Criminal Law - Terry Searches Predicated on Nothing More than Reasonable Suspicion That a Suspect Is Armed and Dangerous - United States v. House, 463 F. App'x 783 (10th Cir. 2012)

David Cashman

Follow this and additional works at: https://dc.suffolk.edu/jtaa-suffolk

Part of the Litigation Commons

Recommended Citation
CRIMINAL LAW—TERRY SEARCHES
PREDICATED ON NOTHING MORE THAN
REASONABLE SUSPICION THAT A SUSPECT IS
ARMED AND DANGEROUS—UNITED STATES V.
HOUSE, 463 F. APP’X 783 (10TH CIR. 2012)

In order to conduct a search or seizure of a person in the United
States, the general rule is that law enforcement officers must first obtain a
warrant.1 The Supreme Court has, however, recognized several exceptions
to this rule, one of which allows an officer to conduct a limited pat-frisk of
a person based on the officer’s reasonable suspicion that criminal activity is
afloat and the suspect is armed and dangerous—the “Terry doctrine.”2 In
United States v. House,3 the United States Court of Appeals for the Tenth
Circuit had the opportunity to consider whether an officer engaged in a
consensual encounter with a suspect must have reasonable suspicion that
criminal activity is afoot as a prerequisite to conducting a Terry pat-frisk.4
The majority opinion mistakenly decided not to address this issue, deciding
the case instead on the grounds that the pat-frisk was unjustified because
the officer lacked reasonable suspicion that the suspect was armed and
dangerous.5

On the afternoon of November 20, 2009, Officer Aaron Daley
visited a home to investigate a call concerning noises coming from a
woman’s basement.6 Upon completing a brief investigation and

---

1 See U.S. CONST. amend. IV (“The right of the people to be secure in their persons . . .
against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but
upon probable cause . . ..”); see also Mincey v. Arizona, 437 U.S. 385, 390 (1978) (“The Fourth
Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that
’searches conducted outside the judicial process, without prior approval by judge or magistrate,
are per se unreasonable under the Fourth Amendment . . . ’” (quoting Katz v. United States, 389
U.S. 347, 357 (1967))). The Court has stated that the primary purpose of the Fourth Amendment
“is to safeguard the privacy and security of individuals against arbitrary invasions by
Amendment provides right that is “basic to a free society” (quoting Wolf v. Colorado, 388 U.S.
25, 27 (1949))).

2 See Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (creating reasonable suspicion exception to
warrant requirement).
3 463 F. App’x 783 (10th Cir. 2012).
4 See id. at 787 (noting issue presented whether reasonable suspicion of criminal activity
necessary to support Terry frisk).
5 See id. (declining to decide whether officer may frisk suspect during consensual encounter).
6 House, 463 F. App’x at 784.
concluding that no one had entered the woman’s home, Officer Daley left the residence.\(^7\) As he was walking to his car, he noticed the defendant, Joseph Paul House ("House"), walking on the sidewalk in the direction of the woman’s home.\(^8\) Simultaneously, Officer Daley noticed that as another patrol car approached the intersection where House was walking, House did an “immediate turnaround.”\(^9\) Suspicion aroused, Officer Daley followed and approached House at another intersection.\(^10\)

Upon catching up to House, who was still walking on the sidewalk, Officer Daley asked, "[H]ey, can I talk to you, hey, can I ask you a few questions?"\(^11\) House, who had been talking on his cell phone, ended his call and turned around to face Officer Daley.\(^12\) As House turned around, Officer Daley noticed a large bulge in House’s left coat pocket and the end of a folding knife protruding from his right coat pocket.\(^13\) Officer Daley asked House if he had any weapons on his person, and House replied that he did not.\(^14\) Officer Daley subsequently instructed House to place his hands behind his back and removed the knife from House’s pocket.\(^15\) Upon securing the knife, Officer Daley conducted a Terry frisk of House in “highly probable [areas] for weapons,” ultimately removing a gun from House’s other pocket.\(^16\)

House was arrested and charged with being a felon in possession of a firearm.\(^17\) Prior to trial, House moved to suppress the evidence of the gun, arguing that he was unlawfully detained and searched.\(^18\) The district court denied his motion, reasoning that the encounter was consensual and

\(^{7}\) Id.
\(^{8}\) Id.
\(^{9}\) Id.
\(^{10}\) Id. (describing officer’s initial contact with House).
\(^{11}\) Id. (denoting officer’s initial contact with House).
\(^{12}\) See United States v. House, No. 2:10-CR-007, 2010 WL 4103548, at *2 (D. Utah Oct. 18, 2010) (stating House stayed to answer questions despite feeling free to leave), overruled by 463 F. App’x 783 (10th Cir. 2012). According to House’s testimony, he answered the officer’s questions because it was "the right thing to do." Id.
\(^{13}\) Id.
\(^{14}\) Id. at 784-85.
\(^{15}\) Id. at 785.
\(^{16}\) Id. (alteration in original); see also infra note 34 and accompanying text (explaining Terry pat-frisks).
\(^{17}\) See House, 463 F. App’x at 784 (stating House entered conditional guilty plea pursuant to 18 U.S.C. § 922(g)(1)). The statute provides, “It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition...” 18 U.S.C. § 922(g)(1) (2012).
\(^{18}\) See House, 2010 WL 4103548, at *5-*6 (arguing gun should be suppressed because search was unlawful).
the officer was therefore entitled to pat-frisk for his own safety.\(^\text{19}\) House subsequently entered a conditional plea of guilty, and the court sentenced him to thirty-nine months imprisonment and three years supervised release for his offense.\(^\text{20}\) House appealed the district court’s ruling not to suppress the evidence of the gun, arguing that the encounter was not consensual and that Officer Daley could not lawfully frisk him because he lacked reasonable suspicion that House was engaged in criminal activity.\(^\text{21}\) The Tenth Circuit rejected House’s first point and opted not to address his second argument, but nevertheless reversed the district court’s ruling because Officer Daley lacked reasonable suspicion to suspect that House was dangerous.\(^\text{22}\)

The Fourth Amendment consists of two independent clauses—the Reasonableness Clause and the Warrant Clause.\(^\text{23}\) Determining how the

---

\(^{19}\) See id. at *6 (justifying pat-frisk as necessary to ensure officer’s safety). The district court rejected House’s assertion that he had been unlawfully detained, finding instead that the encounter was consensual. Id. at *5. The court explained that not all citizen-police encounters qualify as seizures, citing Supreme Court decisions to support its conclusion. Id. at *3; see also infra note 23 and accompanying text (defining seizures). Having found the encounter consensual, the district court cited Tenth Circuit precedent allowing frisks for officer safety. See House, 2010 WL 4103548, at *5 (providing officer may conduct pat-down if he harbors reasonable suspicion person is armed and dangerous (citing United States v. Manjarrez, 348 F.3d 881, 886 (10th Cir. 2003))).

