223. See *supra* text accompanying note 110.

224. See, e.g., *Terry*, 392 U.S. at 30.

of the circumstances.²²⁵ The only aspect that needs to be reconsidered is the entitlement to search upon minimal suspicion that the individual possesses a firearm. A gun can be a factor in the objective analysis of whether the individual is dangerous enough to warrant a frisk, but a situation or person is not inherently dangerous merely because someone possesses a gun where possession is not illegal.²²⁶ Claiming that “armed” does not automatically mean “dangerous” also does not mean that guns are inherently safe, or lack the potential to inflict harm.²²⁷ It simply means that the totality of the circumstances condition should not be met as soon as the officer suspects a firearm is present.²²⁸

Holding that an armed individual is not inherently dangerous does not minimize the officer’s authority to promote public safety in dangerous situations. Differentiating between “armed” and “dangerous” protects law-abiding gun carriers from the unnecessary “petty indignity”²²⁹ of a search solely because the gun carrier is exercising the right to carry a firearm.²³⁰ But this does not eliminate a police officer’s ability to search an individual who the officer has reason to believe poses a threat—the threat just needs to be beyond mere gun possession,²³¹ which, as a default status, is not illegal.²³²

“Armed” means that one is equipped with a weapon.²³³ But courts have interpreted “weapons” to be numerous everyday objects, including a baseball bat, a sharpened pencil, a rope, and even a stick.²³⁴ Therefore, interpreting *Terry*’s standard as a unitary concept is an “absurdity” that permits an officer to frisk any individual “armed” with any everyday object that could conceivably be used as a “weapon.”²³⁵ It also permits the officer to ignore

225. See, e.g., *State v. Vandenberg*, 81 P.3d 19, 25 (N.M. 2003).

226. See, e.g., *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132 (6th Cir. 2015).

227. See *Robinson IV*, 846 F.3d 694, 708 (4th Cir. 2017) (Harris, J., dissenting) (“Guns, of course, are in some sense intrinsically dangerous. But the question under *Terry* is whether a person carrying a gun is a danger to the police or others.”), *cert. denied*, 138 S. Ct. 379 (Oct. 30, 2017) (No. 16-1532) (mem.).

228. See *Robinson I*, No. 3:14-CR-28, 2014 WL 4064038, at *13 (N.D.W. Va. Aug. 8, 2014) (explaining that everyone carrying a gun will be at risk of having their privacy violated if “armed and therefore dangerous” is the standard), *report and recommendation adopted in part and rejected in part*, No. 3:14-CR-28, 2014 WL 4064035 (N.D.W. Va. Aug. 14, 2014).

229. *Terry*, 392 U.S. at 17.

230. See *Robinson IV*, 846 F.3d at 707 (Harris, J., dissenting).

231. See, e.g., *Robinson I*, 2014 WL 4064038, at *14.

232. See *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132 (6th Cir. 2015) (“Where it is lawful to possess a firearm, unlawful possession ‘is not the default status.’” (quoting *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013))).

233. See *Robinson IV*, 846 F.3d at 703 (Wynn, J., concurring).

234. See *id.* at 703–04 (quoting *Wright v. New Jersey*, 469 U.S. 1146, 1149 n.3 (1985)).

235. See *id.* at 703. Considering the absurd objects that one could be “armed” with further demonstrates that one is not dangerous merely because one is armed. Rather, an individual is dangerous because of the totality of the circumstances that indicate that he or she poses a threat. A woman “leaving a convenience store ‘armed’ with a bottle of wine” can hardly be considered dangerous for holding the bottle of wine. *Id.* But she could be dangerous if the totality of the circumstances suggests that she intends to inflict harm upon another or commit an unlawful act.

the true totality of the circumstances—including whether the state legislature has acted to enable state citizens to openly carry firearms.²³⁶

While public safety and preserving constitutional rights are both important policy considerations, it is difficult to conclude that one is significantly more important than the other in this context. Requiring police officers to point to other objective indicators of dangerousness beyond mere gun possession might “engender serious safety concerns,”²³⁷ but it does not significantly reduce their ability to conduct investigatory stops safely. Nothing prevents an officer from deeming a gun carrier “dangerous” if the attendant situation suggests as much—an officer cannot just *assume* that a gun carrier is “dangerous” merely for carrying a gun when the state permits its citizens to carry firearms.²³⁸ On the other hand, holding a gun possessor to be inherently dangerous “has the effect of depriving countless law-abiding citizens of what would otherwise be their Fourth Amendment and other constitutional rights.”²³⁹ Consequently, the threat that a gun possessor *could* conceivably pose does not warrant the certain interference with the integrity of his or her constitutional rights.

Because each state has its own gun laws, a blanket statement such as “armed and therefore dangerous” clashes with the idea that elected officials are, and have always been, representative of the state’s people.²⁴⁰ The state’s elected officials implement gun legislation,²⁴¹ and, as such, having the judiciary step in and delegitimize the state legislature’s authority by creating dissonance between the state’s laws and police’s investigatory procedures is inappropriate unless the state’s laws are unconstitutional. To fix this, courts should strongly consider a state’s gun laws when confronted with *Terry* situations in the future and require more than mere possession of a firearm to conduct a frisk in states that permit their citizens to carry firearms in public.

CONCLUSION

Terry’s “armed and dangerous” standard, which permits police officers to conduct searches of individuals perceived to pose a threat to the officers’ or general public’s safety, has led circuit and state supreme courts to resolve similar cases differently. The dispute among the courts as to whether an “armed” individual is inherently “dangerous” solely for carrying a firearm implicates the Fourth and Second Amendments, as well as state gun laws. The Fourth Amendment right to be free from unreasonable searches and seizures is integral to Americans’ privacy interests and to their protection from overzealous governmental intrusion into personal matters. The Second

236. *See, e.g., State v. Vandenberg*, 81 P.3d 19, 25 (N.M. 2003).

237. *See Robinson IV*, 846 F.3d at 716 (Harris, J., dissenting).

238. *See, e.g., Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132 (6th Cir. 2015).

239. *Robinson IV*, 846 F.3d at 711 (Harris, J., dissenting).

240. *See, e.g., GA. CONST. of 1777*, art. II (“The legislature of this State shall be composed of the representatives of the people . . .”).

241. *See Robinson IV*, 846 F.3d at 708 (Harris, J., dissenting) (explaining that after *Heller* and *McDonald*, state laws were enacted to expand public carry rights).

Amendment, as interpreted by *Heller*, incorporated against the states by *McDonald*, and expanded by state laws to permit individuals to openly carry firearms in public, provides Americans with the means to defend themselves against outside threats.

Given the role that these rights have played throughout American history, and continue to play today, infringing upon either must not be tolerated unless there is a significantly greater opposing interest at stake. The need to protect officers and the general public from gun carriers who might legally possess their firearms, while important, is not a significantly greater interest that warrants interfering with the integrity of gun carriers' constitutional and state-given rights in states that have passed laws to allow their citizens to openly carry firearms in public. Further, because American gun rights have considerably evolved since the 1968 *Terry* opinion, the standard for a police officer to bypass one's Fourth Amendment rights and conduct a search should reflect today's gun rights in a particular state rather than reflecting the more restrictive gun rights in place in 1968. Therefore, in states with permissive gun laws that allow their citizens to carry firearms in public, objective factors other than suspicion or knowledge that a firearm is present should be required for an officer to conduct a search. In these states, merely being "armed" should not automatically make one "dangerous" and subject to a police search.