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When One Word Changes Everything: How the Unitary Concept Dismantles the Basis of *Terry* Frisks

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INTRODUCTION

Recent school shootings, such as those in Santa Fe, Texas, and Parkland, Florida, have intensified the long-standing national debate surrounding gun policy.[1] The debate centers around what one side

1. *See, e.g.*, Callum Borchers, *Texas Shooting Suspect's Choice of Guns Complicates Debate over Assault Rifles*, CHI. TRIB. (May 20, 2018), http://www.chicagotribune.com/news/nationworld/ct-texas-school-shooting-gun-debate-20180520-story.html [https://perma.cc/B5DE-2K7S (staff-uploaded archive)] (quoting an opponent of gun control measures who believes that the shotgun used by the Santa Fe High School shooter "is actually more deadly than the much-vilified AR-15" and that "[b]anning AR-15s will do nothing to stop disturbed and deranged shooters"); Emily Witt, *How the Survivors of Parkland Began the Never Again Movement*, NEW YORKER (Feb. 19, 2018), https://www.newyorker.com/news/news-desk/how-the-survivors-of-parkland-began-the-never-again-movement [http://perma.cc/KRS8-CAJ5] (explaining that only four days after the shooting in Parkland, Florida, students began advocating for stricter background checks through news interviews, op-eds, and the formation of the Never Again movement).

sees as a necessary remedy to unacceptable gun violence across the country and the other side perceives as the categorical abridgment and eventual confiscation of a fundamental constitutional right.[2] Commentators have criticized both viewpoints[3] as being counterproductive due to their ardent, all-or-nothing arguments.[4] If continued, one commentator argues, it will impede future attempts to attain bipartisan compromise for gun policy.[5]

Despite the ideological gridlock, our nation's gun laws have changed substantially in the last fifty years. All fifty states now permit concealed carry[6] and forty-five states allow open carry of a gun, though some are more restrictive than others.[7] Of the forty-five states

2. Eric Arnesen, *'Gunfight: The Battle over the Right to Bear Arms in America' by Adam Winkler*, CHI. TRIB. (Mar. 3, 2018), http://www.chicagotribune.com/lifestyles/books/ct-books-gunfight-review-story.html [https://perma.cc/JZ42-TGB2 (staff-uploaded archive)].

3. Justin Bank, *Right and Left React to the Las Vegas Shooting and the Gun Control Debate*, N.Y. TIMES (Oct. 3, 2017), https://www.nytimes.com/2017/10/03/us/politics/right-and-left-las-vegas-shooting-gun-control-debate.html [https://perma.cc/66Y4-9X22 (dark archive)] (chronicling the debate following the Las Vegas shooting); James Brooke, *Shootings Firm Up Gun Control Cause, at Least for Present*, N.Y. TIMES, Apr. 23, 1999, at A1 (chronicling the debate following the Columbine shooting); Mariano Castillo, *NRA Clear on Gun Debate Stance: Arm Schools*, CNN (Dec. 21, 2012), https://www.cnn.com/2012/12/21/us/connecticut-school-shooting/index.html [https://perma.cc/ZK4J-CJBA] (chronicling the debate following the Sandy Hook shooting); Anna Dubenko, *Right and Left React to the Gun Control Debate After the Florida Shooting*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/politics/right-and-left-react-to-the-gun-control-debate-after-the-florida-shooting.html [https://perma.cc/6D7W-A2GW (dark archive)] (chronicling the debate following the Parkland shooting); Michael D. Regan, *San Bernardino Shooting Sparks Fresh Debate Over Gun Laws*, PBS NEWSHOUR (Dec. 5, 2015), https://www.pbs.org/newshour/nation/san-bernardino-shooting-sparks-fresh-debate-over-gun-laws [https://perma.cc/8UDA-6YZ7] (chronicling the debate following the San Bernardino shooting); Laurel Wamsley, *A Texas Town Mourns, and a Nation Struggles to Find New Ground in Gun Debate*, NPR (May 21, 2018), https://www.npr.org/sections/thetwo-way/2018/05/21/613006381/a-texas-town-mourns-and-a-nation-struggles-to-find-new-ground-in-gun-debate [https://perma.cc/TLR9-S935 (dark archive)] (chronicling the debate following a shooting in Santa Fe, New Mexico).

4. Arnesen, *supra* note 2.

5. *See id.*

6. *Concealed Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/#state [https://perma.cc/PSE7-UFNJ].

7. *See* Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 5, 17 (2015) (discussing the proliferation of concealed carry permits in Florida and the nation at large); Joshua Gillin, *There Are 45 States that Allow Open Carry for Firearms, Former NRA President Says*, POLITIFACT FLA. (Nov. 18, 2015), https://www.politifact.com/florida/statements/2015/nov/18/marion-hammer/there-are-45-states-allow-open-carry-handguns-form/ [https://perma.cc/9E6X-GQUX] (analyzing the NRA president's statement regarding open carry laws across the United States and concluding that groups on both sides of the aisle on gun policy agree that five states ban open carry, although the open carry laws in

that allow open carry, thirty-one allow it without a permit or license.[8] Moreover, by 2010, *District of Columbia v. Heller*[9] and *McDonald v. City of Chicago*[10] had fundamentally changed the scope of Second Amendment rights.[11] While the impetus behind this change is unclear, one thing is evident: there has been an underlying evolution in the way our nation views guns, which has impacted the pervasiveness of concealed and open carry laws and the development of Supreme Court jurisprudence.[12]

What many Americans fail to recognize is that this change is more than simply a benefit or detriment to either side's view of the national gun debate.[13] Specifically, this change turns the foundation of

some states are not as permissive as others). In fact, Professor Bellin also notes that "almost every state enacted at least one new gun law" after the Sandy Hook shooting, but, surprisingly, most of the new laws expanded gun rights. Bellin, *supra*, at 3.

8. *Open Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/ [https://perma.cc/4U6W-CP8K]; *see also* Neena Satija, *Texas a Flashpoint in National Debate over Right to Film Police*, TEX. TRIB. (May 9, 2015), https://www.texastribune.org/2015/05/09/reveal-story-1/ [https://perma.cc/H462-9A4Y] (describing groups that seek to hold police accountable, specifically highlighting members of a North Texas group called "Open Carry Cop Watch" that brings cameras and legally carries AK-47 and AR-15 rifles when monitoring the police).

9. 554 U.S. 570 (2008).

10. 561 U.S. 742 (2010).

11. *See id.* at 791 (furthering the scope of *Heller* by concluding that the Second Amendment right to bear arms for self-defense applies to the states by incorporation into the Fourteenth Amendment); *Heller*, 554 U.S. at 635 (holding that the Second Amendment protects the right to bear arms for the purpose of self-defense and that the respective statute in the District of Columbia was unconstitutional in banning the possession of handguns in the home).

12. *See* Josh Blackman, *The Supreme Court Has Strengthened Gun Rights and Limited Gun Control*, N.Y. TIMES (June 15, 2016), https://www.nytimes.com/roomfordebate/2016/06/15/can-gun-control-still-pass-muster-in-the-supreme-court/the-supreme-court-has-strengthened-gun-rights-and-limited-gun-control [https://perma.cc/6VWJ-5S78] (identifying Hillary Clinton and then-Senator Barack Obama as politicians who acknowledged the power of the Second Amendment and the rights it confers to individuals); *see supra* notes 6–11 and accompanying text.

13. *See, e.g.*, United States v. Robinson (*Robinson II*), 846 F.3d 694, 707 (4th Cir. 2017) (en banc) (Harris, J., dissenting) ("Today in West Virginia, citizens are legally entitled to arm themselves in public and there is no reason to think that a person carrying or concealing a weapon during a traffic stop—conduct fully sanctioned by state law—is anything but a law-abiding citizen who poses no threat to the authorities."), *cert. denied*, 138 S. Ct. 379 (2017) (mem.); Bellin, *supra* note 7, at 2–6 (discussing the substantial transformation of the nation's gun laws and how this transformation changes the underpinnings of gun policing, specifically through the Fourth Amendment); Matthew J. Wilkins, Note, *Armed and Not Dangerous? A Mistaken Treatment of Firearms in* Terry *Analyses*, 95 TEX. L. REV. 1165, 1165–67 (2017) (explaining that the Supreme Court's

stop-and-frisk tactics on its head.[14] As the police and the courts are faced with changing norms and sentiments surrounding guns, strict adherence to rigid, antiquated rules—whether perceived or actual—results in perverse outcomes. Indeed, this was the issue in *United States v. Robinson*.[15]

In *Robinson II*,[16] the Fourth Circuit interpreted the Supreme Court's use of "armed and thus dangerous" to create a unitary concept because "[t]he use of 'and thus' recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed."[17] In other words, law enforcement need not identify *how* an individual is dangerous outside of simply carrying a weapon[18]: under the "'thus' iteration," the weapon alone *makes* the individual dangerous.

