



ARTICLES

Frisking Every Suspect: The Withering of *Terry*

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INTRODUCTION

More than twenty-five years after *Terry v. Ohio*,¹ the use of stops and frisks² to control crime still generates controversy.

*** Five thousand tenants of a Chicago public housing project join in support of police plans for warrantless searches to fight violent crime.³ When a judge finds the police action unconstitutional,⁴ President Clinton himself makes his own proposal: Warrantless searches with prior consent, and heavy reliance on stops and frisks.⁵

*** In the wake of the beating of Rodney King, the *Los Angeles Times* reports that most black men in Los Angeles can recount numerous instances in which police have stopped, frisked, and harassed them, sometimes inflicting injuries.⁶ They recount what they call "The Routine" — a procedure used by Los Angeles police officers when they stop a suspect. The police force the male suspect to kneel on the pavement, fingers laced behind his neck, and frisk him. The officers then force the suspect to lie

¹ 392 U.S. 1 (1968).

² The terms "stop" and "frisk" refer to distinct police procedures which are often functionally related and are usually considered together. See Wayne R. LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 40 n.3 (1968) [hereafter LaFave, *Street Encounters*]. A "stop" occurs when police temporarily detain a person, for purposes of investigatory questioning, reasonably suspected of being involved in criminal activity. See 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.2(b), at 22 (1978). A "frisk" occurs when a police officer conducts a cursory search "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29; see also *infra* text accompanying notes 53-57 (presenting *Terry* Court's analysis of stop and frisk).

³ See Lynn Sweet, *Clinton Unveils Tailored 7-Point Sweeps Policy*, CHI. SUN-TIMES, Apr. 17, 1994, at A3 (reporting that Federal Judge Wayne Anderson declared Chicago Housing Authority warrantless searches unconstitutional).

⁴ *Id.*

⁵ The Clinton plan calls for "consent searches" of homes and advocates that "[s]top-and-frisks, already legal if a police officer is suspicious of a person, should be increased. . . ." *Id.*; see also Ronald Brownstein, *Frisk for Guns at Housing Projects, Panel Urges*, L.A. TIMES, Apr. 13, 1994, at A24 (reporting on task force proposal urging "more aggressive frisking . . . in and around public housing projects"). Proposals calling for increased frisking continue to be made despite the availability of less intrusive tactics that do not compromise tenants' rights. See David A. Harris, *Warrantless Searches Are Useless*, S.F. DAILY J., May 11, 1994 (calling for better police protection for public housing tenants instead of requiring them to relinquish their rights in order to be safe).

⁶ Stephen Brown, *Black Men, LAPD — A Mix of Bitterness and Suspicion*, L.A. TIMES, Dec. 16, 1991, at A1.

“prone out,” face down on the ground.⁷ As a reporter discusses the subject with several men, police cars appear suddenly at a house just down the street. Officers use “The Routine” on four young black men sitting in the yard.⁸ The officers make no arrests.⁹

*** In an essay in *The New York Times Magazine*, Professor James Q. Wilson suggests a way to stem the rising tide of violent crime: “Just Take Away Their Guns.”¹⁰ Wilson recommends that police increase the use of frisks to detect and remove weapons.¹¹ He says that those frisks could be based simply on gang membership.¹² He acknowledges that his solution undoubtedly means that “[i]nnocent people will be stopped,” and that decisions by police on whom to frisk would almost surely have a racial cast: “Young black and Hispanic men will probably be stopped more often than [others].”¹³ But he believes that increased police frisking of these citizens is a fair price to pay to fight crime.¹⁴

In this Article, I focus on the issue of whom the police may frisk. Largely ignored by the Supreme Court, this question seems ready to overtake *Terry*.

Terry established that officers could stop suspects, and that they could do so with less than probable cause. But the Supreme Court has always maintained that police could perform frisks — pat-down searches of the outer clothing of suspects —

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES, Mar. 20, 1994, § 6 (Magazine), at 46.

¹¹ *Id.* at 47.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* To be sure, deciding whether this “price” is fair should include distributive questions. Young black and Hispanic men likely would bear the cost of this measure, with whites and others being frisked no more than usual. It is also worth noting that not everyone agrees with Wilson’s assertion that police currently only frisk few people, at least insofar as minority communities are concerned. See, e.g., Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1 (reporting that blacks and Latinos feel their neighborhoods receive disproportionate share of aggressive frisks and other illegal search and seizure tactics). See generally Tracey Maclin, “Black and Blue Encounters” — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U.L. REV. 243 (1991) (cataloging numerous instances of police use of aggressive stop and frisk tactics against blacks).

only if the officer suspected a violent crime was afoot, or if the individual suspect showed some sign of being armed and dangerous.¹⁵ Perhaps as a result of the high-visibility use of frisks as a contemporary crime control device, or because of general public antipathy to crime, lower courts have stretched the law governing frisks to the point that the Supreme Court might find it unrecognizable. Lower courts have consistently expanded the *types of offenses* always considered violent regardless of the individual circumstances.¹⁶ At the same time, lower courts have also found that certain *types of persons and situations* always pose a danger of armed violence to police. When confronted with these offenses, persons, or situations, police may *automatically* frisk, whether or not any individualized circumstances point to danger.¹⁷ Soon, *anyone* stopped by police may have to undergo a physical search at the officer's discretion, however benign the circumstances of the encounter or the conduct of the "suspect." At that point,¹⁸ the *Terry* stop and frisk will become what the Supreme Court has repeatedly said¹⁹ — and still says²⁰ — it will never be: a device for gathering evidence, pure and simple. The "specifically established and well delineated [*Terry*] exception"²¹ that purported to allow a limited search only in dangerous circumstances will have completely swallowed the rule. Without immediate change, the lower court cases governing frisks

¹⁵ See *infra* text accompanying notes 52-59 (discussing Supreme Court's analysis of procedure police must follow in frisking suspect as set forth in *Terry v. Ohio*, 392 U.S. 1 (1968)).

¹⁶ See *infra* notes 128, 132-37 and accompanying text (explaining that lower federal and state courts have been expanding types of offenses considered violent for purposes of frisks).

¹⁷ See *infra* notes 128, 132-46 and accompanying text (surveying numerous circumstances that allow police to frisk suspects).

¹⁸ Some might argue that we have reached that point already, at least for citizens who are members of minority groups. See *infra* text accompanying notes 188-93 (noting that minority group members sustain disproportionate share of indignities and rights violations as result of frisks).

¹⁹ See, e.g., *Adams v. Williams*, 407 U.S. 143, 146 (1972) (declaring that purpose of frisk "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence").

²⁰ *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2136 (1993) (stating that frisks may be used only to find weapons, not to gather evidence).

²¹ *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

threaten to turn the language in *Terry* that carefully restricted the scope of stops and frisks into empty words.

If the *Terry* frisk is to remain the very limited creature that the Supreme Court says it still intends the *Terry* frisk to be, the Court must make clear that a frisk may follow a stop *only* if the suspected offense *necessarily involves weapons, force, or violence*. If the offense can occur without violence, a frisk should only be allowed if the officer harbors a reasonable, articulable suspicion that the particular individual involved is armed and dangerous.²²

Courts should also change the way they judge the legitimacy of an officer's frisk of a suspect. Currently, courts defer to police testimony to such a degree that they have abdicated their roles as evaluators of the facts. Instead, courts should treat police testimony on frisks with at least the same skepticism that they use elsewhere.²³ Only by making these changes can courts ensure that police use stops and frisks solely for their own protection and not for evidence gathering.

If, on the other hand, we now think that only *automatic* frisks following *every Terry* stop can make officers safe, we should be willing not only to say so directly, but also to confront the full range of consequences of that conclusion. When we face what automatic frisks actually mean, we will see that they are both unwarranted and unwise.

Part I explores the foundations of the *Terry* doctrine, and focuses on the Supreme Court's cases involving frisks. As its most recent explication of *Terry* shows, the Court continues to try to maintain *Terry*'s original character. But Part II illustrates that lower courts have pushed the law toward the nearly automatic use of frisks in an ever-increasing number of cases. Part III discusses the dangers lurking in this approach; Part IV examines solutions.

²² See *infra* text accompanying notes 206-08 (proposing that Supreme Court limit lawful frisks to circumstances involving individuals suspected of being armed and dangerous).

²³ See *infra* text accompanying notes 207-09 (arguing that courts should not accord special deference to police testimony).

I. FROM *TERRY* TO THE PRESENT: THE SUPREME COURT'S CASES ON FRISKS

A. *The Context of Terry*

Police had used the stop and frisk technique against suspects on the streets for years before 1968; it did not originate with *Terry*.²⁴ Indeed, some states had even adopted statutes codifying the practice.²⁵

As *Terry* came to the Supreme Court, two sets of concerns loomed in the background, perhaps even overshadowing the niceties of legal doctrine and the intellectual filigree of the Court's careful work. First, American society seemed to be fraying at the edges. A palpable climate of unrest had settled over the nation. Campuses seethed with demonstrations opposing the Vietnam conflict.²⁶ Cities across the country experienced widespread rioting in the wake of the assassination of Dr. Martin Luther King.²⁷ These events seemed only to underscore the general escalation of crime.²⁸ When presidential candidate Rich-

²⁴ See Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991) (recounting widespread use and abuse of warrantless searches and seizures on the street against African-Americans). For a survey of the many articles concerning stops and frisks prior to *Terry*, see LaFave, *Street Encounters*, *supra* note 2, at 40 n.4.

²⁵ See, e.g., N.Y. CRIM. PROC. LAW § 140.5 (McKinney 1992) (same statute as discussed in *Sibron v. New York*, 392 U.S. 40, 43-44 (1968), decided the same day as *Terry*).

²⁶ The most dramatic example of the numerous demonstrations involved four students who were killed by National Guardsmen at Kent State University. See generally *Sheuer v. Rhodes*, 416 U.S. 232 (1974) (discussing civil rights suits arising from deaths at Kent State demonstrations).

²⁷ See, e.g., *Widespread Disorders*, N.Y. TIMES, Apr. 5, 1968, at A1 (recounting nationwide outbreaks of violence that occurred in wake of King's murder); see also *Looting . . . Arson . . . Death . . . As Riots Sweep U.S. Cities*, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 12 (summarizing reports of riots in New York, Memphis, Nashville, Detroit, Minneapolis, Chicago, and other cities); *Mobs Run Wild in the Nation's Capital*, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 8 (reporting rioting in Washington, D.C., where "Negro mobs terrorized the Nation's capital, burning, looting, beating whites, attacking police and firemen and threatening wholesale slaughter.").

²⁸ See, e.g., Brief for Respondents at 6, *Sibron v. New York*, 392 U.S. 40 (1968) (No. 63) (pointing out that the "struggle between forces of order and crime had reached such intensity" that the outcome was uncertain); see also Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 538-39 (stating that *Terry* decision reflected tensions in society at large).

ard Nixon promised that police would restore respect for the law by righting the wrongs of the Warren Court's liberal jurisprudence,²⁹ voters responded.

Second, the issue of race had come to the fore. The marches, demonstrations, and litigation of the civil rights movement — along with the anger and bigotry that these events sometimes evoked³⁰ — were at their peak. The murder of Dr. King put a sharper point on the whole debate; the main advocate of non-violent resistance to racial injustice had himself suffered a violent death. A central concern of those struggling for racial equality was the mistreatment of African-Americans by largely white police departments all over the country. In African-American communities, police officers *were* the law; whatever brutality and street justice they chose to mete out to black citizens simply had to be endured, without recourse.³¹ Indeed, the abuse of African-Americans through the use of stops and frisks — the very practice at issue in *Terry* — had become so pervasive that the President's Commission on Law Enforcement and the Administration of Justice addressed the subject directly in 1967:

Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt "aggressive patrol" in which officers are encouraged routinely to stop and question persons on the street³²

²⁹ See, e.g., Robert B. Semple, Jr., *Nixon Decries 'Lawless Society' and Urges Limited Wiretapping*, N.Y. TIMES, May 9, 1968, at A1. Nixon's comments decriing Supreme Court decisions as "go[ing] too far in weakening the peace forces as against the criminal forces" received strong approval. *Id.*; see also *Nixon Links Court to Rise in Crime*, N.Y. TIMES, May 31, 1968, at A18 (reporting that presidential candidate Nixon accused Supreme Court of "giving the 'green light' to 'the criminal elements' in this country").

³⁰ See, e.g., Donald Janson, *Dr. King and 500 Jeered In 5-Mile Chicago March*, N.Y. TIMES, Aug. 22, 1966, at A1 (reporting that during fair housing march through white neighborhoods, Dr. King was met by 2000 whites, many of whom hurled objects and insults); Gene Roberts, *Rock Hits Dr. King As Whites Attack March in Chicago*, N.Y. TIMES, Aug. 6, 1966, at A1 (reporting on injuries to Dr. King and others in Chicago march as crowd of whites raged out of control and battled policemen in white residential area).

³¹ See Williams, *supra* note 24, at 568-73 (describing police abuse of author's father and racially abusive overtones of police work in African-American communities); see also NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 299-314 (1968) (describing racial harassment of African-Americans through, inter alia, "aggressive street patrol" and "intensive, often indiscriminate, street stops and searches").

³² TASK FORCE ON THE POLICE, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

Thus race, especially mistreatment of African-Americans by the police, formed a significant part of the backdrop of *Terry*.

B. *The Terry Case*

The central character in *Terry*, Officer McFadden, was a veteran's veteran of the Cleveland Police Department: thirty-nine years on the job, thirty spent patrolling the same area of downtown Cleveland.³³ As he passed by a store one day on a street he had walked countless times, he noticed something unusual. He saw two men, each of whom took turns walking slowly back and forth in front of the store window while looking inside, eventually returning to the spot where the other stood for some brief conversation. He observed a dozen such trips.³⁴ A third man joined and spoke to the first two at one point and then walked away; the first two men eventually left on foot, joining the third man just a couple of blocks from the store.³⁵ McFadden's experience told him the men might be "casing" the store for a daylight robbery, probably an armed one.³⁶ Although he did not have probable cause to seize or to search the men,³⁷ McFadden stopped the men and asked them who they were.³⁸ When he received unsatisfactory answers, he spun the defendant around and frisked him, patting down his outer clothing, and found a pistol.³⁹

As it worked its way to the Supreme Court, *Terry* attracted widespread attention. Law enforcement was especially anxious for the Court to affirm the constitutionality of stops and frisks and increase the power of police over criminal suspects.⁴⁰ In

ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

³³ *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 7-8 (quoting with approval trial court's finding that Officer McFadden did not have probable cause).

