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PROTECTIVE SEARCHES, PAT-DOWNS, OR FRISKS?: THE SCOPE OF THE PERMISSIBLE INTRUSION TO ASCERTAIN IF A DETAINED PERSON IS ARMED

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I. INTRODUCTION

A protective search of suspects for weapons is a limited intrusion designed solely to insure the safety of the police officer and others while the officer is conducting a criminal investigation.[1] Although it is a well-established police procedure, of continuing controversy is the basic notion of what a protective search is, that is, whether it permits an intrusion underneath the surface of a person's clothing or whether it permits merely a "pat-down" or "frisk" of the exterior of the person's clothing.[2] By examining this question, more fundamental questions about the nature of such protective searches arise: what level of certainty may the officer obtain regarding whether the suspect is unarmed; how intensive may the intrusion be; and what weapons may the police look for? As will be seen, the answers to these questions largely determine the permissible scope of a protective search.

The constitutionalization of protective searches has it origins in *Terry v. Ohio,*[3] the Supreme Court case that first addressed the issue and brought the police practice of checking for weapons persons they ac-

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

2. Some issues are well settled, such as the level of individualized suspicion needed for such actions, *see* note 22 *infra*, and the breadth of the search, that is, the parameters of the area into which the officers may permissibly look or examine, and this article does not address those settled principles.

3. 392 U.S. 1 (1968). The police practice of stopping and frisking suspicious persons was a "time-honored police procedure" pre-dating *Terry* but the constitutionality of the practice was largely ignored or avoided prior to *Terry*. *See* Wayne R. LaFave, *"Street Encounters" and the Constitution*: Terry, Sibron, Peters *and Beyond*, 67 MICH. L. REV. 39, 40-46 (1968).

costed within the protections of the Fourth Amendment.[4] The Court legitimated the practice of protective searches, setting forth the standards and justification for such intrusions. In Part II, this article reviews *Terry* and *Sibron v. New York*,[5] which is the other initial Supreme Court case addressing the constitutionality of a protective search. Part III examines subsequent Supreme Court authority discussing protective searches. As those Parts demonstrate, *Terry* and *Sibron* are characterized by ambiguous language, and subsequent Supreme Court authority has done little to clarify the meaning of those cases. The ambiguities have caused much discord in the lower courts, which have adopted differing interpretations of the basic precepts of what constitutes a protective search. Those differing interpretations are outlined in Part IV.

The remaining portions of this article seek to clarify the proper scope of a protective search. To do so, some myths regarding the proper scope of a protective search must be dispelled. Principally, as discussed in Part V, this involves rejecting artificial limits on a protective search, such as any pat-down requirement. This in turn requires establishing that a least intrusive means analysis is not a part of Fourth Amendment jurisprudence, that the fear of false testimony by police officers does not justify a pat-down requirement, and that a pat-down requirement is not supported by the rationale that justifies utilization of bright-line rules.

After eliminating those artificial limitations on the scope of a protective search, its proper scope is discussed in Part VI. That Part establishes that three interrelated considerations serve to measure the proper scope of a protective search. The first, and most important, is the level of assurance the police may obtain in satisfying themselves that the suspect they are confronting is not armed. The second concerns the intensity of the search, which illuminates the limits on the analogy between searches incident to arrest and protective searches. The third factor refers to limits on the types of weapons for which a search can be made. It will be argued that a police officer may obtain only reasonable assurance that the suspect is not armed, that the officer may only examine those areas that may contain a weapon, and that, absent reason to be-

4. U.S. CONST., amend. IV, provides as follows:

> 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.

5. 392 U.S. 40 (1968).

lieve that the suspect is harboring an unusual weapon, the officer may only examine those areas where fairly large objects, such as knives and guns, may be concealed. Within that framework, the scope of any protective search is based on the circumstances of each case, guided by the principle that the scope of the intrusion must be reasonably related to its purpose. Part VII contains some concluding remarks.

II. SUPREME COURT AUTHORITY: *TERRY* AND *SIBRON*

In *Terry v. Ohio*,[6] the Court was confronted with a situation where a police officer, Detective McFadden, reasonably believed that Terry and two other men he had confronted were planning to rob a store.[7] McFadden grabbed Terry and "patted down the outside of his clothing."[8] He felt a pistol in the left breast pocket of Terry's overcoat and reached in but was unable to remove the gun. At that point, the officer ordered all three men into a store and, as they went in, McFadden removed Terry's coat and recovered the gun. He then proceeded to pat down the outer clothing of the other two men, Chilton and Katz. McFadden discovered a revolver in the outer pocket of the overcoat of Chilton and seized it. "The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns."[9]

Based on these facts, the Supreme Court, utilizing a balancing test,[10] considered the competing governmental and individual interests involved in the officer's "invasion of Terry's personal security by searching him for weapons" during the course of his investigation of the possible criminal activity.[11] The Court concluded that a limited intrusion designed to ascertain if the suspect is armed was justified. The Court recognized that such an intrusion implicated significant aspects of per-

6. 392 U.S. 1 (1968).

7. *See id.* at 27-28.

8. *Id.* at 7.

9. *Id.*

10. Along with *Camara v. Municipal Court*, 387 U.S. 523 (1967), *Terry* originated the use of a balancing test. *See, e.g.*, Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 544-49, 584-624 (1995) (discussing origins and utilization of a balancing test by the Court). That test has been often criticized. *See, e.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1184-94 (1988).

11. *Terry*, 392 U.S. at 23.

sonal security: the "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."[12] Indeed, the Court said: "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every person to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'"[13] The question in the case before it, the Court asserted, was whether the person's "right to personal security was violated" by the on-the-street encounter.[14] Focusing specifically on the protective search that may occur during an investigatory stop, the Court viewed it as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment"[15] and that such an intrusion is an "annoying, frightening, and perhaps humiliating experience."[16]

On the other hand, the Court recognized that the governmental interests were more than just investigating crime; "[i]n addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."[17] The Court posited that "it would be unreasonable to require that police offi-

12. *Id.* at 8-9.

13. *Id.* (quoting Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891)). *See also id.* at 17 (referring to a stop and frisk as a "serious intrusion upon the sanctity of the person"). Recent Supreme Court pronouncements on when a stop occurs have significantly undermined this right of personal security. *See* Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After* Hodari D. *and* Bostick, 28 AM. CRIM. L. REV. 799 (1991) (analyzing Supreme Court precedent and asserting that the Court's definition of a seizure fails to strike the proper balance between the competing interests of law enforcement and individual security); Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1990) (defining a seizure as an attempted acquisition of control over a person). *See also* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1260-64 (1990) (stressing the importance of freedom of movement and concluding that "[t]he Constitution mandates that the citizenry is beyond the reach of state intrusion unless the government has good reason to believe that a crime has been or is being committed").

14. *Terry*, 392 U.S. at 9. *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 348 (1998) (contrasting the *Terry* Court's emphasis on labeling the person's right as the right to be secure with the Court's typical labeling of the person's protected interest as being the right to privacy).

15. 392 U.S. at 17.

16. *Id.* at 25.

17. *Id.* at 23.

cers take unnecessary risks in the performance of their duties."[18] It pointed to the long tradition of American criminals use of armed violence and observed that "every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives."[19] Accordingly, the Court believed it would be "clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[20]

The Court then departed from the probable cause standard to measure the propriety of a search and seizure[21] and adopted a new standard to measure the propriety of a protective search: it is justified when an officer has articulable suspicion that the person detained is armed and dangerous.[22] The Court believed that the manner in which a search is

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18. *Id.*

19. *Id.* at 23-24. Since *Terry* was decided, the number of police officers killed annually in the line of duty has tripled and the numbers of those assaulted and wounded have risen by a factor of twenty. *See* United States v. Michelletti, 13 F.3d 838, 844 (5th Cir.), *cert. denied*, 513 U.S. 829 (1994). *See also* Maryland v. Wilson, 519 U.S. 408, ___, 117 S. Ct. 882, 885 (1997) (noting that "traffic stops may be dangerous encounters" and that "[i]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops").

20. 392 U.S. at 24.

21. *See, e.g.*, LaFave, *supra* note 3, at 53-56 (discussing the *Terry* Court's rejection of the probable cause standard).

22. Discussing the concept of articulable suspicion in *United States v. Sokolow*, 490 U.S. 1, 7 (1989), the Court stated:

> The officer, of course, must be able to articulate something more than suspicion or "hunch." [*Terry v. Ohio*, 392 U.S. 1 (1968)]. The Fourth Amendment requires "some minimal level of objective justification" for making the stop. *INS v. Delgado*, 466 U.S. 210, 217 (1984). That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," *United States v. Gates*, 462 U.S. 213, 218 (1983), and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 544 (1985).

See also Ornelas v. United States, 517 U.S. 690, 695-96 (1996) (discussing the concept of articulable suspicion). All of the factors justifying a *Terry* stop and a protective search, examined separately, can be "quite consistent" with innocent behavior but, when examined together, can still "amount to reasonable suspicion." *Sokolow*, 490 U.S. at 9. The amount of information available to the officer at the time need not be great. *See, e.g., id.* Indeed, in *Terry*, the officer only observed the suspects pacing back and forth in front of a store for a period of time, conferring, and looking into the store's windows. The officer was an experienced veteran and that experience provided meaning to the men's actions: he believed that criminal activity, that is, a plan to rob the store, was afoot. His stop and frisk of the men was therefore upheld. *See* 392 U.S. at 5-7, 27-28.

conducted is just "as vital a part of the inquiry" as whether it is warranted at all.[23] Although the Court did "not develop at length . . . the limitations which the Fourth Amendment places upon a protective seizure and search for weapons,"[24] the Court believed that it must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[25] Each case, the *Terry* Court believed, must be evaluated based on the particular circumstances presented.[26] The limitations of a protective search, the Court emphasized, "will have to be developed in the concrete factual circumstances of individual cases."[27]

Applying those principles to the facts of *Terry*, the Court saw "no serious problem" in the scope of the search:

> Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz's person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.[28]

Three aspects of *Terry* that have generated controversy and confusion are important to the present discussion. The first is the ambiguity concerning whether the Court was approving of a mere pat-down or something else. One reading is that the Court was limiting the search to only a pat-down.[29] Another reading of the Court's language regarding the scope of a protective search is that *Terry*'s references to a pat-down were merely descriptive, not limiting.[30] It was mere happenstance that the protective actions of Officer McFadden in *Terry* were restricted to a pat-down and the Court repeatedly asserted that each case must be de-

23. *Terry*, 392 U.S. at 28.
24. *Id.* at 29.
25. *Id.*
26. *See id.* at 28-29.
27. *Id.* at 29.
28. *Id.* at 29-30.
29. *See infra* note 103 and authorities cited therein.
30. *See infra* note 110 and authorities cited therein.

cided on its own facts. The Court was careful not to state that the scope of the search must be limited invariably to only a pat-down of the outer clothing. However, in summing up its opinion, the Court, while stressing that "[e]ach case of this sort will, of course, have to be decided on its own facts," said that it was holding that an officer is entitled "to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."[31] Even this language, while far from transparent, did not seem to limit a search to only a pat-down; instead, the search was to be limited to the outer clothing, but nothing suggested that the officer had to remain on the surface of the clothing for the search to be proper. Taken as a whole, according to this view, *Terry* seemed to be a factually based analysis of the case before the Court, with no hard and fast set of rules announced governing the scope of the permissible intrusion associated with all protective searches.