\(^{20}\) House, 463 F. App’x at 784.

\(^{21}\) Appellant’s Reply Brief at 1-6, United States v. House, 463 F. App’x 783 (10th Cir. 2012) (No. 11-4102), 2011 WL 5320845, at *1-6.

\(^{22}\) See House, 463 F. App’x at 785-90 (stating encounter consensual but House’s possession of knife did not create threat to officer). In rejecting the State’s argument that Officer Daley reasonably believed House to be armed and dangerous, the court stated that being armed does not necessarily equate with being dangerous. Id. at 790. The court assumed, without deciding, that a frisk could be proper solely based on a finding that the individual was armed and dangerous, sidestepping House’s main argument that frisks pursuant to consensual encounters are per se impermissible. Id. at 786-87.

\(^{23}\) See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”). The threshold inquiry with all Fourth Amendment issues is to determine whether a given governmental action constitutes a “search” or “seizure.” See Brett Andrew Harvey, Minnesota v. Dickerson and the Plain Touch Doctrine: A Proposal to Preserve Fourth Amendment Liberties During Investigatory Stops, 58 ALB. L. REV. 871, 873-74 (1995) (explaining nature of Fourth Amendment searches). A Fourth Amendment search occurs when government agents intrude upon an area in which an individual has asserted a legitimate expectation of privacy. See Katz v. United States, 389 U.S. 347, 350 (1967) (articulating modern-day interpretation of Fourth
two clauses interrelate is a difficult task, and one with which the Supreme Court has struggled, because to decide the clauses’ proper relationship is to decide the values and purposes of the amendment.\textsuperscript{24} Traditionally, the Court reconciled the two clauses by indicating that the latter clause gave meaning to the former: that is, searches and seizures were reasonable when conducted pursuant to judicially authorized warrants supported by probable cause.\textsuperscript{25} Only in extreme circumstances where exigencies made it impracticable for officers to obtain a warrant did the Court allow for warrantless searches and seizures in the name of reasonableness, and even then, the Court always required that officers have probable cause.\textsuperscript{26} The Court’s general warrant requirement supported by probable cause lent the

Amendment search). A person is seized within the meaning of the Fourth Amendment when, by means of physical force or show of authority, his freedom of movement is restrained, and in the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave. See Florida v. Bostick, 501 U.S. 429, 434 (1991) (explaining seizure does not occur simply because officer approaches individual and asks questions); United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (defining seizures of persons). Once an action is determined to constitute either a search or seizure, the question becomes whether the search or seizure was reasonable, for “what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.” Elkins v. United States, 364 U.S. 206, 222 (1960); see also Wolf v. Colorado, 338 U.S. 25, 27 (1949) (observing arbitrary intrusions upon personal privacy unreasonable and violate concept of ordered liberty), overruled by Mapp v. Ohio, 367 U.S. 643 (1961).

\textsuperscript{24} See Scott E. Sundby, \textit{A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry}, 72 MINN. L. REV. 383, 384 (1988) (“Although the challenge of reconciling the warrant and reasonableness clauses appears elementary, the Court’s inability to meet the challenge is understandable considering that the task goes to the very core of the amendment’s meaning and purpose.”).

\textsuperscript{25} See Mincey v. Arizona, 437 U.S. 385, 390 (1978) (observing “cardinal principle” that searches conducted outside judicial process are per se unreasonable); see also Mancusi v. DeForte, 392 U.S. 364, 370-71 (1968) (holding unconstitutional warrantless search of office absent warrant even where subpoena obtained); United States v. Jeffers, 342 U.S. 48, 51 (1951) (stating warrant requirement too frequently ignored); Johnson v. United States, 333 U.S. 10, 13-14 (1948) (justifying warrant requirement); Agnello v. United States, 269 U.S. 20, 33 (1925) (stating warrantless search of home invalid under Fourth Amendment). The Johnson Court maintained that the warrant requirement existed to ensure that a “neutral and detached magistrate” determined when “the right of privacy must reasonably yield to the right of search,” rather than allowing such a decision to be made by “officer[s] engaged in the often competitive enterprise of ferreting out crime.” Johnson, 333 U.S. at 13-14.

\textsuperscript{26} See Sundby, \textit{supra} note 24, at 386-87 (indicating reasonableness only sometimes necessitated making warrant exception); see also Mincey, 437 U.S. at 393-94 (recognizing exigencies may make warrant unnecessary); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (allowing warrantless search by officer in hot pursuit); Jeffers, 342 U.S. at 51 (positing lack of warrant may be excused under exceptional circumstances). Officers conducting warrantless searches pursuant to exigent circumstances still needed probable cause to believe that they would find evidence in the place they were looking. See Wong Sun v. United States, 371 U.S. 477, 479-80 (1963) (noting warrantless search required probable cause); United States v. Walsh, 299 F.3d 729, 733 (8th Cir. 2002) (holding warrantless search justified by exigent circumstances and probable cause).
amendment a high amount of predictability and gave greater protection to individual privacy. In 1967, however, the Court laid the seeds for change in *Camara v. Municipal Court*, holding that reasonableness, which was met when governmental need to conduct housing inspections outweighed individual privacy interests, satisfied the probable cause element of the warrant requirement.

One year later in *Terry v. Ohio*, the Supreme Court pushed the reasonableness clause further to the forefront of Fourth Amendment analysis, proclaiming that a non-emergency search and seizure did not require a warrant so long as it was reasonable. The facts of *Terry* were rather unremarkable given the magnitude of the Court’s holding: a veteran Cleveland police officer observed several men on a street corner whom he suspected to be casing a jewelry store in preparation for an attempted robbery. Although the officer’s suspicion did not quite rise to the level of

---

27 See Sundby, supra note 24, at 388 (stating Court’s “focus on warrant clause yielded predictability and strong protections”); see also Katz, 389 U.S. at 357 (reiterating per se rule that warrantless searches are prohibited). The Court has justified the warrant requirement by stating that it protects the right to privacy by assuring “an objective determination whether an intrusion is justified in any given case.” Skinner v. Ry. Labor Execs. Ass’n, 489 U.S. 602, 621-22 (1989).