This Comment argues that the Fourth Circuit misinterpreted this standard and effectively dismantled the basis of *Terry* frisks. Permissive carry laws are ubiquitous, and many law-abiding citizens freely participate.[19] Now more than ever, the Fourth Circuit should have held that the "armed and dangerous" standard is comprised of two distinct inquiries that each require police to identify specific and articulable facts before frisking an individual. The Fourth Circuit's unitary concept categorically disregards the evolution of constitutional rights, permissive gun-related state laws, and, most importantly, stop-and-frisk precedent, thereby subjecting both lawful gun carriers and those merely suspected of being armed to unbridled police discretion to stop-and-frisk.[20]

Second Amendment jurisprudence and the deregulation of state firearm laws have "profoundly affected Fourth Amendment law," specifically stop-and-frisk).

14. *See Robinson II*, 846 F.3d at 707 (Harris, J., dissenting) (explaining that "for many years" law enforcement could rightfully "assume that anyone carrying a concealed firearm was up to no good," and, in fact, the act of carrying a concealed gun was branded as a "hallmark[] of criminal activity"); Wilkins, *supra* note 13, at 1167 (explaining that "[i]n the past, there was a 'blanket assumption' that those who carried firearms were dangerous," but this consensus has somewhat faded).

15. 846 F.3d 694 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 379 (2017) (mem.); *see id.* at 702 (Wynn, J., concurring).

16. Throughout this Comment, *Robinson II* refers to the Fourth Circuit Court of Appeals' en banc decision, not to the 2016 decision that vacated Robinson's conviction.

17. *Robinson II*, 846 F.3d at 700 (first citing Terry v. Ohio, 392 U.S. 1, 28 (1968); and then citing Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (per curiam)).

18. *See id.* ("[T]he risk of danger is created simply because the person, who was forcibly stopped, is armed.").

19. *See supra* notes 6–8 and accompanying text.

20. *See infra* Sections II.A–II.B.1.

Analysis proceeds in three parts. Part I summarizes the inception of stop-and-frisk and explains the procedural history, facts, and reasoning behind the majority and concurring opinions in *Robinson II*. Part II analyzes how the Fourth Circuit misinterpreted the armed and dangerous standard and dismantled the basis of *Terry* frisks. It then discusses how the inevitable implications of the unitary concept will adversely affect lawful gun carriers and those assumed to be armed. Part III concludes that the Supreme Court should grant certiorari in a stop-and-frisk case, overturn the Fourth Circuit's unitary concept holding, and clarify the importance of a separate showing of dangerousness in the frisk standard.

I. FROM *TERRY* TO *ROBINSON*

The Fourth Amendment prohibits the government from engaging in unreasonable searches and seizures "but upon probable cause."[21] Stop-and-frisk is a revolutionary concept in Fourth Amendment jurisprudence because it "cracked" the monolith of the Fourth Amendment's probable cause standard.[22] In *Terry v. Ohio*,[23] the Supreme Court held that a police officer can stop and frisk an individual based upon reasonable suspicion.[24] One of the primary justifications for adjudicating the constitutionality of stop-and-frisk was the need for law enforcement to pursue investigations without fear of assault by an armed individual.[25]

Like any new concept or practice, the Court set limiting parameters and standards: (1) an officer may conduct a stop only if they have a reasonable suspicion that criminal activity is afoot; and (2) after conducting a stop, the officer may conduct a frisk of the stopped individual only if there are specific and articulable facts that show the person is armed and dangerous.[26] Additionally, the Court limited the scope of the frisk to a search for weapons in an individual's outer layer of clothing.[27] While the stop-and-frisk

21. U.S. CONST. amend. IV.

22. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: INVESTIGATING CRIME, CRIMINAL PROCEDURE PRINCIPLES, POLICIES, AND PERSPECTIVES 388–89 (6th ed. 2017).

23. 392 U.S. 1 (1968).

24. *Id.* at 27, 30–31.

25. *Id.* at 29; *Robinson II*, 846 F.3d 694, 701 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

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

27. *See Terry*, 392 U.S. at 30–31.

doctrine has its proponents and detractors,[28] it is an established arm of the Fourth Amendment.[29] The Supreme Court's limiting standards still stand to this day, but the frisk standard—more precisely, the internal "dangerous" inquiry—is under attack.

In 2017, the majority in *Robinson II* held that "armed and dangerous" is a unitary concept, thereby broadening the divide in the already existing circuit split. This Part sets forth the facts and procedural history of *Robinson II*, presents the reasoning of the majority opinion, and summarizes the concurring opinion. The dissent is analyzed at length in Parts II and III.

A. Facts and Procedural History

On March 24, 2014, in Ranson, West Virginia, an unidentified caller alerted the police that he "witnessed a black male in a bluish greenish Toyota Camry load a firearm [and] conceal it in his pocket" at a 7-Eleven convenience store.[30] According to the testimony of several officers, the 7-Eleven is located in a quintessential high-crime area.[31] Once the responding officer observed a blue-green Toyota Camry with a black, male passenger driving away from the 7-Eleven, he stopped the vehicle on the basis that both occupants were not wearing their seatbelts.[32]

After approaching the car and asking for identification, the officer asked Shaquille Robinson to step out of the car.[33] As Robinson exited the car, the officer "asked if [Robinson] had any weapons on him."[34] According to the questioning officer, Robinson

28. *See, e.g.*, Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957 (1999) (arguing that *Terry v. Ohio* was the catalyst for curbing Fourth Amendment protections for racially motivated searches and seizures); David A. Graham, *Stop-and-Frisk: Trump's Bad Idea for Fighting Crime*, ATLANTIC (Sept. 21, 2016), https://www.theatlantic.com/politics/archive/2016/09/trump-stop-and-frisk-ineffective-unconstitutional/501041/ [https://perma.cc/5P6H-3L2K]; Thomas A. Reppetto, Opinion, *How Stop-and-Frisk Saved New York*, N.Y. POST (July 24, 2012), https://nypost.com/2012/07/24/how-stop-and-frisk-saved-new-york/ [https://perma.cc/Q2CZ-A6W5].

29. *See Terry*, 392 U.S. at 26–27.

30. *Robinson II*, 846 F.3d at 696.

31. One officer, with only a year and a half of law enforcement experience, stated that he had experienced at least twenty drug trafficking incidents at this location. *Id.* Another observed three people waiting for drugs while she was dropping off an informant to buy drugs and received numerous complaints about drug transactions at this location. *Id.* Lastly, "[a]nother officer testified that 'anytime you hear Apple Tree or 7-Eleven, your radar goes up a notch.'" *See id.* (alteration in original).

32. *Id.* at 697.

33. *Id.*

34. *Id.*

said nothing but gave "a weird . . . 'oh, crap' look[]."[35] The officer understood this look to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]."[36] Thereafter, Robinson was instructed to submit to a frisk in which the officer recovered a loaded gun from his front pocket, confirming the prior tip.[37] "According to officers' testimony, Robinson was cooperative . . . and made no furtive gestures or movements" that suggested that he was reaching for the weapon during the stop.[38] As a previously convicted felon, Robinson was charged with illegal possession of a firearm by a felon.[39]

The magistrate judge recommended that the district court grant Robinson's motion to suppress the firearm and ammunition seized during the frisk as a Fourth Amendment violation based on insufficient evidence that he was both armed *and also* dangerous.[40] However, the motion was ultimately denied by the district court.[41] On appeal, the Fourth Circuit reversed the district court's decision, vacating Robinson's conviction and sentence.[42] Almost two months after the court reversed Robinson's conviction, however, the court granted the government's petition for rehearing en banc, thereby vacating the previous panel's judgment and opinion.[43]

B. Majority Opinion

After addressing Robinson's concessions,[44] the majority focused on the crux of the appeal—how the court would interpret and apply the armed and dangerous inquiry.[45] Robinson argued that although

35. *Id.* (alteration in original).

36. *Id.* (alteration in original).

37. *Id.*

38. United States v. Robinson (*Robinson I*), 814 F.3d 201, 204 (4th Cir. 2016), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

39. 18 U.S.C. § 922(g)(1) (2012).

40. *Robinson I*, 814 F.3d at 205 (emphasis added).

