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# Arkansas Open Carry: Understanding Law Enforcement's Legal Capability Under a Difficult Statute

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# Arkansas Open Carry: Understanding Law Enforcement's Legal Capability Under a Difficult Statute

## I. INTRODUCTION

“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”<sup>1</sup> Although the United States Supreme Court in *District of Columbia v. Heller* established a fundamental understanding that individuals have a right to own a gun for personal use, the Court recognized that, as with all fundamental rights, the individual right to keep and bear arms is “not unlimited.”<sup>2</sup> A few limits the Court mentioned included “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>3</sup> Naturally, the *Heller* decision left us with this question: What are the constitutionally sound restrictions, and how far can the government go?<sup>4</sup>

The revised Arkansas Carrying a Weapon Statute (Open Carry Statute)<sup>5</sup> implicates this very question that *Heller* left undecided. In 2013, the Open Carry Statute was revised by the Arkansas legislature, through the passage of Act 746, to read:

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1. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).
2. *Id.* at 595.
3. *Id.* at 626-27.
4. Adam Liptak, *Coming Next, Court Fights on Guns in Cities*, N.Y. TIMES, June 27, 2008, at A1, [http://www.nytimes.com/2008/06/27/washington/27guns.html?\\_r=0](http://www.nytimes.com/2008/06/27/washington/27guns.html?_r=0) [<https://perma.cc/D3XX-4T2P>].
5. ARK. CODE ANN. § 5-73-120 (2015).

A person commits the offense of carrying a weapon if he or she possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person.<sup>6</sup>

By reading the plain meaning of the statute, it seems that “[i]t is now illegal to possess a handgun only if the person has the ‘purpose’ to use it ‘unlawfully’ against a person.”<sup>7</sup> Although the history of this Arkansas criminal statute tends to show that the legalization of openly carrying firearms may not have been the true intention of the legislature,<sup>8</sup> it is anticipated that the court will be bound by the rule of lenity.<sup>9</sup>

The rule of lenity is a legal doctrine that requires penal statutes to “be construed to reach the most lenient interpretation from the defendant’s standpoint.”<sup>10</sup> In cases involving an ambiguous statute, such as the Arkansas Open Carry Statute, the court will be bound to “strictly” construe the penal statute and resolve all doubts in favor of the defendant.<sup>11</sup> Because the rule of lenity will likely apply, the practical consequence is that Arkansas’s Open Carry Statute likely legalizes the possession of a firearm in public view so long as the possessor does not have an intention to use the gun unlawfully against another.<sup>12</sup> The most recent non-binding Attorney General opinion on this issue took this same interpretation and many law enforcement departments across the state are handling the situation

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6. ARK. CODE ANN. § 5-73-120(a) (2015).

7. Laurent Sacharoff & Jacob Worlow, *Open Carry in Arkansas—An Ambiguous Statute*, 2014 ARK. L. NOTES 1548 (2014), <http://media.law.uark.edu/arklawnotes/2014/02/13/open-carry-in-arkansas-an-ambiguous-statute/> [https://perma.cc/3GBP-CMZF].

8. *Id.*

9. *Id.*

10. Michael W. Mullane, *Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach*, 2005 ARK. L. NOTES 405 (2005), <http://media.law.uark.edu/arklawnotes/files/2011/03/Mullane-Statutory-Interpretation-in-Arkansas-Arkansas-Law-Notes-2005.pdf> [https://perma.cc/V453-5S4K].

11. *Williams v. State*, 364 Ark. 203, 208, 217 S.W.3d 817, 819 (2005).

12. Sacharoff & Worlow, *supra* note 7.

accordingly.<sup>13</sup> However, the complete lack of any judicial or legislative guidance on what exactly the revisions in the statute mean has led to much debate, even resulting in contradicting attorneys general opinions.<sup>14</sup>

Although the statute has clearly sparked confusion throughout the state on exactly how people may carry their guns in public,<sup>15</sup> the variety of issues raised by this statute do not stop at simple statutory interpretation. The real concerns that stem from this statute deeply coincide with law enforcement's legal capability regarding this law, and most importantly, how this capability impacts Arkansas citizens who choose to openly carry their firearms.

Because a plain meaning interpretation and the rule of lenity likely permit the open carry of firearms under the Arkansas Open Carry Statute, the Arkansas General Assembly must provide clarification in order to ensure proper protection under the Fourth Amendment. This comment will focus on the issues relating to this ambiguous statute, and it will provide some clarity on law enforcement's legal capability when dealing with the Arkansas Carrying a Weapon Statute. Furthermore, the problems and concerns with leaving this statute in the present legal climate, especially given the broad legal discretion of law enforcement, will be addressed. Finally, this article provides some suggestions for the Arkansas General Assembly to revise the statute and, therefore, diminish the concerns exemplified by the current open carry legislation.

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13. See Ark. Op. Att'y Gen. No. 2015-064 (Aug. 28, 2015); see also Telephone Interview with Scott Young, Lieutenant, Wash. Cty. Sheriff's Office (Oct. 20, 2015); Telephone Interview with Lieutenant Si, Benton Cty. Sheriff's Office (Oct. 20, 2015); Telephone Interview with Greg Downs, Gen. Counsel, Ark. State Police (Oct. 20, 2015); Sacharoff & Worlow, *supra* note 7.

14. Compare Ark. Op. Att'y Gen. No. 2015-064 (Aug. 28, 2015) (addressing the effects of Act 746 and advising that a person may carry a handgun legally so long as they do not have the intent to attempt unlawful employment of the handgun), with Ark. Op. Att'y Gen. No. 2013-47 (July 8, 2013) (advising that Act 746 should not be interpreted to authorize "open-carry").

15. See Melanie Buck, *Open Carry Debate Continues*, MYPULSENEWS.COM (July 1, 2015), <http://mypulsenews.com/open-carry-debate-continues/> [<https://perma.cc/96YM-BKRC>].