Second, *Terry* was ambiguous regarding any requirement that the officer employ the least intrusive means in performing the protective search. A least intrusive means analysis, as developed in other cases, requires that the police employ the most minimally intrusive search or seizure that will effectuate the government's goals; if the officer's intrusion goes beyond that which is minimally necessary, it violates the Fourth Amendment.[32] *Terry* spoke of "Officer McFadden confin[ing] his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find."[33] Some courts and authorities assert that this language mandates a least intrusive means analysis.[34] On the other hand, this language could be read as simply descriptive of what McFadden did. Indeed, the Court did not set forth any requirement of a

31. *Terry*, 392 U.S. at 30. *See also id.* at 15 ("No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.").

32. *See infra* Part V.A.

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

34. *See* cases cited *infra* notes 140-41. *See also* Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1205 (1983) (interpreting *Terry* as mandating a least intrusive means analysis); Strossen, *supra* note 10, at 1263 n.479 (noting that courts and commentators have interpreted *Terry* as requiring a least intrusive means analysis and arguing that *Terry* at least implicitly supports such an analysis); Sam Kamin, *Law and Technology: The Case for a Smart Gun Detector*, 59 W.T.R. LAW & CONTEMP. PROBS. 221, 226 (1996) (asserting that *Terry* mandates a least intrusive means requirement for frisks).

least intrusive means analysis beyond those few words or seek to justify such a standard in Fourth Amendment jurisprudence.

A third theme emanating from *Terry*'s language is the level of assurance that the officer may obtain that the suspect is armed. *Terry* spoke in terms of giving the officers "the power to take necessary measures to determine whether the person is in fact carrying a weapon,"[35] but later stated that the intrusion must be "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[36] If the officer can determine if the person is "in fact" carrying a weapon, that level of assurance would justify an extensive examination of the suspect, which seems at odds with an intrusion "reasonably designed" to discover weapons, which implies a lower level of assurance that the person is not armed.

These three ambiguities in *Terry* have played out in subsequent Supreme Court and lower court decisions. *Sibron v. New York*,[37] a companion case to *Terry*, served to undermine the *Terry* Court's assertions that there were no hard and fast rules and that each case must be decided on its own facts. It also added support for the view that a pat-down defined the limits of a permissible protective search.

An officer confronted Sibron after observing him engaged in a series of conversations with known narcotics addicts.[38] The officer told Sibron: "You know what I am after," and Sibron "mumbled something and reached into his pocket."[39] The officer at the same time "thrust his hand into the same pocket" and discovered several glassine envelopes containing heroin.[40] The state did not attempt to justify the search as a protective one at the hearing on the motion to suppress evidence; instead, the officer testified that he was looking for narcotics.[41] The Supreme Court observed that the officer's testimony presented no "facts from which he [could have] reasonably inferred that [Sibron] was armed and dangerous."[42] Nonetheless, the Court "assum[ed] *arguendo*" that the officer had sufficient grounds for a search of Sibron for weapons and then

35. *Terry*, 392 U.S. at 24.

36. *Id.* at 29.

37. 392 U.S. 40 (1968). *Sibron* was issued as a joint opinion with *Peters v. New York*. *Peters* involved a search incident to arrest based on probable cause and the limitations of a protective search were not discussed in that case. *See Sibron*, 392 U.S. at 66-68.

38. *See id.* at 45.

39. *Id.*

40. *Id.*

41. *See id.* at 46-47 n.4 & 64-65 n.21.

42. *Id.* at 64.

found that "the nature and scope of the search conducted by [the officer] were so clearly unrelated to that justification as to render the heroin inadmissible."[43] The Court reasoned:

> The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, [the officer] thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man.[44]

One fundamental problem with the Court's analysis in *Sibron* is that it was unnecessary to a decision in the case. The state, at the motion to suppress, never asserted that it was a protective search and the officer's testimony demonstrated that he was looking for narcotics. The Court's analysis was therefore ill considered and served merely to confuse what *Terry* announced regarding the proper scope of a protective search.[45]

Moreover, having taken on the issue, the Court's analysis did little to clarify the principles set forth in *Terry*. Both *Terry* and *Sibron* were authored by Chief Justice Warren. Although in *Terry* he was generally careful to emphasize that the holding of the Court was addressed to the facts in *Terry* and that each case had to be decided on its own facts, Warren broadly opined in *Sibron* that the "search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects."[46] Was this merely descriptive or was it designed to limit the scope of all *Terry* searches? One reading of

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43. *Id.* at 65.

44. *Id.*

45. *Compare* Michigan v. Long, 463 U.S. 1032, 1052 n.16 (1983) (distinguishing *Sibron* on the ground that it was not a protective search but rather a search for narcotics), *with Long*, 463 U.S. at 1060 (Brennan, J., dissenting) (relying on *Sibron*'s language to assert that the scope of a *Terry* search "consisted *solely of a limited* [pat-down] *of the outer clothing*"). *Cf. also* United States v. Robinson, 414 U.S. 218, 250 (1973) (Marshall, J., dissenting) (citing *Sibron* for proposition that a protective search was limited to patting down outer clothing of suspect); Chimel v. California, 395 U.S. 752, 762 (1969) (stating that the search in *Sibron* was illegal because it was not a protective search but rather a search for narcotics).

46. *Sibron*, 392 U.S. at 65.

Terry, where the Court emphasized that it was merely deciding the factual situation before it and not setting broad rules, would seem to indicate that the language of *Sibron* was again a mere factual recitation of the circumstances of *Terry*. However, the remainder of the language quoted above from *Sibron* indicates that the Court was not merely summarizing the facts of *Terry*. Warren emphasized that the officer in *Sibron* made "no attempt at an initial limited exploration for arms," but instead "thrust his hand into Sibron's pocket and took from him envelopes of heroin."[47] Arguably consistent with a least intrusive analysis and with the view that the scope of a protective search is limited to a pat-down, this language seems to indicate that there was some more limited action the officer should have performed, namely a pat-down.

Yet, if an officer is confronting a suspect that he believes is armed and dangerous, and the person reaches into a pocket, what could be more limited that going directly to that pocket and insuring that no weapon would be coming out of the pocket in the suspect's hand? That was exactly the point of Justice Black, who dissented in *Sibron*. Drawing different inferences than the majority from the facts, Black argued that the officer had probable cause to believe that Sibron had a dangerous weapon in his pocket "which he might use if it were not taken away from him."[48] Black therefore believed that it was an appropriate response to reach into Sibron's pocket.[49]

III. SUBSEQUENT SUPREME COURT AUTHORITY

Four subsequent Supreme Court cases discuss the scope of a protective search. The first, *Adams v. Williams*,[50] concerned an officer who had information indicating exactly where the weapon might be found. The officer was tipped by an informant that a suspect seated in a nearby car was carrying a handgun in his waistband.[51] The officer approached the vehicle, tapped on the window, and asked the driver to open the door. Instead, the driver rolled down the window.[52] The officer then reached in and removed a revolver from the driver's waistband.[53] "The gun had not been visible . . . from outside the car, but it was in precisely

47. *Id.*
48. *Id.* at 80-81 (Black, J., dissenting in part and concurring in part).
49. *See id.*
50. 407 U.S. 143 (1972).
51. *See id.* at 144-45.
52. *See id.* at 145.
53. *See id.*

the place indicated by the informant."[54]

After determining that the information was sufficient to justify an investigative stop and a protective search,[55] the Supreme Court upheld the officer's action:

> When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure [the officer's] safety. . . .[56]

The Court performed no extended analysis of the scope of the intrusion. It did not speak in terms of a preliminary pat-down requirement or any exceptions to it. Instead, the Court simply stated: "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 limited in scope to this protective purpose."[57]

Williams has also been interpreted in wildly differing ways.[58] *Williams* at least dispels any notion that a pat-down of the outer clothing invariably represents the limits of a protective search or is a preliminary requirement of all protective searches. Beyond those principles, *Williams* lends support to several views regarding the proper scope of a protective search. For example, some courts view *Williams* as representing an exception to a pat-down requirement due to the knowledge of the exact location of the weapon.[59] Others believe that *Williams* excused a pat-down requirement because the officer had reliable information that Williams had a gun in his waistband and, when the suspect failed "to comply with the officer's request to exit the car, [the suspect] prevented the officer from performing a frisk or pat-down without placing himself

54. Adams v. Williams, 407 U.S. 143, 148 (1972).

55. *See id.* at 145-46.

56. *Id.* at 148.

57. *Id.* at 146.

58. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.5(b), at 272 (3d ed. 1996) (itemizing various views of *Williams*).