³⁸ *Id.* at 7.

³⁹ *Id.*

⁴⁰ Amicus briefs urging the Court to affirm the conviction were filed by not only the United States Government and the State of New York, but also by others including the National District Attorneys' Association and Americans for Effective Law Enforcement. *Id.* at 4. *But see* LaFave, *Street Encounters*, *supra* note 2, at 42 (arguing that law enforcement's interests are satisfied by low legal visibility of stops and frisks).

one of its most eagerly awaited opinions in years,⁴¹ the Supreme Court gave law enforcement most of what it needed, even if not all that it wanted. For the first time, the Court explicitly condoned the use of stops and frisks to address street crime, and allowed them without probable cause.

The Court began by rejecting the argument that Officer McFadden's stopping and frisking of the defendant did not constitute a "real" search or seizure for Fourth Amendment purposes.⁴² But in almost the same breath, the Court permitted something it never had before.⁴³ Balancing the "limited"⁴⁴ and "brief"⁴⁵ nature of the intrusions that stops and frisks entailed against the needs of law enforcement to attack crime⁴⁶ and protect officers stopping suspects,⁴⁷ the Court decided to allow searches and seizures upon *less* than probable cause. Because a stop detained a person only briefly and a frisk intruded upon a person in only a limited way,⁴⁸ and because law enforcement needed a tool to address dynamic street encounters between

⁴¹ Indeed, the newspaper headlines generated by *Terry* were as big as any generated by any of today's most controversial cases. See, e.g., William Kling, *Stop, Frisk Upheld by High Court*, CHI. TRIBUNE, June 11, 1968, at A1; Tom Littlewood, *High Court Upholds "Stop, Frisk,"* CHI. SUN-TIMES, June 11, 1968, at A3.

⁴² *Terry*, 392 U.S. at 16-19. The Court rejected the state's characterization of the officer's actions as a mere "minor inconvenience and petty indignity," *Id.* at 10 (quoting *People v. Rivera*, 201 N.E.2d 32, 36 (N.Y. 1964)). Instead, the Court declared that stops and frisks constitute "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Id.* at 17. The Court refused to create any category of lesser intrusions not subject to Fourth Amendment scrutiny. *Id.* at 19.

⁴³ Prior to *Terry*, any intrusion upon a citizen's person or liberty required probable cause as an absolute prerequisite. See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 661 (1994). The police had to show probable cause to believe that a crime had been committed. In addition, in the case of a seizure of a person, the police also had to show that the person to be seized had committed the crime. In the case of a search, the police had to show that the evidence, fruits, or instrumentalities of the crime would be found in the search. See *Terry*, 392 U.S. at 35-37 (Douglas, J., dissenting) (examining pre-*Terry* requirements for lawful searches and seizures). Before *Terry*, police either had probable cause or they did not; no middle ground existed. See *id.* (noting that police had previously been held to probable cause standard for lawful searches and seizures).

⁴⁴ *Terry*, 392 U.S. at 24. Note, however, that the Court also characterized the intrusion as a "severe, . . . annoying, frightening and perhaps humiliating experience." *Id.* at 24-25.

⁴⁵ *Id.* at 25.

⁴⁶ *Id.* at 22.

⁴⁷ *Id.* at 23.

⁴⁸ *But see supra* text accompanying note 42 (discussing Supreme Court's refusal to characterize stops and frisks as minor inconvenience or petty indignity).

citizens and police, the Court allowed officers to stop suspects whenever they possessed a “reasonable suspicion” that crime was afoot.⁴⁹ A reasonable suspicion was less than probable cause, but it required more than an “unparticularized suspicion” or a bald hunch.⁵⁰ Rather, the officer would have to articulate the reasons — based on experience and observations — that made her suspicious.⁵¹ The proper question, the Court said, would be whether the officer could “point to specific and articulable facts which, taken together with rational inferences drawn from those facts,” would “warrant a [person] of reasonable caution in the belief that the action taken was appropriate?”⁵²

The Court analyzed police use of stops and frisks in two steps, beginning with the stop. First, the stop must be reasonable at its inception.⁵³ Second, once an officer has properly stopped a

⁴⁹ *Terry*, 392 U.S. at 30.

⁵⁰ *Id.* at 27.

⁵¹ *Id.*

⁵² *Id.* at 21-22. The *Terry* Court emphasized the requirement that searches must be reasonable throughout the opinion. For example, it stated: “For ‘what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.’” *Id.* at 9 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)). The Court concluded that *Terry*-type searches “must therefore be confined in scope to an intrusion reasonably designed to discover” weapons. *Id.* at 29. Some scholars have commented that *Terry*’s focus on reasonableness represents its main achievement and ties it to the purpose of the Fourth Amendment. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (asserting that Fourth Amendment’s central idea is neither probable cause nor necessity for warrants, but requirement “that all searches and seizures be reasonable”); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1481 (1985) (arguing that one model of Fourth Amendment “demands only that searches be reasonable”).

But not everyone agrees that reasonableness is everything in Fourth Amendment jurisprudence, if for no other reason than that reasonableness has no content of its own. See, e.g., Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 417 (1988) (cautioning that confining court review of searches and seizures to reasonableness “allows the definition of reasonableness to drift” and results in viewing “every government intrusion on an ad hoc basis”). A better view is that the core value of the Fourth Amendment is distrust of government power over the individual. See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) (“The constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central meaning of the Fourth Amendment is distrust of police power and discretion.”); Ronald J. Bacigal, *Putting the People Back Into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 362 (1994) (“[T]he Fourth Amendment is profoundly antigovernment, and the need to protect people from a potentially oppressive Executive Branch has dominated the Supreme Court Fourth Amendment corpus.”).

⁵³ *Terry*, 392 U.S. at 20.

suspect, the question becomes the conditions under which the police may frisk the suspect. The Court said that the officer may frisk if the crime thought to be afoot is "likely" to involve weapons,⁵⁴ or if the officer has reasonable suspicion, based on observation of the individual involved, that the suspect is armed and dangerous.⁵⁵ The frisk could serve only to ascertain whether weapons (not items of evidence) were present;⁵⁶ it was therefore limited in scope to a patdown of the outer clothing.⁵⁷

The Court said Officer McFadden's actions fit neatly into this analytical scheme. He was able to articulate reasons for his suspicion that crime was afoot, based on his observations and the inferences drawn from his years of experience.⁵⁸ Since he suspected the men of armed robbery, his frisk of the defendant was perfect police work.⁵⁹

In his concurrence, Justice Harlan added a few clarifying thoughts. First, when an officer has stopped a person based on a reasonable suspicion that a violent crime is afoot, the officer need not pause to question the suspect in an effort to dispel these suspicions. Rather, the officer can proceed directly from stop to frisk in one action.⁶⁰ Second, Harlan reminded the other Justices that the legitimacy of any frisk depended on the legitimacy of the stop.⁶¹ In other words, a valid frisk *presupposed* a valid stop.

Terry surely represents the Court's best effort to engineer a series of compromises on a number of sensitive issues. On the one hand, police may stop and frisk individuals, and may do so without probable cause. However, an officer must be able to articulate the reasons that she thought that crime was afoot and

⁵⁴ *Id.* at 28. The Court justified Officer McFadden's actions on the basis that the suspected crime was a daytime robbery, which "would be likely to involve the use of weapons." *Id.*

⁵⁵ *Id.* at 27. *Terry* contains language similar to that used to explain stops: An officer may frisk a suspect without probable cause when "he has reason to believe that he is dealing with an armed and dangerous individual. . . . [T]he issue is whether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*

⁵⁶ *Id.* at 29-30.

⁵⁷ *Id.*

⁵⁸ *Id.* at 6-7, 28.

⁵⁹ *Id.* at 28.

⁶⁰ *Id.* at 33.

⁶¹ *Id.* at 32-33.

that the suspect was dangerous. An officer's "street sense" alone, no matter how well-honed, does not suffice. And the scope of the officer's actions must be limited to that which is necessary to derail the suspected crime and disarm the suspect; no searches for evidence are allowed. On the other hand, the Court explicitly acknowledged "police-community tensions in the crowded centers of our Nation's cities"⁶² and that policing in general, and stops and frisks in particular, had been used for the "wholesale harassment" of minority groups, especially African-Americans.⁶³ *Terry* seemed to hold the promise of addressing these long-standing grievances while accommodating the needs of law enforcement.⁶⁴

But in hindsight, one can also view *Terry* as a reasonable-sounding effort to remove the "handcuffs" the Warren Court had put on the police, to turn back the clock on *Mapp v. Ohio*.⁶⁵ After *Mapp*, decided in 1961, state courts would only admit evidence seized from suspicious persons during street encounters if the police had probable cause to seize the evidence.⁶⁶ *Terry* took the law backward, a considerable distance back towards the time when the police officer ruled the street based on simple gut instinct.⁶⁷ After *Terry*, police had much greater leeway to interfere with a citizen's right to move about unmolested⁶⁸ and conduct discretionary (even if limited) bodily searches than at any time since *Mapp*. At bottom, *Terry* clearly favors police, regardless of the care with which the Court seemed to balance the needs of law enforcement against the

⁶² *Id.* at 12.

⁶³ *Id.* at 14.

⁶⁴ See Williams, *supra* note 24, at 571 (commenting that *Terry* seemed to be an admirable effort of political compromise between law enforcement's needs and citizens' interests, particularly those of African-Americans).

⁶⁵ 367 U.S. 643 (1961).

⁶⁶ See *supra* note 43 and accompanying text (noting that seizures by police required probable cause prior to *Terry*).

⁶⁷ See REMO FRANCESCHINI, A MATTER OF HONOR: ONE COP'S LIFELONG PURSUIT OF JOHN GOTTI AND THE MOB 36 (1993) (recounting police practice of approaching people on street and giving them "toss" changed completely once *Mapp* required probable cause to search or seize).

⁶⁸ Professor Tracey Maclin calls this the "right of locomotion" and has argued that *Terry* and similar cases have nearly extinguished the citizen's right to move about as desired. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

rights of citizens.⁶⁹ Indeed, it is tempting to conclude that the Court had two related goals in *Terry* — unshackling the police from *Mapp*, and addressing in a political sense the rising social tensions in America by providing more latitude for law enforcement — and that it achieved both.

C. *The Supreme Court's Cases Since Terry*

Terry did not address every question arising in the context of stops and frisks.⁷⁰ The Court has spoken about frisks only a few times since *Terry*, leaving two of the biggest questions — who may be frisked and under what circumstances — largely to lower courts. In the few cases in which the Court *has* addressed frisks, it has tried to maintain the original boundaries it set in *Terry*.

In *Sibron v. New York*,⁷¹ decided the same day as *Terry*, a police officer observed the defendant associating with drug addicts over the course of eight hours.⁷² When the defendant later entered a restaurant, he spoke with three other known addicts.⁷³ The officer then ordered the defendant out of the restaurant, saying, “You know what I am after.”⁷⁴ As the defendant “mumbled something and reached into his pocket,” the officer thrust his hand into the same pocket and found heroin.⁷⁵

⁶⁹ See Harris, *supra* note 43, at 663 (characterizing *Terry* as “a pro ‘law and order’ decision timed to address” societal violence and tensions).

⁷⁰ *Terry v. Ohio*, 392 U.S. 1, 29 (1968). Surely the Court adopted the right approach, given the many questions raised by frisks and the almost infinite variety of street encounters between citizens and police. Shortly after *Terry*, Professor LaFave wisely observed:

Given the oft-stated need for guidelines, one is struck with the fact that very few specific guidelines can be distilled from [*Terry* and *Sibron v. New York*, 392 U.S. 40 (1968)]. However, this point should not be pushed too far; this was the Court’s first foray into this particular thicket, and it is thus understandable that it made a conscious effort to leave sufficient room for later movement in almost any direction.

LaFave, *Street Encounters*, *supra* note 2, at 46.

⁷¹ 392 U.S. 40 (1968).

⁷² *Id.* at 45.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

The Court used *Sibron* to flesh out the difference between reasonable suspicion and hunches.⁷⁶ More important for purposes of this discussion, Justice Harlan's concurring opinion attempted to articulate standards for frisks.⁷⁷ Although the right to frisk may be "automatic" when an officer performs a valid stop of a person the officer reasonably suspects of a crime "whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category."⁷⁸ In other words, Harlan counseled lower courts to exercise caution in deciding when an officer could frisk a suspect. Police may frisk only in two situations: either the suspected crime, by its nature, requires a weapon, or the suspect shows some outward sign of being armed.⁷⁹

Sibron thus attempts to limit the power the Court gave the police in *Terry*. Stopping a suspect requires some reasonable suspicion to believe that crime is afoot; frisking requires either that the crime must involve weapons, or that there must be a reasonable, articulable belief that the particular individual is armed.⁸⁰

⁷⁶ *Id.* at 62-64. Simply observing the defendant's associations with drug addicts without hearing any conversation amounted to nothing more than proceeding on the officer's instinct. The Supreme Court seemed to enjoy the trial court's view of the situation. Quoting the trial judge's findings twice, the Justices commented that *Sibron* and the other drug addicts "might have been talking about the World Series." *Id.* at 47. The idea that those who talk to drug addicts are engaged in trafficking "is simply not the sort of reasonable inference required to support" a stop and frisk. *Id.* at 62.

⁷⁷ Justice Harlan's conclusion that the officer lacked any basis for a valid stop obviated the need to discuss frisks. Nonetheless, he professed to being troubled by the use of frisks when the nature of the suspected offense created no reasonable apprehension of danger. *Id.* at 74 (Harlan, J., concurring).

⁷⁸ *Id.*

⁷⁹ Justice Harlan stated that "[i]f the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so." *Id.* (Harlan, J., concurring). Professor LaFave explained Justice Harlan's statement:

[A] protective search may always be made when the stopping is to investigate what appears to be a crime of violence. For other crimes . . . it would apparently take noticeable bulges in the suspects clothing, movements by the suspect toward his pockets, or similar observations to give rise to a substantial possibility that the suspect was armed.

LaFave, *Street Encounters*, *supra* note 2, at 88.

⁸⁰ Harris, *supra* note 43, at 664 (stating that *Sibron* "represented an effort to demarcate the limits of *Terry*").