29 See id. at 537-39 (analyzing constitutionality of housing inspection under probable cause as defined by reasonableness). At issue in *Camara* was a routine governmental housing inspection of the physical condition of a private property. *Id.* at 525 (noting petitioner brought action after being charged for not allowing warrantless inspection of his home). The first issue the Court had to decide was whether such searches were subject to the traditional warrant and probable cause requirement. *Id.* at 533 (“We simply cannot say that the protections provided by the warrant procedure are not needed in this context . . . .”). Having elected to analyze the case pursuant to the warrant requirement, the Court was still faced with the dilemma of how the housing inspections could be upheld, since the probable cause requirement was not met. *See Carroll v. United States*, 267 U.S. 132, 162 (1925) (defining probable cause as facts sufficient to warrant man of reasonable caution that offense committed); Sundby, supra note 24, at 392-93 (noting probable cause, as previously defined, not met in *Camara*). To satisfy the probable cause requirement, the Court simply engrafted a new meaning onto probable cause, positing that probable cause was met where the governmental interest in conducting housing inspections outweighed the individual’s interest in privacy. *See Camara*, 387 U.S. at 534-35 (defining probable cause in terms of reasonableness).

30 392 U.S. 1 (1968).

31 *Id.* at 20 (“[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”). The Court then explicitly stated that “the conduct involved in this case must be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.” *Id.*

32 See *id.* at 546 (stating police detective observed two men alternately walk back and forth past several retail stores. The men paused to examine a particular store window with each pass, and after each walk-by, they would meet at the street corner and confer. *Id.* at 6. The two men repeated their routine approximately twelve times, interrupted once by a third man with whom they had a brief conversation. *Id.* After observing this behavior, the detective became suspicious that criminal activity was unfolding. *Id.*
probable cause, he felt compelled to intervene; so he stopped the men, pat-
frisked each man for weapons, and recovered a pistol from the overcoat of
one of the men—Terry.33 Under the rubric of reasonableness, the Court
balanced the governmental interest in crime prevention and officer safety
against the individual interest in privacy, holding that an officer is
constitutionally permitted to stop and frisk a defendant whom he has
reasonable suspicion to believe is engaged in criminal activity and is armed
and dangerous.34 The Court’s decision was a bold step in allowing greater
governmental intrusion into individual privacy, yet it took care to cabin the
effect of its holding by stating that the stop must be reasonable at its
inception, and that the frisk must be limited to search for weapons when the
suspect is reasonably believed to be armed and dangerous.35

33 Id. at 6-7 (stating officer believed men were “casing a job, a stick-up”). At some point the
third man left the corner where the other two had been conversing, only to rejoin them in front of
one of the stores into which they had been peering. Id. at 6. Once the men rejoined in front of the
store, the detective approached the trio, identified himself as a police officer, and asked the
suspects for their names. Id. at 6-7. After the suspects mumbled incoherent responses to his
inquiries, the officer promptly grabbed Terry, turned him around, and “patted down the outside of
his clothing.” Id. at 7.

34 Id. at 30-31 (authorizing investigatory stops when balancing test weighs in favor of
governmental action). The Terry Court borrowed the balancing test set forth in Camara to weigh
the governmental interest in crime prevention against the individual’s interest in privacy. Id. at
20-27 (citing Camara balancing test as only “ready test” for determining reasonableness). Using
this balancing test, the Court held that an investigatory stop is permitted when a police officer is
able to identify “specific and articulable facts which, taken together with rational inferences from
those facts,” create a reasonable, particularized suspicion that the individual is engaged in
criminal activity. Id. at 21. In essence, the Court’s definition of reasonable suspicion served to
delineate the parameters of a reasonable stop and to ensure that constitutionally guaranteed rights
of privacy were not invaded on mere “inarticulate hunches.” See id. at 19-22 (stating officer’s
action must be “justified at its inception”). Under this framework, the Court decided that the
officer was justified in stopping and seizing the defendant. Id. at 23. Having decided that the
officer could lawfully stop Terry, the Court recognized that it still needed to decide if, and under
what circumstances, the stop could proceed to a frisk, for the frisk entailed still another level of
intrusion upon privacy. Id. at 23-25 (recognizing protective frisk entails “severe . . . intrusion
upon cherished personal security”). Once again, the Court utilized the Camara balancing test to
weigh the governmental interest in officer safety against the individual’s right to privacy, and
ultimately decided that the officer’s safety warranted a limited invasion of the individual’s
privacy rights. Id. (authorizing officer’s action because of threat to his safety during investigatory
stop). Concluding, the Court circumscribed its holding to the particular facts presented in Terry,
averring that lower courts would need to perform a balancing analysis in each case to determine
whether the governmental interest sufficiently justifies an invasion of individual rights. Id. at 30
(“Each case of this sort will, of course, have to be decided on its own facts.”).

35 See supra text accompanying note 34 (outlining specific circumstances under which stop
of individual is permissible). Having articulated circumstances under which an officer could
lawfully stop an individual, the Court was careful to define when the stop could proceed to a
frisk. See Terry, 392 U.S. at 27, 30-31 (creating “narrowly drawn authority” allowing reasonable
search for weapons to protect officer safety). At the same time, the Court made clear that the stop
did not necessarily authorize the frisk. See id. at 27. To proceed from a stop to a frisk, the officer
must have “reason to believe that he is dealing with an armed and dangerous individual.” Id.
The balancing test that the Court employed in Terry subsequently proved to be somewhat unwieldy for lower courts, which struggled to apply the inherently subjective analysis in ways that produced consistent, predictable results. Consequently, the Court has been called upon to explicate Terry principles in a number of subsequent cases; in so doing, it has provided clarification of the requisite level of suspicion necessary to conduct the stop and the frisk as well as the proper parameters of the stop and the frisk in myriad factual circumstances. Analysis of the Court's Court clarified this point in the following way:

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unperticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. Upon articulating the standards under which an officer could stop and frisk an individual, the Court made sure to limit the scope of the frisk to search for weapons only, ensuring that officers would not use their frisk authority to search for non-harmful contraband. See id. at 26 (stating patdown must be "strictly circumscribed by the exigencies which justify its initiation"). In other words, the frisk must be limited to "that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Id.