59. *See, e.g.*, State v. Hernandez, 658 So. 2d 620, 620-21 (Fla. Dist. Ct. App. 1995), *rev. denied*, 666 So. 2d 143 (Fla. 1995) (when officer observed bulge on left side of suspect's shirt, lifting shirt "at exact spot where he observed bulge" permissible as a "limited intrusion" and "an initial pat down search of the defendant would have been an exercise in futility"); *see also* Johnson v. State, 696 So. 2d 1271, 1274 (Fla. Dist. Ct. App. 1997) (same).

in a much more dangerous position in relation to the suspect."[60]

The second decision is *Pennsylvania v. Mimms*,[61] decided a few years after *Williams*. A police officer observed a bulge in a motorist's jacket after the motorist had exited his car pursuant to the officer's order during a valid traffic stop. The Court left to the reader's imagination what actions the officer actually performed and stated simply that the officer "frisked" the man and discovered a revolver.[62] The question before the Supreme Court was whether there was sufficient justification for the intrusion and not whether the scope of the intrusion was exceeded. The Court concluded that the bulge was sufficient to justify a "'pat-down.'"[63] *Mimms,* which otherwise has little relevance to the present discussion on the scope of a permissible protective search, illustrates the use of the words "frisk" and "pat-down" to describe a *Terry* search.[64] Some lower courts have used those shorthand phrases not as merely descriptive of what the officer has done, but as terms of limitation as to what an officer may only do, that is, the officer may only pat down or frisk.[65]

A third case, the Supreme Court's decision in *Michigan v. Long*,[66] while itself not free from ambiguity, seemed to reject a least intrusive means requirement and adds support to the view that the scope of a frisk is not inflexibly limited to an external pat-down of the person's clothing in all situations. The *Long* Court extended the permissible scope of a *Terry* search to include areas beyond the person.[67] Specifically, the Court expanded such searches to include the passenger compartment of a vehicle in which the detained person is seated or from which that person has alighted,[68] reiterating *Terry's* language that the scope must be developed in the "concrete factual circumstances" of each

60. Commonwealth v. Cavalieri, 485 A.2d 790, 793 (Pa. Super. Ct. 1984). *See also* State v. Smith, 693 A.2d 749, 751-52 (Md. 1997); State v. Smith, 689 N.E.2d 598, 599-600 (Ohio Ct. App. 1996). *Accord* 4 LAFAVE, *supra* note 58, § 9.5(b), at 272 (3d ed. 1996).

61. 434 U.S. 106 (1977).

62. *Id.* at 107.

63. *Id.* at 112.

64. *See, e.g.,* Knowles v. Iowa, 119 S. Ct. 484, 488 (1998) (referring to *Terry* as permitting a "pat-down"); Maryland v. Buie, 494 U.S. 325, 332 (1990) (referring to *Terry* as authorizing a "limited pat-down" for weapons); Ybarra v. Illinois, 444 U.S. 85, 93 (1979) (under the *Terry* "doctrine a law enforcement officer, for his own protection and safety, may conduct a pat-down to find weapons").

65. *See infra* notes 103 and authorities cited therein.

66. 463 U.S. 1032 (1983).

67. *Id.* at 1034-35. *See also Buie*, 494 U.S. at 332-36 (relying on *Terry* and *Long* to permit a protective sweep of a house by police officers when they have articulable suspicion that the area swept harbors an individual posing a danger to those at the scene of an arrest).

68. 463 U.S. at 1035.

case.[69]

The police in *Long* investigated a person whom they suspected of drunk driving. Long's car was in a ditch on the side of the road and the driver, Long, was outside of his car when the police arrived.[70] When asked for his vehicle registration, Long began to walk back to the open driver's door of the car.[71] "The officers followed Long and both observed a large hunting knife on the floorboard of the driver's side of the car."[72] The officers stopped Long and "subjected him to a *Terry* protective pat-down, which revealed no weapons."[73] One of the officers then shined a light into the car to search for weapons and observed something protruding from the armrest on the front seat.[74] After the officer knelt in the vehicle and lifted the armrest, he observed an open leather pouch containing marijuana.[75]

Rejecting the claim that the scope of a permissible *Terry* search was limited to the person, the Court stated:

> Although *Terry* itself involved the stop and subsequent pat-down search of a person, we were careful to note that "[w]e need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective search and seizure for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases." Contrary to Long's view, *Terry* need not be read as restricting the preventative search to the person of the detained suspect.[76]

The *Long* Court also asserted that *Terry* authorized the frisking of the overcoat worn by Terry because those were the facts of the case.[77] The Court thereafter defined the scope of a permissible *Terry* search of a vehicle to include those areas of a passenger compartment "in which a weapon may be placed or hidden."[78] It therefore upheld the search of

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69. *Id.* at 1047.

70. *See id.* at 1035-36.

71. *See id.* at 1036.

72. *Id.*

73. *Id.*

74. *See id.*

75. *See id.*

76. *Id.* at 1047 (quoting Terry v. Ohio, 392 U.S. at 29) (citations omitted).

77. *See id.* at 1047 n.12, (quoting People v. Long, 320 N.W.2d 866, 871 (Mich. 1982) (Coleman, J., dissenting)). The Court added that the principles stated in *Terry* would still control if the overcoat had been carried rather than worn. *See id.*

78. *Id.* at 1049.

Long's vehicle as a valid protective action by the police:

> The subsequent search of the car was restricted to those areas to which Long would generally have immediate control, and that could contain a weapon. The trial court determined that the leather pouch containing the marihuana could have contained a weapon. It is clear that the intrusion was "strictly circumscribed by the exigencies which justifi[ed] its initiation."[79]

The Court rejected arguments by Long regarding the scope of the search and that an area search is fundamentally inconsistent with the limited scope of a *Terry* search. The Court said that *Terry* searches were limited in that they had to be justified by articulable suspicion and by the fact that they are protective in nature.[80] To justify an area search, the Court opined, "the officer must have an articulable suspicion that the suspect is potentially dangerous."[81] The Court made no allusions to any preliminary pat-down requirement and did not engage in any least intrusive analysis.[82] Instead, it stated that a *Terry* investigation "at close range" requires the officer to make a "quick decision as to how to protect himself and others from possible danger," and that there is no requirement "that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter."[83] Indeed, the Court seemed to disavow any least intrusive means analysis: "For the practical reasons explained in *Terry*, we have never required the police to adopt alternative measures to avoid a legitimate *Terry*-type intrusion."[84] This disavowal could have been more explicit. The question was not whether the police had to avoid the "*Terry*-type intrusion" entirely, but whether the intrusion must be limited in scope by adopting measures designed to be only as intrusive as necessary to effectuate its goal.[85]

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79. Michigan v. Long, 463 U.S. 1049, 1050-51 (1983) (citations omitted).

80. *See id.* at 1049.

81. *Id.* at 1052-53 n.16.

82. *See id.* The Court summarily dismissed *Sibron* by asserting that the "case was a search for narcotics, and not a search for weapons." *Id.*

83. *Id.* at 1052.

84. *Id.* at 1052-53 n.16 (citation omitted). *Cf.* LaFave, *supra* note 34, at 1205 (acknowledging that *Long* rejected any lesser intrusive means analysis but criticizing the decision as inconsistent with prior cases).

85. *Cf.* United States v. Johnson, 932 F.2d 1068, 1069-71 (5th Cir. 1991) (interpreting *Long* to permit police to reach inside pair of overalls lying on duffel bag after police observed outline of gun and rejecting claim that police should have simply removed the overalls from

Justice Brennan, dissenting, viewed the permissible scope of *Terry* searches narrowly, rejecting the majority's view of the scope of a permissible protective search. He highlighted *Terry*'s language that the scope of a permissible frisk was "*a carefully limited search of the outer clothing*" of the detained person,[86] as well as *Sibron*'s characterization of *Terry* to the same effect,[87] and concluded that it was the permissible limit of a protective search. He further opined that nothing in *Terry* authorized the police to search a suspect's car, which was a "far cry from a 'frisk' and certainly was not 'limited.'"[88] Brennan also argued that the police could have "pursued less intrusive, but equally effective, means of insuring their safety."[89] Thus, for example, he opined that the police could have detained Long outside the vehicle, asked him where the registration was, and then retrieved the registration themselves.[90]

The only other Supreme Court decision on the scope of a *Terry* search is *Minnesota v. Dickerson*.[91] In *Dickerson*, a police officer detected no weapon-like objects during the course of a "pat-down search" of the front of the suspect's body.[92] The frisk did reveal, however, "a small lump" in the suspect's pocket. After "squeezing, sliding and otherwise manipulating" the lump, the officer concluded that it was crack cocaine and retrieved it from the pocket.[93] Justice White, writing for the Court, set forth what he described as the principles that had been settled 25 years before in *Terry* and *Sibron*:[94] a police officer "may conduct a pat-down search 'to determine whether the person is in fact carrying a weapon;'" a "protective search . . . must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby;'" and "[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*."[95]

Although the Court recognized that a police officer may properly seize "nonthreatening contraband" detected during a *Terry* frisk, it nev-

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suspect's reach during encounter).

86. *Long*, 463 U.S. at 1056 (Brennan, J., dissenting) (quoting *Terry*, 392 U.S. at 30).

87. *See id.* at 1060.

88. *Id.* at 1056.

89. *Id.* at 1065.

90. *See id.* at 1065 n.7.

91. 508 U.S. 366 (1993).

92. *Id.* at 369.

93. *Id.* at 377-78 (quoting State v. Dickerson, 481 N.W.2d 840 (Minn. 1992) (citation omitted)).

94. *See id.* at 373.

95. *Id.* (quoting *Terry*, 392 U.S. at 24, 26; *Sibron*, 392 U.S. at 65-66).

ertheless found the particular search at issue constitutionally invalid.[96] The Court explained that, "[a]lthough the officer was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket," the officer exceeded the scope of a *Terry* search after concluding that the object was not a weapon.[97] The Court went on to adopt the plain feel doctrine, which permits an officer to seize contraband discovered by the sense of touch during a valid *Terry* search.[98] As part of its explanation of that doctrine, the Court discussed the lower court's rejection of the doctrine based on the lower court's distinguishing between the sense of touch and the sense of sight, with the lower court believing that touch is more intrusive to personal privacy than sight and less reliable.[99] Addressing that belief, the Supreme Court noted:

> *Terry* itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband.[100]

In light of the fact that an officer is permitted to frisk a person, the Court viewed the lower court's belief that the sense of touch was more intrusive than the sense of sight to be inapposite.[101]

IV. THE CONFUSION IN THE LOWER COURTS

The diversity of views regarding the permissible scope of a *Terry* intrusion in the 30 years since *Terry* was decided, and in light of subsequent Supreme Court precedent, defies precise categorization. Some generalizations, however, can be discerned. Because an external pat-down of a suspect's clothing is the action performed in the overwhelming number of frisks and was in fact the action taken by Officer McFadden in *Terry*, courts have often used the terms "frisk" or "pat-down" as

96. *Id.* at 373-75, 377-80.
97. *Id.* at 379 (citation omitted).
98. *See id.* at 374-75.
99. *See id.* at 376.
100. *Id.*
101. *See id.* at 377.

shorthand to describe a *Terry* protective search. For example, one court has stated that, in *Terry,* the Supreme Court "held that if the articulable facts . . . support an objectively reasonable suspicion that the person . . . is armed and dangerous, the officer may conduct a carefully limited search of the outer clothing of [the person lawfully stopped] in an attempt to discover weapons which might be used to assault the officer."[102] Indeed, some courts make the prototypical protective search the only permissible action that the police may take, that is, *Terry* searches are limited to pat-downs, with an intrusion underneath the surface permitted only if something that could be a weapon is detected during the pat-down.[103]

Other courts have avoided the rigidity of that rule when the officer

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102. Derricott v. State, 611 A.2d 592, 595 (Md. 1992). *See also In re* S.J., 713 A.2d 45, 48 (Pa. 1998) (*Terry* search described as pat-down of outer garments for weapons).

