

# TERRY, HANDGUNS, AND THE HAND FORMULA: SOME PRELIMINARY THOUGHTS

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## I. INTRODUCTION

The Fourth Amendment exists in the world of probabilities. When the framers prohibited “unreasonable searches and seizures,”<sup>1</sup> they opened the door to modern-day “reasonable suspicion analysis,” which “is not concerned with ‘hard certainties, but with probabilities[.]’”<sup>2</sup> Thus, while *Terry v. Ohio* radically shifted the focus of the reasonableness inquiry from the warrant process to the warrantless world of “stop and frisk,”<sup>3</sup> in many ways the case merely reaffirmed the informed speculation and educated guesswork central to police investigations.

But the goalposts for reasonableness in *Terry* analyses appear to be changing with respect to investigating firearms violations. Courts and officers once could assume that a concealed-gun possessor *probably* was in violation of a state firearms statute because most states tightly restricted or outright prohibited the public concealed carry of firearms.<sup>4</sup> But today, all fifty states allow the open and concealed

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1. U.S. CONST. amend. IV (emphasis added).

2. *United States v. Lewis*, 674 F.3d 1298, 1304 (11th Cir. 2012) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

3. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 262 (6th ed., 2013) (“*Terry* provided the impetus, as well as the framework, for a move by the Supreme Court away from the proposition that ‘warrantless searches are *per se* unreasonable,’ to the competing view that the appropriate test of police conduct ‘is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.’”) (citations omitted).

4. Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U.L. REV. 1, 25 (2015) (observing that, when states largely prohibited public possession of firearms, “[j]udges[] (and officers[]) . . . rested on [the]

carry of firearms in public,<sup>5</sup> and forty-two of these states place little or no restrictions on who can do so.<sup>6</sup> This changing landscape alters not only the probabilistic calculus of who may be stopped under suspicion of committing a crime but also the calculus of who may be frisked under suspicion of posing a danger to the officer and the public.

Courts considering these questions have struggled to consistently articulate what constitutes “reasonable suspicion” in these circumstances. Some maintain that public gun possession still provides a good indicator that criminal activity may be afoot,<sup>7</sup> while others conclude that authorizing stops based solely on facially lawful activity would “eviscerate Fourth Amendment protections for lawfully armed individuals[.]”<sup>8</sup> Even when courts concede that a *Terry* stop of an armed individual was initiated lawfully, they disagree on what constitutes reasonable suspicion to conduct a protective frisk. Some argue that an armed individual poses a *per se* danger and may be searched,<sup>9</sup> while others claim additional indicia of dangerousness beyond the mere possession of a gun is required.<sup>10</sup> The Supreme Court recently declined an invitation to clarify the issue, leaving confusion and conflict among the lower courts.<sup>11</sup>

In considering how to assess this changing probability calculus, this short Essay asks whether tort law probability principles can play a role in clarifying a justifiable reasonableness standard in the age of concealed carry. With reference to the iconic Hand Formula,<sup>12</sup> this Essay suggests a thought experiment: if one considered a *Terry* stop and a *Terry* protective frisk as two types of “precautions” (B) designed to prevent crime and injury, respectively, what amount of risk (P) and magnitude (L) of

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generally unstated empirical assumption that there was a significant likelihood that such a person was carrying the gun unlawfully.”)

5. See *Concealed Carry*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> (last visited May 6, 2018) (“Every state—as well as the District of Columbia—allows the carrying of concealed weapons in some form.”).

6. Drake v. Filko, 724 F.3d 426, 441 n.5 (3d Cir. 2013) (Hardiman, J., dissenting).

7. See, e.g., *Lewis*, 674 F.3d at 1304 (upholding custodial stop and frisk based solely on individual’s admission he possessed a gun); State in Interest of H.B., 381 A.2d 759, 769 (N.J. 1977) (Handler, J., dissenting) (finding that an anonymous phone tip giving a “general description and location of a ‘man with a gun’” constituted reasonable suspicion to stop and frisk the suspected individual).

8. United States v. Robinson, 846 F.3d 694, 708 (4th Cir. 2017) (en banc) (Harris, J., dissenting) (“[W]hen a state elects to legalize the public carry of firearms, . . . the Fourth Amendment equation changes, and public possession of a gun is no longer ‘suspicious’ in a way that would authorize a *Terry* stop.”).

9. See *id.* at 700 (upholding frisk of armed individual because “the officer reasonably believed that the person stopped ‘was armed *and thus*’ dangerous.”) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977)); United States v. Orman, 486 F.3d 1170, 1176–77 (9th Cir. 2007) (concluding that an officer reasonably suspected the stopped individual was dangerous because he was armed).

10. See, e.g., *Northrup v. City of Toledo Police Dep’t.*, 785 F.3d 1128, 1132 (6th Cir. 2015) (“Clearly established law require[s] officers to point to evidence” that suspects are both “armed *and dangerous*.”).