36 See United States v. Cortez, 449 U.S. 411, 417 (1981) (commenting on lower courts' inconsistent definitions of "reasonable suspicion"). See generally Rachel Karen Laser, Comment, Unreasonable Suspicion: Relying on Refusals to Support Terry Stops, 62 U. CHI. L. REV. 1161, 1169 (1995) (noting Court has consistently acknowledged that "reasonable suspicion" standard not self-evident). Prominent criminal law professor Wayne LaFave observed that given the oft-stated need for guidelines, one is struck with the fact that very few specific guidelines can be distilled from Terry. See Wayne R. LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 40 & n.3 (1968) (noting Court consciously left itself room for later elaboration of Terry).

37 See Jamie L. Stulin, Comment, Does Hiibel Redefine Terry? The Latest Expansion of the Terry Doctrine and the Silent Impact of Terrorism on the Supreme Court's Decision to Compel Identification, 54 AM. U. L. REV. 1449, 1456-58 (2005) (providing cogent outline of Terry's progeny). Since deciding Terry, the Court has considered numerous factors that may lead to the requisite suspicion necessary to support a Terry stop. See id. at 1456-57 (outlining factors). Such factors include a suspect's behavior. See, e.g., United States v. Sokolow, 490 U.S. 1, 8-9 (1989) (authorizing stop of defendant whose behavior illustrated classic signs of drug courier); United States v. Mendenhall, 446 U.S. 544, 564-66 (1980) (deeming stop of defendant who appeared nervous and tried to evade police detection constitutional); United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 (1975) (listing erratic, evasive behavior as pertinent factor in establishing reasonable suspicion). Additionally, the location of the stop is relevant to reasonable suspicion. See Adams v. Williams, 407 U.S. 143, 147-48 (1972) (legitimizing policeman's reasonable suspicion due to defendant's presence in high-crime area). The Court has also identified a suspect's race as potentially important. See Brignoni-Ponce, 422 U.S. at 886-87 (holding ancestry a factor but alone insufficient to support Terry stop). A fourth factor considered is the credibility of an anonymous tip. See Alabama v. White, 496 U.S. 325, 332 (1990) (supporting stop of defendant based on anonymous tip); Illinois v. Gates, 462 U.S. 213, 244-46 (1983) (confirming anonymous tip may be sufficient to support stop). The Court has also considered the
jurisprudence subsequent to Terry reflects several trends, the combined effect of which has been to give police ever more leeway in their encounters with individuals: 1) the Court has broadened the bounds of permissible Terry stops, and generally loosened the reasonable suspicion standard, making it easier for officers to detain individuals; 2) the Court has made it easier to categorize an encounter as “consensual,” and therefore not subject to any Fourth Amendment regulation; and 3) the Court has generally given officers more flexibility to take measures to ensure their safety, including allowing pat-frisks in circumstances beyond the scope of those considered in Terry.\(^{(38)}\) Although the Court has consistently credibility of non-anonymous tips. See Adams, 407 U.S. at 146-47 (positing informant’s tip could supply requisite reasonable suspicion for search). Finally, the Court has weighed the interests at stake. See Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 451-55 (1990) (upholding police sobriety checkpoint because of serious public interest and lowered expectation of privacy); Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 618-21 (1989) (ruling public safety concerns warrant railroad employee drug testing); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (holding students accorded reduced level of protection because of state’s interest in school discipline). In addition to examining factors contributing to “reasonable suspicion” to perform a Terry stop, the Court has also been called upon to address the scope and nature of Terry pat-frisks. See, e.g., Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (permitting officer to seize contraband immediately recognized during pat-frisk); Maryland v. Buie, 494 U.S. 325, 336-37 (1990) (allowing “protective sweep” of areas immediately surrounding suspect incident to arrest); Michigan v. Long, 463 U.S. 1032, 1052-53 (1983) (upholding Terry pat-frisk of passenger compartment of lawfully stopped vehicle); Ybarra v. Illinois, 444 U.S. 85, 91, 95-96 (1979) (disallowing pat-frisk of tavern patron merely based on proximity to suspect); Sibron v. New York, 392 U.S. 40, 74 (1968) (Harlan, J., concurring) (stating protective pat-frisk of suspect possessing narcotics unjustified).