In *Adams v. Williams*,⁸¹ decided just four years after *Terry* and *Sibron*, a known informant approached an officer in a “high-crime area” at 2:15 a.m. and told him that a person sitting in a nearby car was carrying drugs and was armed with a gun in his waistband.⁸² The officer approached the car, knocked on the window, and asked Williams to open the door; Williams rolled down the window instead.⁸³ The officer immediately reached into the car and pulled a loaded pistol out of Williams’ waistband.⁸⁴ Williams was arrested for possessing the gun; a subsequent search revealed heroin and other weapons.⁸⁵

The Court used *Adams* to make two points. First, a known informant’s tip could supply the requisite reasonable suspicion for a *Terry* stop. The tip in *Adams* was sufficient to support the officer’s actions.⁸⁶ Second, the Court said that the circumstances gave the officer ample reasons to be concerned with safety. The lateness of the hour and the dangerous location were only the beginning.⁸⁷ The defendant’s disobedience to the officer’s command to step out of the car made the possible presence of a gun in Williams’ waistband “an even greater threat”;⁸⁸ outside the car, the officer could have observed his movements more easily than if he remained seated in the car. Under these conditions, the Court reasoned, the officer’s actions constituted a reasonable frisk. Because the officer faced danger, the act of immediately reaching in for the gun to the very spot the informant specified, without pausing to question Williams to

⁸¹ 407 U.S. 143 (1972).

⁸² *Id.* at 145. The informant had supplied police with accurate information in the past. *Id.* at 146.

⁸³ *Id.* at 145.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 146. The officer knew the informant, the informant had provided him with information on prior occasions, and in this case the informant came forward personally with information verifiable at the scene. *Id.* at 146-47. Such a tip, the Court said, was as good as any other type of information — strong in some respects, weak in others. A *Terry* stop need not be based only on the officer’s own observations. *Id.* at 147.

⁸⁷ *Id.* at 147-48.

⁸⁸ *Id.* at 148.

confirm or disprove the officer's suspicions,⁸⁹ did not make the frisk illegal.

Implicit in these points are two important ideas. First, *Adams* shows that Justice Harlan's analysis of the "armed and dangerous" situation in his concurrences in *Terry* and *Sibron* had won out over the position the *Terry* majority seemed to take. *Terry* seemed to require (or at the very least to imply) that an officer had to make some efforts to verify the suspicion that led him to stop a suspect *before* he could proceed to frisk.⁹⁰ Harlan explained in *Terry* and *Sibron* that where the officer has an articulable suspicion of a crime of violence, "the right to frisk must be immediate and automatic."⁹¹ *Adams* adopted Harlan's view. Second, frisks are *not* automatic after stops, unless the officer suspects a crime that requires a weapon. Otherwise, frisks require a particularized suspicion that the suspect is armed and dangerous⁹² — a bulge under the coat or in a pocket, for example.

*Ybarra v. Illinois*⁹³ gave the Court another chance to consider frisks. *Ybarra* strongly affirmed the rule that, absent reasonable suspicion of a crime involving weapons or individualized suspicion of dangerousness, police cannot automatically follow stops with frisks.

In *Ybarra*, police entered a tavern with a warrant authorizing them to search the premises and the bartender for evidence of drug trafficking.⁹⁴ As they entered, the police announced that they planned to frisk everyone present.⁹⁵ While patting down the defendant, who was a customer in the bar, an officer said

⁸⁹ Given the *Terry* opinion's language concerning how the officer had asked questions after stopping, but before frisking the suspects, one could conclude that police must make an effort to dispel suspicions before a frisk. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). But Justice Harlan's contrary words in the concurrence had it right. *See id.* at 33 (Harlan, J., concurring). Justice Harlan suggested and the *Adams* Court held that police do not need to dispel suspicion when they suspect involvement in violent crime. *Compare Adams*, 407 U.S. at 148 *with Terry*, 392 U.S. at 33 (Harlan, J., concurring).

⁹⁰ *See Terry*, 392 U.S. at 30.

⁹¹ *Id.* at 33; *see also Sibron*, 392 U.S. at 74.

⁹² *Sibron*, 392 U.S. at 74.

⁹³ 444 U.S. 85 (1979).

⁹⁴ *Id.* at 88.

⁹⁵ *Id.*

he felt “a cigarette pack with objects in it.”⁹⁶ The officer removed and opened the pack, revealing heroin.⁹⁷

The Supreme Court began by rejecting the contention that the warrant allowed the police to search everyone present. Probable cause to search the defendant never existed, and he did nothing to create any suspicion about himself.⁹⁸ Neither his presence in a place to be searched, nor his proximity to a person the police may search, permitted the police to search him.⁹⁹

More to the point, the Court explicitly rejected the argument that the officer’s actions constituted a reasonable frisk for weapons. *Terry*, the Court explained, created a narrow exception that the Court “has been careful to maintain”: *Terry* permits a frisk solely for weapons only with a “reasonable belief or suspicion directed at the person to be frisked” that he is armed.¹⁰⁰ *Terry* did not, the Court said, permit any kind of “generalized ‘cursory search for weapons.’”¹⁰¹ Reinforcing the boundary constructed in *Terry*, the Court concluded that “[t]he initial frisk of [the defendant] was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons.”¹⁰²

It is hard to imagine how the Court could have taken a stronger, clearer position than it did in *Ybarra*. The rule the case announces seems unequivocal in its requirements and in its reaffirmance of *Terry*. Yet, lower courts have avoided its mandate.¹⁰³

⁹⁶ *Id.*

⁹⁷ *Id.* at 89.

⁹⁸ *Id.* at 90-91.

⁹⁹ *Id.* at 91.

¹⁰⁰ *Id.* at 93-94.

¹⁰¹ *Id.*

¹⁰² *Id.* at 92-93.

¹⁰³ See *infra* notes 140-42 and accompanying text (discussing lower court decisions contrary to standard announced in *Ybarra*. Even after *Ybarra*, which expressly reaffirmed *Terry*'s prohibition against routine frisks for weapons, police continued to use frisks as a matter of routine with everyone they encountered. See, e.g., *United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989) (characterizing routine pat-down search as “prudent precaution” when officer was alone with suspect, a larger man wearing long coat); *State v. Vasquez*, 807 P.2d 520, 522 (Ariz. 1991) (approving of routine frisks by police as “procedures born of the exigencies of street encounters” such as domestic violence situations); *State v. Williamson*,

Ybarra was the last Supreme Court opinion to deal directly with a frisk of a person under *Terry*. A number of other cases since *Ybarra*, however, have dealt indirectly with the issue. For example, in *Michigan v. Long*,¹⁰⁴ police officers asked a person suspected of driving while intoxicated to get papers from his car.¹⁰⁵ As the person did so, one of the officers saw what he thought was a weapon protruding from under the seat.¹⁰⁶ The officer searched the car, finding marijuana that was later used to convict the defendant.¹⁰⁷ The Supreme Court held that the "frisk of the car"¹⁰⁸ was valid,¹⁰⁹ regardless of the fact that the officers could have eliminated the danger to themselves without a search simply by keeping the defendant in place outside the car.¹¹⁰ In *Maryland v. Buie*,¹¹¹ the Court allowed a

206 N.W.2d 613, 615-16 (Wis. 1973) (holding that police justifiably frisked suspect stopped for traffic violation who could not produce license or identification because officers making a stop can not always protect themselves from attack).

For a particularly candid example prior to *Ybarra*, see *United States v. Davis*, 441 F.2d 28, 29-30 (9th Cir. 1971), in which the officer testified that he frisked the defendant to protect himself, as he always did: "At this time my partner . . . began to give him, the defendant, a cursory search, which we do with every person we come in contact with, every violator we come in contact with." This will not surprise anyone who practices in the criminal courts on a regular basis. Early on in my own practice, both as a post-graduate prosecuting intern and as a defense attorney, I lost count of the number of times I heard an officer testify that he stopped the defendant after becoming suspicious and "patted him down for my safety," without mention of anything specific that appeared to endanger the officer's safety. The reasons for this go beyond concerns for safety, as officers often receive training to frisk routinely. See, e.g., DEVALLIS RUTLEDGE, *THE SEARCH AND SEIZURE HANDBOOK FOR LAW OFFICERS* 96 (2d ed. 1985) (instructing officers, upon making a lawful stop, to "conduct a patdown of his outer-clothing, in an attempt to discover weapons, for your safety and the safety of the public."); LEGISLATION AND SPECIAL PROJECTS SECTION, U.S. DEP'T OF JUSTICE, *MANUAL ON THE LAW OF SEARCH AND SEIZURE* 25 (1974) ("All companions of an arrestee within the immediate vicinity capable of harming the [police officer] may be subjected to a cursory pat-down to give assurance that they are unarmed.").

¹⁰⁴ 463 U.S. 1032 (1983).

¹⁰⁵ *Id.* at 1035-36.

¹⁰⁶ *Id.* at 1036.

¹⁰⁷ *Id.*

¹⁰⁸ See *Maryland v. Buie*, 494 U.S. 325, 332 (1990) ("In a sense, *Long* authorized a 'frisk' of an automobile for weapons.").

¹⁰⁹ *Long*, 463 U.S. at 1050-51.

¹¹⁰ One could argue that *Long* should be considered quite important as a frisk case, since it allowed a frisk of the area surrounding the suspect and a frisk of a suspect who, while armed, was not dangerous. As Professor LaFave has noted, this last aspect of *Long* is puzzling: "Unquestionably the most perverse aspect of *Long* is that it does not require officers to minimize danger to themselves in order to avoid *Terry* intrusions. Indeed, officers may be "emboldened" to forego safety and "thereby gain the prerogative to make

suspicionless “protective sweep” — a frisk of areas immediately surrounding a suspect — incident to arrest.¹¹² Any broader search — for example, a search of other rooms in the suspect’s house — required the officer to have a reasonable, articulable belief that the area harbored an individual posing a danger.¹¹³ In both *Long* and *Buie*, the Court went to great lengths to stress the continued vitality of the limits *Terry* set on frisks: Officers may frisk only to protect themselves or others present, and the officers must have a reasonable suspicion of actual dangerousness.¹¹⁴

*Minnesota v. Dickerson*¹¹⁵ is the most recent Supreme Court case to deal (albeit indirectly) with *Terry*. In *Dickerson*, the Court created a “plain feel” exception to the Fourth Amendment. Any time an officer frisking a suspect feels an object whose character as contraband is immediately apparent to the officer’s touch from outside the suspect’s clothing, the officer may seize the object.¹¹⁶

searches without probable cause.” Wayne R. LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1205 (1983).

¹¹¹ 494 U.S. 325 (1993).

¹¹² *Id.* at 334.

¹¹³ *Id.*

¹¹⁴ The language employed by the *Buie* Court is instructive; it returned directly to *Terry*. In *Buie*, the Court rejected the state’s contention that “no level of objective justification should be required [for any sweep in the home] because of ‘the danger that inheres in the in-home arrest for a violent crime. . . .’” *Id.* at 334 n.2. The Court declared that “the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.” *Id.* at 334-35 n.2 (emphasis added).

¹¹⁵ 113 S. Ct. 2130 (1993).

¹¹⁶ *Id.* at 2136-38. As articulated, this new doctrine stands at the intersection of the existing plain view exception and the *Terry* stop and frisk doctrine. Compare *Dickerson*, 113 S. Ct. at 2136-37 (discussing plain view exception) with *id.* at 2135-38 (discussing *Terry* stop and frisk doctrine). First, before police may seize an object, they must feel it during an otherwise valid stop and frisk. This point is implicit in the Court’s statement that “[the defendant] has not challenged the finding made by the trial court and affirmed by both the Court of Appeals and the State Supreme Court that the police were justified under *Terry* in stopping him and frisking him for weapons.” *Id.* at 2138. Second, as with the plain view rule, the officer must realize the contraband character of the object immediately as she perceives it. With a frisk, however, this “plain feel” perception occurs through the sense of touch. *Id.* at 2137. The Court specifically concluded that the sense of touch is no less valid than other senses and no more intrusive than what is already allowed under *Terry*. *Id.* at 2137-38.

Dickerson not only permitted stops and frisks that uncover contraband; it encouraged them. It created a clear incentive to use frisks to gather such evidence, despite the Court's rhetoric to the contrary. As long as the officer observes the fine distinctions set forth in *Dickerson* — no search beyond that which is necessary to find weapons,¹¹⁷ and the officer must testify that it was "immediately apparent" that the object she felt (but could not see) was contraband¹¹⁸ — the evidence is admissible.

But more important for purposes of this discussion, the Court used *Dickerson* as an occasion to explicate and reinforce a very traditional view of *Terry* frisks. An officer may frisk a suspect, the Court said, only if he "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others."¹¹⁹ Frisks have one — and only one — purpose: determining whether the suspect is armed. Police may not use a frisk to discover evidence, and its scope is limited to what is necessary to discover weapons.¹²⁰ If the frisk goes beyond the simple patdown search of outer clothing necessary to locate weapons, any evidence recovered is inadmissible.¹²¹

The Supreme Court therefore seemed quite serious when it stated in *Dickerson* that "[t]hese principles were settled 25 years ago" with the decisions in *Terry* and *Sibron*.¹²² To hear the Court tell it, its rules governing frisks had remained unchanged, enduring rocklike against the tides of legal argument¹²³ and public opinion. If *Adams* permitted an automatic search, the case did at least involve the presence of a dangerous weapon.¹²⁴ *Ybarra* was unequivocal in its rejection of blanket

¹¹⁷ *Id.* at 2138-39.

¹¹⁸ *Id.* at 2137.

¹¹⁹ *Id.* at 2136 (quoting *Terry v. Ohio*, 392 U.S. 1, 24 (1968)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ For example, in *Dickerson*, the State of Minnesota essentially argued that the *Terry* stop and frisk should be converted into an evidence gathering device. *Id.* at 2130; see also Harris, *supra* note 43, at 667-69 n.115 (arguing that despite holding in *Dickerson*, Supreme Court has moved farther away from stop and frisk requirements articulated in *Terry*).

¹²⁴ Justice Douglas's dissent, however, accurately points out that the law permitted Williams to carry a handgun with a permit. *Adams v. Williams*, 407 U.S. 143, 149 (1972) (Douglas, J., dissenting). Therefore, whether Williams' handgun rendered him dangerous

“cursory searches for weapons” and restated the rule that there must be some indication of dangerousness on the part of the person searched; simple association with a person or place would not permit a *Terry* frisk. *Buie* maintains the need for some reasonable suspicion to allow a protective sweep — a frisk of a place — of areas not immediately adjoining the site of an arrest. Its quirky facts make *Long* more problematic.¹²⁵ But even there the Court tries to maintain the idea that the dangerousness of a potentially armed suspect must form the basis for a frisk. *Dickerson*’s strong language seems calculated to reinvigorate the limits *Terry* set on the use of frisks.