## II. REQUIREMENTS UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects the right of all citizens to be free from unreasonable searches and seizures by the government.<sup>16</sup> The touchstone of analysis under the Fourth Amendment is always “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”<sup>17</sup> Reasonableness depends “on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.”<sup>18</sup> The Fourth Amendment applies to seizures of a person, including seizures that are substantially shorter when compared to traditional arrests.<sup>19</sup> “While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him,” the Fourth Amendment requires officers to have “at least [] a reasonable and articulable suspicion that the person seized is engaged in criminal activity” before they may constitutionally engage in “any curtailment of a person’s liberty.”<sup>20</sup> The totality of the circumstances—“the whole picture”—must be taken into account in determining if an officer has developed this founded suspicion.<sup>21</sup>

## III. THE PROBLEMATIC INTERACTION SCENARIOS BETWEEN LAW ENFORCEMENT AND INDIVIDUALS

To effectively understand law enforcement’s legal capability under the statute and, in turn, the concerns of this article, it is important to address the types of police-citizen encounters this statute implicates. The established law

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16. U.S. CONST. amend. IV.

17. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

18. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

19. *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *see also Terry*, 392 U.S. at 16, 19.

20. *Reid*, 448 U.S. at 440; *see also Delaware v. Prouse*, 440 U.S. 648, 661 (1979); *Brignoni-Ponce*, 442 U.S. at 878.

21. *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see also Brown v. Texas*, 443 U.S. 47, 51 (1979); *Brignoni-Ponce*, 442 U.S. at 884.

governing these interactions gives a thorough basis for realizing the concerns this statute creates.

The Supreme Court has consistently held that in situations where it is impractical for an officer to obtain advance judicial approval of searches and seizures through the warrant process, the officer's intrusion "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."<sup>22</sup> Arkansas has adopted the Supreme Court's construction of the types of searches and seizures that result from these "street" police-citizen interactions,<sup>23</sup> which generally fall into these categories: (1) the officer develops a reasonable suspicion to conduct a limited search for weapons that might be used to assault him, the *Terry* stop and frisk scenario;<sup>24</sup> (2) a consensual officer-citizen encounter;<sup>25</sup> (3) the officer develops probable cause that a crime has been committed, the search incident to arrest scenario;<sup>26</sup> (4) a routine traffic stop;<sup>27</sup> (5) police engaging in community caretaking functions;<sup>28</sup> and (6) the officer has a reasonable belief there may be weapons in a car with a dangerous suspect.<sup>29</sup> Although it is possible that all of these scenarios could implicate the Arkansas Open Carry Statute, the two types of encounters that create the true concerns of this article include *Terry* stop and frisks and consensual encounters because of law enforcement's capability to search individuals based solely on the low threshold standard of reasonable suspicion.

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22. *Terry*, 392 U.S. at 20.

23. *Jefferson v. State*, 349 Ark. 236, 244, 76 S.W.3d 850, 854-55 (2002); *Thompson v. State*, 303 Ark. 407, 409-10, 797 S.W.2d 450, 451-52 (1990).

24. *See Terry*, 392 U.S. at 30.

25. *See Florida v. Bostick*, 501 U.S. 429, 431 (1991).

26. *See Weeks v. United States*, 232 U.S. 383, 392-98 (1914); *see also United States v. Robinson*, 414 U.S. 218, 227 (1973).

27. *See Pennsylvania v. Mimms*, 434 U.S. 106, 333-34 (1977).

28. *See, e.g., Illinois v. Lister*, 540 U.S. 419, 424-25 (2004) (holding that police handing out flyers was not to determine whether individuals were committing a crime, but rather to ask vehicle occupants for their help in providing information about a crime that was likely committed by others, and therefore is held to different, less demanding, constitutional standards).

29. *See Michigan v. Long*, 463 U.S. 1032, 1035, 1054 (1983).

The third interaction scenario, the search incident to arrest scenario, requires a substantially higher evidentiary standard than *Terry* stops or consensual encounters: that of probable cause.<sup>30</sup> Through a line of cases, the Supreme Court has determined when and how the search incident to arrest exception to the warrant requirement of the Fourth Amendment applies.<sup>31</sup> When officers establish probable cause that a crime has been committed, they are permitted to conduct a search of the person and their vehicle “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” or if there is a likelihood of discovering offense related evidence in the vehicle,<sup>32</sup> without a warrant.<sup>33</sup> Some jurisdictions, such as Arkansas, allow this search incident to arrest exception to extend outside of the vehicle context to the immediate surroundings of the accused.<sup>34</sup> This higher standard of probable cause as well as the specifically delineated circumstances for searches incident to arrest sufficiently protect individuals from arbitrary or minimally justified searches that the current Open Carry Statute seems to encourage.

In addition, routine traffic stops and car searches will implicate the Open Carry Statute when officers lawfully pull a vehicle over and the individual is openly carrying a firearm. However, in these instances, the officer’s interactions are controlled by the same foundational principles commanded by *Terry*.<sup>35</sup>

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30. See *Robinson*, 414 U.S. at 235.

31. See *Arizona v. Gant*, 556 U.S. 332, 341, 351 (2009); *Thornton v. United States*, 541 U.S. 615, 623-24 (2004); *New York v. Belton*, 453 U.S. 454, 460 (1981); *Robinson*, 414 U.S. at 224; *Chimel v. California*, 395 U.S. 752, 762-63 (1969). Arkansas has adopted a similar construction of the United States Supreme Court search incident to arrest exception through ARK. R. CRIM. P. 12.4.

32. *Gant*, 556 U.S. at 343-44.

33. Angad Singh, *Stepping Out of the Vehicle: The Potential of Arizona v. Gant to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1770, 1775, 1780 (2010); see also *Gant*, 556 U.S. at 351; *Belton*, 453 U.S. at 462-63; *Robinson*, 414 U.S. at 218; *Chimel*, 395 U.S. at 768.

34. See ARK. R. CRIM. P. 12.5; see also Sean Foley, *The Newly Murky World of Searches Incident to Lawful Arrest: Why the Gant Restrictions Should Apply to All Searches Incident to Arrest*, 61 U. KAN. L. REV. 753, 767-80 (2013).

35. The Supreme Court has held that when an officer legally stops a driver they may order the driver out of the car without further justification. *Pennsylvania v. Mimms*, 434

The “special needs” or “community caretaking” exceptions are specifically delineated police activities that the Supreme Court has come to recognize as distinctive from ordinary law enforcement activities.<sup>36</sup> These searches and seizures come within the “special needs” category when a perceived need makes the warrant requirement or development of probable cause impractical.<sup>37</sup> Although these are functions and activities of law enforcement that could potentially implicate the Open Carry Statute, this area of law is still developing and more closely resembles other government activities that invade the privacy interests of citizens, such as administrative and border searches, rather than ordinary criminal law enforcement.<sup>38</sup> As such, these non-criminal law enforcement interactions are not directly applicable to the main concerns of this article and will not be specifically addressed.