\(^{(38)}\) See Elizabeth Ahern Wells, Note, Warrantless Traffic Stops: A Suspension of Constitutional Guarantees in Post September 11th America, 34 U. TOL. L. REV. 899, 899 (2003) (observing Terry “reasonable suspicion” standard has evolved into virtual “green light for police officers”); see also United States v. Arvizu, 534 U.S. 266, 277 (2002) (upholding investigatory stop of driver based on aggregate of individually innocent factors); Sokolow, 490 U.S. at 7-8 (expanding “reasonable suspicion” standard to include totality of circumstances); United States v. Simpson, 609 F.3d 1140, 1149 (10th Cir. 2010) (“[L]ies, evasions or inconsistencies about any subject . . . may contribute to reasonable suspicion.”). Commentators have criticized Arvizu as eroding the “reasonable suspicion” standard beyond recognition. See Wells, supra, at 913 (posing aggregation of innocent factors to create “reasonable suspicion” does not protect privacy rights). Also contributing to the erosion of the “reasonable suspicion” standard is a general trend toward treating police officers as experts and giving undue deference to their judgment. See David A. Harris, Frisking Every Suspect: The Withering of Terry, 28 U.C. DAVIS L. REV. 1, 34 (1994) (criticizing Court for setting standard deferring to officers’ judgments); see also Ornelas v. United States, 517 U.S. 690, 700 (1996) (deferring to police officer’s experience to determine whether reasonable suspicion present); Cortez, 449 U.S. at 418 (“[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”). The Court also broadened the scope of Terry stops to include drug crimes and minor crimes, as opposed to just violent crimes. See White, 496 U.S. at 330 (allowing officers to stop driver for suspected drug offense); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (applying Terry principles to stop of driver suspected of not having license). In addition to loosening the strictures of “reasonable suspicion” and applying Terry principles to
more cases, the Court has also categorized more encounters as consensual, and therefore not subject to Fourth Amendment protections. See Florida v. Bostick, 501 U.S. 429, 434 (1991) (rejecting mere police questioning does not constitute seizure); Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) (holding consent to search was voluntary); Tracey MacIn, “Black and Blue Encounters” Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 247-49 (1991) (arguing Court’s reasonable person standard allows it to artificially categorize more encounters as consensual). The Court has also generally granted officers greater flexibility to ensure their own safety. See, e.g., Ryburn v. Huff, 132 S. Ct. 987, 991 (2012) (permitting officers to enter woman’s home after she declined to answer whether guns located inside); Maryland v. Wilson, 519 U.S. 408, 414 (1997) (allowing officers to order innocent passengers out of car for officer safety); Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (authorizing officer to order driver out of vehicle during traffic stop for officer safety); Chimel v. California, 395 U.S. 752, 763 (1969) (allowing officers to search area where arrestee might reach for weapons). While the Court has decided a number of cases regarding what measures officers may take to protect their own safety, it has decided relatively fewer cases dealing specifically with the frisk. See Harris, supra, at 14 (stating Court spoken about frisks only few times since Terry). To the extent that the Supreme Court has weighed in, it has sent mixed messages: it has held steadfastly that pat-frisks may only occur when the suspect is believed to be armed and dangerous; however, it has allowed officers to satisfy that burden fairly easily and has also, purposefully or not, encouraged frisks by allowing officers to seize non-dangerous contraband that they can immediately detect during the course of a frisk. Compare Ybarra, 444 U.S. at 91-93 (disallowing frisk of tavern patron who was merely in proximity of suspect), and Sibron v. New York, 392 U.S. 40, 74 (1968) (Harlan, J., concurring) (cautioning drugs not basis for belief that suspect was armed and dangerous), with Dickerson, 508 U.S. at 375-76 (permitting officer to seize non-harmful contraband immediately recognizable during pat-frisk), and Adams, 407 U.S. at 147-48 (positing informant’s tip that suspect armed, lateness of hour, and location justified frisk). The Supreme Court has also allowed pat-frisks and other searches and seizures in contexts where there is no suspicion of criminal conduct at all. See Arizona v. Johnson, 555 U.S. 323, 327, 332 (2009) (permitting pat-frisk of passenger in lawfully stopped vehicle); Buie, 494 U.S. at 334 (sustaining warrantless protective sweep of premise during arrest); Sitz, 496 U.S. at 451-55 (allowing police to stop vehicles at check points without reasonable suspicion of criminal activity). Despite the Court’s proclamation that frisks must be limited to searches for weapons, and perhaps because of its general permissiveness allowing officers to take measures to ensure their own safety, lower courts have also allowed frisks “automatically—categorically—in many situations in which the offense suspected does not require a weapon, and the suspect shows no outward sign he might be armed and dangerous.” Harris, supra, at 22-23 (observing lower courts have classified certain types of offenses and people as always dangerous). For example, lower courts have allowed pat-frisks of drug dealers, based on the notion that drug dealers are always dangerous. See, e.g., United States v. Garcia, 459 F.3d 1059, 1064 (10th Cir. 2006) (stating frisk of drug traffickers reasonable); United States v. Brown, 913 F.2d 570, 572 (8th Cir. 1990) (permitting frisk of drug trafficker); United States v. Trillo, 809 F.2d 108, 113 (1st Cir. 1987) (allowing weapons frisk of major drug trafficking suspect); United States v. Oates, 560 F.2d 45, 61-62 (2d Cir. 1977) (permitting pat-frisk based on officer’s experience that narcotics dealers use firearms as “tools of the trade”). Lower courts have also condoned the frisking of burglary suspects on the rationale that burglars often carry tools that might be used as weapons. See United States v. Moore, 817 F.2d 1105, 1108 (4th Cir. 1987) (condoning automatic frisk because burglary often involves use of weapons). Courts have also allowed pat-frisks of companions of arrestees, even if the companion is not suspected of any criminal wrongdoing. See, e.g., United States v. Cruz, 909 F.2d 422, 424 (11th Cir. 1989) (justifying frisk of defendant because she was with “known drug dealer”); United States v. Stevens, 509 F.2d 683, 688 (8th Cir. 1975) (upholding automatic frisk of companion in car); United States v. Poms, 484 F.2d 919, 922 (4th Cir. 1973) (holding police may automatically frisk all companions of arrestees within immediate vicinity of victim). Finally, lower courts have
broadened the applicability of *Terry*, and shown increased deference to promote officer safety, it has never squarely decided the constitutionality of pat-frisks in the specific context of consensual encounters between officers and citizens on the street. As such, there has been a split of opinion allowed pat-frisks based on the most barebones facts, evidencing a clear deference to concerns for officer safety. See, e.g., *United States v. Harris*, 313 F.3d 1228, 1236 (10th Cir. 2002) (upholding frisk of nervous and noncompliant suspect); *United States v. Jackson*, 300 F.3d 740, 746 (7th Cir. 2002) (upholding frisk because suspect known to be armed in the past); *United States v. Robinson*, 119 F.3d 663, 667 (8th Cir. 1997) (permitting pat-frisk where defendant took hands off steering wheel and “moved them towards his waist”); *United States v. Rideau*, 969 F.2d 1572, 1575 (5th Cir. 1992) (justifying frisk because defendant’s “moves took place after a detention, at night, in a high crime area”); *United States v. Mitchell*, 951 F.2d 1291, 1296 (D.C. Cir. 1991) (sustaining frisk of passenger who moved both hands under coat suggesting hiding gun); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (allowing frisk of passenger who “stooped down and moved from side to side”). Unfortunately, the effects of broad officer leeway are not shared equally along racial lines. See Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 571-73 (1991) (describing widespread abuse of warrantless searches and seizures upon African-Americans).