But while the Court has been asleep in the cloistered confines of its own precedents, lower federal courts and state courts have been hard at work. In literally thousands of opinions over twenty-six years, these courts have taken the two permissible rationales for *Terry* frisks — crimes involving violence or indications that the particular suspect is armed — and stretched them out of shape. Although the motive seems laudable — protection of the police — the extent to which these cases give police leeway threatens to shrink the Supreme Court’s high-sounding words into nothing but meaningless small print. The result is that in many jurisdictions police may legally frisk suspects automatically — without any consideration of whether the individual might be armed and often in spite of a total lack of any such indications — in an array of cases so wide that it might astonish the Justices.

II. THE PROLIFERATION OF THE AUTOMATIC FRISK

The great bulk of case law on stops and frisks has come from lower federal courts and state courts. This is especially true in the frisk area, about which the Supreme Court has spoken less than half a dozen times.

An examination of these frisk cases leaves an unmistakable impression: Notwithstanding the Supreme Court’s instructions, lower courts allow frisks automatically — categorically — in

for frisking purposes remains unclear because he could have had a permit to carry it.

¹²⁵ See LaFave, *supra* note 110, at 1204-05 (characterizing Court’s expansive view of danger in *Terry* context in *Long* as both unfortunate and frightening).

many situations in which the offense suspected does not require a weapon, and the suspect shows no outward sign he might be armed and dangerous. This has happened through a series of simple judicial declarations, most of which were based on nothing more than unsubstantiated police testimony or earlier judicial statements. For present purposes, we can divide these cases into two broad categories: *types of offenses* always considered dangerous, and *types of people or situations* always considered dangerous. Within either category, courts automatically allow frisks to follow stops. Both categories break down into a number of sub-categories.

A. *Dangerous Offenses*

Recall that *Terry* and the Supreme Court cases that followed it held unequivocally that officers may always frisk when the crime thought to be afoot was one that was violent by nature. Indeed, *Terry* was the prototypical example: Officer McFadden thought the men he was watching were contemplating a daylight armed robbery, an offense requiring force and weapons.¹²⁶ *Adams* took the point further: when the offense suspected involves the possibility of armed violence (recall that the informant reported the defendant had a gun at his waist), a frisk may follow a stop without any pause in between.¹²⁷

Many lower courts have arrived at the same conclusion — frisks may automatically follow stops — about a number of crimes *not* violent by nature. In any event, perpetrators of these crimes do not require weapons (though they may, of course, possess them). Two such crimes stand out: drug offenses and burglary.

1. Drug Offenses

The early and widespread use of the stop and frisk technique against narcotics dealers becomes apparent in cases decided in the first years after *Terry*. Many of these cases involved large-scale

¹²⁶ See *Terry*, 392 U.S. at 6 (including daytime robbery among violent offenses requiring weapons use).

¹²⁷ See *supra* notes 87-89, 91 and accompanying text (discussing *Adams* Court's finding that officers may frisk immediately upon stop when violent crime is suspected).

trafficking. Courts had no trouble in these cases deciding that major traffickers are so likely to be armed as to justify automatic frisks every time such a suspect is stopped.¹²⁸ Weapons, especially firearms, are the “tools of the trade” for big drug dealers,¹²⁹ and police should be able to protect themselves from these dangers by frisking suspects immediately upon stopping them.

Standing alone, this does not seem objectionable. Large-scale trafficking in illegal narcotics — or trafficking in any valuable

¹²⁸ Given the claim I make in the text to a temporal progression, I will break the usual rule and list the following cases in chronological order. *See, e.g.*, *United States v. Santana*, 485 F.2d 365, 367 (2d Cir. 1973) (holding that police may frisk defendant recognized “as being among the 100 major narcotics violators in New York City”); *United States v. Oates*, 560 F.2d 45, 61-62 (2d Cir. 1977) (allowing police frisk of narcotics trafficker on basis of police officer’s “personal experiences” that “substantial dealers in narcotics” use firearms as “tools of the trade” (quoting in part *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976))); *United States v. Vasquez*, 634 F.2d 41, 43 (2d Cir. 1980) (justifying detectives’ protective frisk of defendant involved in major drug trafficking, “particularly in view of the violent nature of narcotics crime”); *United States v. Pajari*, 715 F.2d 1378, 1383-84 (8th Cir. 1983) (holding that police justifiably frisked suspect believed to be “major narcotics dealer” when he acted nervously and reached down toward his feet); *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir.) (holding that police may engage in weapons frisk of major drug trafficking suspect during seizure), *cert. denied*, 482 U.S. 916 (1987); *United States v. Nersesian*, 824 F.2d 1294, 1317 (2d Cir. 1987) (reasoning that police justifiably frisked defendant suspected of being narcotics courier transporting large sums of money and narcotics because such individuals might carry weapons); *United States v. Woodall*, 938 F.2d 834, 836 (8th Cir. 1991) (ruling that police intelligence information identifying defendant as associate of narcotics violator and as “suspected of manufacturing controlled substances” justified frisk); *United States v. Anderson*, 859 F.2d 1171, 1177 (3d Cir. 1988) (holding that police justifiably frisked defendant upon discovering “a large amount of cash” suspected to come from drugs because “persons involved with drugs often carry weapons”); *United States v. Cruz*, 909 F.2d 422, 424 (11th Cir. 1989) (justifying frisk on basis that police observed defendant walking with a “known drug dealer” who spoke to another dealer in order to “exchange a kilogram of cocaine”); *United States v. Cotton*, 708 F. Supp. 841, 845 (W.D. Tenn. 1989) (declaring that defendant’s involvement in a “substantial illegal drug transaction” justified patdown because persons engaging in such activity “may be armed and dangerous to the investigating officer”); *United States v. Ceballos*, 719 F. Supp. 119, 126 (E.D.N.Y. 1989) (allowing police to frisk defendants observed to have engaged in major narcotics transaction “[b]ecause of the increasingly violent nature of narcotics trafficking, . . . the need to frisk those suspected of committing a narcotics offense in the course of a street encounter is obvious”); *Williams v. Virginia*, 354 S.E.2d 79, 87 (Va. Ct. App. 1987) (adopting “better view” that police may frisk defendants suspected of either narcotics distribution or possession); *Caffie v. State*, 516 So. 2d 822, 828 (Ala. Crim. App. 1986) (“[W]e recognize that under certain circumstances, for example, where the authorities are dealing with an individual suspected of trafficking in large quantities of narcotics, they may be authorized to automatically frisk the suspect.”).

¹²⁹ *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977).

black market commodity, for that matter — may involve the possession of valuable contraband, and of large (sometimes extremely large) quantities of illicit cash.¹³⁰ Traffickers must rely on themselves for protection of their goods and money, and for “justice” in the event of a theft or robbery; calling the police is obviously out of the question. Thus the presence of weapons in these cases would make perfect sense.¹³¹

After the “automatic frisks are okay for major traffickers” cases, subsequent cases watered down the law even further. In these cases, courts were willing to say that *any* traffickers in narcotics — down to low-level distributors and the smallest-time street corner sellers — were likely to be armed.¹³² They, too, could be frisked automatically upon being stopped, regardless of whether they exhibited any signs of being armed.

These cases authorizing frisks for retail dealers were followed by a third group. The cases in this group do not rely on the

¹³⁰ See STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993) (arguing that primary effect of drug prohibition has been to escalate value of illegal drugs on street to value of \$60 to \$100 billion dollars, 70 to 140 times their free market value).

¹³¹ See *infra* notes 180-82 and accompanying text (examining empirical data suggesting that defendants suspected of narcotics offenses are probably armed and dangerous).

¹³² See, e.g., *United States v. Brown*, 913 F.2d 570, 572 (8th Cir. 1990) (“[S]ince weapons and violence are frequently associated with drug transactions, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous.”); *United States v. Salas*, 879 F.2d 530, 535 (9th Cir. 1989) (ruling that police may reasonably assume suspected narcotics dealers to be armed and dangerous regardless of size of their operations); *United States v. Post*, 607 F.2d 847, 851 (9th Cir. 1979) (declaring that “[i]t is not unreasonable to suspect that a dealer in narcotics might be armed,” without considering scope of suspect’s drug trafficking); *State v. Holder*, 557 A.2d 553, 555 (Conn. App. Ct. 1989) (holding that police may frisk street-level narcotics sellers because “[i]t is by now common knowledge among police officers that sellers of narcotics are frequently armed” (quoting *State v. Marino*, 555 A.2d 455, 458 (Conn. App. Ct. 1989))); *State v. Richardson*, 456 N.W.2d 830, 836 (Wis. 1990) (condoning frisk because anonymous tip advised that defendant would have seven grams of cocaine in his possession for sale and “drug dealers and weapons go hand in hand, thus warranting a *Terry* frisk for weapons”); *People v. Lee*, 240 Cal. Rptr. 32, 36 (Cal. Ct. App. 1987) (relying on police officer’s belief that defendant was engaging in street corner drug sales and defendant’s placing hand in pocket of jacket to justify frisk). *But see Kindell v. State*, 562 So. 2d 422, 423 (Fla. Dist. Ct. App. 1990) (rejecting anonymous tip that “black males were selling drugs at a certain location” and officer’s testimony that during any “drug call, for my own safety I will always check the outer clothing for weapons” as sufficient basis to justify frisk); *Caffie v. State*, 516 So. 2d 822, 828 (Ala. Crim. App. 1986) (cautioning that police may not automatically frisk all low-level narcotics sellers just because those trafficking large quantities of drugs remain subject to automatic frisks).

fact of trafficking at all, except in the sense that at some point all users purchase their drugs from someone. In these cases, anyone involved in any drug transaction — including the purchaser/user — may be frisked automatically because of the supposed violent nature of drug crime.¹³³ Indeed, certain courts now say that the dangerous nature of “narcotics crime” or “drug offenses” supports an automatic frisk, without reference to any trafficking (be it major or minor) or transaction of any size.¹³⁴ The implication is hard to miss: Despite Justice Harlan’s explicit

¹³³ See, e.g., *United States v. Brown*, 913 F.2d 570, 572 (8th Cir. 1990) (approving of automatic frisks in drug cases because “weapons and violence are frequently associated with drug transactions,” without any distinction between major trafficking, minor trafficking, and simple transactions); *United States v. Gilliard*, 847 F.2d 21, 25 (1st Cir. 1988) (reasoning that police justifiably frisked suspected drug purchaser because defendant “participated in a narcotics sale and . . . firearms are ‘tools of the trade’”); *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir. 1987) (determining that defendant’s participation in single narcotics transaction justified automatic frisk because “concealed weapons were part and parcel for the drug trade”); *Jackson v. State*, 804 S.W.2d 735, 739 (Ark. Ct. App. 1991) (approving of automatic frisk because police observed defendant standing in area where police “reasonably suspected that the men in front of the abandoned building were engaging in drug use or traffic”); *People v. Ratcliff*, 778 P.2d 1371, 1379 (Colo. 1989) (justifying frisk of suspected drug purchaser because police “had previously encountered armed suspects under similar circumstances”); *State v. Williams*, 554 N.E.2d 108, 112 (Ohio 1990) (allowing automatic frisk of person driving up to property where police spotted growing marijuana because “individuals involved in trafficking marijuana were likely to be armed and dangerous”). The Ohio Supreme Court has recognized that allowing frisks in narcotics cases without regard for the size of the transactions effectively renders frisks automatic. See *State v. Evans*, 618 N.E.2d 162, 169 (Ohio 1993) (noting that frisking “is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed”).

¹³⁴ See, e.g., *United States v. Alexander*, 907 F.2d 269, 273 (2d Cir. 1990) (announcing that police may automatically frisk individuals suspected of purchasing narcotics because of “the dangerous nature of the drug trade and the genuine need of law enforcement agents to protect themselves from the deadly threat it may pose”); *United States v. Anderson*, 859 F.2d 1171, 1177 (3d Cir. 1988) (holding that police may automatically frisk defendant carrying what might be drug money because “persons involved with drugs often carry weapons”); *United States v. Vasquez*, 634 F.2d 41, 43 (2d Cir. 1980) (ruling that “in view of the violent nature of narcotics crime” police officers justifiably subjected defendant to automatic frisk when defendant “bent down and reached under his seat”); *United States v. Terry*, 718 F. Supp. 1181, 1185 (S.D.N.Y. 1989) (allowing automatic frisk of drug purchaser because of “the violent nature of the narcotics crime”); *State v. Dickerson*, 469 N.W.2d 462, 465 (Minn. Ct. App. 1991) (holding that police officer justifiably frisked suspected drug purchaser because of officer’s “experience that drug possessors often carry weapons”), *rev’d sub nom.* *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993). But see *State v. Thomas*, 542 A.2d 912, 918 (N.J. 1988) (rejecting police suspicion that defendant possessed drugs as valid basis for automatic frisk because “defendant was not suspected of the violent criminal activity that would justify an ‘automatic’ search”).

warning in *Sibron* against the dangers of using frisks in cases of simple possession of narcotics,¹³⁵ that is exactly what the law in these cases allows.

2. Burglary

Courts frequently allow automatic frisks of burglary suspects, on the rationale that burglars often carry screwdrivers and other tools that they might use as weapons.¹³⁶ This holds true for all kinds of burglaries, not just nighttime burglaries or burglaries of

¹³⁵ *Sibron v. New York*, 392 U.S. 40, 74 (1968).