103. *See, e.g.,* Warren v. State, __ S.E.2d __, 1998 WL 678091, at *7 (Ala. Crim. App. 1998) ("Generally, *Terry* limits the permissible scope of a protective pat-down to 'a carefully limited search of the outer clothing' of a suspect"); Parker v. State, 697 N.E.2d 1265, 1267 (Ind. Ct. App. 1998) (citing *Terry* for proposition that officer "may perform a carefully limited pat-down of the outer clothing of the suspect"); State v. Smith, 693 A.2d 749, 751 (Md. 1997) (protective search is, in most instances, limited to a pat-down of the outer surface of the suspect's clothing); State v. Newton, 489 S.E.2d 147, 149 (Ga. Ct. App. 1997) (*Terry* pat-down is generally "two-step process" with "pat down first" followed by an intrusion beneath the surface only if something feels like a weapon); Hodges v. State, 667 So. 2d 145, 147-48 (Ala. Crim. App. 1995), *rev'd,* 678 So. 2d 1049 (Ala. 1996); State v. Crook, 485 N.W.2d 726, 729 (Minn. Ct. App. 1992) (search permitted in *Terry* limited to pat of outer areas of a person's clothing unless an object thought to be a weapon is felt); State v. Andrews, 565 N.E.2d 1271, 1274 (Ohio 1991) (protective search approved of in *Terry* limited to pat-down), *cert. denied,* 501 U.S. 1220 (1991); Alfred v. State, 487 A.2d 1228, 1239 (Md. Ct. Spec. App. 1985) ("only a pat-down of the exterior of the clothing surface is permitted"); People v. Superior Court, 94 Cal. Rptr. 728, 730-31 (Cal. Ct. App. 1971) (reviewing California decisions); People v. Collins, 463 P.2d 403, 406 (Cal. 1970) (en banc) (limiting search to pat-down of exterior of suspect's clothing); Shaver v. State, 963 S.W.2d 598, 602-04 (Ark. 1998) (Newbern, J., dissenting) (citing court rule limiting frisk to outer clothing of person detained and immediate surrounding and collecting cases in accord). *See also* GEORGE DERY III, *Remote Frisking Down to the Skin: Government Searching Technology Powerful Enough to Locate Holes in Fourth Amendment Fundamentals,* 30 CREIGHTON L. REV. 353, 387 (1997) ("the scope of any frisk was explicitly restricted to a pat down of the outer clothing" by the *Terry* Court); David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 12 (1994) (*Terry* frisk "limited in scope to a pat-down of the outer clothing"). Professor LaFave initially interpreted *Terry* as limiting a protective search to a pat-down but has acknowledged that later cases do not impose such a limitation. *Compare* LaFave, *supra* note 3, at 88 ("*Terry* indicates that a two-step process must ordinarily be followed: the officer must pat down first and then intrude beneath the surface only if he comes upon something which feels like a weapon"), *with* 4 LAFAVE, *supra* note 58, § 9.5(b), at 271-73 (3d ed. 1996) (interpreting Supreme Court precedent to mean that an external patting of a person's clothing is not initially required when conducting a protective search but arguing that such a pat-down should be required, with exceptions for situations where "it would be foolhardy for the officer to do anything short of an immediate search").

has specific knowledge of the location of the weapon.[104] For example, in *Commonwealth v. Houser*,[105] the court upheld a police officer reaching into the jacket pocket of a suspect based on the officer's observation of the outline of a gun. The court stated that "a police officer may search *directly* for the weapon when he has reason to believe that it is on a certain part of the individual's body."[106] The court reasoned:

> To require a police officer to frisk an individual when he already has reason to believe that a handgun is in a certain location on the suspect's body would only increase the risk of harm to the officer. Furthermore, a search limited to the area where the weapon is believed to be is in our view most reasonable under the circumstances.[107]

Other courts dispense with the pat-down requirement when the suspect's actions make the frisk more difficult[108] or the situation more dangerous.[109]

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104. *See, e.g.*, People v. Superior Court, 94 Cal. Rptr. 728, 730-32 (Cal. Ct. App. 1971) (when responding to call of shots fired, permissible to reach directly into pocket of defendant after observing him reach into pocket upon approach of police and noting that, to require a preliminary pat-down, "would be contrary to every dictate of reason"); People v. Taggart, 229 N.E.2d 581, 586 (N.Y. 1967), *appeal dismissed*, 392 U.S. 667 (1968) (when officer acted on anonymous tip that suspect had gun in left hand jacket pocket, reasonable for officer to reach into pocket without preparatory frisk of exterior of clothing). *See also* cases cited *supra* note 59. *Cf.* State v. Escobales, 547 A.2d 553, 554-55 (Conn. App. Ct. 1988), *cert. denied*, 552 A.2d 434 (Conn. 1988), *cert. denied*, 490 U.S. 1023 (1989) (upholding reaching into shirt during traffic stop after officers observed suspect stuff something into his pants under his shirt, which one of the officers believed was a gun; the court reasoned that the officer "knew from her observation precisely where the defendant had concealed the bulky object. The ultimate question in fourth amendment cases is: Was the police officer's response to the given situation reasonable? In this case, [Officer] Lula had reason to suspect, on the basis of her direct observations, that the defendant had just concealed a weapon.").

105. 364 A.2d 459, 460-61 (Pa. Super. Ct. 1976).

106. *Id.* at 460.

107. *Id.* at 461.

108. *See, e.g.*, People v. Whitehead, 522 N.Y.S.2d 721, 723 (N.Y. App. Div. 1987). *See also* 4 LAFAVE, *supra* note 58, § 9.5(b), at 272-73 (3d ed. 1996) (advocating rule that pat-down is required but allowing exception where the suspect makes the pat-down ineffective or more dangerous).

109. *See, e.g.*, State v. Smith, 693 A.2d 749, 751-52 (Md. 1997); People v. Casias, 563 P.2d 926, 933-34 (Colo. 1977) (en banc) (while pat-down of exterior of clothing usually required, directly reaching into pocket upheld in response to suspect's reaching into pocket); Commonwealth v. Cavalieri, 485 A.2d 790, 793 (Pa. Super. Ct. 1984). *See also* 4 LAFAVE, *supra* note 58, § 9.5(b), at 272-73 (3d ed. 1996) (advocating rule that pat-down is required but allowing exception where the suspect makes the pat-down more dangerous); cases cited *supra* note 60.

Still other courts have recognized that the concept of a protective search is flexible and not restricted to or by an initial pat-down of the person's clothing.[110] Illustrative is *United States v. Baker*,[111] wherein the court stated:

> In finding that Officer Pope was restricted to conducting a pat-down frisk, the district court erroneously concluded that a pat-down frisk was the only permissible method of conducting a *Terry* search. This reasoning is incorrect because the reasonableness of a protective search depends on the factual circumstances of each case. Thus, a pat-down frisk is but one example of how a reasonable protective search may be conducted.[112]

In *Baker*, Officer Pope lawfully stopped a car for a traffic violation and developed articulable suspicion that the driver, Baker, was armed and dangerous. Pope observed a bulge under Baker's shirt near the waistband of his pants.[113] Pope ordered Baker to lift his shirt to permit Pope to observe the concealed object. Baker eventually complied, revealing a handgun tucked into his waistband.[114] The Fourth Circuit, in balancing the officer's interest in self-protection against the resulting intrusion on Baker's personal security, concluded that the officer's action

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110. *See, e.g.*, United States v. Baker, 78 F.3d 135, 138 (4th Cir. 1996) (no pat-down requirement); United States v. Hill, 545 F.2d 1191, 1193 (9th Cir. 1976) (per curiam) (rejecting the view that *Terry* limited weapon searches to pat-down searches, saying: "Any limited intrusion designed to discover guns, knives, clubs or other instruments of assault are permissible."); United States v. Poms, 484 F.2d 919, 920-22 (4th Cir. 1973) (upholding protective search of shoulder bag when police had tip that Poms always carried gun in the bag); Hodges v. State, 678 So. 2d 1049, 1051 (Ala. 1996) (reasonableness of *Terry* search measured by facts of each case and pulling up pants leg to determine if weapon in suspect's boot not unreasonable); Stone v. State, 671 N.E.2d 499, 502-03 (Ind. Ct. App. 1996) (while the police officer's actions "went further than the commonly accepted pat-down of the outer clothing for weapons," request of suspect to remove untied high top athletic shoes not unreasonable); Johnson v. State, 696 So. 2d 1271, 1274 (Fla. Dist. Ct. App. 1997) (rejecting preliminary pat-down as requirement and permitting reaching under sweater where gun was suspected to be); State v. Hernandez, 658 So. 2d 620, 621 (Fla. Dist. Ct. App. 1995) (lifting shirt to disclose what was causing bulge reasonable), *rev. denied*, 666 So. 2d 143 (Fla. 1995); Moore v. United States, 468 A.2d 1342, 1346 (D.C. 1983) (rejecting requirement of pat-down prior to reaching into pocket where officer observed bulge); Bromwell v. State, 427 A.2d 884, 891 (Del. 1981) (search of box reasonable, with the court stating: "To impose an inflexible limit upon a weapons search of a suspect lawfully detained under suspicion of armed felony to a clothing frisk, regardless of the attendant circumstances, would . . . be unrealistic and unreasonable.").

111. 78 F.3d 135 (4th Cir. 1996).

112. *Id.* at 138 (citations omitted).

113. *See id.* at 136.