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U.S. 106, 111 (1977). Furthermore, the officer may legally order the passenger out of the car. *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997). In these circumstances, the officer is still bound by the requirements of the Fourth Amendment, and any decision by the officer relating to a search of the individual will demand a *Terry* analysis. See Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of the Permissible Intrusion to Ascertain if a Detained Person Is Armed*, 82 MARQ. L. REV. 491, 491-92 (1999).

36. See Mary Elizabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 326-27 (1999); see also William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 553-56 (1992).

37. JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* 469-73 (6th ed. 2017). For a discussion on the limitations and legal requirements for officers undertaking community caretaking functions, see Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1518, 1528-30 (2009).

38. For examples of distinct police activities that are distinguished from ordinary law enforcement activities, see *Brigham City, Utah v. Stuart*, 547 U.S. 398, 401-02 (2006) (police rendering emergency aid); *Illinois v. Lidster*, 540 U.S. 419, 422 (2004) (police handing out flyers); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 444 (1990) (highway sobriety checkpoints); *New Jersey v. T.L.O.*, 469 U.S. 325, 327, 347-48 (1985) (searches by public school officials); *United States v. Ramsay*, 431 U.S. 606, 616, 623-25 (1977) (border searches); *South Dakota v. Opperman*, 428 U.S. 364, 365 (1976) (inventory searches); *Camara v. Mun. Ct.*, 387 U.S. 523, 525 (1967) (administrative searches).



### A. Terry Stop and Frisk

Of the two types of encounters that create the immediate concerns surrounding this statute, the *Terry* stop and frisk encounter is an appropriate starting point for determining how law enforcement officers will handle police-citizen interactions involving the open carrying of firearms in Arkansas. The established principles of the *Terry* stop and frisk scenario provide law enforcement officers with great discretion to stop and frisk citizens even when there is no real reason to suspect any involvement in a crime,<sup>39</sup> and it is this discretion that potentially implicates Fourth Amendment concerns stemming from the Open Carry Statute. Indeed, a great deal of confusion related to this statute revolves around these very encounters.<sup>40</sup>

In the landmark case of *Terry v. Ohio*, the High Court held that when a police officer observes unusual conduct that leads them reasonably to conclude that an individual may be armed and presently dangerous, they are entitled to conduct a frisk search of that individual for weapons.<sup>41</sup> This holding defined when, and more importantly why, officers can conduct a pat-down search of individuals whom they encounter on a daily basis on the streets.<sup>42</sup> The Court's reasoning was based on officer safety.<sup>43</sup> However, in practice, it has established itself as an effective tool for law enforcement in their investigations.<sup>44</sup>

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39. See Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 884-86 (2002); see also David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 977, 986, 1021 (1998) [hereinafter Harris, *Particularized Suspicion*]; David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 5, (1994) [hereinafter Harris, *Frisking Every Suspect*].

40. See Laurent A. Sacharoff, Editorial, *Complex Question: Gun Law's Meaning Complicated*, ARK. DEMOCRAT-GAZETTE, Sept. 12, 2015, at 33; see also Laura Monteverdi, *Clarifying the Open Carry Law in Arkansas*, KTHV (June 5, 2015, 11:25 AM), <http://legacy.thv11.com/story/news/local/2015/06/04/clarifying-the-open-carry-law-in-arkansas/28504357/> [https://perma.cc/92GE-QYBY].

41. 392 U.S. 1, 30 (1968).

42. *Id.*

43. *Id.*

44. See Daniel C. Isaacs, *Miranda's Application to the Expanding Terry Stop*, 18 J.L. & POL'Y 383, 387-93 (2009).

Of course, these *Terry* frisks always implicate the individual's Fourth Amendment right to be free from unreasonable searches and seizures because even though brief, they are still considered a constitutional "search" and "seizure."<sup>45</sup> The *Terry* decision determined that when officers develop a reasonable suspicion that the individual is armed and presently dangerous, then a "carefully limited search of the outer clothing of such persons" is reasonable under the Fourth Amendment.<sup>46</sup>

The permissible degree of intrusion allowed during a *Terry* stop has greatly expanded since the Supreme Court decision in 1968.<sup>47</sup> Courts have consistently departed from the "carefully limited search of the outer clothing,"<sup>48</sup> as the trend towards granting officers "greater latitude in using force in order to 'neutralize' potentially dangerous suspects during an investigation detention" has become the norm.<sup>49</sup> In effect, since *Terry*, the Supreme Court has expanded the permissible reasons for the stop as well as the scope of the intrusion for police officers.<sup>50</sup>

In this state, reasonable suspicion is specifically defined in the Arkansas Rules of Criminal Procedure:

[A] suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.<sup>51</sup>

The Arkansas legislature has defined the factors to be considered in determining if a police officer has grounds to

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45. See *Terry*, 392 U.S. at 30.

46. *Id.*

47. See *Isaacs*, *supra* note 44, at 387; see also *United States v. Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990).

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

49. See *Isaacs*, *supra* note 44, at 393.

50. See *Florida v. Royer*, 460 U.S. 491, 497-500 (1983); see also *Isaacs*, *supra* note 44, at 387-93.

51. ARK. R. CRIM. P. 2.1.

reasonably suspect an individual.<sup>52</sup> There are many factors that are considered:

- (1) The demeanor of the suspect;
- (2) The gait and manner of the suspect;
- (3) Any knowledge the officer may have of the suspect's background or character;
- (4) Whether the suspect is carrying anything, and what he or she is carrying;
- (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;
- (6) The time of the day or night the suspect is observed;
- (7) Any overheard conversation of the suspect;
- (8) The particular streets and areas involved;
- (9) Any information received from third persons, whether they are known or unknown;
- (10) Whether the suspect is consorting with others whose conduct is reasonably suspect;
- (11) The suspect's proximity to known criminal conduct;
- (12) The incidence of crime in the immediate neighborhood;
- (13) The suspect's apparent effort to conceal an article; and
- (14) The apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.<sup>53</sup>

In viewing this list, it becomes quickly apparent that almost everything is taken into account when determining reasonable suspicion. The Arkansas Supreme Court has further clarified that this list is not exhaustive.<sup>54</sup> An officer can rely on things that seem completely innocent in nature. For example, the officer can rely on the gait and manner of the person, the particular streets and areas involved, or—of particular importance to the Arkansas Open Carry Statute—whether the suspect is carrying anything.<sup>55</sup> This establishes the initial concern with the revised statute. Does the simple fact that the

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52. See ARK. CODE ANN. § 16-81-203 (West 2016).