¹³⁶ *See, e.g.*, *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987) (condoning automatic frisk on grounds that street was dark, officer was alone, and suspected offense "was a burglary, a felony that often involves the use of weapons"); *Gutierrez v. State*, 793 P.2d 1078, 1081 (Alaska Ct. App. 1990) (justifying frisk of suspect because "[w]hile burglary is not *per se* a crime of violence, it is a serious crime and . . . someone suspected of burglary would carry a weapon and resort to violence"); *State v. Aguirre*, 633 P.2d 1047, 1049 (Ariz. Ct. App. 1981) (ruling that police legally frisked defendant suspected of burglary "even though defendant was not behaving in a threatening manner"); *State v. Nichols*, 549 P.2d 235, 238 (Ariz. Ct. App. 1976) (upholding frisk on basis that "a burglar may be armed with weapons, or tools such as knives and screwdrivers which could be used as weapons"); *People v. Myles*, 123 Cal. Rptr. 348, 352 (Cal. Ct. App. 1975) (declaring automatic patdown search reasonable because "a burglar may be armed with weapons, or tools such as knives or screwdrivers which could be used as weapons"); *People v. Martineau*, 523 P.2d 126, 128 (Colo. 1974) (holding that police may automatically frisk defendants suspected of burglary); *Quevedo v. State*, 554 So. 2d 620 (Fla. Dist. Ct. App. 1989) ("The mere fact that [defendant] is reasonably suspected of having committed a *burglary* in itself justifies a *Terry* pat-down and frisk for weapons."); *State v. Scott*, 405 N.W.2d 829, 832 (Iowa 1987) (holding frisk of burglary suspect proper because burglars may be armed or use burglary tools as weapons); *People v. Peyton*, 421 N.W.2d 643, 646 (Mich. Ct. App. 1988) (justifying frisk on basis that defendants, who did not provide identification or explanation for their presence, were suspected of burglary); *Mays v. State*, 726 S.W.2d 937, 944 (Tex. Crim. App. 1986) (condoning frisk because both men suspected of burglary were larger than the officer). *But see* *People v. Galvin*, 535 N.E.2d 837, 837-46 (Ill. 1989) (reversing "rule" of *People v. McGowan*, 370 N.E.2d 537 (Ill. 1977) and announcing that burglary suspects may not be automatically frisked in every case without regard to totality of circumstances, i.e., whether or not suspect may actually be dangerous). The rule permitting automatic frisks in burglary cases apparently even extends beyond burglaries of structures. *See, e.g.*, *People v. Tate*, 657 P.2d 955, 959 (Colo. 1983) (permitting automatic frisk of defendant based on his burglary of vending machine); *United States v. Walker*, 924 F.2d 1, 4 (1st Cir. 1991) (reasoning that officers justifiably frisked defendant suspected of burglary because "burglars often carry weapons or other dangerous objects"); *State v. Carter*, 707 P.2d 656, 660 (Utah 1985) (determining frisks of burglary suspects to be reasonable because they may be armed with weapons or tools that could be used as weapons). *But cf.* *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The *Garner* Court implicitly rejected the idea that fleeing burglary suspects constitute sufficient danger to the police to warrant the use of deadly force.

particular types of structures. As with narcotics cases, the reasoning is that those involved *might* have weapons.

3. Gambling Establishments

One case has even held that the occupants of places devoted to illegal gambling — so-called “gambling houses” — are often armed. Therefore, like individuals involved in drug trafficking and burglary, police may automatically frisk individuals in gambling houses, regardless of whether there is any outward sign that the suspect to be frisked is armed.¹³⁷

B. Dangerous People and Situations

As with narcotics and burglary cases, lower courts have found that police may always frisk certain *people* and may always frisk whoever is present in certain *situations*. Again, there need not be any sign at the time of the frisk that the persons involved might be armed.

1. Companions of Arrestees

A substantial number of cases allow automatic frisks of any companion of any person the police arrest, whether or not the companion poses any threat to the police.¹³⁸ Supporters of

¹³⁷ *People v. Tsang*, 569 N.Y.S.2d 78, 79 (N.Y. App. Div. 1991) (justifying frisk on basis that “guns usually accompany illegal gambling house operations”).

¹³⁸ *See, e.g.*, *United States v. Cruz*, 909 F.2d 422, 424 (11th Cir. 1990) (justifying frisk of defendant on basis that she was seen walking with “known drug dealer,” who consorted with other drug dealers); *United States v. Stevens*, 509 F.2d 683, 688 (8th Cir. 1975) (upholding automatic frisk of companion in car initially stopped for traffic violation when officer began to suspect car’s involvement in a burglary because “a police officer may, for his own protection, briefly frisk a person reasonably suspected of having some nexus with a felony before questioning him”); *United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973) (holding that police may automatically frisk all companions of arrestees within immediate vicinity of arrest as reasonably necessary safety precaution); *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971) (“All companions of the arrestee in the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to cursory ‘pat-down’ reasonably necessary to give assurance that they are unarmed.”); *Allison v. State*, 373 S.E.2d 273, 276 (Ga. Ct. App. 1988) (holding that consensual search of suspect, which turns up gun, justifies frisk of first person’s companion); *State v. Bechtold*, 783 P.2d 1008, 1010 (Or. Ct. App. 1989) (condoning automatic frisk of driver’s companion because police determined driver to be under influence of drugs and car’s owner, though not present, was wanted on arrest warrant for drugs). *But see* *United States v. Flett*, 806 F.2d

these cases explain them by arguing that frisking anyone present when police make an arrest is necessary for the safety of the officers.¹³⁹

2. Persons Present When Police Execute a Search Warrant

A similar group of cases holds that police may frisk anyone present when they execute a search warrant,¹⁴⁰ despite Su-

823, 827 (8th Cir. 1986) (rejecting “automatic companion” rule” (quoting *United States v. Bell*, 762 F.2d 495, 498 (6th Cir. 1985))); *United States v. Bell*, 762 F.2d 495, 498 (6th Cir. 1985) (same); *United States v. \$37,590*, 736 F. Supp. 1272, 1278 (S.D.N.Y. 1990) (“Simply because someone is in the company of others who themselves are suspected or convicted of criminal activity does not alone provide the basis for a *Terry* stop and frisk.”); *People v. Kinsella*, 527 N.Y.S.2d 899, 901 (N.Y. App. Div. 1988) (“The mere fact that the defendant was observed. . . walking down the street with the individual who [was suspected] did not give rise to reasonable suspicion . . .”); *People v. Chinchillo*, 509 N.Y.S.2d 153, 155 (N.Y. App. Div. 1986) (holding that mere presence of defendant with another individual who was wanted on arrest warrant did not establish reasonable basis for suspecting threat to officer safety justifying frisk); *Voelkel v. State*, 717 S.W.2d 314, 316 (Tex. Crim. App. 1986) (declaring that no constitutional basis for frisk of companion existed, even though police observed drugs and paraphernalia in room).

¹³⁹ See, e.g., John J. O’Shea, *The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee’s Companion*, 62 NOTRE DAME L. REV. 751, 758-59 (1987) (arguing that pervasive danger to police officers makes automatic frisks of companions necessary). But see Jeanne C. Serocke, *The Automatic Companion Rule: An Appropriate Standard to Justify the Terry Frisk of an Arrestee’s Companion?*, 56 FORDHAM L. REV. 917, 919 (1988) (criticizing rule for allowing searches without reasonable suspicion).

¹⁴⁰ See, e.g., *United States v. Jaramillo*, 25 F.3d 1146 (2d Cir. 1994). The court acknowledged that police may not frisk bar patrons emerging from a rest room during police raid without particularized suspicion. *Id.* at 1153-54. The court, however, held that police may patdown persons present or arriving during raid of private home because “it is obviously reasonable to believe that individuals in a private home or vehicle have some connection with one another. . . .” *Id.* at 1152; see also *United States v. Reid*, 997 F.2d 1576, 1579 (D.C. Cir. 1993) (holding that police may automatically frisk persons arriving at or leaving apartment because their “proximity to the premises” leads to reasonable suspicion); *United States v. Harvey*, 897 F.2d 1300, 1303-04 (5th Cir. 1990) (allowing for automatic frisk of persons arriving at residence in which police seized methamphetamine, syringes and firearms), *overruled on other grounds*, *United States v. Lambert*, 984 F.2d 658 (5th Cir. 1993); *United States v. Patterson*, 885 F.2d 483, 484-85 (8th Cir. 1989) (allowing police to frisk persons knocking on door of residence being searched by police because “the possible danger presented by an individual approaching and entering a structure housing a drug operation is obvious”); *United States v. Vigo*, 487 F.2d 295, 298 (2d Cir. 1973) (upholding protective search of purse of passenger in car of person being arrested); *People v. Huerta*, 267 Cal. Rptr. 243, 246 (Ct. App. 1990) (upholding frisk on basis that police may reasonably presume person entering “residence of illicit drug activity” during search to be armed); *People v. Thurman*, 257 Cal. Rptr. 517, 520 (Ct. App. 1989) (“[W]here police officers are called upon to execute a warranted search for narcotics within a private residence they have a lawful right to conduct a limited *Terry* pat-down search for weapons

preme Court and lower court holdings that are directly to the contrary.¹⁴¹ Searching a person or place is a situation "fraught with danger,"¹⁴² the reasoning goes, and the police need to know that they are safe as they perform this difficult job.¹⁴³

upon the occupants present while the search is in progress," regardless of whether those occupants present any threat.); *People v. Martinez*, 801 P.2d 542, 544-45 (Colo. 1990) (determining frisk of unidentified person approaching house being searched for drugs to be reasonably justified in light of circumstances); *State v. Davis*, 380 S.E.2d 378, 379 (N.C. Ct. App. 1989) (upholding frisk of all bar patrons because police had obtained search warrant for bar and its two proprietors); *State v. Harris*, 384 S.E.2d 50, 53 (N.C. Ct. App. 1989) (condoning frisk of defendant and other motel room occupants suspected of dealing drugs and carrying weapons); *State v. Zearley*, 444 N.W.2d 353, 357 (N.D. 1989) (holding frisk valid because defendant's presence at private residence being searched for drugs pursuant to warrant allowed police to infer connection with owners reasonably suspected to be dangerous); *State v. Chambers*, 198 N.W.2d 377, 382 (Wis. 1972) (holding that police may automatically frisk persons arriving at apartment being searched for drugs).

¹⁴¹ See *Ybarra v. Illinois*, 444 U.S. 90, 92 n.4 (1979) ("[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place."); see also *Michigan v. Summers*, 452 U.S. 692, 695 n.4 (1981). In *Summers*, the Court held that police may detain persons on the premises which they are about to search based on a warrant. *Id.* at 705-06. The Court distinguished *Ybarra* on grounds that *Ybarra* did not deal with detention, but with the legitimacy of a search.

In *Ybarra* . . . [n]o question concerning the legitimacy of the detention was raised. Rather, the Court concluded that the search of *Ybarra* was invalid because the police had no reason to believe he had any special connection with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband.

Id. at 695 n.4; see also *Kindell v. State*, 562 So. 2d 422, 423 (Fla. Dist. Ct. App. 1990) (holding search unjustified because officers did not have reasonable suspicion that suspect was dangerous); *Caffie v. State*, 516 So. 2d 822, 828 (Ala. Crim. App. 1986) (same); *State v. Thomas*, 542 A.2d 912, 918 (N.J. 1988) (same); *People v. Galvin*, 535 N.E.2d 837, 837-46 (Ill. 1989) (same); JOHN M. BURKOFF, SEARCH WARRANT LAW DESKBOOK § 13.2 (Oct. 1994) ("In short, the upshot of *Summers* and *Ybarra* is that the police may detain — but they may not search — the occupants of search premises based entirely on their presence at the scene pursuant to execution of a search warrant for contraband.").

¹⁴² *People v. Thurman*, 257 Cal. Rptr. 517, 519-20 (Cal. Ct. App. 1989) (noting that officers executing warrants are "aware that they were engaged in undertaking fraught with the potential for sudden violence").

¹⁴³ Supporters of automatic frisks during service of search warrants might seek solace in *Michigan v. Summers*, 452 U.S. 692 (1981). In *Summers*, the Court held that police may detain a person in the process of leaving her apartment when the officers arrived to execute a search warrant. The Court explained that the officers could detain the person involved simply to maintain the status quo. *Id.* at 701-02. The *Summers* Court, however, did not decide whether the search of *Summers* was justified as it occurred after the officers established probable cause to arrest. *Id.* at 705. The question in the search warrant cases surveyed here is not whether the status quo may be maintained. Rather, it is whether *everyone* who shows up while a warrant is being executed can be searched automatically. This is an intrusion of a greater degree than was present in *Summers*. See *supra* note 141 (discuss-

3. Persons Placed in Squad Cars

Some cases hold that officers may frisk any person placed in a squad car.¹⁴⁴ Although this would obviously be true in cases in which the suspect was arrested,¹⁴⁵ the cases cited here involve not arrestees but persons subject only to *Terry*-type restraint.

4. Bad Situations For Police

Many cases hold that police may frisk persons based not on the crime or outward signs that the suspect may be armed, but because the situation presents the police with circumstances detrimental to their safety. The most common factors are presence in a so-called "high-crime" area, a larger number of suspects than officers, darkness, or some combination of the three.¹⁴⁶

ing *Summers*).

¹⁴⁴ See, e.g., *United States v. Abokhai*, 829 F.2d 666, 670-71 (8th Cir. 1987) (justifying frisk of defendant before placing him in patrol car as "a reasonable precaution taken to protect the officers' safety" because there had been a recent armed robbery in the area and possible third person was unaccounted for); *Mashburn v. State*, 367 S.E.2d 881, 881 (Ga. Ct. App. 1988) (upholding frisk because defendant became "real nervous" when asked to sit in patrol car while officer cited him for violation of local open container ordinance); cf. *People v. Kinsella*, 527 N.Y.S.2d 899, 901 (N.Y. App. Div. 1988) ("Although a police officer may reasonably pat down a person before he places him in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing him in the police car in the first place."); *People v. Howington*, 443 N.Y.S.2d 519, 520 (N.Y. App. Div. 1981) (holding that police department policy requiring "as a safety precaution all suspects about to enter a police vehicle must be subject to a pat-down search . . . may not be employed as justification to search a person impermissibly seized").

¹⁴⁵ See *United States v. Robinson*, 414 U.S. 218, 236 (1973) (holding that search of arrestee's person and area within control of arrestee comports with Fourth Amendment, despite lack of any indicia of dangerousness); see also *Chimel v. California*, 395 U.S. 752, 763 (1969) (announcing that search incident to warrantless in-home arrest may only extend as far as arrestee's person and area within which arrestee might obtain weapon).

¹⁴⁶ See, e.g., *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987) (declaring that police justifiably frisked defendant as "[t]he hour was late, the street was dark, the officer was alone, and the suspected crime was a burglary, a felony that often involves the use of weapons"); *Jackson v. State*, 804 S.W.2d 735, 737 (Ark. Ct. App. 1991) (justifying frisk on bases that suspects stood in a "drug trafficking" location, and one suspect walked away when approached by police); *People v. Loudermilk*, 241 Cal. Rptr. 208, 212 (Cal. Ct. App. 1987) (condoning frisk on basis that "defendant lied to the officer and himself created the confusion as to his own identity"); *State v. Lightfoot*, 580 So. 2d 702, 705 (La. Ct. App. 1991) (determining that frisk was justified because officers were outnumbered, an altercation arose when one suspect resisted officers' commands, and events took place late at night in "dangerous area known to the officers for heavy drug trafficking"); *State v. Darby*,

In sum, using the idea that certain kinds of offenses, people and situations always present the officer with danger, lower courts have greatly expanded the legal bases upon which officers may frisk suspects. The result has been that in large numbers of cases police may frisk *any* suspect stopped, without reference to the individual's dangerousness.