See *United States v. House*, 463 F. App’x 783, 791 (10th Cir. 2012) (Baldock, J., dissenting) (stating Court never decided constitutionality of frisks during consensual encounters with person on street). It does merit attention that the Court has come infinitely close to addressing the precise issue of suspicionless pat-frisks during consensual encounters with citizens on the street, but it did so in the context of car stops, which have always been treated differently than stops on the street. See *Johnson*, 555 U.S. at 327, 352 (upholding pat-frisk of passenger in lawfully stopped vehicle). The *Johnson* Court stated:

> [I]n a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

Id. at 327. The Court had previously held that officers who conduct “routine traffic stop[s]” may “ perform a ‘patdown’ of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.” *Knowles v. Iowa*, 525 U.S. 113, 118 (1998). Although such reasoning appears to resolve the issue of pat-frisks during consensual encounters on the street, it does not; unlike stops on the street, during a traffic stop a police officer effectively seizes “everyone in the vehicle,” including all passengers. *Brendlin v. California*, 551 U.S. 249, 255 (2007). As *Terry* makes clear, once someone is lawfully stopped, that person may be lawfully frisked if suspected of being armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). Furthermore, the *Johnson* Court had the opportunity to specifically address the issue of pat-frisks during consensual encounters, especially because the lower court analyzed the case in precisely those terms, yet the Court refused to do so. *Compare Johnson*, 555 U.S. at 333 (stating officer’s inquiries into matters unrelated to stop do not convert encounter into consensual one), with *State v. Johnson*, 170 P.3d 667, 673 (Ariz. Ct. App. 2007) (concluding encounter with defendant “evolved into a separate, consensual encounter”). In addition, the reasoning behind pat-frisking passengers is very particular; the Court has oft-recognized that traffic stops are “especially fraught with danger to police officers,” and that the risk of violence stems from the fact that “evidence of a more serious crime might be uncovered during the stop.” *See Maryland v. Wilson*,
among lower courts—some have held that reasonable suspicion of criminal conduct is a necessary prerequisite to pat-frisk, while others have ruled that pat-frisks based entirely on suspicion that a person is armed and dangerous are permissible.\textsuperscript{40}

In United States v. House, the Tenth Circuit had the opportunity to decide an important and contentious Terry issue—whether officers may pat-frisk suspects during consensual encounters on the street in the absence of articulable suspicion of criminal activity.\textsuperscript{41} The court declined to decide the issue, reasoning that it could decide the issue on other grounds—namely, that the pat-frisk was unconstitutional because there was no evidence indicating that House was dangerous at the time of the frisk.\textsuperscript{42}

\textsuperscript{40} Compare United States v. Orman, 486 F.3d 1170, 1173 (9th Cir. 2007) (stating Terry did not “cabin the use of officer safety patdowns” to lawful investigatory stops), \textit{and} United States v. Romain, 393 F.3d 63, 75 (1st Cir. 2004) (holding officer legitimately on residential premises pursuant to consent may frisk for safety), \textit{and} United States v. Bonds, 829 F.2d 1072, 1075 (11th Cir. 1987) (holding officer entitled to frisk to ensure safety absent concern of criminal activity), \textit{with} United States v. Burton, 228 F.3d 524, 527 (4th Cir. 2000) (stating reasonable suspicion of criminal activity necessary pre-requisite to pat-frisk), \textit{and} United States v. Gray, 213 F.3d 998, 1000 (8th Cir. 2000) (noting criminal activity necessary to justify pat-frisk), \textit{and} United States v. Bonds, 829 F.2d 1072, 1075 (11th Cir. 1987) (holding officer entitled to frisk to ensure safety absent concern of criminal activity), \textit{with} United States v. Burton, 228 F.3d 524, 527 (4th Cir. 2000) (stating reasonable suspicion of criminal activity necessary pre-requisite to pat-frisk), \textit{and} United States v. Gray, 213 F.3d 998, 1000 (8th Cir. 2000) (noting criminal activity necessary to justify pat-frisk), \textit{and} United States v. United States v. Bonds, 829 F.2d 1072, 1075 (11th Cir. 1987) (holding officer entitled to frisk to ensure safety absent concern of criminal activity), \textit{with} United States v. Burton, 228 F.3d 524, 527 (4th Cir. 2000) (stating reasonable suspicion of criminal activity necessary pre-requisite to pat-frisk), \textit{and} United States v. Gray, 213 F.3d 998, 1000 (8th Cir. 2000) (noting criminal activity necessary to justify pat-frisk), \textit{and} Gomez v. United States, 597 A.2d 884, 890-91 (D.C. 1991) (reasoning “legitimate safety concerns” cannot support frisk absent suspicion of criminal activity). While a fairly even split of authority exists, the Eighth Circuit has not been consistent in its holding that pat-frisks require lawful investigatory stops. See United States v. Ellis, 501 F.3d 958, 961-63 (8th Cir. 2007) (upholding frisk without identifying criminal activity as basis). Prominent criminal law professor Wayne LaFave has stated that a lawful stop is a necessary pre-requisite to a frisk. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE 4TH AMENDMENT § 9.6(a) (Thomson West ed., 4th ed. 2004) (“[T]he fact remains that a frisk for self-protection cannot be undertaken when the officer has unnecessarily put himself in a position of danger by not avoiding the individual in question.”). The Tenth and Seventh Circuits have issued opinions that seem to allow pat-frisks based solely on officer safety, yet neither court decided the issue explicitly. See United States v. Manjarrez, 348 F.3d 881, 887-88 (10th Cir. 2003) (upholding frisk that was not necessary to its decision because evidence resulted from consent search); United States v. $84,000 U.S. Currency, 717 F.2d 1090, 1099 (7th Cir. 1983) (upholding pat-down of man suspected of smuggling drugs, but who voluntarily accompanied officer in airport).

\textsuperscript{41} See House, 463 F. App’x at 784 (stating issue in case). The court found the encounter was consensual because there was only one officer, the encounter took place on a public sidewalk in the middle of the day, House testified that he felt “free to leave,” and the officer did not demand, but rather asked House if he could ask him a few questions. \textit{Id.} at 785-86.

\textsuperscript{42} See \textit{id.} at 786 (emphasizing Terry language stating frisk dependent upon suspect being armed and dangerous). The court held that Officer Daley could reasonably conclude, based on his observation of the folding knife and the bulge under House’s jacket, that House was armed. \textit{Id.} at 788. It maintained, however, that there was no indication that House was presently dangerous to Officer Daley or other citizens, stating that “[b]eing armed does not ineluctably equate with dangerousness.” \textit{Id.}
The court disagreed with the government’s assertion that there was Tenth Circuit precedent stating officers may pat-frisk absent suspicion that criminal activity is afoot, but indicated that because that issue was not material to its holding, it would assume (without deciding) that officers may pat-frisk based solely on safety concerns.\(^{43}\)