41. *Robinson II*, 846 F.3d at 697. The district court "concluded that the . . . caller's eyewitness knowledge and the contemporaneous nature of the [call]" were sufficient to "contribute to the officer's reasonable suspicion" that Robinson was armed and dangerous when taken together with the high-crime area and Robinson's "weird look." *Id.*

42. *Id.*

43. *Id.*

44. Judge Niemeyer, at the outset of his discussion, quickly addressed multiple concessions that Robinson made in his briefs and oral argument, which included: (1) the lawfulness of both the forced stop based on the seatbelt violations and the instruction to exit the car; (2) the caller's tip was sufficiently reliable to support the officer's actions; and (3) the police had sufficient reasonable suspicion to believe that Robinson was armed. *See id.* at 697–98.

45. *See id.* at 698–702.

the armed element of the standard was clearly met, the police are required to identify independent, objective facts that indicate that he is *also dangerous*.[46] In other words, armed and dangerous encompasses two distinct inquires, requiring that police point to specific and articulable facts for each element before frisking an individual.[47] Robinson argued that West Virginia, through legislation, allows its residents to carry concealed firearms.[48] Therefore, the caller's tip that a man had a loaded and concealed weapon should have been a mere alert to "innocent behavior," given the officer's lack of knowledge as to whether Robinson possessed a license to carry.[49] Further, Robinson highlighted that his behavior during the stop did not create a reasonable suspicion of dangerousness.[50]

The Fourth Circuit rejected Robinson's arguments.[51] Based on the majority's reading, *Terry* and its progeny hold that being armed satisfies the armed and thus dangerous standard, allowing an officer to lawfully frisk.[52] Notwithstanding the term's conjunctive form, the inclusion of the word "thus" deliberately linked "armed" and "dangerous" into a unitary concept.[53] In support of this interpretation, the court pointed to "the general risk . . . inherent during . . . traffic stop[s]," as acknowledged by the Supreme Court.[54] Coupling the general risk in traffic stops with an individual who is "'armed with a weapon that could unexpectedly and fatally be used against' the

46. *Id.* at 698.

47. *Id.*

48. *See* W. VA. CODE ANN. § 61-7-4(a) (Westlaw through 2018 First Extraordinary Sess.).

49. *Robinson II*, 846 F.3d at 698. It is important to note that the specific and articulable facts that are used to obtain a reasonable belief of dangerousness can only come from what the officer knows at the time before the frisk occurs. Terry v. Ohio, 392 U.S. 1, 21–22 (1968). Uncertainty as to whether Robinson lawfully possessed the gun in this concealed carry state supports Robinson's argument that the officer lacked the foundation to lawfully frisk him. *See* United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013) (discussing the "eviscerat[ion]" of the Fourth Amendment if possessing a firearm in an open carry state as the sole justification for an investigatory detention).

50. *Robinson II*, 846 F.3d at 698 ("[H]e was compliant, cooperative, [and] not displaying signs of nervousness."); *Robinson I*, 814 F.3d 201, 204 (4th Cir. 2016) (highlighting that the arresting officers indicated that Robinson was cooperative and made no movements that might have suggested that he intended to reach for his weapon during the stop), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

51. *Robinson II*, 846 F.3d at 698.

52. *Id.* at 699–700 (quoting *Terry*, 392 U.S. at 28).

53. *Id.* at 700.

54. *Id.* at 699; *see also* Arizona v. Johnson, 555 U.S. 323, 330 (2009); Michigan v. Long, 463 U.S. 1032, 1049 (1983).

officer,"[55] a responding "officer is 'warranted in believing his safety . . . [is] in danger.'"[56] Moreover, state law permitting open or concealed carry does not eliminate danger to the officer in a lawful stop.[57] The court noted that the purpose of a frisk for weapons is not to find evidence of a crime but to allow the officer to investigate the grounds for the stop "without fear of violence."[58] Lawfully carried weapons present no less of a danger than ones that are unlawfully carried, especially when the individual's propensities are unknown.[59] Consequently, the Fourth Circuit held that the frisk was constitutional and affirmed the judgment of the district court.[60]

C. Concurring Opinion

In his concurring opinion, Judge Wynn agreed at the outset that Robinson's concessions—that he was lawfully stopped and that the police reasonably suspected he was carrying a firearm—alone were enough for the police to lawfully conduct a frisk.[61] He departed from the majority, however, in the means used to reach that conclusion.[62] Judge Wynn noted that the majority reduced the central inquiry to whether the frisk was justifiable based solely on the tip that he carried a loaded and concealed weapon.[63] But this fails to address two crucial questions: "(1) whether individuals who carry firearms—lawfully or unlawfully—pose a categorical risk of danger to others and police officers, in particular, and (2) whether individuals who choose to carry firearms forego certain constitutional protections afforded to individuals who elect not to carry firearms."[64] The answer to both questions, Judge Wynn concluded, is yes.[65]

Beginning with the first question, Judge Wynn disagreed that the armed and dangerous standard is unitary.[66] First, from a purely grammatical standpoint, the use of the word "and" by the Supreme Court elicits the "long-standing principle that elements separated by a

55. *Robinson II*, 846 F.3d at 699 (quoting *Terry*, 392 U.S. at 23).
56. *Id.* (quoting *Terry*, 392 U.S. at 27).
57. *See id.* at 700–01.
58. *Id.* at 701 (quoting Adams v. Williams, 407 U.S. 143, 146 (1972)).
59. *Id.*
60. *Id.* at 701–02.
61. *Id.* at 702 (Wynn, J., concurring).
62. *See id.*
63. *Id.*
64. *Id.*
65. *See id.*
66. *Id.* at 703.

conjunctive should be interpreted as distinct requirements."[67] In fact, the Sixth and Seventh Circuits found this grammatical analysis persuasive when holding that the armed and dangerous standard encompasses two distinct elements.[68]

Second, interpreting the standard as unitary will lead to adverse consequences for people merely engaged in harmless behavior.[69] The definition of armed, according to *Black's Law Dictionary*, is "[e]quipped with a weapon."[70] Unlike the term "firearm," "weapon" can be broadly interpreted. Indeed, Justice Brennan addressed the expansive definition of "weapon" by listing everyday objects that, although dangerous when used for a nefarious purpose, should not elicit reasonable suspicion to conduct a frisk.[71] Nevertheless, the unitary concept interpretation means that any item that fits the definition of a weapon can give rise to reasonable suspicion to conduct a frisk, even if the item is not being used as a weapon.[72]

Third, Judge Wynn pointed out that the Supreme Court in *Michigan v. Long*[73] expressly recognized "the independent role of 'dangerous[ness].'"[74] But Judge Wynn's argument did not overcome the "thus" iteration; instead, it actually begged the question of how to reconcile *Long* with the unitary concept.[75]

Notwithstanding the three arguments above, Judge Wynn argued that his disagreement with the majority was not predicated on the unitary concept interpretation in and of itself but, more distinctly, on the contention that the standard is unitary for all weapons.[76] Instead,

67. *Id.*

68. *See* Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) ("Clearly established law require[s] . . . evidence that Northrup may have been 'armed *and dangerous*.'" (quoting Sibron v. New York, 392 U.S. 40, 64 (1967))); United States v. Leo, 792 F.3d 742, 748 (7th Cir. 2015) (stating that a frisk, which is an exception to a warrantless search, is allowed when there is an "articulable suspicion" that the individual is "both armed and a danger").

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

70. *Id.* (quoting *Armed*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

71. *See* Wright v. New Jersey, 469 U.S. 1146, 1149 n.3 (1985) (Brennan, J., dissenting) (listing items that the legislature could not have contemplated as falling within the definition of a weapon (quoting State v. Lee, 457 A.2d 1184, 1187 (N.J. Super. Ct. App. Div. 1982) (Antell, J., dissenting), *aff'd as modified*, 475 A.2d 31 (N.J. 1984)).

72. *See Robinson II*, 846 F.3d at 704 (Wynn, J., concurring).

73. 463 U.S. 1032 (1983).

74. *Robinson II*, 846 F.3d at 704 (Wynn, J., concurring) (citing *Long*, 463 U.S. at 1049).

75. *See id.*

76. *See id.* at 704–05.

Terry and *Pennsylvania v. Mimms*[77] conflated the standard only where "officers reasonably suspect[] that a detainee has a *firearm* or other inherently dangerous weapon."[78] From this premise, Judge Wynn highlighted that the Supreme Court, and the Second, Fourth, Eighth, and Tenth Circuits have previously accorded heightened attention to guns because of their inherent dangerousness.[79] These prior decisions led Judge Wynn to conclude that firearms are inherently dangerous, and that those who carry them pose a risk of danger to law enforcement and the public.[80]

This conclusion, however, begged the secondary question of whether those who choose to carry firearms forego other constitutional protections afforded to those who do not carry firearms.[81] The answer, again, was yes.[82] The inherent danger of choosing to carry a weapon necessarily impacts their exercise of other constitutional rights, the most germane of which is being frisked when lawfully stopped.[83]

II. HOW THE MAJORITY OPINION MISINTERPRETED THE ARMED AND DANGEROUS STANDARD AND OPENED THE DOOR TO PERVERSE IMPLICATIONS

The crux of the majority's decision falls on whether Robinson and the circumstances surrounding his arrest provided the officer with specific and articulable facts as to his dangerousness. As mentioned above, the majority held that the armed and dangerous standard is a unitary concept based on the Supreme Court's inclusion of the word

77. 434 U.S. 106 (1977) (per curiam).