III. ANALYSIS: HOW DID WE GET HERE? IS "HERE" A GOOD PLACE TO BE?

As should now be clear, the Supreme Court and lower courts are miles apart on the law of frisks. How did this gulf develop? The Supreme Court did leave many questions unanswered in *Terry*, with the intent that lower courts would develop the law.¹⁴⁷ But the *direction* this development took need not necessarily have been toward widening the power to frisk. How did this happen?

A. Police Testimony

To answer this question, the proper place to begin is police testimony. Because the government has the initial burden in hearings on warrantless searches, including *Terry* stops and frisks, the police officer's testimony serves as the beginning point for a trial court's consideration of the constitutionality of the police action.¹⁴⁸ Typical police testimony in a *Terry* case begins with

550 So. 2d 963, 966 (La. Ct. App. 1989) (upholding police frisk on basis that two suspects outnumbered lone police officer in early morning hours); *Mays v. State*, 726 S.W.2d 937, 944 (Tex. Crim. App. 1986) (justifying frisk on basis that two larger men suspected of burglary confronted police officer). *But see* *United States v. Thomas*, 863 F.2d 622, 629-30 (9th Cir. 1988) (rejecting government's argument that "if it was reasonable for [the officer] to investigate further by asking questions, it was reasonable for him to pat-down the exterior of [Thomas'] clothing"); *M.A.H. v. Florida*, 559 So. 2d 407, 408-09 (Fla. Dist. Ct. App. 1990) (concluding that search was unjustified by mere location in area of drug activity); *L.D.P. v. State*, 551 So. 2d 1257, 1258 (Fla. Dist. Ct. App. 1989) ("[F]light alone, even in a high crime area, does not give rise to a founded suspicion" justifying patdown.); *Gibbs v. State*, 306 A.2d 587, 594-95 (Md. Ct. Spec. App. 1973) (ruling that location's high narcotics crime rate alone did not justify frisk).

¹⁴⁷ *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

¹⁴⁸ *Terry* represents an exception to the constitutional requirements for warrants and probable cause. When police act without a warrant, the burden usually falls on them to show that their conduct came within an established exception. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(b), at 499 (1978) ("[I]f

the basis for the officer's suspicion that crime was afoot. The officer then explains (but sometimes does not)¹⁴⁹ what made the suspect dangerous enough to frisk. Seldom, if ever, do police supply any data substantiating their assumptions that the suspect was armed and dangerous;¹⁵⁰ rather, it is simply assumed.

While it may be true that police testimony must play the lead role in every *Terry* case, it is lower courts' consistent *view* of this testimony that is troubling. These courts do not simply hear the police testimony, consider it, and decide whether to accept it in accordance with the usual model of court as fact-finder. Rather, they usually just accept it without question. Judges rarely express skepticism about this testimony; instead, they simply cite to earlier opinions in which other judges have concluded — again, based not on any hard data but on police assertions — that certain offenses and situations mean that suspects are probably armed and dangerous and therefore officers may automatically frisk.

The Supreme Court itself must shoulder at least some of the blame for the lower courts' willingness to unquestioningly accept the word of police witnesses. After all, that is exactly the direction the Court told lower courts to take in *United States v. Cortez*.¹⁵¹ The Court used *Cortez* to speak generally about the

police acted without a warrant, the burden of proof is on the prosecution.”). Beyond this, police testimony is the source of virtually all the information courts get about searches and seizures. While defendants have the *right* to testify in suppression hearings and may do so, there is little question that courts will believe the police. *See, e.g.*, *Bostick v. State*, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part) (“Needless to say, there is conflict in the evidence about whether the defendant consented to the search.”), *rev'd on other grounds*, 554 So. 2d 1153 (Fla. 1989). Judge Letts's comment implies that the defendant's story would, of course, differ from the truth as told by the police.

¹⁴⁹ *See supra* notes 139-46 and accompanying text (discussing routine police procedure of frisking all suspects).

¹⁵⁰ The only exception my research of reported appellate opinions unearthed involved an officer who asserted, without any substantiating data, that police found weapons in 85 to 98 percent of all cases in which they executed a search warrant. *State v. Harris*, 384 S.E.2d 50, 51 (N.C. Ct. App. 1989).

¹⁵¹ 449 U.S. 411 (1981). In *Cortez*, agents of the Border Patrol stopped the defendant's truck and found illegal aliens in the back. *Id.* at 413-17. The Court began by discussing two important search and seizure standards. First, courts should view the evidence not as isolated fact. Rather, “the totality of the circumstances must be taken into account.” *Id.* at 417. Second, the “whole picture” should give the court “a suspicion that the particular individual being stopped is engaged in wrongdoing.” *Id.* at 418.

way that lower courts should evaluate the evidence relating to stops and frisks. The world view with which courts should make these assessments, the Court said, belongs not to judging, but to policing.

[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.¹⁵²

Cortez mandates that police testimony receive the utmost deference. Lower courts should generally accept what officers say; the police are the ones who know the business of crime, and judges should not second-guess them.

This approach is flawed. It invites less than forthright testimony from police by reinforcing the natural tendency to believe police officers over defendants.¹⁵³ It is also inconsistent with long-standing practice when juries serve as fact-finders; judges tell juries that police are no more believable as witnesses than others.¹⁵⁴

But even more important, there are genuine reasons to be skeptical — not just unbiased — about police testimony in search and seizure cases. First, police have no great love for search and seizure law and the exclusionary rule.¹⁵⁵ When officers have made an arrest based upon contraband found on the defendant, they know that the defendant is in every factual sense guilty; to have the defendant go free because of a violation of the Fourth Amendment may seem too high a price to pay.¹⁵⁶ The result can be a kind of “ends justify the means”

¹⁵² *Id.*

¹⁵³ See, e.g., William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 914-15 (1991) (commenting on defendants' incentives to lie and post-hoc shaping of police testimony).

¹⁵⁴ See, e.g., 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.01, at 468 (4th ed. 1990) (arguing that jurors should judge credibility of police officer testimony in same way they judge other witnesses' testimony).

¹⁵⁵ See FRANCESCHINI, *supra* note 67, at 39. Franceschini, a former New York City detective, states: “Police officers made sure the community was under control and the law was not broken. After *Mapp v. Ohio* that became a much harder job.” *Id.*

¹⁵⁶ The evidence shows clearly that the “price” of the exclusionary rule is grossly overestimated. See Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 600-02 (“[J]ust over one-half of 1% of the felony cases . . . were lost due to the [exclusion of physical evidence, confessions, and identifications] combined.”); see also Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost”*

thinking, in which testimony gets adjusted in hindsight so that the prosecution can succeed. Suppression issues thus present an almost too tempting scenario for post hoc justification.¹⁵⁷ These cases are litigated by the guilty with the goal not of vindicating society's Fourth Amendment concerns, but of avoiding deserved punishment.¹⁵⁸ The Supreme Court recognized this in its justification of the warrant requirement:

[A police search without a warrant] bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.¹⁵⁹

Tied closely to the issue of hindsight (indeed, perhaps it is a stronger version of the same issue) is the fact that police can and do perjure themselves to justify searches and seizures. Police perjury is by no means a new problem,¹⁶⁰ but it is certainly not yet a problem of the past. In the early 1990s, the Mollen Commission, a body constituted to investigate police corruption in New York, reported that one of the most common corrupt practices among New York police was lying and falsifying evidence to support searches and seizures of otherwise dubious validity.¹⁶¹ The Mollen Commission found the practice to be so widespread

Arrests, 1983 AM. B. FOUND. RES. J. 611, 622 ("All the available evidence . . . consistently indicates that *the general level of the rule's effects on criminal prosecutions is marginal at most.*")

¹⁵⁷ See Stuntz, *supra* note 153, at 912-13, 915. Stuntz writes that police officers adjust their testimony to fit search and seizure rules. *Id.* He also contends that judges' views may be distorted by a desire to allow evidence in cases proving the police suspicions were correct and defendant was guilty. *Id.*

¹⁵⁸ See *Illinois v. Gates*, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting) ("Rights secured by the Fourth Amendment are particularly difficult to protect because their 'advocates are usually criminals.'" (quoting in part *Draper v. United States*, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting))).

¹⁵⁹ *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

¹⁶⁰ See FRANCESCHINI, *supra* note 67, at 37 ("I thought the whole Dropsy Era [i.e., the years after *Mapp* in 1961] mentality was wrong because our entire profession's credibility went out the window. . . . [W]e were being seen as — and we were in fact — liars"). *But see* *People v. Berrios*, 270 N.E.2d 709 (N.Y. 1971) (refusing to change burden of proof in "Dropsy" cases despite suspicions of police perjury).

¹⁶¹ See Joe Sexton, *New York Police Often Lie Under Oath Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1 (noting that draft report of Mollen Commission "cites numerous instances of police officers tampering with evidence to justify arrests, falsifying reports and then lying under oath").

and accepted that police had given it a name: "testilying."¹⁶² There is nothing to suggest that the practice is any different anywhere else.

When I say that police justify questionable searches and seizures with creative hindsight or even perjury, my purpose is not to argue that the police are bad or dishonest people. Though a few surely are, most are not. Rather, the point is that instead of accepting police testimony about frisks unquestioningly, as courts now do, or even neutrally, as they *could* do, courts should view police testimony at least carefully, and not accept every profession of suspicion or dangerousness at face value. Indeed, skepticism should be the rule, not the exception.

B. *Lack of Substantiating Data*

This returns us to an earlier point: Rarely is an assertion about the dangerousness supporting a frisk accompanied by any data. While at first blush empirical proof of dangerousness may seem like a lot to ask, it is not. First, such proof need only rise to the level of reasonable suspicion, not beyond a reasonable doubt. More importantly, recall that it is the police and prosecution who are seeking to make use of an exception to Fourth Amendment requirements when they seek to introduce evidence seized in a *Terry* frisk; it is they who have sought in countless cases to widen the scope of the power to frisk, usually successfully. There is nothing novel in requiring the party seeking the benefit of an exception to or a change from the established rule of law to carry the burden of justifying the exception or change. Yet precisely the opposite has occurred in the frisk cases. Police and prosecutors assert the need for the exception or change, and they receive it almost without question, and certainly without proving their assertion, even to the level of reasonable suspicion. Indeed, the burden seems to have been cast the other way; those who would oppose the wider police power to frisk must prove to the court that this should not be so. And when there is neither empirical data

¹⁶² *Id.*

concerning a proposal, nor any requirement that data be produced, the allocation of the burden of proof alone may determine the outcome.¹⁶³

C. Bright Line Rules

Perhaps what is at work in the frisk cases is a preference for so-called bright line rules. In the context of criminal procedure, bright line rules are clear legal boundaries to police conduct. They guide the police effectively because they are easy to follow and do not require officers in the field to measure their conduct against the nuances of constitutional law.¹⁶⁴ For example, *New York v. Belton*¹⁶⁵ created a rule always allowing the search incident to arrest of automobile passenger compartments and closed containers found in them, regardless of whether suspects could actually reach these areas.¹⁶⁶ The Court quoted Professor LaFave:

Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. . . . [Fourth Amendment protections] can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.¹⁶⁷

While both police and citizens gain from clear rules that police may follow routinely,¹⁶⁸ the clarity and ease of enforceability

¹⁶³ See, e.g., *United States v. Leon*, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting) (characterizing assignment of burden of proof in cases involving outcomes not determined on the basis of evidence as “merely a way of announcing a predetermined conclusion” (quoting Ronald Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 *IND. L.J.* 329, 332-33 (1973))).

¹⁶⁴ The Supreme Court has taken these factors into consideration on a number of occasions. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (“A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”).

¹⁶⁵ 453 U.S. 454 (1981).

¹⁶⁶ *Id.* at 459-63.

¹⁶⁷ Wayne R. LaFave, “Case-by-Case Adjudication” versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 *SUP. CT. REV.* 127, 141, 142.

¹⁶⁸ WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 3.7, at 191 (2d ed.

ty that such rules may provide should not become ends in themselves. Bright-line rules are only preferable to case-by-case adjudication when they reach the same result as case-by-case adjudication in most cases. *Belton* is a good example of a bright-line rule that fails to consistently reach the same results as case-by-case adjudication. While the police may find the *Belton* rule easy to follow, it allows the police to search more extensively than case-by-case adjudication did. The results produced in cases subsequent to *Belton* overshoot by a considerable margin those one would get under the prior regime.¹⁶⁹

The same principle seems to be at work in the frisk cases. Despite the Supreme Court's nearly unvarying restatement of the *Terry* rules, lower courts have created their own bright line rules by stating that additional crimes, persons, and situations carry a danger of confrontation with an armed suspect. This has had the effect of bringing more types of cases into the existing rule that only violent or armed crimes allow for an immediate frisk, with no showing that the bright line test approximates the outcome of case-by-case adjudication. To the extent that prosecuting authorities wish to expand the law in their favor, the burden should be on them to show that these bright lines approximate the "right" result. Simply creating these new categories of dangerous offenses, relying on nothing more than unsubstantiated police testimony or the prior pronouncements of earlier courts, seems at best unjustified.¹⁷⁰

D. *Where Are We Headed?*

The time rapidly approaches when *frisks will automatically follow all stops*, irrespective of the Supreme Court's rhetoric in even so recent a case as *Dickerson*.

Wherever they are, Americans share one concern today — the fear of crime. As 1993 ended and 1994 began, fear of crime was

1992) (arguing that "easily understood standardized procedures" work to the advantage of both citizens and law enforcement).

¹⁶⁹ *Id.*

¹⁷⁰ At least one other reason accounts for why the law regarding frisks is as it is now. Courts have expressed their hostility to the exclusionary rule by bending substantive law in search and seizure cases. *See, e.g.,* Bradley, *supra* note 52, at 1470 (expressing view that Supreme Court "strives to justify such police behavior by stretching existing doctrine to accommodate" instances in which exclusionary rules dictate suppression of evidence).

the number one concern of the public, ahead of the economy, unemployment, and the budget deficit.¹⁷¹ People especially fear violent crime, and politicians from the President on down seem ready to exploit this fear.¹⁷² The concern grows unabated even while statistical reports indicate that crime is actually *not increasing* or is even *decreasing*.¹⁷³

Thus it is hardly surprising to find that most people would support crime-fighting efforts of questionable constitutionality. It is inevitable that the police and the courts, no less than our elected officials, will begin to reflect — or even foster — these attitudes, much as they did with the *Terry* opinion itself. Given the distance the lower courts have come toward an automatic frisk rule despite the Supreme Court's efforts to confine *Terry* to its original meaning, and given the ever-growing concerns with violent crime and with the pervasiveness of weapons in our society, lower courts — or even the Supreme Court — may soon take the limits *Terry* placed on frisks and toss them out like last week's newspaper. One can almost hear the reasoning: "As the Supreme Court said in *Terry*, American criminals have a long history of armed violence. Since *Terry*, things have gotten, and continue to get, worse. Violent crime and guns are pervasive; indeed, there is a risk of armed violence with every criminal the police stop. Therefore, any time the police legitimately stop a suspect, they may frisk that suspect as a matter of course in order that the police be able to do their jobs without putting their lives in danger."