114. *See id.*

was "a reasonable search limited to discovering whether he was carrying a concealed weapon."[115] The court reasoned:

> Directing that he raise his shirt required little movement by Baker and allowed Officer Pope to immediately determine whether Baker was armed without having to come in close contact with him. And, it minimized the risk that he could draw his weapon before Officer Pope could attempt to neutralize the potential threat. In comparison, complying with this direction involved a limited intrusion upon Baker's personal security. Indeed, this act was less intrusive than the pat-down frisk sanctioned in *Terry*. The officer avoided the "serious intrusion upon the sanctity of the person" necessitated by the pat-down frisk, which requires the officer to "feel with sensitive fingers every portion of the prisoner's body."[116]

One recent Maryland case illustrates the competing and conflicting rules that the courts have adopted to measure the propriety of the scope of a search. That case, *State v. Smith*,[117] went through three levels of review and generated five opinions and at least four differing views on the scope of a permissible *Terry* search. In *Smith*, Baltimore City Police Officer Sean White "responded to a police radio broadcast that a group of individuals were selling drugs and discharging firearms" at a specified street corner.[118] Upon arriving at the scene, Officer White, who was an expert in the use of handguns by drug traffickers,[119] observed a group of four to five men disperse, with one of the individuals, later identified as Smith, placing an object in the back waistband of his pants as he ran.[120] "Although Officer White was unable to discern the precise nature of the object," it was established that he reasonably believed that Smith was sticking a handgun into his waist area.[121] Thus, White had current direct observations that reasonably led him to believe that Smith was armed and dangerous and that the location of the gun was in the back of Smith's waistband. After detaining Smith, the officer reached directly to the back of the waistband area and patted down that area but detected

115. *Id.* at 138.
116. *Id.* (citations omitted).
117. 693 A.2d 749 (Md. 1997).
118. *Id.* at 750.
119. *See id.* at 756 (Raker, J., dissenting).
120. *See id.*
121. *Id.* at 750, 753 n.1.

nothing.[122] "White then 'double-checked' his pat-down by pulling Smith's shirt back to reveal [his] waistband."[123] "At that point, a plastic bag containing cocaine fell to the ground."[124]

Denying the motion to suppress physical evidence, the motion court believed that the tugging of the shirt was a limited intrusion designed solely to "reveal the outline of a gun" and was performed in the back of the waistband, which was "the normal place to secrete a weapon."[125] The Court of Special Appeals, which is Maryland's intermediate appellate court, reversed. The majority first asserted that police officers are restricted to a pat-down of a person's outer garments: "'Under the ever-present minimization requirement of the Fourth Amendment, only a pat-down of the exterior of the clothing surface is permitted.'"[126] It then created its own unique exceptions to that rule when

> 1) after the pat-down begins there is some additional conduct on the part of the suspect that supports a reasonable belief (even after the outer garments have been patted-down) that the suspect is armed with a weapon, or 2) after the frisk is completed, the police officer has some other reasonable basis to believe that the suspect is armed and dangerous.[127]

One judge, dissenting, quoted from *Terry* and *Williams* extensively, and asserted that the proper scope of a protective search was not limited arbitrarily to include only the outer clothing of persons but instead depended on the facts and circumstances of each case.[128] The dissent acknowledged that the "rule defining the area that may be frisked is not . . . easily stated"[129] but emphasized that the limitations of a protective search were tied to the "particular facts and circumstances" of each encounter.[130]

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122. *See id.* at 750, 753; *id.* at 756 (Raker, J., dissenting).

123. *Id.* at 750.

124. *Id.*

125. Smith v. State, 666 A.2d 883, 886 (Md. Ct. Spec. App. 1995), *aff'd*, 693 A.2d 749 (Md. 1997).

126. *Id.* at 887 (quoting Alfred v. State, 487 A.2d 1228 (Md. Ct. Spec. App. 1985)). In reaching this conclusion, the court viewed the search in *Terry* as "the model for how the police should conduct" a protective search. *Id.* at 888 (quoting Anderson v. State, 553 A.2d 1296 (Md. Ct. Spec. App. 1989)).

127. *Id.* at 890.

128. *See id.* at 890-93 (Garrity, J., dissenting).

129. *Id.* at 891-92.

130. *Id.* at 893. *See also id.* at 894 ("it is most important to realize clearly *that the Su-*

Upon further review to the highest court of Maryland, three of the seven judges of the Maryland Court of Appeals agreed with the dissent in the intermediate appellate court.[131] However, a majority of the Court of Appeals rejected that view. That majority also rejected, in part, the Court of Special Appeals' framework for assessing the scope of a permissible protective search. The Court of Appeals majority established that an officer must employ the least intrusive method of discovering and neutralizing any concealed weapons.[132] Accordingly, in "most instances, a pat-down" is all that the police officer may do[133] because, the court believed, "a pat-down of the outer surface of a suspect's clothing is typically the least intrusive method" of discovering a weapon.[134] The majority allowed, however, that "[u]nder certain conditions, more intrusive means of 'frisking' may be justified."[135] It then detailed as an example "the rare instance where a police officer is unable to perform an effective pat-down. . . ."[136] Using the Supreme Court's opinion in *Williams* to illustrate, the court characterized the search there as "clearly more intrusive than a pat-down," but said that it was justified because of "the suspect's failure to comply with the officer's directive and the resulting inability of the officer to conduct an effective pat-down."[137] The majority concluded that, "[u]nder those circumstances, the police officer remained within the bounds of 'what was minimally necessary' to ensure his protection."[138] The court also cited other cases where it believed that "extenuating circumstances placed the officer's safety in such jeopardy that alternative means of determining whether the suspect was armed were justified and reasonable."[139]

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preme Court did not confine a weapons search to mere outer clothing if the circumstances otherwise warranted").

131. *See* State v. Smith, 693 A.2d 749, 755 (Md. 1997) (Raker, J., dissenting).

132. *See id.* at 753.

133. *Id.* at 751.

134. *Id.* at 753.

135. *Id.* at 751.

136. *Id.*

137. *Id.* at 751-52. The court rejected the view that *Williams* authorized "police officers to dispense with a pat-down merely because they have reason to believe that a weapon is concealed at a particular location on a suspect's person." *Id.* at 752 (citing 4 LAFAVE, *supra* note 58, § 9.5(b), at 272 (3d ed. 1996)).

138. *Id.* at 752.

139. *Id.*

V. THE SCOPE OF A PROTECTIVE SEARCH: ELIMINATING THE MISCONCEIVED PAT-DOWN LIMITATION

The concept of a pat-down or frisk is a constant theme running throughout the caselaw. Supreme Court opinions use the terms repeatedly to describe a protective search. The initial cases, *Terry* and *Sibron*, are ambiguous as to whether such actions define the permissible limits of a search. However, *Williams* and *Long* suggest that there is no such limitation. More current cases simply shed no light on the issue. However, numerous lower courts and commentators assert that there is a pat-down requirement. A pat-down requirement seems to be justified principally by reference to another requirement, that is, that an officer must employ the least intrusive means to effectuate the search. Professor LaFave provides another justification, that is, that a pat-down requirement serves to deter false police testimony. A third possible justification is that a pat-down creates a convenient bright-line rule. These three justifications for a pat-down limitation on protective searches are examined in this part.

A. Least Intrusive Means Analysis

The lower courts are hopelessly split on the question of whether a least intrusive means analysis is an element that should be applied in assessing the reasonableness of the scope of a protective search. Many lower courts continue to look to the availability of less intrusive alternatives in assessing the reasonableness of a search or seizure,[140] including

140. *See, e.g.*, Nelson v. City of Irvine, 143 F.3d 1196, 1203-04 (9th Cir. 1998) (finding blood test unreasonable based on availability of breath and urine tests to ascertain if driving while intoxicated); F.E.R. v. Valdez, 58 F.3d 1530, 1535 (10th Cir. 1995) (inquiring "whether the state could have achieved its objectives in a less intrusive manner and finding that dissemination of patients' records was proper"); Kraushaar v. Flanigan, 45 F.3d 1040, 1046 (7th Cir. 1995) (using less intrusive means analysis to conclude that a more intrusive search of minor offender was necessary based on facts); Chapman v. Nichols, 989 F.2d 393, 396-97 (10th Cir. 1993) (strip search in jail of minor offender unreasonable because of availability of pat-down search); United States v. Pierre, 958 F.2d 1304, 1309 (5th Cir. 1992) (en banc) (analyzing agent's actions while interrogating occupants of vehicle stopped at checkpoint to establish that they were "no more intrusive than necessary"), *cert. denied*, 506 U.S. 898 (1992); Baughman v. State, 45 Cal. Rptr. 2d 82, 87 (Cal. Ct. App. 1995) (stating rule in invasion of privacy action); Estes v. Rowland, 17 Cal. Rptr. 2d 901, 904-05, 909-10, 920 (Cal. Ct. App. 1993) (applying less intrusive means analysis to searches of prison visitors); State v. Patterson, 582 A.2d 1204, 1205-26 (Me. 1990) (stating rule in context of vehicle safety roadblocks), *cert. denied*, 500 U.S. 941 (1991); Barreras v. New Mexico Corrections Dep't, 838 P.2d 983, 987 (N.M. 1992) (applying less intrusive means analysis to canine searches of correctional officers); State v. Garcia, 860 P.2d 217, 219 (N.M. App. 1993) (applying less intrusive means analysis to strip search of prison visitors and finding that permitting visitor to depart from prison was required alternative). *See also* Alexander v. City and County of San Francisco, 29 F.3d 1355, 1368 (9th

when assessing the reasonableness of an investigative stop[141] and frisk.[142] This is despite what seems to be a clear mandate from the Supreme Court in more recent cases that a least intrusive means analysis is not an element of reasonableness.

As previously discussed, the Supreme Court's initial pronouncements in *Terry* and *Sibron* on the propriety of such an analysis are subject to conflicting interpretations. In many other cases extending well into the 1980s, the Court embraced the view that the examination of less intrusive means is a component of reasonableness.[143] Even in cases

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Cir. 1994) (Kozinski, J., concurring) (employing less intrusive means analysis of using tear gas or waiting out suspect to show that storming of suspect's residence was unreasonable), *cert. denied*, 115 S. Ct. 735 (1995); 4 LAFAVE, *supra* note 58, § 10.7(b), at 658 (3d ed. 1996) (arguing for less intrusive means analysis for screening prison visitors); Russell W. Galloway, Jr. *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 772 n.214 (1992) (availability of less restrictive alternatives is factor to be considered); Strossen, *supra* note 10, at 1263 (advocating less intrusive means analysis and asserting that "the initial search for weapons should be limited to a pat-down of the detainee's outer clothing").