78. *Robinson II*, 846 F.3d at 704 (Wynn, J., concurring).

79. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (discussing a law that mandated owners of legal firearms to disassemble or trigger lock their weapon); McLaughlin v. United States, 476 U.S. 16, 17 (1986) (stating that a gun is "typically and characteristically dangerous"); United States v. Copening, 506 F.3d 1241, 1248 (10th Cir. 2007) (stating that a loaded gun is "by any measure an inherently dangerous weapon"); Pelissero v. Thompson, 170 F.3d 442, 447 (4th Cir. 1999) (stating that the possession of a firearm increases the risk of danger by adding "an aspect of violence to otherwise nonviolent conduct"); Love v. Tippy, 133 F.3d 1066, 1069 (8th Cir. 1998) (recognizing the threat to the safety of others that firearms pose due to their "inherently violent nature"); United States v. Allah, 130 F.3d 33, 40 (2d Cir. 1997) (contrasting the regulation of financial structuring with the regulation of firearms which "are inherently dangerous devices").

80. *Robinson II*, 846 F.3d at 705 (Wynn, J., concurring).

81. *Id.* at 706.

82. *See id.*

83. *Id.*

"thus" in *Terry* and *Mimms*. Therefore, the officer was justified in conducting a frisk based solely on the reasonable belief that Robinson was armed.[84] The concurrence admonished the majority's holding as it pertained to its overbroad reach in applying to all weapons.[85] Judge Wynn found the unitary concept acceptable only in its application to firearms.[86] Despite the slight difference, the unitary concept, as articulated by both the majority and concurrence, is an unconstitutional and incorrect reading of *Terry* and its progeny. The Supreme Court created the armed and dangerous standard to encompass two distinct inquiries. By reading the "armed and thus dangerous" iterations in isolation, the majority misinterpreted the standard.

A. Errors by the Majority

In *Terry*, a police officer observed two men alternately walk up and down a sidewalk; each time the two men passed the same store window, they stopped and peered inside, then conferred with one another before repeating the routine.[87] This sequence of events led the officer to conclude that the men were armed and preparing for "a stick up."[88] The officer eventually engaged the men and frisked them for weapons.[89] The Supreme Court stated that the officer was justified in believing the two men were "armed and thus presented a threat [or danger] to the officer's safety."[90] In *Mimms*, one of the first stop-and-frisk cases after *Terry*, an officer conducted a traffic stop to issue a traffic summons for the driver's expired license plate.[91] Upon approaching the car, he noticed a bulge in the individual's jacket.[92] Fearing that the bulge might have been a weapon, the officer immediately conducted a frisk.[93] The Court held that "[t]he bulge in the jacket permitted the officer to conclude that Mimms was armed

84. *See id.* at 700–02 (majority opinion).
85. *See id.* at 704–05 (Wynn, J., concurring).
86. *Id.*
87. Terry v. Ohio, 392 U.S. 1, 6 (1968).
88. *See id.*
89. *Id.* at 6–7.
90. *Id.* at 28. It is important to note, however, that the Court recognized that the officer predicated his suspicion on the belief that the men were "contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons." *Id.*
91. Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977) (per curiam).
92. *Id.*
93. *Id.*

and thus posed a serious and present danger to the safety of the officer."[94]

The "thus" iteration is the foundation of the unitary concept interpretation.[95] The *Robinson II* majority concluded that the Supreme Court's use of "thus" expresses a deliberate choice to combine the elements and recognize that an armed individual is inherently dangerous.[96] But this misinterprets and misapplies Supreme Court precedent in several ways.

1. Ignoring Intentional Phrasing

First, the *Robinson II* majority neglected to give significant meaning to the Supreme Court's grammatical structure of armed and dangerous. Clearly, there was no context offered by the Supreme Court which reasonably warrants the belief that the "and" in "armed *and* dangerous" is to be interpreted other than in its ordinary sense as a conjunction,[97] aside from the "thus" iterations mentioned in *Terry* and *Mimms*.[98] In support of the *Robinson II* majority, the concurrence admitted that the "thus" iteration, at most, conflated the elements into a unitary concept, but only for firearms.[99]

Concededly, the majority's and concurrence's reasoning is compelling when applied to the regular armed and dangerous iteration—the Supreme Court did not coincidentally use the "thus" iterations. But, if there must be emphasis on the different iterations of the standard, the majority dodged the fact that the standard has been written a third way throughout the Supreme Court's stop-and-frisk

94. *Id.* at 112.

95. *Robinson II*, 846 F.3d 694, 700 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

96. *Id.* (first citing Terry v. Ohio, 392 U.S. 1, 28 (1968); and then citing *Mimms*, 434 U.S. at 112).

97. *See* Crooks v. Harrelson, 282 U.S. 55, 58 (1930). *Compare* Meredith v. Pence, 984 N.E.2d 1213, 1221 (Ind. 2013) ("The framers [sic] use of the conjunction 'and' [in the education clause of Indiana's Constitution] plainly suggests that the phrases are separate and distinct."), *with* Horne v. Flores, 557 U.S. 433, 454 (2009) (citing FED. R. CIV. P. 60(b)(5)) (analyzing Rule 60(b)(5)'s list of three disjunctive provisions for relief and concluding that the use of "or" makes it clear that each provision is independently sufficient to warrant relief).

98. *See Robinson II*, 846 F.3d at 700 (holding, albeit implicitly, that the addition of "thus" in the armed and dangerous standard eliminates the ordinary use of "and" as a conjunction separating two distinct elements).

99. *Id.* at 704 (Wynn, J., concurring) (explaining that reconciling the regular armed and dangerous standard and the "thus" iteration in this way ensures two distinct meanings and maintains the limitations on police that *Terry* first created).

precedent.[100] "Armed and *presently* dangerous" is the next most notable alternative phrasing of the standard. In fact, the Court wrote "and presently" as the first iteration of armed and dangerous in *Terry*.[101] Neither the elevated weight given by the majority to the "thus" standard nor the concurrence's limitation of the unitary concept to firearms can be reconciled with the equally weighty armed and presently dangerous iteration.

Breaking down the grammatical structure of the "and presently" iteration shows how contradictory it is to the unitary concept. The court used a conjunction to signify separation and distinction of the two elements.[102] If being armed were enough or, as the Fourth Circuit contends, if being armed inherently embodied danger, the court could have used it alone rather than form a standard that encompasses meaningless surplusage.[103] More to the point, the second element—dangerous—is offset by a qualifier: "presently," which serves as a temporal constraint. This suggests that only danger in the moment is sufficient to warrant reasonable suspicion to conduct a frisk.[104] Therefore, the officer is justified in conducting a frisk only by

100. *See, e.g.*, Arizona v. Johnson, 555 U.S. 323, 327–28 (2009) (applying the armed and dangerous standard to a stop-and-frisk involving a suspected gang member); Michigan v. Long, 463 U.S. 1032, 1047–49 (1983) (using the "armed and dangerous" standard to justify the search of a vehicle when the police have reason to suspect that the individual is dangerous and possesses immediate access to a weapon); Ybarra v. Illinois, 444 U.S. 85, 92–93 (1979) (stating that an officer could not justify the frisking of a bystander while conducting a search warrant under the armed and dangerous standard); *Mimms*, 434 U.S. at 112 (1977) (referencing the standard as both armed and presently dangerous and later as "armed and thus pos[ing] a serious and present danger"); Adams v. Williams, 407 U.S. 143, 146–48 (1972) (holding that a police officer was justified in his frisking of an individual based on a tip that said individual was carrying a firearm under the armed and dangerous standard); Terry v. Ohio, 392 U.S. 1, 24 (1968) (stating that an officer is justified in conducting a stop-and-frisk if he reasonably believes the individual is "armed and presently dangerous").