11. *Robinson v. United States*, 138 S. Ct. 379 (2017) (denying certiorari).

12. See Robert Steinbuch, *The Executive-Internalization Approach to High-Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services into the Stream of Commerce*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y. 321, 346 (2007) (explaining that the “oft-quoted Learned Hand formula,” “set forth in the iconic decision[] *United States v. Carroll Towing Co.*[.]” formed the foundation for modern tort “risk-utility test[s]” in products liability and other areas involving inherently dangerous instruments).

harm would be required to justify these precautions? In particular, what “specific and articulable facts” beyond mere gun possession are necessary in this new concealed carry age to demonstrate a sufficient risk of criminal activity to justify a stop? And once stopped, what renders an armed individual a sufficient risk to justify a protective search for weapons?

While this Essay suggests tentative answers to the above questions, they by no means are intended to conclusively resolve what has become an increasingly thorny issue in Fourth Amendment jurisprudence. Rather, they are intended to serve as starting points for a broader discussion about the role of private tort principles in defining constitutional restraints, of stop and frisk practices in an increasingly armed civil society, and of *Terry*’s continued relevance in assessing the next fifty years of police-civilian encounters.

## II. TERRY STOPS AND FIREARMS: OLD ASSUMPTIONS

Prior to 1968, a presumption existed that the only lawful encounters between civilians and police officers under the Fourth Amendment were either voluntary encounters, or searches, seizures, or arrests based upon probable cause.<sup>13</sup> The Warren Court shattered that presumption in *Terry*, in which the Court held for the first time that lawful police encounters do exist “which do[] not depend solely upon the voluntary cooperation of the citizen and yet which stop[] short of an arrest based on probable cause . . . .”<sup>14</sup> In greatly expanding the permissible scope of law enforcement’s investigative powers, the Court found that a police officer can seize a person and subject her to a limited search for weapons, so long as the officer has a “reasonable suspicion” that the individual is presently or imminently engaged in criminal activity and is armed and dangerous.<sup>15</sup>

Although often overlooked, *Terry* authorizes two distinct actions, a “stop” and a “frisk,” each controlled by a separate test. Police can *stop* persons who appear to be engaged in crime. They can *frisk* [those persons after a lawful stop] if there is reasonable suspicion to believe the person “is armed and presently dangerous to the officer or to others.”<sup>16</sup>

In other words, “[t]he stop and the search are analyzed as two separate events, with each requiring its own justification.”<sup>17</sup> For example, if an officer lawfully stops someone because she reasonably suspects criminal activity, she cannot

13. DRESSLER & MICHAELS, *supra* note 3, at 263.

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

15. *Id.* at 30 (“We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.”).

16. Bellin, *supra* note 4, at 30 (emphasis added).

17. Matthew J. Wilkins, *Armed and Not Dangerous? A Mistaken Treatment of Firearms in Terry Analyses*, 95 TEX. L. REV. 1165, 1168 (2017); *Arizona v. Johnson*, 555 U.S. 323, 326–27 (2009) (“First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed

automatically frisk the individual without a separate finding that the individual is armed and dangerous. Conversely, an officer cannot lawfully stop someone solely because the individual is armed without independent reasonable suspicion that the individual is engaged in criminal activity.<sup>18</sup>

Despite the need to point to “specific and articulable facts” indicative of criminal activity to justify a stop and search, officers after *Terry* regularly stopped and frisked individuals in public based on one fact: the suspected presence of a firearm.<sup>19</sup> Courts regularly upheld with little fanfare stops and subsequent searches based solely on reasonable suspicion of gun possession.<sup>20</sup> Courts assumed that an officer could reasonably suspect, at a minimum, that the individual was in the act of committing a weapons possession offense because for most of the half-century since *Terry* states either tightly constricted or outright prohibited the public carrying of firearms.<sup>21</sup> Even in states with more lenient public possession laws, the relative infrequency of open and concealed carry permitting<sup>22</sup> and scarcity of guns in public in general,<sup>23</sup> all might reasonably have given rise to a suspicion of some type of criminal mischief.

For decades, that reasonableness was virtually assumed when the suspect possessed a firearm, because of two increasingly unreliable assumptions made by officers and courts. First, there was a widely held “assumption that a person carry-

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a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.”)

18. See *United States v. Burton*, 228 F.3d 524, 527 (4th Cir. 2000) (holding that an officer may not conduct a protective search to allay a reasonable fear that a suspect is armed without first having a reasonable suspicion to support an investigatory stop); *Terry*, 392 U.S. at 32–33 (Harlan, J., concurring) (“If the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. . . . [T]he person addressed. . . certainly need not submit to a frisk for the questioner’s protection.”); *United States v. Gray*, 213 F.3d 998, 1000–01 (8th Cir. 2000) (finding protective frisk violated the Fourth Amendment because officers had no reasonable suspicion that the individual was engaged in criminal activity).