¹⁷¹ See, e.g., Richard Lacayo, *Lock 'Em Up*, TIME, Feb. 7, 1994, at 50, 52 (reporting that majority of those polled felt crime was "their greatest concern").

¹⁷² See Gwen Ifill, *State of the Union: The Overview; Clinton Vows Fight For His Health Plan*, N.Y. TIMES, Jan. 26, 1994, at A1 (reporting that President Clinton "voiced strong support" for provision of federal crime bill that would mandate life without parole for criminals convicted of third violent felony); see also Phil Gramm, *Drugs, Crime and Punishment; Don't Let Judges Set Crooks Free*, N.Y. TIMES, July 8, 1993, at A19 (advocating maintaining long mandatory minimum sentences because "[w]ith the end of the cold war, domestic crime is now the greatest threat to the safety and well being of Americans").

¹⁷³ See OFFICE OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 3 (1992) (reporting that "[r]ates of crime either declined or remained stable last year" and that level of violent crime had not increased from prior year); see also FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 58 (1992) (reporting that crimes per 100,000 population decreased four percent from 1991 to 1992 and decreased slightly from 1988 to 1992).

Even if the courts do not go so far explicitly, the current, piecemeal approach, in combination with *Dickerson*, has already considerably weakened what might be considered the most sacrosanct of these *Terry* safeguards: The rule that frisks are only searches for weapons, and that courts will exclude any evidence found in a search which exceeds the scope needed to find weapons. Under *Dickerson*, if there is a valid stop and frisk, contraband uncovered is admissible as long as its nature was immediately apparent upon the officer's touch.¹⁷⁴ As long as the officer is willing to utter the magical phrase — "When I touched it, I knew right away what it was" — the evidence comes in. Combined with wide-ranging automatic frisk rules, *Terry* stops become, for all practical purposes, evidence-gathering devices.

IV. PROPOSED RULES FOR FRISKS

What rule, then, should govern frisks? In the next part of this Article, I begin seeking an answer to this question by scrutinizing recommendations made elsewhere, including the idea that the law should allow police to frisk every person validly stopped. I find these suggestions either insufficient to address the problems that frisks pose or else otherwise undesirable. Instead, I propose that the Court reinvigorate *Terry* by insisting on true dangerousness as the criterion for frisks. I also propose that the Supreme Court mandate that the lower courts evaluate police testimony with much greater care.

A. *Automatic Frisks Following Every Stop*

The first idea is the simplest. Move the law fully and explicitly in the direction in which it is headed and allow a frisk any time an officer has legitimately stopped a suspect. In other words, frisks could automatically follow stops, regardless of the nature of the crime suspected or whether the suspect exhibits any outward sign of being armed.¹⁷⁵ Advocates of this rule supply

¹⁷⁴ *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2137 (1993).

¹⁷⁵ See Mitchell Lampson, *On the Silver Anniversary of Terry v. Ohio: The Reasonableness of an Automatic Frisk*, 28 CRIM. L. BULL. 336, 337 (1992) ("The time has come to allow officers to frisk *every* individual they legitimately stop.").

two rationales. First, if the streets and the job of policing them were dangerous in 1968, they are only more so now;¹⁷⁶ courts should recognize the risks with which officers live day in and day out and give them the tools they obviously need to protect themselves. In other words, police simply need to frisk in order to be safe.¹⁷⁷ Second, officers will always put their safety first and frisk anyway, no matter what courts do. To the extent that exclusion of evidence based on violations of *Terry* stands on deterrence, it will never work because police will still frisk in order to protect themselves.¹⁷⁸

But there are several serious problems with the automatic frisk approach. I discussed the first of these in Part II: The lack of any data supporting the well-intentioned but unproven assertion that police simply must have the power to frisk anyone they stop in order to protect themselves. If the law must move in this direction, surely there must be more to recommend the view than bald assertions of heartfelt, gut feelings. Where, then, is the evidence? For example, one author argues that “[t]he time has come . . . to recognize the dangers involved in every street encounter . . . [and that] the officer’s safety always outweighs any intrusion involved in a patdown frisk.”¹⁷⁹ But he makes no effort to tell us *why* the blanket use of frisks would make police safer, except to argue that the world is a more dangerous place now than it was when the Supreme Court decided *Terry*.¹⁸⁰ In fact, he concedes that he lacks data to support his argument.¹⁸¹ The argument seems literally to boil down to the

¹⁷⁶ *Id.* at 349.

¹⁷⁷ *Id.* at 337.

¹⁷⁸ *Id.* at 357-58.

¹⁷⁹ *Id.* at 337, 345.

¹⁸⁰ *Id.* at 349. As proof of his proposition, Lampson lists an array of statistics regarding the number of assaults and killings on police officers in 1990. *Id.* at 349 n.6. Of the 65 officers “feloniously killed” in 1990, Lampson tells us that more than half died in shootings from less than five feet. *Id.* From this he infers that these unfortunate murders present “precisely the situation in which a quick, pat-down frisk might have thwarted any assault.” *Id.*

¹⁸¹ *Id.* at 360, n.130 (“Unfortunately, available data do not provide a clear picture as to how often or why frisks are made.”). Other data have been misused. For example, Allen P. Bristow, *Police Officer Shootings — A Tactical Evaluation*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 93 (1963), has been cited by the Supreme Court in several cases. *See, e.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977); *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973); *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972). The Court recently used

assertion that since any person stopped *could* be dangerous, it is reasonable to allow police to frisk everyone stopped. It seems little enough to ask that, if we are to take *Terry* and its concerns for the safety of the police seriously, advocates of automatic frisks support their argument with hard data showing that automatic frisks protect police.

The second argument for blanket, automatic frisks will sound familiar to anyone who has studied the Supreme Court's criminal procedure decisions during the last fifteen years: The rule does not deter, so eliminate it. For example, in *United States v. Leon*, the Court explained that the exclusion of evidence based on a faulty warrant would not deter the issuing magistrate; therefore, using the exclusionary rule in such a case was inappropriate.¹⁸² The idea is simple: If the concept behind the exclusionary rule is deterrence of official wrongdoing, courts should not apply the rule where it would have no deterrent effect.

In the context of automatic frisks, this argument ignores an important point: If automatic frisks are allowed, and the evidence seized as a result may be used against the suspect (as advocates of this position seem to assume should be so),¹⁸³ this *creates* a huge incentive to frisk everyone the police stop in order to gather evidence that may be used to convict the suspect, regardless of whether or not the suspect was dangerous in any way. Unless the courts or the supporters of an automatic frisk rule are prepared to pare down the technique, perhaps allowing

this research to support the proposition that stops of cars pose such danger to officers that they necessitate broad police powers to conduct vehicle searches. *Michigan v. Long*, 463 U.S. 1032, 1048 n.13 (1983). The study, however, does not support this conclusion. As Professor LaFave noted, "a power to search the car is neither adequate nor necessary to protect the police in any of [the] situations [studied]." LaFave, *supra* note 110, at 1207. Indeed, the data that exist arguably contradict the conclusion that *Terry* frisk powers should be broadened because they fight crime efficaciously. See Robert L. Bogomolny, *Street Patrol: The Decision to Stop a Citizen*, 12 CRIM. L. BULL. 544, 550-51, 567-74 (1976). Bogomolny points out that stops and frisks must have a net positive yield to merit justification. *Id.* at 574. Unquestionably, the use of the technique in fighting crime must produce sufficiently strong results to outweigh negative effects, such as creation of community and racial tensions. Bogomolny's study indicates that stops and frisks have been more likely to target younger males and blacks than other techniques, but without much appreciable crime-fighting effect. *Id.*

¹⁸² 468 U.S. 897, 916-17 (1984).

¹⁸³ See, e.g., Lampson, *supra* note 175 (failing to mention limitation on automatic frisks).

frisks, but not allowing the introduction of evidence seized as a result,¹⁸⁴ the automatic frisk rule turns *Terry* stops into searches for contraband, something the Supreme Court still says it will not countenance.¹⁸⁵

These objections to the automatic frisk rule challenge its efficacy and logic, but a more fundamental problem remains: Those who police would frisk most often, who would suffer most of the indignities this rule would allow, are not distributed evenly across the population. On the contrary, the automatic frisk rule will most heavily burden members of minority groups, especially African-Americans.

The racially biased use of stops and frisks and so-called "aggressive patrol" techniques predated *Terry*. By 1968, the use of these tactics had become a major source of tension and friction between African-American communities and the police officers working in them. The Court thought the issue serious enough that it explicitly made the racial cast of *Terry* stops a prominent part of the decision.¹⁸⁶ These concerns and the civil rights struggles of the 1950s and 1960s were part of the reason (if not *the* reason) for the Warren Court's concern with criminal procedure in general and with stops and frisks in particular.¹⁸⁷

Even leaving this history aside, African-Americans and Hispanic-Americans pay a higher personal price for contemporary stop and frisk practices than whites do.¹⁸⁸ Cases

¹⁸⁴ See *infra* text accompanying notes 202-05 (proposing that courts change exclusionary rule to require suppression of all evidence gathered with stops and frisks).

¹⁸⁵ See *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2136 (1993) (stating that *Terry* searches should not constitute evidence-gathering tactic).

¹⁸⁶ See *supra* text accompanying notes 30-32 (examining role of racial considerations in *Terry*).

¹⁸⁷ See, e.g., A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968) (concluding that Warren Court's criminal procedure related directly to struggle for civil rights for African-Americans who bore brunt of both discrimination against poor and police brutality). To be sure, *Terry* did not end the Supreme Court's struggle with cases evidencing racially biased law enforcement. See generally Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 844 (1994) (noting numerous pre- and post-*Terry* cases demonstrating considerations of race).

¹⁸⁸ This article only addresses lawful police practices. Undoubtedly, however, much more illegal police activity is visited disproportionately on African-Americans and Hispanic-Americans, at considerably higher price. See Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. TIMES, Mar. 7, 1991, at A18 (reporting that beating of Rodney King came as no surprise to police brutality investigators who receive many calls about such occurrences each week); see also William Grady, *Police Brutality Suit Heads to Trial*, CHI.

from courts around the country already permit *Terry* stops of individuals based on nothing more than their presence in a high-crime or drug-involved location, and allegedly evasive behavior toward the police.¹⁸⁹ Minority group members are more likely than majority race individuals to live and work in such areas.¹⁹⁰ Moreover, the police often use race as a proxy for criminality in deciding whether to stop a putative suspect.¹⁹¹ Given all of this, the automatic frisk cases — especially those that allow frisks based on the character of the neighborhood — paint an ugly picture: *Minority group members can be not only stopped, but subjected to a frisk without any evidence that they are armed or dangerous, just because they are present in the neighborhoods in which they work or live.*

In short, racism in the criminal justice system remains an intractable societal problem even now, twenty-six years after *Terry*, especially in the context of stop and frisk law. To adopt the automatic frisk rule, one would have to ignore this entire history. If the *Terry* court intended to rein in unacceptable police behavior toward African-Americans, then surely allowing police to frisk everyone that they stop represents a step backward. Under the rule, police *may*, but need not, frisk any person legitimately stopped. In other words, although police could frisk everyone, they would not have to do so; it would be within the individual officer's discretion to decide who merited frisking. Can there be any doubt that the burden of this rule

TRIBUNE, Feb. 15, 1989, at News 7 (examining allegations of torture against African-American suspect by police); Charles Nicodemus, 'Expert' Is Challenged in Police Torture Case, CHI. SUN TIMES, Jan. 7, 1992, at News 3 (reporting that forensic pathologist stated photographs supported allegations of torture). See generally Maclin, *supra* note 14 (containing comprehensive review of police brutality against African-Americans).

¹⁸⁹ Harris, *supra* note 43, at 672-75.

¹⁹⁰ *Id.* at 677-78.

¹⁹¹ See MICHAEL K. BROWN, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 170 (1981) (finding that police consider "[r]ace, age, sex and social class" in deciding "whether or not to stop someone"); see also Steiker, *supra* note 187, at 840 ("[R]ace still play[s] a large role in the determination of dangerousness."); Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 214 (1983) ("[P]olice still view race as an important factor in the decision to detain a suspect."); *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1520 (1988) (concluding that police "continue to use race in ways that visit profound but unnoticed injuries on citizens every day"); Harris, *supra* note 14, at A1 (reporting that blacks suffer disproportionately from use of police policies that contravene the Fourth Amendment in numerous ways).

would fall disproportionately upon African-Americans? Given the history of race and law enforcement, there is every reason to think that the automatic frisk power would be used in an unbalanced way and not in a racially neutral, even-handed fashion.¹⁹² Blacks, especially young black men, would bear the brunt of this law enforcement tool.¹⁹³ Even leaving aside the other criticisms of the automatic frisk rule, it should be discarded based on the likely racial impact of its implementation alone.

B. A Return to Pre-Terry Law

Perhaps another alternative would better address the problem than the automatic frisk rule would: a return to the law as it existed just prior to *Terry*. Under such a regime, stops and frisks would require probable cause. The standard for judging when a set of police observations could serve as the basis for a stop and frisk would become harder to meet. Instead of reasonable suspicion, a frisk would require probable cause to believe that the suspect is armed or dangerous. Before police could frisk, they would have to have more evidence than they do now of the violent nature of either the criminal activity thought to be afoot or the suspect.

This alternative has several inherent problems. First, as the Supreme Court recognized in *Terry*, police may perform stops and frisks for reasons wholly unrelated to obtaining evidence for convictions.¹⁹⁴ Some of these are clearly unacceptable, such as racial harassment. Police may also use stops and frisks simply to control the streets.¹⁹⁵ One of the Court's chief concerns was to

¹⁹² See BROWN, *supra* note 191, at 170 (concluding that police use "race, age, sex and social class" to decide "whether or not to stop someone"); see also KENNETH C. DAVIS, POLICE DISCRETION 18 (1975) (arguing that police discretion results in disproportionate willingness to stop and search members of "kinky" (criminal) class, "recognizable by physical characteristics and appearance").