101. *Terry*, 392 U.S. at 24 (concluding that it would be clearly unreasonable to deny police some form of self-protective search power when an investigated individual is "armed and presently dangerous"). Additionally, stop-and-frisk cases subsequent to *Terry* regularly incorporate the "and presently" iteration of the standard. *See, e.g.*, *Ybarra*, 444 U.S. at 92–93; Sophie J. Hart & Dennis M. Martin, Essay, *Judge Gorsuch and the Fourth Amendment*, 69 STAN. L. REV. ONLINE 132, 135–36 (2017), https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/03/69-Stan.-L.-Rev.-Online-132.pdf [https://perma.cc/3YZF-R27K] (stating that most courts adhere to the "armed and presently dangerous" standard from *Terry*).

102. *See Meredith*, 984 N.E.2d at 1221.

103. *See Robinson II*, 846 F.3d at 709 (Harris, J., dissenting).

104. Since police rely on in-the-moment judgments to form a reasonable suspicion, it logically follows that police can only draw on their perceptions. *See Terry*, 392 U.S. at 30; *Robinson II*, 846 F.3d at 698.

pointing to specific and articulable facts that the stopped individual is not only carrying a weapon but is, at that moment, also dangerous.[105]

Of course, the plain-language argument can be configured in support of the "thus" iteration, but this further proves my point: there is no viable reconciliation in favor of the "thus" standard that could not also go in favor of "presently," and vice versa, if emphasis is put on grammatical structure. At bottom, the conflicting iterations are polar opposites that nullify each other, leaving just the regular armed and dangerous standard. The unitary concept holding was manufactured out of the two mere instances that the Supreme Court used the "thus" iteration—out of seven other times the standard was written a different way throughout *Terry* and *Mimms*[106]—in isolation and without surrounding context.

2. Reading the Standard in Isolation

Extending the argument that the majority's preferred iteration is nullified by the equally available "and presently" standard, the "thus" iteration's support for a unitary concept fails for a second reason: the majority ignored the interpretations of the frisk standard in cases decided after *Terry* and *Mimms*. After *Mimms*—which applied *Terry* to automobile drivers in a roadside setting[107]—*Michigan v. Long* presented the question of whether officers could extend a protective frisk for weapons during a roadside stop to the individual's car.[108] In *Long*, the Court discussed how *Terry*'s scope has been narrowly expanded over time to several new factual situations.[109] Each situation, the Court recognized, poses substantial risk and danger to law enforcement,[110] just like in *Terry*.[111] Notwithstanding the new factual situation in *Long*, the Court held, in part, that the inherent danger in roadside stops "compel[s] our conclusion that the search of

105. *See Terry*, 392 U.S. at 21.

106. *See* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (per curiam) (articulating the stop-and-frisk standard without using "thus" once); *Terry*, 392 U.S. at 24–25, 27, 30 (stating the stop-and-frisk standard five times without using "thus").

107. *See Mimms*, 434 U.S. at 109.

108. *See* Michigan v. Long, 463 U.S. 1032, 1034 (1983) ("We did not, however, expressly address whether such a protective search for weapons could extend to an area beyond the person.").

109. *See id.* at 1047–48.

110. *See id.* (establishing that the holdings of *Pennsylvania v. Mimms* and *Adams v. Williams* were both based in part on the inherent danger in traffic stops).

111. *See Terry*, 392 U.S. at 23–24 (discussing the immediate interest of law enforcement to be able to assure their safety against America's long history of armed violence).

the passenger compartment . . . is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts' . . . that the suspect is dangerous *and* the suspect may gain immediate control of weapons."[112]

Ybarra v. Illinois[113] presents another contradictory reading of the armed and dangerous standard that the majority avoided.[114] Ybarra was an unfortunate bystander in the Aurora Tap Tavern during the execution of a search warrant.[115] The search warrant specifically and particularly allowed the officers to search the tavern and the prime suspect, a bartender at the tavern.[116] However, law enforcement conducted pat downs of every individual in the bar, including Ybarra on two separate occasions.[117] During the first pat down, the officer felt a cigarette pack on Ybarra.[118] It was not until Ybarra was frisked for the second time that the officer removed the cigarette pack and found heroin inside.[119]

Analyzing the case, the Court quickly rejected the State's contention that there was probable cause to search and remove the cigarette pack.[120] In the alternative, the State argued that the first pat down was constitutionally permissible as a frisk for weapons under *Terry*.[121] The Court also rejected this argument because the frisk "was simply not supported by a reasonable belief that [Ybarra] was armed and presently dangerous."[122]

Neither *Long* nor *Ybarra* dealt with firearms,[123] which Judge Wynn's concurrence suggests is the linchpin that rightfully allows

112. *Long*, 463 U.S. at 1049 (emphasis added) (citing *Terry*, 392 U.S. at 21) (conveying two distinct elements that must be met for the stop-and-frisk to be legitimate).

113. 444 U.S. 85 (1979).

114. *See id.* at 92–93.

115. *Id.* at 88.

116. *Id.*

117. *Id.* at 88–89. The officers announced that they would be conducting pat downs as a "cursory search for weapons." *Id.* at 88.

118. *Id.*

119. *Id.* at 88–89.

120. *Id.* at 91 (citing Sibron v. New York, 392 U.S. 40, 62–63 (1968)) ("[Ybarra's] mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search [him] . . . [A] search or seizure of a person must be supported by probable cause particularized with respect to that person.").

121. *Id.* at 92.

122. *Id.* at 92–93.

123. *See* Michigan v. Long, 463 U.S. 1032, 1036 (1983) (involving an officer who saw a knife on the defendant's floorboard); *Ybarra*, 444 U.S. at 88–89 (involving an officer who found heroin on the defendant).

conflating the frisk standard into a unitary concept.[124] But *Adams v. Williams*[125] defeats that argument. In *Adams*, decided between *Terry* and *Mimms*, the officer received a tip that a man was sitting in his car with heroin and a gun.[126] The officer approached the car, situated in a high-crime area, tapped on the window, and asked the individual to open the door.[127] Instead, the individual rolled down the window, at which point the officer reached into the car and removed the firearm from the individual's waistband.[128] The gun carrier was subsequently arrested for unlawful possession of a pistol.[129]

The frisked individual contested the reliability of the tip and, most relevantly, argued that the officer's actions were unreasonable under *Terry*.[130] Interestingly, although the case involved a firearm, the majority never mentioned any iteration of the armed and dangerous standard that included "thus" or "therefore."[131] Instead, the Court used the "armed and presently dangerous" iteration.[132] Moreover, the Court pointed to several specific and articulable facts known to the officer at the time that made the officer's actions reasonable, without referencing the unitary concept.[133] Therefore, even when a firearm is the product of a frisk, the Supreme Court did not apply the unitary concept.

These cases show two things. First, every expansion of the stop-and-frisk doctrine has retained the requirement that an officer reasonably believe that the individual is armed *and also* dangerous—a two-element test.[134] Second, despite the concurrence's insistence, conflating the frisk standard when an officer is dealing with a firearm

124. *See Robinson II*, 846 F.3d 694, 704 (4th Cir. 2017) (en banc) (Wynn, J., concurring), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

125. 407 U.S. 143 (1972).

126. *Id.* at 144–45.

127. *Id.*

128. *Id.* at 145.

129. *Id.*

130. *Id.*

131. *See id.* at 146 (citing Terry v. Ohio, 392 U.S. 1, 24 (1968)) (listing the standard only twice and phrasing it as either armed and dangerous or armed and presently dangerous).

132. *Id.*

133. *See id.* at 147–48.

134. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1049 (1983) (discussing the elements of armed and dangerous separately when determining whether the search of a vehicle was appropriate); Ybarra v. Illinois, 444 U.S. 85, 92–93 (1979) (addressing each element of the armed and dangerous standard distinctly); Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (per curiam) (citing *Terry*, 392 U.S. at 21–22) (stating that a limited pat down is reasonable when the officer reasonably concludes that the individual is armed and presently dangerous).

is invalid under *Adams*. Overall, the *Robinson II* majority plainly read the "thus" iteration in isolation and without any surrounding context, disregarding anything contrary to their preferred unitary concept interpretation. *Terry* and its progeny show that the conjunction in armed and dangerous was intentional and each element must be distinctly satisfied to conduct a lawful frisk.

B. Implications of Robinson II

As discussed above, the majority misinterpreted *Terry* and its progeny,[135] which led the court to hold that an individual is presumptively dangerous when armed.[136] Unfortunately, that is where the majority opinion ends, with no discussion about the implications of this landmark interpretation. Fortunately, both the concurring and dissenting opinions explore the implications of this new interpretation, providing a vivid picture of the potential consequences. I will expand on these implications and provide my own.