53. ARK. CODE ANN. § 16-81-203.

54. *Laimé v. State*, 60 S.W.3d 464, 473 (Ark. 2001).

55. ARK. CODE ANN. § 16-81-203.

suspect is openly carrying a firearm establish a reasonable suspicion that he is engaged in criminal activity?

Of course, the answer depends on whether the statute effectively legalizes open carry in public. If these recent textual changes do not allow for open carry—as Dustin McDaniel, the previous Attorney General, interpreted the statute—then the answer is clearly yes because openly carrying individuals would simply be in violation of the statute itself. Officers who view individuals openly carrying firearms would have probable cause, a substantially higher standard than reasonable suspicion, that such person was in violation of the Carrying a Weapon statute.

However, if Arkansas is now an open carry state (which appears to be the case with the current statute)<sup>56</sup> then this fact alone *should not* be sufficient to establish a reasonable suspicion. In states where possession of an unconcealed firearm is legal, the mere observation or report of an unconcealed firearm cannot, without more, create reasonable suspicion for a *Terry* stop.<sup>57</sup> However, because the recent textual changes of this statute are ambiguous, there is concern throughout the state of what standard of suspicion officers develop, or must develop, when dealing with openly carrying citizens.

Furthermore, if officers do develop a reasonable suspicion that the individual is in violation of the Carrying a Weapon statute, is this enough to seize and search the individual? Arkansas has developed its own rule for when a detention without an arrest may transpire. This rule states:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a

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56. See *infra* Part III.A-B.

57. See *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131-33 (6th Cir. 2015); *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013); *United States v. Lewis*, 672 F.3d 232, 240 (3d Cir. 2012); *United States v. Ubiles*, 224 F.3d 213, 217-18 (3d Cir. 2000); *St. John v. McColley*, 653 F. Supp. 2d 1155, 1161-63 (D.N.M. 2009); *United States v. Dudley*, 854 F. Supp. 570, 579-80 (S.D. Ind. 1994); *Pulley v. Commonwealth*, 481 S.W.3d 520, 526-27 (Ky. Ct. App. 2016); *State v. Williamson*, 368 S.W.3d 468, 480-81 (Tenn. 2012). *But see infra* Part IV.B (arguing in actual practice it may be enough to search the individual).

misdeemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.<sup>58</sup>

This rule precisely clarifies that the officer's reasonable suspicion that the individual is engaged in criminal activity "must be tied to commission of a felony or a misdemeanor involving forcible injury to persons or property."<sup>59</sup> Violation of the Open Carry Statute is a Class-A misdemeanor.<sup>60</sup> For an officer to stop and detain any person they suspect of committing a misdemeanor, the crime itself must involve "danger of forcible injury to persons."<sup>61</sup> Of course, the Open Carry Statute addresses the danger of forcible injury to persons, namely by including the *mens rea* or mental state requirement of the action being done "with a purpose to attempt to unlawfully employ the handgun . . . as a weapon against a person."<sup>62</sup> Therefore, when a police officer investigates an individual openly carrying a firearm and develops a reasonable suspicion that the individual is violating the Open Carry Statute—by determining that they have an intent to employ the weapon unlawfully—it would be reasonable to stop and detain the individual. This strict connection requiring the officer's development of reasonable suspicion to the commission of this particular crime essentially mandates that the officer's investigation revolve around the intent of the individual. Proving intent is, of course, "inherently

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58. ARK. R. CRIM. P. 3.1.

59. ARK. R. CRIM. P. 3.1; *see also* Laime v. State, 347 Ark. 142, 154-55, 60 S.W.3d. 464, 473 (2001).

60. ARK. CODE ANN. § 5-73-120(d) (West 2013).

61. ARK. R. CRIM. P. 3.1.

62. ARK. CODE ANN. § 5-73-120(a) (West 2015).

difficult” and generally requires circumstantial evidence to prove.<sup>63</sup>

Arkansas Rule of Criminal Procedure 3.4 provides that if the officer has detained an individual under Rule 3.1, they may search “the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others.”<sup>64</sup> When dealing with the Open Carry Statute, this allows the officer to seize the firearm and search the immediate surroundings at the moment they develop reasonable suspicion that the statute has been violated. Naturally, without definitively knowing whether openly carrying itself develops this reasonable suspicion, officers and citizens alike are unsure how this applies to the current form of the statute. Again, the ambiguity makes it difficult to determine how these legal standards should theoretically play out in these police-citizen interactions.

Many of the interactions that law enforcement officers will have with openly carrying individuals will be sparked by anonymous tips from citizens within the community.<sup>65</sup> The natural question of consequence is how do these anonymous tips fit into the “totality of the circumstances” when developing a reasonable suspicion to briefly detain and search such individuals? The Supreme Court has established that the reliability of the anonymous tipster is the focal point of this inquiry.

In *Florida v. JL*, the Supreme Court decided “whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer’s stop and frisk of that person.”<sup>66</sup> In *JL*, “an anonymous caller reported to the Miami-

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63. See Chad S.C. Stover, *Best Practices in Proving Specific Intent and Malice. What Can Civil and Criminal Litigators Learn from One Another?*, ABA SEC. LITIG., at 1, 5 (2014), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_sac/2014\\_sac/best\\_practices.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/best_practices.authcheckdam.pdf) [<https://perma.cc/S8ND-784G>].

64. ARK. R. CRIM. P. 3.4.

65. See, e.g., Eugene Volokh, *The Volokh Conspiracy: The Fourth Amendment and Open Carry (Where Such Open Carry Is Legal)*, WASH. POST (May 13, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/the-fourth-amendment-and-open-carry-of-guns-where-such-open-carry-is-legal/> [<https://perma.cc/H8AQ-KB4K>].

66. 529 U.S. 266, 268 (2000).

Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.”<sup>67</sup> The officers arrived at the scene and, apart from the tip, had no reason to suspect any of the three waiting at the bus stop of being involved in illegal conduct.<sup>68</sup> The officers frisked J. L. and seized an illegal gun from his pocket.<sup>69</sup> The Supreme Court held that “[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . ‘an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.’”<sup>70</sup> In *JL*, the Supreme Court made it clear that an anonymous tip claiming a person is carrying a gun is not, without more, sufficient to justify a police officer’s stop and frisk of that person,<sup>71</sup> but the Court, in dicta, did mention the dangerous nature of firearms.<sup>72</sup>

However, that is not to say that any tip that is given to law enforcement about an individual openly carrying a firearm will be dismissed as insufficient to justify a stop. The reality is quite the opposite as illustrated in *Parker v. Chard*.<sup>73</sup>

In *Chard*, Officers Chard and Illetschko “were dispatched to investigate shoplifting allegations in Uptown Minneapolis.”<sup>74</sup> “The manager said that a customer had approached another [] employee and pointed out several African American females inside the store . . . claim[ing] to have seen them running out of Victoria’s Secret.”<sup>75</sup> “An employee there confirmed that a ‘group of black females’ had ‘very recently’ run out of the store, but could not confirm whether any merchandise was stolen.”<sup>76</sup> The officers did not believe Parker and her friends had stolen any merchandise, noting the women never acted suspiciously;

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 270.

71. *J.L.*, 529 U.S. at 268.

72. *Id.* at 272.

73. See 777 F.3d. 977, 981-82 (8th Cir. 2015).

74. *Id.* at 979.

75. *Id.*

76. *Id.*

the officers searched Parker's bags and, unsurprisingly, found nothing stolen.<sup>77</sup> Parker filed a civil rights lawsuit against the officer for seizing her without reasonable suspicion.<sup>78</sup> The Eighth Circuit held that since "the tipster's basis of knowledge was not inside information but rather the observation of visible activity . . . it was not clearly established that [Officers] Chard and Illetschko—having corroborated the running asserted in the eyewitness tip, and knowing shoplifting recently occurred—could not reasonably suspect Parker of shoplifting."<sup>79</sup> Here, the reliability of the tip was confirmed by the observation of the visible activity by the witness as well as corroboration of the part of the tip alleging suspicious activity.<sup>80</sup>

To put these principles into the context of the current Open Carry Statute, an anonymous tip alleging only that an individual is openly carrying a firearm in public is insufficient in and of itself to develop reasonable suspicion because there are no specific facts of criminality.<sup>81</sup> Of course, nothing in the Fourth Amendment prohibits officers from "responding to the call and ascertaining through a consensual encounter whether [the suspect] appear[s] dangerous."<sup>82</sup> But, until particularized facts supporting a reasonable suspicion emerge, a stop of these individuals is not allowed based solely on an anonymous tip that they are carrying a firearm openly.<sup>83</sup>

The totality of the circumstances test allows for an officer to draw on their own experiences and even legal activity can be significant contributions in developing a reasonable suspicion.<sup>84</sup> Looking to the Arkansas law, the legislatively-defined factors are a good starting point for determining what circumstances will play a role in deciding whether the officer has a reasonable

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77. *Id.*

78. *Chard*, 777 F.3d at 980.

79. *Id.* at 981.

80. *Id.*

81. *See Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131-34 (6th Cir. 2015); *United States v. Ubiles*, 224 F.3d 213, 217-19 (3d Cir. 2000).

82. *Northrup*, 785 F.3d at 1133; *see also infra* Part III.B.

83. *Northrup*, 785 F.3d at 1133.

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



suspicion.<sup>85</sup> The fact that an individual is openly carrying a firearm is very significant but, alone, cannot be dispositive in an open carry state. However, the ambiguity within the statute and lack of guidance of its current meaning have made these questions significantly more complex than the average open carry state.

The unique concern when dealing with the Open Carry Statute evolves when officers use an individual's obvious possession of a firearm to search and seize individuals who normally—if not carrying a visible firearm or weapon—would not be subject to such Fourth Amendment intrusions.<sup>86</sup> Take as an example the recent case against Richard Chambless.

In May 2015, Richard Chambless was in Bald Knob, Arkansas shopping between different stores while openly carrying a pistol on his hip.<sup>87</sup> As he stopped inside the local McDonald's to get a drink, Bald Knob Police arrived at the scene and immediately arrested him for disorderly conduct and carrying a weapon in violation of Ark. Code. Ann. § 5-73-120, even though he was not acting unusual or violent.<sup>88</sup> As he said, "I was out shopping in town, stopped here to get a drink of water carrying my weapon and went to jail for it."<sup>89</sup> Despite arguments that he had been seized illegally, he was convicted of both crimes and sentenced to "1 year probation, 15 days in jail, and a \$2,160 fine."<sup>90</sup> However, before he was able to appeal his convictions, Attorney General Leslie Rutledge issued her official opinion on the matter stating that open carry is legal in

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85. See ARK. CODE ANN. § 16-81-203 (Repl. 2016).

86. See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1097-99 (1998).

87. Janelle Lilley & Marine Glisovic, *UPDATE: Man Found Guilty After Being Arrested for Open Carry in Bald Knob*, KATV (Sept. 10, 2015), <http://katv.com/news/local/man-arrested-for-open-carry-in-bald-knob> [<https://perma.cc/KPT7-PMUF>].

88. *Id.*

89. *Id.*

90. *Id.*; Curt Lanning, *Bald Knob Open Carry Case Dismissed*, ARKANSASMATTERS.COM (Nov. 18, 2015), <http://www.arkansasmatters.com/news/local-news/bald-knob-open-carry-case-dismissed/273686971> [<https://perma.cc/9AL9-TALJ>].

Arkansas, and the case against Chambless was subsequently dropped.<sup>91</sup>

Another similar example is James Tanner who recently filed a civil lawsuit against the Arkansas State Police after his concealed carry license was revoked.<sup>92</sup> On November 29, 2014, James Tanner, who at the time was a concealed carry license holder, was openly carrying a handgun “while shopping at a Wal-Mart in Searcy, Arkansas.”<sup>93</sup> Arkansas State Trooper Kurt Ziegenhorn, an out-of-uniform officer who noticed Tanner’s open firearm, immediately approached Tanner “and demanded that [he] provide identification.”<sup>94</sup> Tanner refused to provide any identification “and proceeded to leave.”<sup>95</sup> Tanner was arrested shortly thereafter and, interestingly, charged with obstruction of governmental operations, but not with violating the Carrying a Weapon Statute.<sup>96</sup> Tanner was convicted and his administrative appeal of the revocation of his concealed carry license was unsuccessful.<sup>97</sup> Arguments that his Fourth Amendment rights had been violated by the illegal seizure were immediately cast aside by the Pulaski County Circuit Court Judge as “senseless.”<sup>98</sup>

Both of these cases illustrate how officers across the state have handled encounters with openly carrying individuals. In both instances, the officers seized and searched the individuals without a warrant. Although it is unclear for certain exactly what facts the officers relied upon in developing reasonable suspicion or probable cause to conduct these searches and seizures, what is readily apparent is that the visible firearm was

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91. Lanning, *supra* note 90.