The dissent countered that the majority mistakenly, and somewhat cavalierly, decided that House did not pose a threat at the time he was frisked.\(^{44}\) The dissent noted that Officer Daley reasonably deemed House a danger to public safety, so it was forced to address the issue of whether officers may frisk suspects in the absence of reasonable suspicion of criminal activity.\(^{45}\) To set up its argument, the dissent pointed out that the Supreme Court simply had not addressed the issue: although Justice Harlan’s concurring opinion in *Terry* stated that a frisk depended upon a valid stop, Harlan’s view did not “win the day.”\(^{46}\) Moreover, the dissent noted that while the *Terry* majority did treat the “stop and frisk” as essentially a single transaction, it offered different rationales for the “stop” and the “frisk”—whereas effective crime prevention and detection justified the stop, officer safety justified the frisk.\(^{47}\) Thus, the dissent reasoned,

---

\(^{43}\) See id. at 786-87 (observing sister circuits divided but declining to decide issue); id. at 791 n.1 (Baldock, J., dissenting) (acknowledging divided sister courts). The court made note of the government’s argument that *Manjarrez*, a Tenth Circuit opinion, stood for the proposition that officers could frisk absent reasonable suspicion. Id. at 786-87. The court responded by stating that it doubted *Manjarrez* stood for that proposition, and in a corresponding footnote, more forcefully stated that *Manjarrez* did not, in fact, stand for that proposition. See id. (doubting government’s interpretation of *Manjarrez*), id. at 786 n.1 (explaining search in *Manjarrez* predicated upon consent and pat-frisk “probably irrelevant”).

\(^{44}\) See id. at 790 (Baldock, J., dissenting) (stating majority simply ignores danger posed by Defendant’s potential possession of firearm). The dissent further pointed out that House was in the vicinity of a criminal investigation and appeared to try to avoid law enforcement. Id. The dissent also cited the Supreme Court’s *Ryburn* decision as supporting the proposition that House’s denial of having weapons was another circumstance contributing to the officer’s fear. Id. at 795 (comparing House’s denial to woman’s actions in *Ryburn*); see also *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (opining officers had “an objectively reasonable basis for fearing that violence was imminent”).

\(^{45}\) See *House*, 463 F. App’x at 790 (Baldock, J., dissenting) (positing majority wrong to conclude House was not dangerous).

\(^{46}\) See id. at 791 (stating Supreme Court, Tenth Circuit not decided whether officer may frisk absent suspicion of criminality); see also *Terry v. Ohio*, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring) (making “perfectly clear” that right to frisk depends on right to stop). As further evidence that Justice Harlan’s view was not controlling, the dissent quoted the *Terry* Court’s statement that the limitations on protective frisks “will have to be developed in the concrete factual circumstances of individual cases.” See *House*, 463 F. App’x at 791 (Baldock, J., dissenting) (quoting *Terry*, 392 U.S. at 29).

\(^{47}\) See *House*, 463 F. App’x at 791 (Baldock, J., dissenting) (noting different rationales offered by *Terry* Court); see also *Terry*, 392 U.S. at 22 (positing effective crime prevention and detection justifies investigatory stop). *Terry* stated that the frisk, however, was based on the “immediate interest of the police officer in taking steps to assure himself that the person with
because consensual encounters still present safety concerns, officers should be allowed to frisk to ensure their safety, and to conduct necessary investigations without fear for their lives.\footnote{48}{See \textit{House}, 463 F. App'x at 791-92 (Ballock, J., dissenting) (noting frisk justified by strong governmental safety interest and necessity of allowing officers to investigate). The dissent notes that if officers may not frisk persons suspected to be armed and dangerous during consensual encounters, officers are left with two nonsensical options. \textit{Id.} at 793-94 (alleging officer would either have to walk away or remain in dangerous situation). Finally, the dissent concedes that an officer may not frisk simply \textit{any} person on the street suspected of being armed, but maintains that if an officer fears that an armed person is also dangerous, a frisk should be allowed. \textit{Id.} at 794.}

Pat-frisks of citizens on the street implicate important Fourth Amendment privacy protections, and therefore deserve close judicial scrutiny.\footnote{49}{See \textit{Terry}, 392 U.S. at 24-25 (acknowledging protective frisk entails “severe, though brief, intrusion upon cherished personal security”). The \textit{Terry} Court further recognized that a pat-frisk must “surely be an annoying, frightening, and perhaps humiliating experience.” \textit{Id.} at 25; see also \textit{Beck v. Ohio}, 379 U.S. 89, 96 (1964) (noting warrantless searches “bypass[ing] safeguards provided by objective predetermination of probable cause”); \textit{Harris}, supra note 38, at 33-35 (opining judiciary’s failure to scrutinize police testimony contributed to gross pat-frisk expansion).}

In \textit{House}, the Tenth Circuit majority had an opportunity to clarify its position with respect to this important \textit{Terry} issue, and in so doing, could have added another voice to the circuit split that currently exists, perhaps encouraging the Supreme Court to clarify the issue once and for all.\footnote{50}{See \textit{House}, 463 F. App'x at 791 n.1 (Ballock, J., dissenting) (remarking sister circuits split on issue of frisks during consensual encounters); see also supra text accompanying note 43 (opining that \textit{Manjarrez} did not address issue); supra text accompanying note 38 (explaining Supreme Court never squarely decided issue, despite coming infinitely close).} Instead, the court side-stepped the issue, finding that House did not pose a threat to Officer Daley’s safety, even though House was visibly armed.\footnote{51}{See \textit{House}, 463 F. App'x at 786-87 (declining to address issue). Based on some Supreme Court and lower court decisions, including Tenth Circuit decisions, there is a persuasive argument that because House was near a reported burglary, appeared to evade officers, and then lied about being armed, Officer Daley did have reasonable concern for his safety. \textit{See Terry}, 392 U.S. at 23-24 (observing guns and knives contribute to vast majority of officer deaths and injuries); see also sources cited supra note 38 (enumerating factors considered by courts).}