19. *Bellin*, *supra* note 4, at 14–15, 31.

20. See *United States v. Gorin*, 564 F.2d 159, 160 (4th Cir. 1977) (“If the detective was justified in questioning Gorin, he also was justified in seizing the gun that he could see even before ‘patting down’ the defendant.”).

21. In 1988, nine states were “shall issue” jurisdictions. See ALA. CODE § 13A-11-75(a)(1)a (2018); CONN. GEN. STAT. ANN § 29-28(a) (West 2018); FLA. STAT. ANN § 790.06(2) (West 2018); IND. CODE ANN. § 35-47-2-3 (West 2018); ME. REV. STAT. ANN. tit. 25, § 2003(1) (2017); N.D. CENT. CODE ANN. §§ 62.1-04-03(1) (West 2017); S.D. CODIFIED LAWS § 23-7-7 (2018); WASH. REV. CODE ANN. § 9.41.070 (West 2018). Vermont was the lone “unrestricted” jurisdiction allowing concealed carry without a permit. Charles C. W. Cooke, *Vermont: Safe and Happy and Armed to the Teeth*, NAT’L REV. (June 24, 2014), <http://www.nationalreview.com/corner/396857> (noting that “constitutional carry” is sometimes referred to as “Vermont carry” because Vermont for decades was the only state in the country that did not require a permit to carry a concealed firearm in public).

22. See, e.g., Clayton E. Cramer & David B. Kopel, “*Shall Issue*: The New Wave of Concealed Handgun Permit Laws, 62 TENN. L. REV. 679, 683 (1995) (observing that, despite California law authorizing the issuance of concealed carry handgun permits, “[f]rom 1984 to 1992, . . . the City of Los Angeles police administration refused to issue any permits. In a city of over three million people, not one person was found needful of a handgun permit.”).

23. Philip Bump, *The Number of People in America vs. the Number of Guns in America, Visualized*, WASH. POST (Dec. 4, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/12/04/the-number-of-americans-vs-the-number-of-guns-in-america-visualized-through-history/?utm\\_term=.1ee21d5f80d5](https://www.washingtonpost.com/news/the-fix/wp/2015/12/04/the-number-of-americans-vs-the-number-of-guns-in-america-visualized-through-history/?utm_term=.1ee21d5f80d5).

ing a concealed weapon was engaged in the crime of unlawful weapons possession[.]” thus justifying a stop under the first *Terry* prong.<sup>24</sup> Second, there was once “nearly unanimous agreement that to be armed was dangerous,”<sup>25</sup> giving officers the automatic right to frisk armed individuals based on this “blanket assumption of dangerousness[.]”<sup>26</sup>

But in an increasingly permissive concealed-carry world, each of these reasonableness assumptions requires reconsideration. As recently as 1988, forty states either prohibited the public possession of firearms (sixteen “no issue” jurisdictions) or tightly regulated such possession (twenty-four “may issue” jurisdictions).<sup>27</sup> But over the next thirty years, states across the country began relaxing their public concealed and open carry laws.<sup>28</sup> As of 2015, all fifty states allow the public concealed carry of firearms.<sup>29</sup> Moreover, forty-two states now impose little or no restrictions on concealed carry authorization, meaning that a full 84% of jurisdictions in the country have either no or very limited restrictions on an individual’s ability to lawfully carry a firearm in public.<sup>30</sup>

For these states, reasonable suspicion to initiate a *Terry* stop can no longer be justified solely on the ground that the individual carries a gun. While officers once assumed that the presence of a concealed weapon indicated that criminal activity may be afoot, “increasingly permissive gun-possession laws erode the assumption that public handgun possession is unlawful.”<sup>31</sup> “[A]s public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt.”<sup>32</sup>

Given this changing landscape, courts should require more from officers than simple reliance on the (suspected) presence of a firearm. At least some other “articulable fact” that a crime is occurring should be present to justify a stop under *Terry*.<sup>33</sup> This accords with *Terry*’s probabilistic purpose that there be some reason

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24. Bellin, *supra* note 4, at 31.

25. Wilkins, *supra* note 17, at 1170.

26. *Id.* (quoting Bellin, *supra* note 4).

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

28. Cramer & Kopel, *supra* note 22, at 685 (“Since 1987, states have increasingly adopted a new breed of concealed handgun permit laws that make easier the process for many adults to get a permit to carry a concealed handgun.”).

29. GIFFORDS L. CTR., *supra* note 5.

30. See *id.* (summarizing state concealed carry laws by state); *Concealed Carry: Right-to-Carry*, NRA-ILA, <https://www.nra.org/get-the-facts/right-to-carry-and-concealed-carry/> (last visited May 6, 2018) (“There are 42 [right to carry] states, . . . Forty of these states have ‘shall issue’ laws, requiring that concealed carry permits be issued to qualified applicants [without discretion].”); *Drake v. Filko*, 724 F.3d 426, 443 n.5 (3d Cir. 2013) (Hardiman, J., dissenting) (In addition to these forty state statutes, Alabama and Connecticut “by statute allow considerable police discretion but, in practice, commonly issue permits to applicants who meet the same standards as in shall-issue states”) (quoting NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT 21 (2012)).