92. *Lawsuit Viewed As Test of Arkansas’ Open-Carry Firearm Law*, WASH. TIMES (Jan. 24, 2016) [hereinafter, *Lawsuit Viewed As Test*], <http://www.washingtontimes.com/news/2016/jan/24/lawsuit-viewed-as-test-of-arkansas-open-carry-fire/> [https://perma.cc/RP93-6DNZ].

93. Order Affirming Decision of Ark. State Police at 2, *Tanner v. Ark. State Police*, No. 60CV-15-3197 (Ark. Cir. Ct. May 26, 2016).

94. *Id.*

95. *Id.*

96. *Lawsuit Viewed As Test*, *supra* note 92.

97. *Id.*; Order Affirming Decision of Ark. State Police, *supra* note 93, at 1.

98. Order Affirming Decision of Ark. State Police, *supra* note 93, at 1, 6-7.

a substantial factor—if not *the only* factor—in their decision to investigate, detain, and ultimately arrest them.

This is a major concern advanced by the current Open Carry Statute. The discretion of police officers to use seemingly innocent facts to validate seizures and subsequent searches of an individual is certainly not a new concept;<sup>99</sup> however, the distinguishing concern with this statute is that officers can use the individual's visible firearm as a *substantial* factor in support of reasonable suspicion, a standard that has been diluted in favor of neutralizing potentially dangerous suspects.<sup>100</sup> These same individuals, without carrying a firearm, would definitely not have been subjected to such searches and seizures—or even investigation at all—which is the problem perpetuated by the lack of clarification and guidance from the legislature and the Arkansas Judiciary, as well as, to some extent, the textual nature of the statute itself. Furthermore, because police officers must determine the mental state or “purpose” for which these individuals are openly carrying their firearms, there is an incentive for police officers to combine seemingly innocent facts (e.g., late at night, high crime area, suspect's demeanor, etc.) to support any conclusions they may have drawn about the individual. The potential for abuse is obvious, especially given recent evidence illuminating the existence of racial profiling, stopping, and frisking without cause by law enforcement officials.<sup>101</sup> Given the historical dilution and expansion of the

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99. See *United States v. Sokolow*, 490 U.S. 1, 8 (1989); *Florida v. Royer*, 460 U.S. 491, 502 (1983); *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

100. See Isaacs, *supra* note 44, at 387-93.

101. See David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 303 (2001) (“The powerful combination of governmental investigations, judicial findings, anecdotal evidence, and statements by law enforcement officials leave little doubt about the existence of racial profiling and other stops without cause.”); Anthony C. Thompson, *Stopping the Usual Suspects: Race and The Fourth Amendment*, 74 N.Y.U. L. REV. 956, 956-65 (1999) (arguing that *Terry* established a pattern of racially motivated searches, and offering a variety of remedies to deter racially motivated searches and seizures); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 425-27 (1997) (discussing the discretionary nature of pre-textual stops and their discriminatory effect on African-Americans and Latinos); MATTHEW R. DUROSE, ERICA L. SMITH & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., CONTACTS BETWEEN POLICE AND

original limited holding of *Terry*,<sup>102</sup> coupled with the seemingly unlimited number of innocent facts that can establish reasonable suspicion, individuals who openly carry a firearm in Arkansas are essentially providing police with substantial support—if not complete justification—for seizing and searching their person.

## B. Consensual Encounter

The second type of police-citizen interaction is the consensual encounter. Under the Consensual Encounter Doctrine, the Supreme Court has upheld substantial investigative questioning by armed police officers without any objective indication of criminality, so long as a reasonable person would feel free to leave.<sup>103</sup>

The seminal case outlining this concept is *United States v. Mendenhall*.<sup>104</sup> In *Mendenhall*, the defendant, Sylvia Mendenhall, arrived at the Detroit Metropolitan Airport on a commercial airline flight from Los Angeles.<sup>105</sup> As she disembarked, she was observed by two DEA agents.<sup>106</sup> After observing the defendant's conduct, which appeared to be characteristic of persons unlawfully carrying narcotics, the agents approached her in the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket.<sup>107</sup> The agents noticed that the name on the defendant's ticket was different from the name on her identification.<sup>108</sup> When the agents questioned Mendenhall, she "became quite shaken, extremely nervous . . . [and] [s]he had a hard time speaking."<sup>109</sup>

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THE PUBLIC, 2005 (2007), <https://www.bjs.gov/content/pub/pdf/cpp05.pdf> [<https://perma.cc/X8E5-ZRXH>].

102. See Isaacs, *supra* note 44, at 387.

103. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980); Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 509-10 (2001); see also Volokh, *supra* note 65.

104. See *Mendenhall*, 446 U.S. at 546-47.

105. *Id.* at 547.

106. *Id.*

107. *Id.* at 547-48.

108. *Id.* at 548.

109. *Mendenhall*, 446 U.S. at 548.

After she was subsequently arrested, the defendant argued on appeal of her conviction that the agents' conduct was not a permissive stop under the standards of *Terry*.<sup>110</sup> The Court concluded "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave;" and therefore, since no seizure of the defendant actually took place, the agents' conduct did not amount to an intrusion upon any constitutionally protected interest.<sup>111</sup> Some factors to be considered in determining if a reasonable person would have felt free to leave include the number of officers present, the display of a weapon, physical contact between the officer and citizen, and the officer's language and tone of voice.<sup>112</sup>

*California v. Hodari D.* expanded this construct by adding a new element to the *Mendenhall* test.<sup>113</sup> In *Hodari D.*, the Court held that a seizure does not occur until either the individual actually submits to the show of authority of the officer, or the officer applies physical force.<sup>114</sup>

Information developed during these consensual encounters—or even the attempt to avoid or resist them—can give rise to reasonable suspicion for a stop.<sup>115</sup> Many times, because the officer has untethered discretion to ask any questions she or he deems appropriate, including requesting consent to search the individual, "it is not uncommon for a consensual encounter to lead directly to probable cause to arrest."<sup>116</sup>

The typical concern of both individuals and law enforcement agencies alike, when dealing with the Open Carry Statute, revolves around the officer's authority when in the

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110. *Id.* at 549-50.