141. *See, e.g.*, Eubanks v. Lawson, 122 F.3d 639, 641-42 (8th Cir. 1997); United States v. Dixon, 51 F.3d 1376, 1380 (8th Cir. 1995); United States v. Bueno, 21 F.3d 120, 125 (6th Cir. 1994); Morgan v. Woessner, 997 F.2d 1244, 1254 n.5 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 801 (1994); United States v. Watts, 7 F.3d 122, 127 (8th Cir. 1993) (police must employ least intrusive means during stop); United States v. Saffeels, 982 F.2d 1199, 1205-06 (8th Cir. 1992), *vacated on other grounds*, 510 U.S. 801 (1993); United States v. Withers, 972 F.2d 837, 843 (7th Cir. 1992); State v. Tierney, 584 N.W.2d 461, 466 (Neb. Ct. App. 1998); Woods v. State, 970 S.W.2d 770, 775 (Tex. Ct. App. 1998); State v. Gruen, 582 N.W.2d 728, 733 (Wis. Ct. App. 1998); People v. Soun, 40 Cal. Rptr. 2d 822, 831 (Cal. Ct. App. 1995); Hawkins v. United States, 663 A.2d 1221, 1227-28 (D.C. 1995); State v. Ohlsen, 537 N.W.2d 794, 797-98 (Iowa Ct. App. 1995); State v. Moreno, 619 So. 2d 62, 66 (La. 1993); State v. Hughes, 899 S.W.2d 92, 99 (Mo. Ct. App. 1994); Gaines v. State, 888 S.W.2d 504, 509 (Tex. Crim. App. 1994); Thomas v. Commonwealth, 434 S.E.2d 319, 323 (Va. Ct. App. 1993), *rev'd on other grounds*, 444 S.E.2d 275 (Va. App. Ct. 1994) (en banc).

142. *See, e.g.*, Woods v. State, 970 S.W.2d 770, 775-76 (Tex. Crim. App. 1998); State v. Smith, 693 A.2d 749 (Md. 1997); Reynolds v. State, 592 So. 2d 1082, 1085 (Fla. 1992); *In re* Marrhonda G., 575 N.Y.S.2d 425, 428 (N.Y. Fam. Ct. 1991); Worthey v. State, 805 S.W.2d 435, 439 (Tex. Crim. App. 1991).

143. *See* New York v. Class, 475 U.S. 106, 118-19 (1986) (finding that the officer's actions of moving papers on car's dash was "no more intrusive than necessary" to locate VIN and stating that the officer cannot enter the passenger compartment if the VIN is visible from outside the vehicle); United States v. Sharpe, 470 U.S. 675, 686-87 (1985) (rejecting unrealistic judicial second guessing as to existence of less intrusive means but stating: "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."); Winston v. Lee, 470 U.S. 753, 760-61 (1985) (discussing surgical intrusions into a person's body for evidence and citing *Schmerber v. California*, 384 U.S. 757 (1966), as an example of a search that was "not more intrusive than reasonably necessary to accomplish its goals"); Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion) ("the investigative methods employed [during a *Terry* stop] should be the least intrusive means reasonably available"); *id.* at 511 n.* (Brennan, J., concurring) (noting that the availability of less intrusive means may make an otherwise reasonable intrusion unreasonable but adding, because a lawful stop must be strictly limited, "it is difficult to conceive of

seemingly rejecting a least intrusive means analysis, the Court nonetheless used such an analysis.[144] Nonetheless, the Court seemed to reject such analysis in *Long* as to protective searches, although that opinion is not without some ambiguity. However, in many other cases and particularly in more recent years, the Supreme Court has repeatedly declared that a less intrusive means analysis is not an element of reasonableness: "We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[145] The Supreme Court has stated that it has rejected the analysis because "elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."[146] Moreover, no part of the balancing test currently utilized by the Supreme Court suggests that a least intrusive means analysis should be employed. The Court merely balances the need to search against the invasion that the search entails.[147]

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a less intrusive means that would be effective to accomplish the purpose of the stop"); Delaware v. Prouse, 440 U.S. 648, 659-60 (1979) (rejecting use of spot checks of drivers' licenses and vehicular registrations at the discretion of the officer in the field in part because of the availability of alternative mechanisms); United States v. Brignoni-Ponce, 422 U.S. 873, 883-87 (1975) (declining to permit roving patrols by immigration authorities to engage in suspicionless stops and requiring articulable suspicion for stop, the latter allowing "the Government adequate means of guarding the public interest"); Wyman v. James, 400 U.S. 309, 318-24 (1971) (receipt of benefits for dependent children permissibly tied to a home visit by governmental authorities because home visit provided information that could not be obtained through interview anywhere else); Berger v. New York, 388 U.S. 41, 56-58 (1967) (commenting on limitations placed on wiretap device used in *Osborn v. New York*, 385 U.S. 323 (1966), as involving no greater invasion of privacy "than was necessary under the circumstances"); Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (area-wide health and safety code inspections reasonable because other canvassing techniques would not achieve acceptable results).

144. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 529 (1979) (noting that less intrusive means analysis is not required but also assuming that it is and concluding that hypothesized alternative was not as effective); United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 & n.12 (1976) (although stating that less restrictive alternative arguments could raise insuperable barriers to the exercise of search and seizure powers, also rejecting the suggested alternative and adding that the traffic-checking program in the interior was "necessary" because the flow of illegal immigrants could not be controlled effectively at the international border).

145. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 663 (1995). *Accord* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453-54 (1990); United States v. Sokolow, 490 U.S. 1, 10-11 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989); Colorado v. Bertine, 479 U.S. 367, 374-75 (1987); United States v. Montoya De Hernandez, 473 U.S. 531, 542-43 (1985); Illinois v. LaFayette, 462 U.S. 640, 647-48 (1983); Cady v. Dombrowski, 413 U.S. 433, 447 (1973).

146. *Vernonia School District*, 515 U.S. at 664 n.3 (quoting Bell v. Wolfish, 441 U.S. 520, 559 n.40 (1979)), which in turn quoted *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976)).

147. *See* Michigan v. Long, 463 U.S. 1032, 1046 (1983); Terry v. Ohio, 392 U.S. 1, 21

More fundamentally, one need not subscribe to the propriety of the Court's balancing test in order to reject a least intrusive means analysis.[148] There is no support for such an analysis in the language of the amendment or in the historical regulation of search and seizure powers.[149] A least intrusive means analysis first appeared in opinions during the Warren Court era,[150] and the advocates of such an analysis do not rely on historical precedent to support it. Rather, they argue that it is necessary to achieve equivalence of protection between Fourth Amendment rights and other guarantees of the Bill of Rights.[151] For example, one commentator has argued that "the rationale which is commonly offered for according a special status to first amendment liberties—that they created the environment necessary for other freedoms to flourish—is equally applicable to the fourth amendment."[152] Such broad brush analysis ignores important historical differences in constitutional rights and the language of the constitution. For example, the First Amendment's Speech Clause utilizes absolute language: "Congress shall make *no* law . . . abridging the freedom of speech."[153] Given that absolute bar,[154] as a general matter,[155] it is appropriate that restrictions on

(1968). *See also* Clancy, *supra* note 10, at 584-624 (discussing the elements of the balancing test employed by the Court).

148. *See supra* note 10 and authorities cited therein.

149. *See, e.g.*, United States v. Koyomejian, 970 F.2d 536, 546 (9th Cir. 1992) (Kozinski, J., concurring) (finding no support for a least intrusive means requirement in either the language of the Fourth Amendment or in the "two centuries of search and seizure caselaw" interpreting it), *cert. denied*, 506 U.S. 1005 (1992).

150. *See supra* note 143 and authorities cited therein.

151. *See* Strossen, *supra* note 10, at 1242 ("Because fourth amendment rights are 'second to none' in importance, governmental actions which intrude upon them should be subject to at least one aspect of the scrutiny applied to infringements of other Bill of Rights freedoms. The Court's refusal to insist that the government conduct searches and seizures pursuant to the least intrusive alternative measure that would still substantially promote state goals relegates fourth amendment freedoms to a second class status in comparison to other constitutional rights."); Sundby, *supra* note 10, at 436-37 (arguing that a strict scrutiny-least intrusive means standard would "bestow preferred status upon the fourth amendment as a fundamental right").

152. Strossen, *supra* note 10, at 1241 (footnote omitted).

153. U.S. CONST., amend. I (emphasis added).

154. *Cf.* LAURENCE H. TRIBE, CONSTITUTIONAL LAW 792-94 (2d ed. 1988) (discussing the recurring debate in First Amendment jurisprudence whether such rights are absolute in the sense that the government may not abridge them at all or whether the amendment requires a balancing of interests).

155. It is, of course, well established that not all restrictions on speech warrant strict scrutiny. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (discussing standards for regulation of commercial speech). This article examines First Amendment jurisprudence only to the extent necessary to contrast its language with that of the Fourth

speech should be subjected to a requirement of necessity, that is, that the government have a compelling interest and that the restriction be narrowly tailored to effectuate that interest.[156] Such close tailoring analysis is, however, inappropriate in the Fourth Amendment context. The Fourth Amendment, instead of barring governmental intrusions, requires only that the intrusion be reasonable. This is to say that reasonableness is a more forgiving concept than a least intrusive means analysis allows. In accordance with that reasonableness mandate, the means need be only reasonably related to the justification for the intrusion.[157]

Such an analysis is also unfair to police officers. Officers on the street confronting potentially armed and dangerous suspects are required to made a "quick decision" as to how to protect themselves.[158] To subject their measurement of what is needed to protect themselves to post hoc second guessing to scrutinize whether they engaged in the least intrusive means of effecting the goal of the intrusion places an unrealistic and dangerous burden on police officers.[159] It is unrealistic because it requires them to "exercise superhuman judgment" in always choosing the least intrusive means of accomplishing the goal, and it is dangerous

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Amendment in order to establish the proposition that the two rights are so different that the standards to judge intrusions on those rights must reflect those differences.

156. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (regulations that discriminate among instances of speech based on its content are valid only if necessary to serve a compelling state interest and are narrowly drawn to that end).