31. Bellin, *supra* note 4, at 25 (“Consequently, the Fourth Amendment authority flowing from that assumption must be reevaluated.”).

32. *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring).

33. *United States v. King*, 990 F.2d 1552, 1559 (10th Cir. 1993) (To allow stops of all armed persons in a permissive concealed carry jurisdiction “would effectively eliminate Fourth Amendment protections for lawfully armed persons”).

to suspect criminal activity. Without some other indicia of criminality, the mere observation or suspicion of a citizen engaging in a lawful activity—concealed firearms possession—provides *no* information regarding the risk (P) of criminal activity. With an unknown (or zero) value for risk, no precautionary stop can be justified, even when the presence of firearms is suspected. “Where it is lawful to possess a firearm, unlawful possession ‘is not the default status.’ There is no ‘automatic firearm exception’ to the *Terry* rule.”<sup>34</sup>

### III. *TERRY* FRISKS AND FIREARMS: A RISK ASSESSMENT APPROACH TO AUTOMATIC SEARCHES

The increasing permissiveness of public firearm possession by state and local governments has eroded the assumption that an officer can lawfully stop an individual solely because he is carrying a gun in public.<sup>35</sup> But assuming a lawful *Terry* stop has been initiated, what hurdle of reasonable suspicion must the officer clear before initiating a frisk?

Over the last decade, courts have split over the issue whether an armed individual is automatically dangerous, or if an officer must show both that the individual is armed and also dangerous. For example, in *United States v. Robinson*, the Fourth Circuit held that any individual who the police suspect possesses a firearm becomes a dangerous individual *per se* for *Terry* purposes.<sup>36</sup> The Ninth and Tenth Circuits, in more limited discussions, similarly found that police had an automatic right to assume that an armed individual was necessarily dangerous.<sup>37</sup> In contrast, in *Northrup v. City of Toledo Police Dep’t*, the Sixth Circuit held that “[c]learly established law require[s] officers] to point to evidence” that suspects are both “armed *and dangerous*.”<sup>38</sup>

This Essay suggests that both sides of the debate miss the mark. By focusing on overly formalistic interpretations of precedent, neither side has fully reckoned with the practical realities attendant in these law enforcement encounters. Courts favoring the *per se* dangerous *individual* approach ignore empirical data suggesting that the vast majority of public gun carriers are not only law-abiding but pose significantly less threat to officers and the public than the average citizen. In contrast, courts requiring a separate finding that the individual is both armed *and* dangerous

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34. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132 (6th Cir. 2015) (first quoting *United States v. Black*, 707 F.3d 531, 540 (2013), and then quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000)); see also *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000) (comparing an officer’s stop of an armed individual in a concealed carry state based on a suspicion that possession might have been illegal as to a stop of an individual because he “possessed a wallet, a perfectly legal act”).

35. *Northrup*, 785 F.3d at 1131–33 (Where the state legislature “has decided its citizens may be entrusted with firearms on public streets[,]” the police have “no authority to disregard this decision” by subjecting law-abiding citizens to *Terry* stops based on nothing more than suspicion of gun possession).

36. *United States v. Robinson*, 846 F.3d 694, 704 (4th Cir. 2017) (Wynn, J., concurring) (“[T]he officer reasonably believed that the person stopped ‘was armed *and thus*’ dangerous.”) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977)); cf. *Robinson*, 846 F.3d at 709 (Harris, J., dissenting) (explaining that “armed” and “dangerous” are two separate prongs of a conjunctive test).

37. *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007); *United States v. Rodriguez*, 739 F.3d 481, 489 (10th Cir. 2013) (upholding frisk justified on nothing more than the presence of a firearm).

38. *Northrup*, 785 F.3d at 1132 (citing *Sibron v. New York*, 392 U.S. 40, 64 (1968)).

ignore the inherent dangerousness to the officer and the public by the firearm itself, regardless of the intentions of the individual in possession.

This Essay also offers a tentative framework to break the impasse: The Hand Formula. With reference to fundamental risk assessment tort principles, officers and courts can justify automatic protective frisks in the presence of firearms that both accords with the presumptive law-abidingness of concealed carry permit holders and the immensely destructive capacities of guns.