The court’s abstinence forced it to make an arguably disingenuous decision, and more importantly, allowed the dissent to have the last word regarding pat-frisks during consensual encounters.\footnote{52}{See supra text accompanying note 38 (enumerating ample precedent on which court could find Officer Daley feared for safety); see also supra text accompanying notes 44-48 (detailing \textit{House} dissent’s lengthy argument). The proposition that the court’s decision was disingenuous is bolstered by the fact that House did not argue in his brief that Officer Daley lacked reasonable suspicion to suspect that House was armed and dangerous, ostensibly conceding the issue. See Appellant’s Reply Brief, supra note 21, at *6-*13 (arguing frisks require suspicion of criminal activity).}
The dissent’s position in *House* is a laudable effort to protect officer safety; however, it is analytically unsupportable, practically troubling, and threatens to eviscerate the privacy protections that *Terry* left in place.\(^{53}\) Analytically, the dissent’s position is indefensible because it overlooks the fact that pat-frisks of persons are seizures, and seizures must be predicated upon reasonable suspicion that a person has, or will soon commit a crime—a suspicion noticeably lacking in *House*.\(^{54}\) The dissent’s position also has practical implications that are troubling, because courts have consistently eroded the “armed and dangerous” aspect of *Terry* by deferring to officer “expertise,” thereby finding that certain people, types of crime, and innocuous, subtle movements provide the basis of concern for officer safety.\(^{55}\) Accordingly, if officers could frisk citizens during consensual encounters, the result may be that they could legally frisk any person on the street, especially if they are a minority, who is unfortunate enough to have his hand in his pocket or who looks down or fidgets in the officer’s presence.\(^{56}\) Finally, the dissent’s rule would discourage cooperative, compliant behavior, as the citizen who stays to answer an officer’s questions risks being frisked, whereas the one who simply walks away does not.\(^{57}\)

The dissent’s position is perhaps emblematic of the problem that arises when the legality of searches and seizures are evaluated solely upon

---

\(^{53}\) See Harris, *supra* note 38, at 5 (cautioning overuse of frisks threatens to make *Terry* into evidence gathering device); see also *supra* note 38 and accompanying text (explaining analytical and practical problems with dissent’s position).

\(^{54}\) See *Terry*, 392 U.S. at 19 ("[T]here can be no question, then, that Officer McFadden ‘seized’ petitioner . . . when he took hold of him and patted down the outer surfaces of his clothing."); Appellant’s Reply Brief, *supra* note 21, at 6 ("It is impossible to conduct a frisk without a detention."); see also United States v. Mendenhall, 446 U.S. 544, 554 (1980) (explaining seizure of person occurs where reasonable person would not feel free to leave). Moreover, the frisk must have as a predicate a reasonable suspicion of criminal activity. See Adams v. Williams, 407 U.S. 143, 146 (1972) ("So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search . . . ."); *Terry*, 392 U.S. at 17-18 (noting seizure must be based on reasonable suspicion of criminal activity at its inception).

\(^{55}\) See cases cited *supra* note 38 (outlining cases upholding pat-frisks based on officer safety).

\(^{56}\) See Harris, *supra* note 38, at 5 (posing someday all persons stopped may have to undergo frisk); see also cases cited *supra* note 38 (illustrating various innocuous behaviors that provide officers with reasonable suspicion to conduct pat-frisks). Minorities have born the brunt of the latitude given to police during street encounters. See Williams, *supra* note 38, at 567 (describing widespread abuse of warrantless searches and seizures on street against African-Americans); see also *Terry*, 392 U.S. at 14 (acknowledging existence of “wholesale harassment” of African-Americans).

\(^{57}\) See United States v. House, 463 F. App’x 783, 786 (10th Cir. 2012) (noting House felt free to leave but stayed because it was “right thing to do”).
reasonableness—namely, when officer safety concerns are at issue, those interests will almost always prevail.\(^5\) To wit, since *Terry*, courts have allowed officers ever more leeway to ensure their own safety when conducting searches and seizures, often at the expense of the privacy rights of those being investigated.\(^5\) While there can be no doubt that officer safety is a weighty concern, if the Fourth Amendment is going to perform its function of protecting individuals from arbitrary and unreasonable invasions, the Reasonableness Clause cannot continually be used to allow law enforcement the unfettered ability to seize and search any person they want, especially those who are not suspected of any wrongdoing.\(^5\)

Unfortunately, courts’ deference to officer safety at the expense of individual privacy is a trend that shows no signs of abating; indeed, it seems that if the current Supreme Court were to decide the legality of pat-frisks of individuals during consensual encounters on the street, it too would likely err on the side of officer safety.\(^5\)

*Terry v. Ohio* was a monumental decision allowing officers to stop and frisk individuals on the street supported by less than probable cause. While *Terry* struck an appropriate balance in protecting individual privacy against governmental interests in ferreting out crime, the subsequent decisions of both the Supreme Court and lower courts have moved the law on stop and frisks steadily in the government’s favor. Allowing frisks based solely on officer safety would represent yet another shift in this area.

---

\(^{58}\) See Sundby, *supra* note 24, at 439 (noting balancing test naturally favors governmental interests). Sundby points out that the governmental interests at stake—saving lives, stopping the flow of illegal narcotics, catching undocumented persons—are tangible and visible benefits that will stand out in the balancing process. Id. By contrast, individual privacy interests are “much less tangible and pale in comparison.” Id.

\(^{59}\) See *supra* text accompanying note 38 (documenting increasing deference given to officers during searches and seizures).

\(^{60}\) See *Harris*, *supra* note 38, at 5 (counseling against overuse of stop and frisk). Harris points out that if officers are allowed to frisk at their own discretion, the “*Terry* stop and frisk will become what the Supreme Court has repeatedly said—and still says—it never will be: a device for gathering evidence, pure and simple.” Id.; see also *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (stating frisks may be used only to find weapons, not to gather evidence); *Adams v. Williams*, 407 U.S. 143, 146 (1972) (declaring frisk is not for discovering evidence of crime).

\(^{61}\) See *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (“We think it too plain for argument that the State’s proffered justification—the safety of the officer—is both legitimate and weighty.”); *supra* text accompanying note 38 (commenting on Court’s increased deference to officer safety concerns). This year, the Court stated that officers could lawfully enter the home of a woman who, when asked whether she had weapons inside, immediately turned around and ran into her house. See *Ryburn v. Huff*, 132 S. Ct. 987, 991 (2012) (upholding officer entrance based on “imminent threat to their safety”). Interestingly, the Court made no mention of whether the officers had probable cause or reasonable suspicion of criminal activity, but justified its decision purely on concerns for officer safety. See *id.* at 991-92 (discussing only officer safety to conclude search was permissible).
direction, permitting officers to subject individuals not suspected of any wrongdoing to the embarrassing and intrusive experience of a pat-frisk. Ultimately, the Supreme Court should directly address this issue, and it should decide that frisks of individuals on the street conducted without suspicion of criminal activity are unlawful. In the meantime, circuit courts, given the opportunity, should make clear that this practice cannot be sustained. In House, the Tenth Circuit missed precisely such an opportunity.

David Cashman