¹⁹³ Ironically, the automatic frisk rule might actually be more palatable if it *required* police to frisk *every* person stopped. This would prevent police from using the rule selectively against minorities. See *supra* text accompanying notes 175-78 (discussing scholarship advocating frisking all suspects stopped by police).

¹⁹⁴ *Terry v. Ohio*, 392 U.S. 1, 12-14 (1968).

¹⁹⁵ See FRANCESCHINI, *supra* note 67, at 39 (noting that police used aggressive street patrol tactics to control streets and "may have used excessive force some times, and there were men who abused their power, but for the most part police officers made sure the

officially recognize this “low-visibility” police procedure¹⁹⁶ and to regulate it, informed by a balancing of the needs of both law enforcement and the citizenry. Even if moving back to pre-*Terry* law does inhibit the frisks for evidence described above, it will effectively remove legal control on police conduct (however weak it may be). The use of stops and frisks would no doubt continue, but, as in the years before *Terry*, it would become largely invisible and subject only to almost unfettered police discretion. Whatever the inadequacies of *Terry* and the cases it has spawned, returning to these “bad old days” would not represent progress.

Second, one virtue (perhaps a better word would be promise) of *Terry* was the hope that the case would help address the many racial problems surrounding police-citizen encounters.¹⁹⁷ Even conceding that *Terry* has been an imperfect and incomplete tool for this purpose,¹⁹⁸ removing it entirely cannot help but exacerbate existing tensions between police and members of minority groups.¹⁹⁹

Third, to the extent that the current standards encourage police perjury, a return to pre-*Terry* law would provide an even greater incentive. Simply put, police may engage in a certain amount of post hoc justification or even prevarication to assure that the court admits evidence, whatever the actual particulars of its seizure. Raising the standard to probable cause may have the unintended effect of increasing the amount of lying, without

community was under control and the law was not broken”).

¹⁹⁶ See, e.g., LaFave, *Street Encounters*, *supra* note 2, at 42 (characterizing stop and frisk as “low visibility” procedure); see also Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 433, 463 (1967) (same).

¹⁹⁷ See Williams, *supra* note 24, at 571 (recognizing Warren Court’s efforts to come to “compromise” between law enforcement interests and interests of citizens “to be free of police harassment”).

¹⁹⁸ See *supra* note 70 and accompanying text (noting that *Terry* Court declined to address all possible stop and frisk issues). Surely, we cannot think of *Terry* as intended to address *all* of the problems between race and law enforcement. Given *Terry*’s limited aims, the decision represents progress.

¹⁹⁹ See *supra* text accompanying notes 30-32, 63-64 (discussing considerations of racial tensions reflected in *Terry* Court’s decision).

affecting how police actually conduct stops and frisks. This point is perhaps best explained by a police officer's discussion of the aftermath of *Mapp v. Ohio*.²⁰⁰

All of a sudden you couldn't stop a guy on the street and give him a toss. You had to have probable cause. . . .

The Dropsy Era [in which police falsely testified that suspects dropped narcotics as police approached] began.

. . . I thought the whole Dropsy Era mentality was wrong because our entire profession's credibility went out the window. People had been almost in awe of the police; *now we were being seen as — and we were, in fact — liars.*²⁰¹

C. Automatic Frisks With Limited Use of Evidence

Another way to approach the problem of *Terry* frisks is to change the exclusionary rule. Allow frisks whenever police may stop; but only weapons²⁰² — or perhaps no evidence at all²⁰³ — recovered in such frisks could be used to convict the defendant.

This proposal has certain virtues. It allows police to protect themselves during stops; it is completely responsive to the idea that police should have the flexibility to keep themselves safe. Moreover, if police will engage in these activities anyway, regardless of the specifics of the rules, the proposal removes deterrence from the equation.

But this proposal leaves certain important questions either completely or partially unaddressed. Although it is true that it would allow police officers to protect themselves to the fullest extent possible, it may correct the current situation more than is actually needed. Put another way, the rule allows the police to frisk everyone, regardless of dangerousness, and will undoubtedly permit many frisks that simply are not necessary. Thus one of the chief problems of the automatic frisk rule²⁰⁴ would persist

²⁰⁰ 367 U.S. 643 (1961).

²⁰¹ FRANCESCHINI, *supra* note 67, at 36-37 (emphasis added).

²⁰² See Marcus Schoenfeld, *The Stop and Frisk Law Is Unconstitutional*, 17 SYRACUSE L. REV. 627, 632-33 (1967) (arguing that police should be allowed to frisk for weapons only).

²⁰³ See WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 43 (1967); see also Comment, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158, 166 (1966) (proposing that courts exclude evidence obtained by searches or frisks with less than probable cause).

²⁰⁴ See *supra* notes 179-84 and accompanying text (criticizing automatic frisk rule).

under this proposal.²⁰⁵ It offers no prospect of addressing the racially biased use of stops and frisks. Indeed, given the greater amount of discretion the proposal gives the police, these practices may even increase.

D. A Focus on Dangerousness and a Reinvigoration of the Role of the Courts

Given the weaknesses of these alternatives, I propose another. It addresses the problems with frisks comprehensively, and also supplies future direction to the lower courts. It does not strip away major parts of *Terry*, as the automatic frisk rule does, nor does it scrap *Terry* entirely.

The problems highlighted here should be attacked in two steps. The goal of these steps is to clarify the ambiguities that have proven to be a source of trouble in lower court decisions, and to invigorate the *independent judgment* of the courts that decide the legality of frisks. First, *Terry* should be reinterpreted to allow frisks only when the crime suspected *must* involve the use of force, violence, or weapons. The fact that the offense, person, or situation *could* present a danger would no longer suffice to validate a frisk. An important, related part of *Terry* would not change: If the conduct or appearance of the individual suspect

²⁰⁵ Professor LaFave puts the point somewhat more strongly: Many would find a rule allowing only admission of weapons to be unacceptable "because the dangers of police misuse of this power seem to be so substantial that the temptation to feign justification for the seizure of other items on stop-and-frisk grounds should be removed." LaFave, *Street Encounters*, *supra* note 2, at 92.

Professor LaFave also advances another proposal. He suggests prohibiting police from using stops and frisk for "minor crimes like possession of narcotics in order to remove the temptation for the police to go on fishing expeditions for contraband." *Id.* at 65-66. This dovetails neatly with Justice Harlan's suggestion that narcotics possession does not inherently create a "substantial likelihood" that the suspect is armed. *Sibron v. New York*, 392 U.S. 40, 74 (1968). LaFave notes one difficulty with this idea. The proposed prohibition may not be easy to implement through interpretation of the Fourth Amendment. Perhaps, however, this could be accomplished by statute. *See* LaFave, *Street Encounters*, *supra* note 2, at 65-66. Another difficulty is that many courts have effectively declared all narcotics related crimes and transactions to be dangerous enough to merit a frisk. *See supra* notes 132-34 and accompanying text. Moreover, in *Dickerson*, the Supreme Court validated what LaFave calls the "stop and fish" approach. The *Dickerson* Court held that so long as police testify that the contraband nature of the item was immediately apparent when the officer touched the item, it is admissible. *Minnesota v. Dickerson*, 113 U.S. 2130, 2136 (1993). Thus, whatever the merits of this proposal, its time seems to have passed.

showed that the person might be armed and dangerous, the officer could still frisk regardless of the type of crime suspected.

Second, the Supreme Court should clarify or change the law as articulated in *Cortez*. Recall that *Cortez* appears to command courts to defer almost completely to the view of police in stop and frisk cases.²⁰⁶ The Supreme Court should make clear that if *Cortez* appears to instruct lower courts to take the police view of these situations unquestioningly, it is incorrect. Rather, although courts should not take a view of the world far removed from the reality of the streets, they also must not abdicate their function as independent evaluators of facts. Blanket fealty to police testimony should end; judges should again become judges.²⁰⁷

These two ideas have several major advantages over both the status quo and the alternatives surveyed above. First, turning the law of frisks sharply and clearly in the direction of dangerousness protects the police in cases where this is needed while not erring on the side of frisking *everyone*, because anyone *could* endanger the officer. Having frisks turn on whether the crime must include force, violence, or weapons does not, of course, affect the officer's power to make a stop; she may do so based on the same criteria as always, and is entitled to protect herself as the situation actually merits. Given the lack of evidence to sustain the idea that police are always in danger and that frisks for all suspects would protect police,²⁰⁸ this proposal

²⁰⁶ See *supra* text accompanying notes 157-62 (discussing scholarship suggesting that police shape their testimony to ensure convictions).

²⁰⁷ Both changes could be bolstered by readopting the probable cause standard and requiring more evidence for a lawful frisk than the current reasonable suspicion standard does. In fact, Professor Maclin has made this proposal in another context, and for somewhat different reasons. See Maclin, *supra* note 68, at 1332-33 (arguing that Supreme Court should "discard" reasonable suspicion test because probable cause has become so "diluted" as to be "the functional equivalent of a reason to suspect, or substantial possibility standard"). Professor Maclin's proposal suggests another approach to the problem discussed in this Article: Allow automatic frisks, but only with probable cause that the suspect is armed and dangerous. Thus, police would be allowed considerable leeway to ensure their safety, while the scope of their discretion would be both reasonable and more stringent than the current standard. But this still leaves at least one problem unaddressed. Such a bright-line rule may accord the police too much discretion without any justification and result in unnecessary frisks. African-Americans and Hispanics are more likely to pay this price than others.

²⁰⁸ See *supra* notes 179-81 and accompanying text.

properly puts the burden on those wishing to change *Terry* to show why it should be changed, rather than simply assuming that the change is both justified and efficacious.

Second, the rule proposed here would provide the police and courts with guidance that is still flexible enough to respond to situations as they arise. Police could frisk in any dangerous situation; anything more would require an individualized suspicion. Admittedly, no rule would be as clear as the automatic frisk rule would be. But there would be a cost to this clarity; in exchange for knowing the frisk is always justified, many individuals could be — and no doubt would be — frisked without reason. While these unjustified intrusions might buy some ease of administration and peace of mind, they would hardly be costless. Especially in minority communities, aggressive use of stops and frisks have become the source of a distinct abrasiveness with racial overtones.²⁰⁹

Third, police discretion to frisk would be limited. Rather than allowing police to frisk anyone they stopped and leaving it up to field officers to choose which suspects merit frisks, the rule proposed here would constrain police. They could only frisk (and use evidence found as a result) where a plausible case for reasonable suspicion of dangerousness could be made.

Fourth, some incentive would remain for police to follow the law. If frisks were restricted to cases presenting real danger, evidence gathered in those cases — be it weapons or other contraband — would come in; if no danger were presented, the evidence is excluded. This rule would not deter officers from using stops and frisks for purposes other than obtaining evidence, such as removing contraband based on hunches or harassing and controlling minority populations. But at least this behavior would not be *rewarded* with convictions based on the evidence so gathered, as it would be under the automatic frisk rule or even the “guns only” rule.

Fifth, the proposal promises to reinvigorate the role of courts in *Terry* proceedings and in so doing to limit practices like “testilying”²¹⁰ by police. If the police perjure themselves

²⁰⁹ See Harris, *supra* note 43, at 681 (noting that unjustified stops and frisks “have become the source of a distinctly racial abrasiveness for African-Americans”).

²¹⁰ See *supra* note 160-62 and accompanying text (noting scholarship suggesting that

concerning searches and seizures, as is apparently the widespread practice, courts that unquestioningly accept this testimony are no less than accomplices to this corruption of the system.²¹¹ The Supreme Court should reinterpret or overturn *Cortez* and clearly state that courts must perform their fact-finding role in the search and seizure context with the same diligence and vigor as they use whenever they evaluate credibility. This would send the message to courts that they must do two important things. First, they should scrutinize police testimony instead of just accepting it. Second, courts should not be party to wholesale perjury any longer and should throw out cases where testifying was suspected instead of blithely waving away objections to the testimony with the flimsy *sub rosa* excuse that "everybody does it, and the Supreme Court told us to accept it."

Sixth, this proposal aims to reanimate *Terry's* role as a regulator of police treatment of African-Americans and other minority groups. While stop and frisk practices are surely but one piece of this puzzle, they represent a major irritant in these communities. The automatic frisk rule would simply let police do whatever they want in this context. The message would be clear: Police discretion in frisking suspects is virtually unlimited. My proposal would neither grant the police open season on members of minority groups (as the automatic frisk rule would) nor drive the stop and frisk practice out of the range of legal oversight (as a return to pre-*Terry* law would). Rather, police would have to articulate reasons related to dangerousness in order to justify a frisk that turns up evidence they wish to use. Having to supply such reasons would tend to push officers away from nonneutral criteria such as race.

This proposal could change the handling of many of the types of crimes, persons, and situations surveyed in Part II in significant ways. For example, while burglary and gambling operations *could* involve the use of weapons, surely the perpetrators need not be either violent or armed just by the nature of the crimes. Similarly, whatever the feeling one has

police shape their testimony to ensure convictions).

²¹¹ Alan M. Dershowitz, *Controlling the Cops: Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17 (expressing view that judges who credit police perjury are accomplices to it).

about major narcotics traffickers, neither small time sellers nor purchasers must necessarily use force, violence, or weapons to carry out their crimes. By the same token, companions of persons arrested cannot be presumed dangerous; as with persons who are simply present when police execute a search warrant, their only crime is one of association. While it may be true that the *situation* of serving a warrant or making an arrest may sometimes be dangerous, individuals present at the scene need not be frisked, and should not be frisked, simply because they *could* pose a danger. As with cars of suspects at a crime scene,²¹² or with those placed in police cars without being arrested, whatever danger is presented is avoidable; a frisk is unnecessary absent individual indications of dangerousness.

CONCLUSION

Terry v. Ohio represented a sea change in the law. For the first time, the “low-visibility” practice of stopping and frisking without probable cause was both recognized and regulated. The Court also explicitly addressed the racial cast these practices often had.

Many subsequent lower court decisions on frisks have moved toward one goal: allowing police to make more frisks by assuming that more and more crimes, persons, and situations *could* present danger to officers, when in fact they *may not*. The result has been a steady progression toward a point at which anyone, anytime, may be searched if they are stopped, with no limits on police discretion.

The proposal advanced here seeks to return the law to the original aims of *Terry*: accommodation of the interests of both law enforcement and citizens, regulation of police activity, and closer scrutiny of the use of such practices against minority groups. Failure to address the frisk problem now means that we should expect more aggressive police practices, without any showing that anything positive will result, and that many Americans, especially African-Americans, will suffer the indignity of searches — often public, often humiliating, limited though they may be — for no reason whatever.

²¹² *Michigan v. Long*, 463 U.S. 1032 (1983).