#### A. The Law-Abiding Gun-Carrier

The Fourth, Ninth, and Tenth Circuits have concluded that a lawfully stopped, armed individual is dangerous *per se* and may be frisked and disarmed for the officer's protection.<sup>39</sup> But critics of this approach scoff at any suggestion that an armed individual in a concealed carry state is automatically dangerous, claiming that "there is general consensus that licensed gun possessors rarely use their firearms to commit violent street crimes such as robberies or murders."<sup>40</sup> Pointing to "the empirical data on the relative rarity of crimes committed by licensed gun carriers[,]"<sup>41</sup> these critics contend that officers should not automatically determine that someone armed poses a danger to them or others because data about licensed gun carriers suggests the opposite.<sup>42</sup> Studies suggest that licensed gun possessors commit far fewer violent crimes than the citizenry at large, and that evidence combined with the heightened background check requirements necessary to procure a concealed carry permit ought to provide licensed gun carriers with an enhanced presumption of law-abidingness.<sup>43</sup> By this logic, officers cannot justifiably frisk (and possibly disarm) a lawful gun possessor without independent indicia of dangerousness because the risk (P) that the officer or nearby public will be harmed is belied by the data.<sup>44</sup>

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39. See *supra* notes 35–36.

40. Bellin, *supra* note 4, at 32.

41. *Id.* at 32–33 (emphasis omitted) ("Statistics published by the State of Texas reflect that people with concealed handgun licenses (CHL) commit only a small fraction of the street crime associated with public weapons possession. For example, of the roughly 4,000 people convicted for robbery or aggravated robbery in Texas in 2011, only two possessed a CHL. The same 2011 Texas data shows that CHL carriers included four (of over 500) convicted murderers, three (of 112) people convicted of manslaughter, and three (of 2,765) people convicted of assault with a deadly weapon." (footnote omitted)).

42. *Id.*

43. BK, *Reconciling Stop and Frisk with Conceal-Carry Laws*, CRIM. JUST. PROGRAM DUQUESNE U. SCH. L. (Apr. 2, 2014), <http://www.duqlawblogs.org/duqcrim/2014/04/reconciling-stop-and-frisk-with-conceal-carry-laws/> ("As a conceal[ed]-carry permit holder . . . this signals to the officer that the individual passed a background check within the last 5 years which should afford the individual some presumption of law abidingness."); *Moore v. Madigan*, 702 F.3d 933, 937–38 (7th Cir. 2012) ("The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders.").

44. See, e.g., Brief of the Governors of Texas, Arizona, Arkansas, Iowa, Kansas, Kentucky, Maine, South Carolina, and South Dakota as Amici Curiae in Support of Petitioners at 9–12, *Peruta v. California*, 137 S. Ct. 1995 (2017) (No. 16-894) (citing multiple studies purporting to show that concealed carry permit holders are "more than 10 times less likely to commit a crime in Texas as compared to the general population").

### B. The Inherently Dangerous Firearm

The Sixth Circuit and Supreme Court of Arizona have concluded that a lawfully stopped armed individual does not pose an automatic threat to the officer, and thus may only be searched if additional facts independent of the firearm suggest the suspect is dangerous.<sup>45</sup> This rationale may accord with the conjunctive language of *Terry* and its progeny and may also reflect symmetry with recent data about the violent propensities of concealed carry permit holders. But by focusing on the individual, these courts ignore the factor that makes the encounter inherently dangerous for the officer and the public: the firearm. It obscures the undeniable objective fact that a firearm is an inherently dangerous device created specifically and solely to inflict damage, and thus that its presence in a law enforcement encounter inherently increases the risks to public and officer safety.<sup>46</sup>

This recognition accords with common sense. A firearm's sole function is to use explosive force to propel solid metal projectiles through the air at supersonic speeds over long distances, the sole purpose of which is to instantly damage, destroy, wound, or kill whatever or whoever is struck by the projectile.<sup>47</sup> Its sole purpose is to inflict damage with great efficiency and force.<sup>48</sup> Gun safety courses require gun owners to know and understand that firearms are inherently dangerous,<sup>49</sup>

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45. *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1133 (6th Cir. 2015); *State v. Serna*, 331 P.3d 405, 410 (Ariz. 2014) ("We . . . disagree with the Ninth Circuit's determination that mere knowledge or suspicion that a person is carrying a firearm satisfies the second prong of *Terry*, which itself involves a dual inquiry; it requires that a suspect be 'armed and presently dangerous.'") (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

46. *McLaughlin v. United States*, 476 U.S. 16, 17 (1986) ("[A] gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous."); *Pelissero v. Thompson*, 170 F.3d 442, 447 (4th Cir. 1999) (recognizing "the substantial risk of danger and the inherently violent nature of firearms") (quoting *Parsons v. Pitzer*, 149 F.3d 734, 738 (7th Cir. 1998)); *United States v. Copenig*, 506 F.3d 1241, 1248 (10th Cir. 2007) (characterizing a "loaded gun [as] by any measure an inherently dangerous weapon"); *Love v. Tippy*, 133 F.3d 1066, 1069 (8th Cir. 1998) (recognizing "the inherently violent nature of firearms, and the danger firearms pose to all members of society"); *United States v. Allah*, 130 F.3d 33, 40 (2d Cir. 1997) ("[F]irearms are inherently dangerous devices.").