157. *See* State v. Vasquez, 807 P.2d 520, 523 (Ariz. 1991) ("we do not require an officer to be all-knowing, only to be prudent and reasonable"). The availability of alternatives may be a consideration in assessing whether the means employed are reasonably related to the intrusion but such an analysis is but one factor in assessing reasonableness. *See* Clancy, *supra* note 10, at 601-24. *Cf.* United States v. King, 990 F.2d 1552, 1562-63 (10th Cir. 1993) ("While police officers are not required to use the least intrusive means in the course of [an investigative stop], we must determine whether [the officer's] failure to use less intrusive means was unreasonable."); Kathryn R. Urbonya, *Dangerous Misconceptions: Protecting Police Officers, Society, and the Fourth Amendment's Right to Personal Security*, 22 HASTINGS CONST. L. Q. 623, 696 (1995) (scrutiny of means does not "necessarily require identifying the least intrusive practice" but instead "entails consideration of whether the police practice was reasonable in light of available alternatives").

158. *Long*, 463 U.S. at 1052 (quoting *Terry*, 392 U.S. at 28).

159. *See, e.g.*, *Vasquez*, 807 P.2d at 524 ("[n]or will we condemn an officer's reach into pockets merely because, in retrospect, it may appear that another course may have been available"); Bailey v. United States, 279 A.2d 508, 510 (D.C. 1971) ("the tactical choice by the police between apparent alternative courses of action cannot be overturned by detached judicial deliberation as long as the course of action taken is in itself reasonable"). *See also* Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992), *cert. denied*, 504 U.S. 915 (1992) ("We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.").

because it "would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves."[160] It is also inconsistent with the view that deference should be given to the experience of police officers in assessing the reasonableness of their actions.[161]

For example, in *State v. Vasquez*,[162] officers confronted Vasquez in a parking lot arguing with his wife in the early morning hours in March, and the police had reasonable suspicion to believe that he was dangerous. After the police decided to take him home rather than arrest him, Vasquez stated that he was cold and indicated that he wanted a nearby jacket.[163] An officer picked up the jacket, which was bulky and had large pockets; he patted it down but could not ascertain if it contained any weapons.[164] The officer then reached into the pockets to check for weapons and discovered cocaine.[165] The Arizona Supreme Court divided over the reasonableness of the officer's actions. The majority rejected any least intrusive means analysis and believed that, because the officer had "the right to conduct a pat-down search of the jacket, the officer had the right to make the search effective" by reaching into the pocket.[166] The dissent, however, asserted that, because the officers "could have protected themselves by not offering to give the jacket to [the] defendant," the search was unreasonable.[167] Is it less intrusive and hence more reasonable to permit the suspect to suffer from the cold by refusing to give him his jacket or more reasonable to reach into a pocket before potentially arming him? This is but one of the myriad of situa-

160. Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994). *Accord* Mathieu v. Imperial Toy Corp., 646 So. 2d 318, 325-26 n.12 (La. 1995).

161. The Supreme Court has recently cautioned that reviewing courts should give deference both to a trial court's and to police officers' inferences drawn from the facts surrounding an encounter:

> A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.

Ornelas v. United States, 517 U.S. 690, 698 (1996). *See also* State v. Escobales, 547 A.2d 553, 555 (Conn. App. Ct. 1988), *cert. denied*, 552 A.2d 434 (Conn. 1988), *cert. denied*, 490 U.S. 1023 (1989) (extending deference to police's assessment of circumstances).

162. 807 P.2d 520 (Ariz. 1991).

163. *See id.* at 521.

164. *See id.*

165. *See id.*

166. *Id.* at 524.

167. *Id.* at 525 (Feldman, J., dissenting).

tions that police officers are faced with each day. To impose a least intrusive means analysis would produce an increasingly complex—and unworkable—set of rules for each of these situations. Should a court create a rule to govern such a situation by announcing that the search was unreasonable because the officer should have instead denied access to the coat? What if the locale was Alaska in the midst of a blizzard? Or Florida in the rain? What if the man was alone or if no one would take responsibility for the coat? Why not just put him in the police car and turn on the heat? But what if the police car's heater was broken? Each minor change in the facts seems to change what might be the least intrusive means that the police could employ and the conclusion one reaches as to what is the least intrusive may be primarily subjective.[168]

Moreover, in the context of protective searches, such an analysis is unworkable for another reason. The analysis seems to be premised on the view that a pat-down is always the least intrusive means. But when a police officer has information that the weapon is in a specific spot, such as in *Williams*, it cannot be said that a pat-down of the entire body is less intrusive than simply going directly to the spot where the object is and determining if it is, in fact, a weapon.[169] Indeed, there may be no need for the officer to touch the person at all.[170] For example, the officer could simply order the person to raise his shirt to expose the bulge.[171] Also, to require a pat-down exposes the officer to unnecessary danger during the close encounter of a pat-down until he has examined the spot where the suspected weapon is located. Finally, modern technological devices are now becoming increasingly available, permitting officers to locate metallic and hard objects without touching the person.[172] Should

168. *Cf.* Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) (least intrusive means analysis is "an inherently subjective determination").

169. *See, e.g.*, State v. Hernandez, 658 So. 2d 620, 620-21 (Fla. Dist. Ct. App. 1995), *rev. denied*, 666 So. 2d 143 (Fla. 1995) (when officer observed bulge on left side of suspect's shirt, lifting shirt "at the exact spot where he observed a bulge" permissible as a "limited intrusion" and "an initial pat down search of the defendant would have been an exercise of futility").

170. *Cf.* Minnesota v. Dickerson, 508 U.S. at 374-77 (discussing relative intrusiveness and reliability of the sense of touch and sense of sight and finding inapposite lower court's view that the touch is more intrusive to privacy than sight because *Terry* authorizes an officer to touch a person); John A. Cecere, Note, *Searches Woven from* Terry *Cloth: How the Plain Feel Doctrine Plus* Terry *Equals Pretextual Search*, 36 B.C. L. REV. 125, 153-54 (1994) (arguing that the "physical touching of an individual represents an extreme invasion of privacy").

171. *See, e.g.*, United States v. Baker, 78 F.3d 135, 138 (4th Cir. 1996).

172. *See generally* George Dery III, *Remote Frisking Down to the Skin: Government Searching Technology Powerful Enough to Locate Holes in Fourth Amendment Fundamentals*, 30 CREIGHTON L. REV. 353, 357 (1997) (discussing operational prototypes of technology that permit "remote frisking" using hand-held or vehicle-mounted devices that "could be

such devices be mandated in lieu of a pat-down? Yet, "[i]n *every* Fourth Amendment decision, a citizen's privacy interest could have been more fully protected had the state adopted a more expensive alternative."[173]

Based on the foregoing, a least intrusive means analysis in the context of protective searches should be rejected. Such an analysis has no support in the history or text of the amendment. It is unfair to police officers who must make a quick decision how to protect themselves, and the analysis is unworkable and often illogical to the extent that it is premised on a pat-down search being the least intrusive means to ascertain that a suspect is armed. The question should be whether the officer's actions were reasonable, based on the totality of the circumstances. Reasonableness contemplates that, of a range of options available to an officer, several options may be acceptable and the mere fact that the officer has not chosen the most minimally intrusive option does not *a fortiori* invalidate the officer's actions. In assessing whether the police officer's actions were unduly intrusive, the scope of the search must be measured by such considerations as the state of the officer's knowledge at the time as to the type of weapon suspected to be possessed, any information as to the location of the weapon, and the ease of ascertaining whether the person is armed or whether there are any barriers to a

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used for visual 'pat downs' for weapons on suspicious persons"); David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 9 (1996) (discussing how private companies and a government laboratory are designing devices "that will allow police officers to 'see' through clothing to detect whether a person is carrying a concealed weapon" and noting that two of the designs "would let an officer perform the functional equivalent of a frisk . . . without having to approach or touch the person"). *Cf. id.* at 43 ("The only certainty regarding technology is that it will keep changing and improving, almost inexorably, no matter what we do. It will become even less intrusive than gun detectors (if that is possible), and even more discriminating than a trained canine nose."). Thus, Professor Harris argues:

> The use of gun detectors might also advance interests of the suspect that a *Terry* frisk could not: a person who has no weapon need not experience a traditional pat-down in which the officer assumes physical control of the person and places her hands on him. With an electronic frisk, there is no need for the suspect to assume the usual subservient position, often in public, with arms and legs spread apart and hands up against a wall or squad car. Additionally, items under clothing or in pockets that are not weapons need not be exposed, touched, or explained in any way, as might be the case in a manual pat-down.

Id. at 53-54.

173. Gadson v. State, 668 A.2d 22, 33 (Md. 1995) (Murphy, J., dissenting) (emphasis added), *cert. denied*, 116 S. Ct. 1704 (1996) (arguing that what must be done is to "balance the means actually chosen to protect the state's interest against the privacy interest asserted by the defendant").

search. However, as will be discussed, the most fundamental consideration is the level of assurance a police officer may obtain that the person he or she is confronting is not armed.

B. Police Perjury

Professor LaFave asserts that a "major virtue of the two-step requirement" of a pat-down and then an intrusion underneath the surface of the clothing only if the officer detects something that may be a weapon during the pat-down

> is that the officer will not be able to justify an intrusion beneath the surface of the suspect's clothing without first showing that he felt a hard object, a matter which often could be subject to later verification by showing that there was such an object. But if a beneath-the-surface search may in some circumstances be made without a patting down, courts will be confronted with the difficult task of determining, on the basis of conflicting testimony, whether those circumstances were present. If incriminating evidence is found, it is understandable that many suspects would claim falsely that those circumstances had not occurred, and it is less understandable but unfortunately true that some police would claim falsely that they had occurred.[174]

Certainly, courts must guard against the police's abuse of authority. Some of the concerns involved in this complex problem are discriminatory treatment of minorities[175] and false testimony[176] regarding the circumstances of the encounter. However, those abuses cannot be rectified by distorting Fourth Amendment principles, which are ill suited to address such issues.[177] The hampering of all police by crafting limitations

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174. 4 LAFAVE, *supra* note 58, § 9.5(b), at 272-73 (footnote omitted).

175. *See, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344-54 (1998) (cataloguing instances of discriminatory enforcement of traffic laws).

176. For recent discussions of the problem of police perjury, *see* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997); Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998); Maclin, *supra* note 175, at 379-86. Indeed, it has been recognized that "[p]erhaps the most common form of police perjury occurs in suppression hearings" to avoid application of the exclusionary rule. Chin & Wells, *supra*, at 248.