111. *Id.* at 554-55.

112. *Id.* at 554.

113. See *California v. Hodari D.*, 499 U.S. 621, 627-29 (1991).

114. *Id.* at 629 (considering a chase by a clearly identifiable police officer).

115. Steinbock, *supra* note 103, at 520; see also *Mendenhall*, 446 U.S. at 547-49, 559-60.

116. Steinbock, *supra* note 103, at 520.

presence of an individual openly carrying a firearm in public.<sup>117</sup> Because the Fourth Amendment is not even implicated in consensual encounters, law enforcement officers essentially have unlimited discretion to investigate these individuals so long as no constitutional search or seizure occurs.

The troubling issue arises again in that, just as illuminated by the low standard of investigative *Terry* stops, consensual encounters require no justification by the officer at all; the only way any Fourth Amendment protections arise is if a reasonable person would feel free to disregard the officer's demand,<sup>118</sup> or if they actually submit to the officer's show of authority.<sup>119</sup> Else, the Fourth Amendment has no application. This unhindered discretion is fundamentally eroding the Fourth Amendment rights of openly carrying, law-abiding citizens. Citizens who openly carry a firearm in Arkansas can, and will, be investigated by law enforcement officers even though they are technically not violating any law.<sup>120</sup> Just as in *Tanner* and *Chambless*' cases, the simple fact that they were openly carrying a firearm was the reason that officers initiated their investigation (and likely their arrest).<sup>121</sup>

In essence, by not violating the law, individuals openly carrying are effectively encouraging, if not requiring, law enforcement officers to inquire and explore their person through consensual encounters, which are by their very nature used as a tool for police to initiate investigations of crime and ultimately lead to arrests.<sup>122</sup> And, of course, once these encounters ensue, the low standard of reasonable suspicion—distilled by the fact that the individual possesses a firearm—is all the officer needs

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117. See *Sheriff's Office Opposes Open Carry of Handguns*, PINE BLUFF COMM., (Oct. 13, 2015, 4:05 AM), <http://pbcommercial.com/news/local/sheriff-s-office-opposes-open-carry-handguns> [https://perma.cc/RP7L-VRC9].

118. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

119. *California v. Hodari D.*, 499 U.S. 621, 629 (1991); *Mendenhall*, 446 U.S. at 555; *Steinbock*, *supra* note 103, at 515-16.

120. See *Suit Viewed As Test of State's Open-Carry Law*, TEXARKANA GAZETTE (Jan. 25, 2016), <http://www.texarkanagazette.com/news/arkansas/story/2016/jan/25/suit-viewed-test-states-open-carry-law/414170/> [https://perma.cc/D7MV-K4CY].

121. See *Lilley & Glisovic*, *supra* note 87; Order Affirming Decision of Ark. State Police, *supra* note 93, at 2.

122. *Steinbock*, *supra* note 103, at 520.

to seize the weapon and the person, as well as search the person and his or her immediate surroundings.<sup>123</sup>

#### IV. SEARCHING FOR A SOLUTION

##### A. Arkansas Supreme Court

A judicial interpretation of this statute is needed. As of the writing of this article, the Arkansas Supreme Court has yet to address the Open Carry Statute head-on, and the state continues to be torn in every direction in handling these situations.<sup>124</sup> Indeed, each county in the state is treating this statute differently and it is impossible, as a threshold matter, to understand exactly what to do with an offense.<sup>125</sup> A potential solution to this problem lies with the Arkansas Supreme Court. It is essential that the judicial system interpret the Open Carry Statute and determine if Arkansas really does allow for open carry. By making an affirmative ruling on the newly revised statute, the Supreme Court could calm at least some of the tension reverberating throughout the state.<sup>126</sup>

##### B. Arkansas General Assembly

The legislature, by changing this law and allowing for open carry, has inadvertently opened the door for law enforcement to use their discretion in both consensual and *Terry* encounters and to engage in investigations of persons openly carrying firearms with little—if any—legal restrictions. All that is required of law enforcement officers is to develop reasonable suspicion that such individual has or is about to commit a crime.<sup>127</sup> After the officers develop reasonable suspicion, they have the authority to conduct a seizure of the individual, and subsequently search that

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123. ARK. R. CRIM. P. 3.4.

124. Tom Henry, “*Open Carry*” *Confusion*, BLYTHEVILLE COURIER NEWS (June 23, 2015), <http://www.blythevillecourier.com/story/2207419.html> [<https://perma.cc/LBK8-FSV4>].

125. *Id.*

126. *Id.*

127. *See Hill v. State*, 275 Ark. 71, 79, 628 S.W.2d 284, 288 (1982); *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968).

person.<sup>128</sup> This is especially problematic when the individual is in their vehicle, where reasonable *suspicion* is all that is needed to search the passenger compartment of an automobile when dealing with the safety of police officers on duty.<sup>129</sup>

This problem presents a major concern with the new statute. The legislature has opened up the doors for law enforcement to investigate, stop, and frisk individuals who are openly carrying a firearm, and any additional evidence that the officers obtain from these searches is admissible against the individual, including evidence of unrelated crimes.<sup>130</sup> Because officers enjoy great discretion, especially when a dangerous weapon is present, it is a natural progression that the accumulation of these interactions will cause tension between communities and their law enforcement departments. Furthermore, this discretion, through the current framework of the Fourth Amendment, significantly erodes the fundamental constitutional protections afforded to all citizens of this state. It is imperative that the Arkansas General Assembly provide clarifications on what exactly these revisions mean. Does Ark. Code Ann. § 5-73-120 definitively make this state an open carry state? Is this exactly what the 2013 revisions intended? May anyone openly carry a firearm? These are the questions that the state desperately needs definitive answers to. The citizens of this state deserve concrete answers from the Arkansas General Assembly.

## V. PROPOSAL FOR A REVISED STATUTE

Considering the current legal framework of the Fourth Amendment, especially the nature and extent of law enforcement's expansive legal capability under *Terry* stop and frisks and consensual encounters, the Arkansas Open Carry

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128. *Terry*, 392 U.S. at 30-31.

129. *See* *Adams v. Williams*, 407 U.S. 143, 144-46 (1972).