47. *Fundamentals of Naval Weapons Systems: Weapon Propulsion and Architecture*, U.S. NAVAL ACAD.: WEAPONS & SYS. ENGINEERING DEP'T, <https://fas.org/man/dod-101/navy/docs/fun/part16.htm> (last visited May 6, 2018) (explaining bullet projectile propulsion process); Chris Woodford, *Bullets and Missiles*, EXPLAIN THAT STUFF!, <http://www.explainthatstuff.com/bullets.html> (last updated June 11, 2017).

48. All firearms safety advocates and courses begin with the four fundamental rules of firearms safety. The second rule—"Never Point The Gun At Something You Are Not Prepared To Destroy!"—underscores the purpose and danger of all firearms. *The 4 Laws of Gun Safety*, GUNLINK BLOG (Jan. 15, 2012), <http://blog.gunlink.info/2012/01/15/the-4-laws-of-gun-safety/>; *Firearms Safety*, EVERY CITIZEN A SOLDIER, <http://www.everycitizenasoldier.org/firearm-safety.html> (last visited May 6, 2018) ("Put bluntly, firearms started out as a tool meant to kill other living things. . . . and there is inherent danger in their misuse. . . . If you aren't willing to break or kill it, don't point a gun at it.").

49. Marty Hayes, *Teaching Gun Safety*, U.S. CONCEALED CARRY ASS'N (Feb. 1, 2010), <https://www.usconcealedcarry.com/teaching-gun-safety/> ("Before the first shot is fired in any training course, gun safety must be addressed. . . . The firearms training industry operates in somewhat of a conundrum inasmuch as we are tasked with teaching people to safely perform inherently unsafe acts[.]"). Indeed, NRA fire safety courses require students to sign an affidavit attesting to their knowledge that "there are inherent dangers and risks in the use of firearms." *E.g.*, *NRA Home Firearm Safety Course*, NIPMUC ROD & GUN CLUB, <http://nipmucrodandgun.com/docs/newsletter/NipmucNRAHFCourse2014.pdf> (last visited May 6, 2018).

as do gun safety manuals and instructors in law enforcement and the military.<sup>50</sup> Indeed, even when courts reject the reasonableness of a *Terry* stop based “solely on the ground that the individual possesses a gun[,]” they nonetheless recognize “the obvious potential danger to officers and the public by a person in possession of a concealed gun in a crowd[.]”<sup>51</sup>

### C. The Hand Formula and Common-Sense Risk Assessment

Many gun rights activists will disagree with the underlying premise of the previous section that guns are inherently dangerous.<sup>52</sup> Indeed, the contention that guns are inherently dangerous practically begs for the common refrain of gun rights activists in response—“Guns don’t kill people; people kill people.”<sup>53</sup> But even if one concedes that guns are only as dangerous as the people who use them, the risk of guessing incorrectly remains too high to bear. The immediate destructive power of firearms far exceeds that of other weapons subject to a *Terry* frisk such as knives or clubs.<sup>54</sup> This fact remains true even if one assumes that the vast majority of public gun possessors are lawful gun carriers and that the vast majority are responsible, peaceful, and generally law abiding. In other words, even if the risk of violent confrontation or accidental injury is low, the consequences are simply too high to prevent officers from taking necessary precautions to protect themselves and the public.

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50. See, e.g., DIV. OF CRIMINAL JUSTICE POLICE TRAINING COMM’N, BASIC COURSE FIREARMS MANUAL (2009), <http://www.state.nj.us/lps/dcj/njptc/manuals/BasicCourseFirearmsManual.pdf>; OR. DEP’T OF PUB. SAFETY, STANDARDS & TRAINING, POLICE OFFICER FIELD TRAINING MANUAL (2013), <https://www.ci.medford.or.us/files/Police%20Field%20Training%20Manual%206-14-2013.pdf>; U.S. DEPT. OF DEFENSE, 5210.56, ARMING AND THE USE OF FORCE (2016), [http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/521056\\_dodd\\_2016.pdf](http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/521056_dodd_2016.pdf) (defining “inherently dangerous property. . . . Examples include, but are not limited to: portable missiles; rockets; arms; ammunition; . . .”).

51. *Regalado v. State*, 25 So. 3d 600, 606 (Fla. Dist. Ct. App. 2009).

52. See, e.g., *Firearms Are NOT Inherently Dangerous!*, GUNLINK BLOG (Jan. 12, 2012), <http://blog.gunlink.info/2012/01/12/firearms-are-not-inherently-dangerous/> (noting “that you are 25 times more likely to be injured while riding a bicycle than while hunting . . . So, next time someone makes the claim that firearms are inherently dangerous or that guns enable or cause crime, steer them to these facts.”); see also DENNIS A. HENIGAN, “GUNS DON’T KILL PEOPLE, PEOPLE KILL PEOPLE” AND OTHER MYTHS ABOUT GUNS AND GUN CONTROL 8–9 (2016) (describing the public statements of gun rights activists “on radio or TV talk shows . . . Over and over again, I would hear, ‘Guns don’t kill people. People kill people.’ I would hear, ‘When guns are outlawed, only outlaws will have guns.’”).