The dissent's premise is based in the pervasiveness of state legislation allowing concealed and open carry in our nation.[137] Judge Harris even stated that:

> [F]or many years . . . concealed firearms were hallmarks of criminal activity . . . carried by law-breakers to facilitate their crimes. . . . But that is no longer the case . . . as behavior once the province of law-breakers becomes commonplace and a matter of legal right, we no longer may take for granted the same correlation between "armed" and "dangerous."[138]

What this means, then, is that law enforcement cannot view guns through the same lens as they did before. Even if *Terry* and *Mimms* are read as creating a unitary concept through the "thus" iterations, both law enforcement and the courts must be prepared to adapt their procedures to a nation where state laws permit open and concealed carry and federal case law supports the constitutional right to bear arms.[139] If not, the following consequences may result.

135. *See supra* Section II.A.

136. *See Robinson II*, 846 F.3d 694, 700 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

137. *See id.* at 707–08 (Harris, J., dissenting).

138. *Id.* at 707.

139. *See id.* at 707, 714 (discussing the proliferation of gun laws); *see also* United States v. Williams, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring in part and

1. No Barrier to Unbridled Police Discretion

The justification for adjudicating the constitutionality of stop-and-frisk in *Terry* was to craft a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer."[140] That justification plainly recognizes that "police officers need discretion to perform their investigative duties" free from the fear of a weapon being used against them.[141] As a result, the Court set up a two-pronged analysis in which a frisk seemingly enables police to reach their desired end point; that is, a pat down allows the officer to continue his investigation with protection from the use of a firearm against himself.[142] Simply considering the syntax of "stop-and-frisk" and its real-world application, officers may not conduct a frisk without (1) satisfying the stop standard, and (2) satisfying the frisk standard.[143] It is reasonable to conclude that this was the standard the *Terry* Court intended.

Although a Fourth Amendment violation during the stop portion involves a fundamental abuse of the "privacy and security of individuals,"[144] this abuse is compounded by the effects of a resulting frisk. To be sure, a frisk is a highly intrusive search, even though it does not reach the magnitude of a full-blown search.[145] The *Terry* Court vividly described the intrusive nature of the procedure and concluded that it has the potential to embarrass and create "community resentment," and therefore is "not to be undertaken lightly."[146] It follows, therefore, that everything preceding a frisk is

concurring in the judgment) (discussing the need for law enforcement and courts to "evaluate [their] thinking" on Fourth Amendment issues in light of gun rights).

140. Terry v. Ohio, 392 U.S. 1, 27 (1968).

141. United States v. Black, 707 F.3d 531, 534 (4th Cir. 2013) (citing *Terry*, 392 U.S. at 1).

142. *Terry*, 392 U.S. at 27 (concluding that, after a thorough evaluation of the countervailing arguments, "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer"—indicating clear emphasis on creating a new extension of the Fourth Amendment that allows a search for weapons). Relatedly, in explaining his agreement with the reasonable suspicion standard crafted by the majority, Justice Harlan stated that the prevailing question generated by stop-and-frisk cases, including *Terry*, is whether the "evidence *produced by a frisk* is admissible." *Id.* at 31 (Harlan, J., concurring) (emphasis added). Because this is the prevailing question, he stated that the problem is the determination of "what makes a frisk reasonable." *Id.* Justice Harlan is impliedly observing that the frisk and anything coming from it is the critical part of the doctrine. *See id.*

143. *See* Arizona v. Johnson, 555 U.S. 323, 326–27 (2009).

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

145. *See id.* at 16–17.

146. *Id.* at 17 n.14.

meant to constructively serve as a barrier—when the barriers are not sufficiently hurdled, the concluding frisk must be invalidated. But, with the Fourth Circuit's implementation of the unitary concept, the "dangerous" inquiry is rendered obsolete. This leaves only the stop standard and whether an individual is armed, or simply reasonably believed to be armed, as the last barriers to a frisk.[147] Several courts—including the Fourth Circuit—and commentators believe these are the only true barriers to a frisk,[148] but the Supreme Court has never held that knowledge that an individual is armed was sufficient, on its own, to effectuate a frisk.[149] But neither the stop standard nor the armed requirement meaningfully serve as a hurdle without the "dangerous" inquiry; thus, there are essentially no barriers to unbridled police discretion to frisk.

147. *See Robinson II*, 846 F.3d 694, 712 (4th Cir. 2017) (en banc) (Harris, J., dissenting) (reciting the government's argument that the court "need not worry about these possible disproportionate effects because a *Terry* frisk may be conducted only after a stop on reasonable suspicion," which prevents stops based on hunches), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

148. *See, e.g.*, *id.* at 700 (majority opinion); United States v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013); Wilkins, *supra* note 13, at 1167.

149. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1049 (1983) (explaining that the circumstances allow a search of the passenger compartment of an automobile if the officer reasonably believes that the suspect "is dangerous and the suspect may gain immediate control of weapons," thus showing a clear demarcation between the armed and the dangerous elements); Ybarra v. Illinois, 444 U.S. 85, 92–93 (1979) (rejecting the State's argument that the first frisk of *Ybarra* was permissible under *Terry* because the officer conducted the frisk without a reasonable belief that Ybarra was armed and presently dangerous, the predicate to conducting a frisk); *Terry*, 392 U.S. at 27 (concluding that the most important part of an officer's ability to effectuate a reasonable search for weapons is not "absolute[] certain[ty] that the individual is armed" but whether the officer "belie[ves] that his safety or that of others [is] in danger"); *see also* Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (holding that armed is separate and distinct from dangerous). Even in the time period alluded to by Judge Harris—several years after the inception of the stop-and-frisk doctrine when concealed firearms were hallmarks of criminal activity—there had to be further evidence to frisk, because armed was insufficient on its own. *Robinson II*, 846 F.3d at 707–08 (Harris, J., dissenting). The officer in *Terry*, for example, used his extensive knowledge of the area and many years of experience, knowledge of the crimes perpetrated there, and his extended observation of the suspects to provide facts that met the reasonable belief that the suspects were planning a daylight robbery, which was the present danger. *Terry*, 392 U.S. at 5–6, 28. Nevertheless, courts have concluded that reasonable suspicion that an individual is armed can meet the standard to conduct a lawful stop, especially when carrying a firearm is illegal in the jurisdiction. *See Rodriguez*, 739 F.3d at 483, 486–87 (holding as reasonable a stop-and-frisk where an officer observed a handgun in the waistband of the suspect's pants in a state where concealed carry is illegal); Bellin, *supra* note 7, at 31 ("The weapon, once detected, is suspected contraband, and contraband can be seized upon detection." (citing Minnesota v. Dickerson, 508 U.S. 366, 376 (1993))).

For the stop portion, an officer must have a reasonable suspicion that a crime or other infraction has been or is being committed.[150] Reasonable suspicion is an objective standard.[151] In practice, and specifically in *Robinson II*, the objectivity of reasonable suspicion is easily evaded,[152] devolving into a mere smokescreen of protection.[153] A police officer stopped Robinson because of a seatbelt violation, a lawful pretext,[154] to further investigate a tip by an unidentified caller as to a concealed handgun.[155] No Fourth Circuit judge found this segment of the case problematic, because the law surrounding pretextual stops is settled. Notably though, the police officer may be incorrect about the armed status of an individual and still satisfy the armed inquiry of the frisk standard once the stop is completed.[156]

In light of state legislation allowing concealed and open carry and the expanding scope of Second Amendment rights,[157] being armed is largely a lawful act that should no longer carry a negative connotation.[158] But under the unitary concept, an individual merely suspected to be armed who has only committed a seatbelt violation, or any other minor infraction, is now subject to a "lawful" invasion of

150. *See* Arizona v. Johnson, 555 U.S. 323, 326 (2009).

151. *Terry*, 392 U.S. at 21–22 (explaining that a court assesses the reasonableness of a search and seizure based on the objective standard of what facts were available to the officer at the moment of the search or seizure); Floyd v. City of New York, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) ("Reasonable suspicion is an objective standard; hence, the subjective intentions or motives of the officer making the stop are irrelevant." (quoting United States v. Bayless, 201 F.3d 116, 133 (2d Cir. 2000))).

152. *Robinson II*, 846 F.3d at 712 (Harris, J., dissenting).

153. Janet Koven Levit, *Pretextual Traffic Stops:* United States v. Whren *and the Death of* Terry v. Ohio, 28 LOY. U. CHI. L.J. 145, 146 (1996) (asserting that a police officer's traffic violation stop can provide a lawful pretext to serve as a smokescreen to disguise the officer's true motives).

154. *See* Whren v. United States, 517 U.S. 806, 810–12 (1996) (holding that the Court is unwilling to entertain challenges to the Fourth Amendment based on subjectivity or pretext, so long as the pretext is not predicated on an impermissible discriminatory basis).

155. *See Robinson II*, 846 F.3d at 695.