130. *See* *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (holding that there are certain circumstances when a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment); *see also* *Arizona v. Hicks*, 480 U.S. 321, 326 (1987) (holding that probable cause is required to invoke the "plain view" doctrine).



Statute erodes fundamental protections of law-abiding citizens, and therefore must be re-written or completely discarded. The concerns of officer discretion raised in these citizen-police encounters inevitably lead to a deterioration of citizens' rights, and without concrete clarification of statutory intent, the lack of guidance is costing law-abiding citizens of Arkansas their constitutional right to be free from unreasonable searches and seizures.

Furthermore, because the current text of the Arkansas Open Carry Statute is ambiguous and has caused a significant amount of confusion, this article proposes that a revision to this statute would provide more clarification and would greatly reduce the erosion of Fourth Amendment protections perpetuated by an unclear and difficult statute. There are many states that have functioning open carry statutes.<sup>131</sup> However, there are many different state approaches to open carry such as prohibiting long guns,<sup>132</sup> requiring permits to openly carry,<sup>133</sup> or prohibiting handguns while allowing for the open carry of long guns.<sup>134</sup> Understanding that there is no one perfect way, there are many other states that allow for open carry through a more effective statutory scheme that does not perpetuate the erosion of individual Fourth Amendment protections.

Arizona is famous for some of the most lenient approaches when it comes to gun laws.<sup>135</sup> The statutory scheme in Arizona allows for any adult person who is not a "prohibited possessor" to openly carry a loaded firearm visible to others.<sup>136</sup> Arizona's

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131. See Joshua Gillin, *There Are 45 States That Allow Open Carry for Firearms, Former NRA President Says*, POLITIFACT (Nov. 18, 2015, 5:26 PM), <http://www.politifact.com/florida/statements/2015/nov/18/marion-hammer/there-are-45-states-allow-open-carry-handguns-form/> [<https://perma.cc/HWF7-JBJ3>]; *Open Carrying*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/open-carrying-policy-summary/> [<https://perma.cc/U2RD-322K>].

132. See, e.g., CAL. PENAL CODE § 26400 (West 2013); FLA. STAT. ANN. § 790.053 (West 2011).

133. See, e.g., MO. REV. STAT. § 571.037 (2013); OKLA. STAT. TIT. 21, § 1289.6 (2012); V.T.C.A. § 46.02 (West 2016).

134. See, e.g., S.C. CODE ANN. § 16-23-20 (2014).

135. Matthew Hartvigsen, *10 States with the Most Lenient Gun Laws*, DESERET NEWS (Apr. 8, 2013, 9:37 AM), <http://www.deseretnews.com/top/1429/8/Arizona-10-states-with-the-most-lenient-gun-laws-.html> [<https://perma.cc/KZ32-FFTA>].

136. ARIZ. REV. STAT. §§ 13-3101(A)(7), 3102 (2016).

open carry law is different from Arkansas's current Open Carry Statute in a number of ways. First and foremost, there is no requirement—or even mention—of intent to use a weapon unlawfully in Arizona's Misconduct Involving Weapons statute.<sup>137</sup> This contrasts starkly against Arkansas's Open Carry Statute because it de-incentivizes law enforcement investigation, while the intent requirement of Arkansas's Open Carry Statute actually encourages, if not requires, officer investigation. Without any mental state requirement, Arizona is effectively deterring police investigation of these presumably law-abiding citizens—placing them on the same playing field as any person not carrying a firearm—thereby reducing the need for officer discretion and, inevitably, the erosion of Fourth Amendment protections.

Another contrast with Arizona's Misconduct Involving Weapons statute—one that is readily apparent—is the clarity, consistency, and relative ease in understanding the statute, which Arkansas's current statute lacks. With little ambiguity, Arizona's clear approval of open carry allows for law enforcement departments across the state to develop consistent policies when dealing with police-citizen encounters involving individuals who are openly carrying firearms.<sup>138</sup> By following Arizona's statutory construction of their open carry laws, Arkansas will make huge strides towards resolving the controversy, concern, and misunderstandings that have plagued open carry in this state since Act 746's textual revisions.

Therefore, if the Arkansas legislature intends for this state to be an open carry state, they should, for example, adopt a statutory construction of the Carrying a Weapon Statute similar to that of Arizona's<sup>139</sup> to read:

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137. ARIZ. REV. STAT. § 13-3102 (West 2016).

138. See Robert Farago, *Open Carry Interaction with the Police: A Law Enforcement Perspective*, THE TRUTH ABOUT GUNS.COM (Mar. 21, 2014), <http://www.thetruthaboutguns.com/2014/03/robert-farago/open-carry-interaction-with-the-police-a-law-enforcement-perspective/> [https://perma.cc/4T25-4XFZ].

139. ARIZ. REV. STAT. § 13-3102.

(a) A person commits the offense of carrying a weapon by knowingly possessing a handgun, knife, or club on or about his person:

(1) in furtherance of a serious offense or during the commission of any felony;

(2) if such person is prohibited from possessing such weapon; or

(3) if entering any establishment where possession of such weapon is unauthorized, unless otherwise specifically authorized by law.

With this statutory scheme, the Arkansas Legislature will be able to determine who is allowed to openly carry a firearm and where such possession is legal. By replacing the current ambiguous language of the Arkansas statute in this manner, the state will definitively and unambiguously become an open carry state by removing any penalty for openly carrying a firearm unless one of these characterizations apply. Of course, the Legislature can and should delineate which persons are prohibited from possessing such firearms and should develop laws that specifically outline the requirements for possession of firearms in restricted areas.

## VI. CONCLUSION

It is essential that Arkansas citizens are educated about the law and understand how law enforcement agencies will be handling these situations going forward. Those who do carry openly should be aware that officers have an expansive capability to investigate individuals who are carrying firearms. By openly carrying a firearm in Arkansas, you are, in effect, providing law enforcement officials with another substantial factor to contribute to the development of reasonable suspicion that you are engaged in criminal activity, a factor that is determinatively against you. The current form of the Arkansas Open Carry Statute must be revised. By considering the expansive discretion of police officers in both *Terry* stop and frisk scenarios as well as consensual encounters, it is clear that the present construction of the statute will continue to erode

Fourth Amendment protections of law-abiding citizens who are openly carrying firearms in public. It is up to the courts and the legislature to provide clarity and to revise the statute accordingly to prevent the continuation of this injustice against liberty.

J. HARRISON BERRY