53. See HENIGAN, *supra* note 52, at 1; David Kyle Johnson, *Guns Don’t Kill People, People Do?*, PSYCHOLOGY TODAY (Feb. 12, 2013), <https://www.psychologytoday.com/blog/logical-take/201302/guns-don-t-kill-people-people-do>.

54. For this reason, the automatic frisk position advocated herein extends only to firearms and not to other “weapons.” To create a blanket rule authorizing frisks upon suspicion of possession of any “weapon” would prove unworkable and lead to “absurd[]” results. See *United States v. Robinson*, 846 F.3d 694, 703 (4th Cir. 2017) (Wynn, J., concurring) (“To illustrate the absurdity of [a] . . . unitary meaning interpretation, consider, for example, that courts have found a bottle to be a ‘weapon.’”); *United States v. Daulton*, 488 F.2d 524, 525 (5th Cir. 1973) (“Courts have held that a wine bottle can be a dangerous weapon.”); *Wright v. New Jersey*, 469 U.S. 1146, 1149 n.3 (1985) (Brennan, J., dissenting) (quoting *State v. Lee*, 457 A.2d 1184, 1187 (N.J. 1982)) (“A ‘weapon’ could be a brick, a baseball, bat, a hammer . . . a knitting needle, a sharpened pencil . . . a fork, metal pipe, a stick, etc.”).

This analysis ought to ring familiar to any attentive first-year law student. The Hand Formula, the centerpiece of first-year Torts, expresses the notion that the investment in precaution taken in any given situation should equal the product of the probability of harm and the magnitude of harm resulting from the injury.<sup>55</sup> In this context, the frisk constitutes the precaution or burden (B) taken. This precaution is designed, as defined by the Court, to be a minimally invasive pat down of outer clothing and far less invasive a precaution than a search for evidence incident to arrest.<sup>56</sup> But the Court has already routinely confirmed that a *Terry* frisk constitutes far more than a de minimis “petty indignity.”<sup>57</sup> Any nonconsensual search by a police officer intrudes upon the “sanctity of the person,” particularly when such searches may be conducted on a public street, with backs turned, legs spread, and hands up on a wall.<sup>58</sup> Thus, to justify this “precaution” for Hand Formula purposes, an officer must demonstrate that the product of the probability of harm and magnitude of harm is significant.

The probability of harm (P) reflects the likelihood that the firearm will be discharged and injure the officer or nearby members of the public, either by the armed individual or someone else, either deliberately or accidentally. While gun rights activists focus on the law-abiding nature of concealed carriers to argue that these individuals pose little risk of violently attacking others, this focuses on only one risk created by public concealed carry. The officer must also account for the possibility that the armed individual will accidentally discharge his weapon or that someone else in the nearby vicinity will gain possession of the firearm and use it, either deliberately or accidentally. The presence of other individuals is relevant as well. When the officer and the armed individual are the only two persons within range,

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55. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[I]f the probability [of an accident] be called P; the injury, L; and the burden [of adequate precautions] B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [ $<$ ] PL.”); see also Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 816–25 (2001) (discussing the contours and limits of the Hand Formula and related risk-assessment metrics).

56. *Terry v. Ohio*, 392 U.S. 1, 26 (1968); cf. *United States v. Robinson*, 846 F.3d 694, 713 (4th Cir. 2017) (Harris, J., dissenting) (“[T]he frisk itself, euphemistically described as a ‘pat-down’ . . . may extend to a thorough touching of sensitive and private areas of the body.”); *Minnesota v. Dickerson*, 508 U.S. 366, 381–82 (1993) (Scalia, J., concurring) (citations omitted) (quoting J. MOYNAHAN, POLICE SEARCHING PROCEDURES 7 (1963) (“I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity—which is described as follows in a police manual: ‘Check the subject’s neck and collar. A check should be made under the subject’s arm. Next a check should be made of the upper back. The lower back should also be checked. ‘A check should be made of the upper part of the man’s chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.’”).

57. *Terry*, 392 U.S. at 16–17 (“[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”).

58. *Id.* at 17.

the risk of injury to others is lower than if the stop occurs in a crowd.<sup>59</sup> At a minimum, the presence of a firearm creates a non-zero risk of harm.