156. *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 111–12 (1977) (per curiam); *Terry*, 392 U.S. at 27.

157. *See supra* notes 6–10 and accompanying text.

158. *See Robinson II*, 846 F.3d at 707 (Harris, J., dissenting), *cert. denied*, 138 S. Ct. 379 (2017) (mem.); United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013); *see, e.g.*, N.C. GEN. STAT. § 14-269 (2017) (authorizing concealed carry with a permit); VA. CODE ANN. § 18.2-287.4 (Supp. 2018) (restricting certain types of carry); W. VA. CODE ANN. § 61-7-4 (Westlaw through 2018 First Extraordinary Sess.) (authorizing concealed carry with a permit). *But see* United States v. Rodriguez, 739 F.3d 481, 483, 486–87 (10th Cir. 2013) (referencing the New Mexico criminal statute that made carrying a concealed firearm anywhere illegal).

his or her sanctity.[159] With the elimination of "dangerous," the stop standard and the armed inquiry prove to be no more than ineffective barriers of Fourth Amendment protection.

Police now have unbridled discretion to intrude upon citizens availing themselves of his or her state's permissive gun laws.[160] Moreover, citizens now have no recourse to compel a distinct showing of dangerousness.[161] Even worse is the potential for law enforcement to disproportionately use this discretion in certain areas and against certain people.[162] Before the unitary concept interpretation, stop-and-frisk had already provoked a longstanding debate surrounding race, police violence, and harassment.[163] It has been recognized that the racial implications of upholding the constitutionality of stop-and-frisk were squarely before the *Terry* Court, whether in the form of an amicus brief[164] or the national incidents leading up to the disposition of the case.[165] In fact, the *Terry* Court admitted that it had at least

159. *See Robinson II*, 846 F.3d at 712 (Harris, J., dissenting) (reasoning that police can target whomever they please for an exploratory frisk—whether or not they know the individual is armed—if they watch them long enough to spot a moving violation).

160. *See* Devon W. Carbado & L. Song Richardson, *The Black Police: Policing our Own*, 131 HARV. L. REV. 1979, 2016 (2018) (explaining that reasonable suspicion, even without the unitary concept interpretation, is a low bar that gives police "tremendous discretion with respect to deciding whom to subject to stop and frisks").

161. *See, e.g.*, *Robinson II*, 846 F.3d at 700 ("In this case, both requirements—a lawful stop and a reasonable suspicion that Robinson was armed—were satisfied, thus justifying [the officer's] frisk under the Fourth Amendment as a matter of law."); *Rodriguez*, 739 F.3d at 491 (rejecting the defendant's argument that the officer "had no reason to believe he was dangerous" merely because he was armed—being armed justified the reasonableness of the frisk). It is noteworthy to add that Justice Harlan's oft-cited statement that "the right to frisk must be immediate and automatic" after a reasonable stop has been conducted does not apply in *Robinson II*. *See Terry*, 392 U.S. at 33 (Harlan, J., concurring). This is because the aforementioned statement is part of a larger conditional statement—the right to an immediate and automatic frisk is only present "if the reason for the stop is . . . an articulable suspicion of a crime of violence." *Id.* This was not the case in *Robinson II*. *See Robinson II*, 846 F.3d at 697.

162. *See Robinson II*, 846 F.3d at 711–12 (Harris, J., dissenting).

163. *See* Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1516 (2017) (listing several factors spanning from protestations by African American leaders and race riots to President Lyndon Johnson's Commission on Law Enforcement and Administration of Justice that all converged to make it clear that the Supreme Court was going to handle a stop-and-frisk case in the sixties).

164. The NAACP Legal Defense Fund submitted an amicus brief in *Terry*, arguing that stop-and-frisk "power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged." *Id.* at 1527–28.

165. *See id.* at 1528–30 (discussing events from the civil rights movement in years preceding *Terry*).

contemplated the racial implications of stop-and-frisk.[166] Accordingly, law professor Devon Carbado has argued that *Terry*, for multiple reasons, "*enables* police violence against African Americans," thereby making it a central part of the debate about race, police violence, and harassment from the 1960s to today.[167]

Fast forward to 2013, and the prescient protestations of several advocacy groups before the disposition of *Terry* came to fruition just as they warned. In the groundbreaking case of *Floyd v. City of New York*,[168] a federal court found that New York Police Department "officers [were] directed, sometimes expressly, to target certain defined groups for stops."[169] And more broadly, within the last six years at least, the multitude of black men and women killed by law enforcement has spurred the debate surrounding race, police violence, and harassment to new heights, resulting in an ever-present tension between communities of color and police.[170] Combining the predictions of aggravated racial implications, evidence of discriminatory employment of stop-and-frisk, and the interrelated resurgence of tension between communities of color and police, the unitary concept interpretation only exacerbates the problem. Disproportionate and discriminatory application of frisks can flourish, with no recourse in compelling a distinct showing of dangerousness, because the unitary concept interpretation openly invites unbridled police discretion.

166. When describing the procedure for a frisk and the backlash against police that can result from it, the Court noted that the exclusionary rule—the prevailing and resulting remedy when deciding a Fourth Amendment case—cannot control whether a frisk can abate this tension. *See Terry*, 392 U.S. at 14–15, 15 n.11, 17 n.14; Carbado, *supra* note 163, at 1532–33 (explaining Chief Justice Warren's argument that the exclusionary rule, as a remedy for Fourth Amendment violations, is ill-equipped to deter alleged wholesale harassment by police against African Americans).

167. Carbado, *supra* note 163, at 1510, 1512 (emphasis added).

168. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

169. *Id.* at 660; *see also* Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html [https://perma.cc/SD8L-CBSQ (dark-archive)] ("Judge Scheindlin found[] the stops overwhelmingly involved minority men because police commanders had come to see them as 'the right people' to stop."). See Carbado, *supra* note 163, at 1537–40, for an in-depth discussion of the *Floyd* litigation and the NYPD's employment of stop-and-frisk as a racial profiling prophylactic.

170. *See* Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016), http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html# 2016 [http://perma.cc/7GGM-P8AE] (profiling the cases of black men and women who died after a police encounter).

2. Dismantling *Terry*'s Narrow Scope Within the Fourth Amendment

The unitary concept dismantles the narrow scope of the stop-and-frisk doctrine.[171] *Terry* represents the beginning sketches of a wholly new parameter to the Fourth Amendment. The Supreme Court was aware of the magnitude that the newly-minted constitutional doctrine would carry[172]—the opinion signaled to lower courts and law enforcement the conduct that the Court approved as "comporting with constitutional guarantees," as well as the conduct that would be sanctioned as impermissible for years to come.[173] To that end, the Court attempted to carefully craft the doctrine as a narrow exception to both the probable cause standard and general adherence to the warrant requirement.[174] After *Terry*, moreover, the Court sought to maintain the doctrine's narrow scope while developing the doctrine through new factual situations.[175]

171. *See Robinson II*, 846 F.3d 694, 707 (4th Cir. 2017) (en banc) (Harris, J., dissenting) (rejecting the unitary concept because it is "a rule that . . . open[s] the door to the very abuses the Fourth Amendment is designed to prevent"), *cert. denied*, 138 S. Ct. 379 (2017) (mem.); United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013) ("Being a felon in possession of a firearm is not the default status. More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would dismantle Fourth Amendment protections for lawfully armed individuals in those states.").

172. *See* Illinois v. Wardlow, 528 U.S. 119, 127 (2000) (Stevens, J., concurring in part and dissenting in part) ("Cognizant that such intrusion had never before received constitutional imprimatur on less than probable cause . . . we reflected upon the magnitude of the departure we were endorsing."); Terry v. Ohio, 392 U.S. 1, 10–13 (1968) (recognizing the competing arguments in favor and against giving stop-and-frisk practices constitutional support as well as the magnitude of the liberties at issue in Fourth Amendment cases).

173. *Terry*, 392 U.S. at 13. The Court further stated that as the doctrine is incorporated into the "judicial process of inclusion and exclusion" of evidentiary rulings, the way a court rules will have the effect of either legitimizing or delegitimizing the conduct. *Id.* Last, in the opening paragraph of Justice Harlan's concurring opinion, he stated that he was "constrained to fill in a few gaps . . . because what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops." *Id.* at 31 (Harlan, J., concurring).

174. *See id.* at 20 (majority opinion) ("Instead [of being subject to the warrant procedure or probable cause], the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."); *see also* Dunaway v. New York, 442 U.S. 200, 208–10 (1979) (discussing the inception of the stop-and-frisk doctrine and how the Supreme Court established a "narrowly drawn" and "narrowly defined" doctrine in its departure from probable cause; as well as how the Court has "been careful to maintain [*Terry*'s] narrow scope" throughout subsequent cases); Ybarra v. Illinois, 444 U.S. 85, 93 (1979) (emphasizing the Court's "narrow" view of *Terry*'s exception to the probable cause requirement).

175. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1052 (1983); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam).

Robinson II did not present a new fact pattern warranting the expansion or restriction of the doctrine.[176] Instead, the fact pattern came on the cusp of a transition of norms surrounding handguns, which challenged the underpinnings of stop-and-frisk. In essence, Shaquille Robinson argued to reaffirm the logical conclusion of *Terry* and its progeny as it pertains to frisks: dangerous is distinct and separate from armed, and requires specific and articulable facts before a frisk can be conducted.[177] In other words, the *Robinson II* majority faced the ancillary question of whether there is permissible conduct that falls in the category of armed but not dangerous.

Indeed, this holding could have embraced the narrow reach of stop-and-frisk.[178] However, the majority elected to interpret the frisk standard as a unitary concept. The dangerousness of roadside stops and, most importantly, firearms (although both are legitimate) outweighed the potential for unbridled police discretion to intrude upon citizens' liberty and security.[179] It follows, therefore, that the scope of the doctrine has expanded beyond what the Court originally intended. In fact, in his concurring opinion in *Terry*—lauded for its prescient insight on several matters that would encapsulate the future development of the doctrine[180]—Justice Harlan further clarified what makes a frisk reasonable under Fourth Amendment protections by "fill[ing] in a few gaps" in the majority opinion.[181] Specifically, he made it clear that the constitutionality of the frisk did not rest on the officer's authority to protect himself and others from *dangerous weapons*—that is, the fact that Terry and Chilton were carrying concealed guns was not the reason why the frisk was upheld.[182] Instead, the majority in *Terry* affirmed the frisk because of the officer's right to frisk when "confronting a possibly *hostile person*."[183] Thus, both Justice Harlan and the majority clearly contemplated the

176. See *supra* Section II.A.2, for a discussion of post-*Terry* cases that involved new factual situations but did not stray from *Terry*'s core tenets.

177. *See supra* Section II.A.

178. *Terry*, 392 U.S. at 27 ("Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search . . . .").

179. *See Robinson II*, 846 F.3d 694, 696 (4th Cir. 2017) (en banc) ("[A]n officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene."), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

180. Wilkins, *supra* note 13, at 1177.

181. *Terry*, 392 U.S. at 31 (Harlan, J., concurring).

182. *Id.* at 31–32.

183. *Id.* at 32.

use of a frisk when a person is dangerous (i.e., hostile). Therefore, the elimination of a key inquiry in the frisk standard—the "dangerous" inquiry—dismantles the basis of *Terry* frisks.

III. THE SOLUTION FOR THE SUPREME COURT

For the reasons discussed in Part II, the *Robinson II* unitary concept interpretation is a misinterpretation of stop-and-frisk precedent that invites unbridled police discretion to frisk, and ultimately dismantles the basis of *Terry* frisks. Surprisingly, the Fourth Circuit is not the only federal appellate court to interpret the frisk standard as a unitary concept.[184] On the other hand, the Sixth and Seventh Circuits have rejected a unitary concept interpretation.[185] Though some scholars characterize circuit splits as trivial and overstated,[186] others have reached the opposite conclusion, specifically in the Fourth Amendment context, based on the perceived need for uniformity (which fosters public faith and legitimacy in the Supreme Court) and the Court's core responsibility to clarify the meaning of rights.[187]

The Supreme Court should clarify whether the frisk standard is a unitary concept or encompasses two separate inquiries. The Supreme Court forever changed the national debate surrounding gun policy with *Heller* and *McDonald*.[188] Although there is no indication of direct causation, those two cases might have been the impetus for the torrent of state legislation permitting concealed and open carry. The Court perhaps affected a shift in the public's perception toward guns, which were once deemed presumptively dangerous but are now authorized by law.[189] Therefore, the Court can no longer sit on its

184. *See* United States v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013); United States v. Orman, 486 F.3d 1170, 1176 (9th Cir. 2007). See generally Wilkins, *supra* note 13, for a discussion of why conflating the frisk standard into a unitary concept is the correct way for courts to read the armed and dangerous standard.

185. *See supra* note 67 and accompanying text.

186. Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1139–40 (2012).

187. *Id.* at 1173–74.

188. *The Heller Decision and What It Means*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/the-second-amendment/the-supreme-court-the-second-amendment/dc-v-heller/ [http://perma.cc/DLZ8-NYB9] ("[T]he ruling in *Heller* represented a dramatic reversal of the Court's previous interpretation of the Second Amendment.").

189. *See* Bellin, *supra* note 7, at 31 (explaining that meeting the dangerousness element in armed and dangerous by implying danger from a firearm is "hardly a foregone conclusion" because of *Terry*'s requirement of specific and articulable facts to justify a

hands while the basis of *Terry* frisk doctrine is dismantled and rendered inconclusive—it must act to remedy the apparent misinterpretation and inevitable implications of the unitary concept interpretation.

The Court has already abdicated its role of clarification once by failing to grant certiorari for *Robinson II*.[190] However, *Robinson II* may present facts—concealing a firearm in a high-crime area—that summarily disqualify certain Supreme Court Justices from reversing the unitary concept, no matter how contrary it is to *Terry* and its progeny. As much as invalidating unconstitutional conduct matters, so does presenting the Court with the right set of facts to do so.

Preliminarily, the Justices must agree that dangerous is a separate, distinct, and necessary element of the frisk standard, but ultimately, they must also agree that the facts of the case in front of them allow them to safely recognize and rule that the person's conduct falls in the category of armed but not dangerous. *Robinson II*'s facts would be a toss-up if not disqualifying. But what about an African American bank manager who lawfully owns and carries a firearm, who was stopped and frisked simply because he carried a gun and looked out of place in an affluent, predominantly white neighborhood; or a plain-clothes, off-duty police officer carrying his gun in a high crime area who is stopped and frisked when pulled over by a colleague? If we assume there is no hint of danger or hostility in either of the hypothetical examples, just like in *Robinson II*,[191] the Court is put in a conundrum that should end clearly in favor of invalidating the unitary concept.

To resolve the circuit split, the Supreme Court should take the next opportunity to grant certiorari in a *Terry* stop-and-frisk case. The solution lies in the reasoning of Judge Harris's dissent[192] and the clear

frisk); Wilkins, *supra* note 13, at 1169, 1170–71 (recognizing that before *Heller*, carrying a weapon could be presumed to be an unlawful act that could elicit a stop and came with a blanket assumption that the person was dangerous, allowing a frisk; however, the *Heller* decision changed whether being armed was presumptively unlawful and dangerous).

190. Robinson v. United States, 38 S. Ct. 379 (2017) (mem.) (denying Robinson's petition for writ of certiorari).

191. *Robinson II*, 846 F.3d 694, 698 (4th Cir. 2017) (en banc) ("[H]e was compliant, cooperative, [and] not displaying signs of nervousness."), *cert. denied*, 138 S. Ct. 379 (2017) (mem.); *Robinson I*, 814 F.3d 201, 204 (4th Cir. 2016) (highlighting that the arresting officers indicated that Robinson was cooperative and made no movements that might have suggested that he intended to reach for his weapon during the stop), *rev'd en banc*, 846 F.3d 694 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (2017) (mem.).

192. See generally *supra* Section II.B, for a discussion of the *Robinson II* dissenters' arguments and their relevance to past and future stop-and-frisk cases.

parameters of the frisk standard proclaimed by *Terry* and its progeny,[193] alongside the right set of facts. Using the correct interpretation and application of *Terry* and its progeny and the evolution of gun norms through a nationwide shift in legislation, the Supreme Court has the tools to effectively reverse *Robinson II* and all cases with similar holdings.

CONCLUSION

The armed and dangerous standard is in need of repair after the *Robinson II* majority's unitary concept interpretation. The assertion that being armed alone satisfies the frisk standard is a misinterpretation, contrary to *Terry* and its progeny's clear separation and distinction between armed and dangerous.[194] The consequences that will abound from this holding are lengthy and profound.[195] The holding will forever brand those who avail themselves of permissive concealed or open carry state laws as the subjects of unbridled police discretion, and it doesn't stop there.[196] The Supreme Court should grant certiorari in a *Terry* frisk case involving a gun and give the lower courts clear guidance as to the unconstitutionality of a unitary concept interpretation and the importance of a separate showing of dangerousness in the frisk standard.

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193. *See supra* Sections II.A–B.
194. *See supra* Section II.A.
195. *See supra* Section II.B.
196. *See supra* Section II.B.2.

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