But even if one concedes that concealed-gun carriers represent a comparatively low risk of harm to the officer or the nearby public, the magnitude of harm from the discharge of a firearm (M) is so significant that the Hand Formula nonetheless justifies the precaution of a frisk. “The United States experiences epidemic levels of gun violence, claiming over 30,000 lives annually, according to the U.S. Centers for Disease Control and Prevention. For every person who dies from a gunshot wound, two others are wounded. Every year, approximately 100,000 Americans are victims of gun violence.”<sup>60</sup> Firearms were “the third-leading cause of injury-related deaths . . . in 2010, following poisoning and motor vehicle accidents.”<sup>61</sup> Moreover, regions and states with more permissive concealed carry laws and higher rates of gun ownership have significantly higher rates of homicide than states with lower rates of gun ownership.<sup>62</sup>

People of all age groups are significantly more likely to die from unintentional firearm injuries when they live in states with more guns, relative to states with fewer guns. On average, states with the highest gun levels had nine times the rate of unintentional firearms deaths compared to states with the lowest gun levels.<sup>63</sup>

And, the American Journal of Public Health found that police officers are significantly more likely to be killed by a civilian firearm in the line of duty in states with higher gun levels than states with lower gun levels.<sup>64</sup> In short, the potentially catastrophic cost of guessing wrong justifies an automatic frisk in the presence of a firearm, even when the risk is low.<sup>65</sup>

But even if one can justify an automatic frisk for firearms during a *Terry* stop, the question remains whether the officer should be allowed to physically disarm the individual. “Weapons seizures are not an explicit part of the *Terry* framework, but a necessary implication of the case is that guns can be seized, at least temporarily, . . . if the firearm makes the person ‘presently dangerous.’”<sup>66</sup> Although the

59. See *United States v. Orman*, 486 F.3d 1170, 1177 (9th Cir. 2007) (upholding frisk of armed individual, in part because “the mall was crowded and at a minimum, [the officer] needed to see that the gun was removed from the premises without endangering his safety or the safety of the mall patrons.”).

60. *Statistics*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/facts/statistics/> (last visited May 6, 2018).

61. *Id.*

62. Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM. J. PUB. HEALTH 1988, 1991 (2002).

63. GIFFORDS L. CTR., *supra* note 60.

64. German Lopez, *America’s Unique Gun Violence Problem, Explained in 17 Maps and Charts*, Vox (Apr. 20, 2018), <https://www.vox.com/policy-and-politics/2017/10/2/16399418/us-gun-violence-statistics-maps-charts>.

65. See *Schubert v. City of Springfield*, 589 F.3d 496, 499–502 (“[The officer] observed Schubert walking toward the Springfield courthouse carrying a gun. . . . [The court] need not outline in detail the obvious and potentially horrific events that could have transpired had an officer noted a man walking toward the courthouse with a gun and chosen not to intervene.”).

66. Bellin, *supra* note 4, at 30–31 (citing *United States v. Fisher*, 364 F.3d 970, 974 (8th Cir. 2004)).

past assumption “that a person carrying a concealed weapon was engaged in the crime of unlawful weapons possession” no longer suffices to disarm an individual “with little analysis,” a recognition of the inherent dangerousness of guns should allow for an automatic temporary disarming of the individual during a lawful stop.<sup>67</sup> Indeed, “[c]ourts may agree that the inherent dangers of firearms make this showing essentially automatic whenever officers encounter armed persons in public.”<sup>68</sup>

#### IV. CONCLUSION

The probability analysis underlying *Terry*'s reasonable suspicion standard depends on an officer's practical understanding of the world around her. In the handguns context, that world is rapidly changing. The number of private firearms in this country now exceeds the number of people physically present in the country.<sup>69</sup> All fifty states and the District of Columbia authorize public concealed carry of these firearms by civilians.<sup>70</sup> Forty-two of these states impose little or no restrictions on who can carry these weapons or where they can carry them.<sup>71</sup> This changing landscape poses obvious and significant challenges for police officers, who have traditionally initiated lawful stops and frisks of publicly armed individuals on the assumption that a crime was being committed by a dangerous person. That assumption seems increasingly unreliable.

In the absence of justifiable bright-line presumptions, traditional tort law risk assessment principles may offer a framework for analyzing *Terry*'s two-pronged test in the concealed carry context. The Hand Formula's sublimely simple articulation of due care requirements in a given circumstance provides one such framework (but certainly not the only one). By applying that well-worn algebraic expression in the Fourth Amendment stop and frisk context, it would appear, at least preliminarily, that a balance of burden sharing ought to be struck between the suspicious officer and the publicly-armed suspect. But in the realm of probabilities and uncertainties—both in tort law and constitutional law—these preliminary conclusions require constant reassessment, reconsideration, and reexamination. Hopefully, this Essay has helped inform that dialogue moving forward.

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67. *Id.* at 31.

68. *Id.*; see also *United States v. Robinson*, 846 F.3d 694, 705 (4th Cir. 2017) (Wynn, J., concurring) (discussing the dangers that lawful firearms pose and recognized by courts).

69. Christopher Ingraham, *There Are Now More Guns Than People in the United States*, WASH. POST (Oct. 5, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm\\_term=.7fa1031d06f1](https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm_term=.7fa1031d06f1).

70. GIFFORDS L. CTR., *supra* note 5.

71. *Id.*