177. *Cf.* LaFave, *supra* note 3, at 59-62 ("it would be harsh medicine indeed to declare [good faith reasonable investigative stops] unconstitutional in order to administer an indirect and ineffective slap" at improper practices and adding that new remedies to control abuse should be developed rather than exclusion of evidence).

on their authority under the Fourth Amendment is not the solution. That would lead to more police deaths and injuries. The source of such problems is bad police officers, not bad principles. Adjusting Fourth Amendment rules to combat lying would simply lead to more creative lying. Thus, if the rule is that the police may only engage in a pat-down of the external clothing of a suspect, such a rule would not prevent a police officer who refuses to abide by the rule from searching a person's pockets. It merely prevents one lie ("I felt a hard object"). Police still have many lies available to them. An officer could avoid the rule by testifying that the person consented to the search or that the person acted to prevent an effective pat-down. The solution is to weed out the bad police and to establish internal police procedures and practices to effectuate that goal.[178] If a police officer engages in discriminatory treatment, the proper remedy is the Equal Protection Clause of the Fourteenth Amendment.[179] If there is a concern for false testimony, the courts are obligated to examine the testimony of police officers carefully[180] and properly apply the standards to measure the propriety of each protective search.

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178. *Cf.* People v. Berrios, 270 N.E.2d 709, 714 (N.Y. 1971) (suggesting that police executives and prosecutors deal with the problem of police perjury through departmental disciplinary procedures and prosecutorial discretion in selecting witnesses and prosecuting witnesses who testify falsely).

179. Discriminatory treatment of minorities is a complex and persistent problem. The *Terry* Court acknowledged that it was a serious concern. 392 U.S. at 14 & 17 n. 14. The Court, however, ultimately—and properly—concluded that the Fourth Amendment's exclusionary rule was not the proper vehicle to attack such abuses. *See id.* at 13-15. The Fourteenth Amendment, not the Fourth, is the proper avenue to attack discrimination. *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment"). *But see generally* Maclin, *supra* note 175 (asserting that the Fourth Amendment includes a concern for equal treatment).

180. *Cf.* Bush v. United States, 375 F.2d 602, 603-04 (D.C. Cir. 1967) (rejecting the need for an cautionary instruction that the testimony of police officers must be viewed with suspicion and observing that the traditional safeguards of the legal system, that is, cross-examination and a properly instructed jury, suffice to protect against such perjury); Chin & Wells, *supra* note 176, at 272-73 (arguing that the jury may be "in the best position to deal with the problem of police perjury" if "given the right tools" to test credibility). Defense counsel must also educate courts hearing motions to suppress about what to look for to evaluate the police testimony. For example, if perjury is common in "dropsy" cases, that is, false testimony that the officer observed the suspect drop the object, *id.* at 249, then defense counsel should be prepared to establish that point and to demonstrate why the police witness in the case before the court is unworthy of belief. Rules are no substitute for proof. Moreover, if the problem is that the courts hearing such police testimony uncritically credit the police, *see id.* at 264-72, changing Fourth Amendment principles is an ineffective method to address lazy or unethical behavior by judges.

C. Bright-Line Rules

The Supreme Court has utilized bright-line rules in several situations to guide the police in the performance of searches and seizures.[181] Bright-line rules do not require case-by-case justification of the police procedure and provide "clear legal boundaries to police conduct."[182] Such rules are premised on the recognition that the protections of the Fourth Amendment "'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"[183]

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hair-line distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[184]

Accordingly, in some instances, "'[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'"[185] It should be emphasized, however, that the use of such rules in Fourth Amendment jurisprudence is the exception and not the rule.[186] Reasonableness is typically measured by the totality of the circumstances and is fact-specific in nature.[187]

A limitation of a protective search to a pat-down of the exterior of the suspect's clothing has the apparent appeal of a bright-line rule. It is

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181. *See, e.g.*, Maryland v. Wilson, 519 U.S. 408 (1997) (permitting police officers to order all passengers to exit a vehicle as an incident of a stop of that vehicle).

182. David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS. L. REV. 1, 37 (1994).

183. New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142).

184. *Id.* at 458 (quoting Wayne R. LaFave, *supra* note 58, at 183).

185. *Id.* at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

186. *See* Ohio v. Robinette, 519 U.S. 33, __, 117 S. Ct. 417, 421 (1996).

187. *See id.*

easily stated and arguably, in theory, easily applied. However, the rationale of such a pat-down rule breaks down upon analysis. With the Fourth Amendment, factual considerations—not abstract doctrine—control.[188] "Each case involving the reasonableness of a *Terry* stop and frisk turns on its own facts."[189] Police work has become increasingly more dangerous and to impose a bright-line rule on the police in a situation where it is a given that they are confronting a person they reasonably suspect is armed and dangerous and where minor differences in clothing, articles carried, and other circumstances that vary with each case, any of which may be of great weight in determining the appropriateness of a given protective action, demonstrates that such a rule is inappropriate. It thus imposes an artificial and unrealistic restriction on their ability to protect themselves.[190] Also, a pat-down requirement actually promotes more intrusion than is necessary when the police know where the object is.

Finally, a pat-down rule is not as bright a line as it may first appear. Professor LaFave, in his treatise on the Fourth Amendment, asserts that there is a pat-down requirement and that "recognition of exceptions to the pat-down requirement should not be undertaken lightly."[191] He then acknowledges that "some limited exceptions *must* be recognized."[192] He thereafter lists numerous exceptions: the situation in *Williams*,[193] which he characterizes as justified because "the suspect's failure to respond to the officer's order to alight from the vehicle made it impossible for the officer to carry out an effective pat-down or to conduct even a partial pat-down without putting himself into a much more dangerous position

188. *See, e.g.*, Terry v. Ohio, 392 U.S. at 29 (the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases"); Brinegar v. United States, 338 U.S. 160, 175 (1949) ("In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."). *But see* Payton v. New York, 445 U.S. 573, 602 (1980) (rejecting claim regarding the practical consequences of warrant as condition of routine felony arrest in home in absence of any evidence that effective law enforcement had suffered and opining that "such arguments of policy must give way to a constitutional command that we consider to be unequivocal").

189. United States v. Michelletti, 13 F.3d 838, 844 (5th Cir. 1994), *cert. denied*, 513 U.S. 829 (1994).

190. *Cf. id.* ("The Fourth Amendment does not require police to allow a suspect to draw first.").

191. 4 LAFAVE, *supra* note 58, § 9.5(b), at 272.

192. *Id.* at 273 (emphasis in original).

193. *See id.*

vis-a-vis the suspect[;]"[194] where "the suspect makes threatening movements, as where he quickly thrusts his hand into his waistband with a metallic-appearing object or where he makes a sudden move to his pocket notwithstanding a police order to keep his hands in plain view[;]"[195] where the officer has reason to believe that the suspect may have a weapon in his hand, then the officer may force open the suspect's hand or order the suspect to drop it;[196] where the clothing is too bulky so that a "pat-down is totally inconclusive[;]"[197] and in other occasional circumstances where "it would be, at best, inconclusive."[198] Try explaining that rule and its exceptions to the police under the guise that it is designed for its ease of application. Moreover, LaFave's list of exceptions dissolves upon examination: there appears to be no underlying rationale for the exceptions beyond the *need* to protect police officers, which is indistinguishable from the rationale supporting *Terry* searches in the first place.

VI. THE PROPER SCOPE OF A PROTECTIVE SEARCH

Three interrelated considerations measure the proper scope of a protective search. The first, and most important, is the level of assurance the police may obtain in satisfying themselves that the suspect they are confronting is not armed. As will be discussed, an officer may be only reasonably assured that the person the officer is confronting is not armed; this is to say that the police must accept some uncertainty when confronting suspects. The second concerns the intensity of the search, which illuminates the limits on the analogy to searches incident to arrest to protective searches. It will be shown that the intensity of a permissible protective search is much less than a search incident to arrest. The third factor refers to limits on the types of weapons for which a search can be made. Because guns and knives are the weapons of choice for assaults on police officers, as a general rule, the size of those weapons limits the areas that can be examined. Within that framework, the inquiry as to whether the scope of the protective search is reasonable is fact-specific to each case.[199]

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194. *Id.* at 272.

195. *Id.* at 273 (footnote omitted). In the accompanying footnote, LaFave opines, however, that "it is not enough that the suspect was seen to put something in his pocket surreptitiously." *Id.* at 273 n.142.

196. *See id.*

197. *Id.* at 280.

198. *Id.* at 40 (1997 Supp.).

199. *See* United States v. Holifield, 956 F.2d 665, 669 (7th Cir. 1992) ("Protective

A. The Level of Assurance That The Police May Obtain

The level of certainty that an officer may obtain that the person he or she is confronting is not armed is the most important consideration in measuring the permissible scope of a protective search for weapons. *Terry* spoke of a police officer having an interest in "taking steps to *assure* himself that the person . . . is not armed with a weapon"[200] and that the officer is empowered to take "necessary measures to determine whether the person is *in fact* carrying a weapon."[201] This language seems to indicate that a very high level of confidence may be obtained by the officer. That notion, however, appears to be contradicted by the limited type of search allowed: the *Terry* Court stated that the intrusion must be "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[202] If the officer can determine if the person is "in fact" carrying a weapon, that level of assurance would justify an extensive examination of the suspect, which seems at odds with an intrusion "reasonably designed" to discover weapons, which implies a lower level of assurance that the person is not armed.

The lower courts are split as to the level of assurance that an officer may obtain. For example, in *Smith*, the Maryland Court of Appeals rejected the ability of the police officer to tug at Smith's shirt after first patting down Smith's waist band, even though the officer had reasonable suspicion to believe that Smith was armed and dangerous and that the gun had been placed under the shirt at the location searched.[203] The court reasoned that "'the right to conduct a *Terry* [frisk] does not give the police the right to make absolutely sure that no weapon is present.'"[204] The dissent in *Smith*, also citing *Terry*, believed that the officer had the right to assure himself that Smith was not carrying a gun and that the officer's actions were reasonably related to that quest: "I find no support for the 'one time and you're out' rule that the majority seems to fashion. An officer should be permitted to 'double-check' to determine whether a suspect is armed and to minimize any risk to his or her

searches are only limited in the sense that the officer conducting the protective search must first have a reasonable suspicion that the suspect is dangerous and the protective search must be directed only to locations which may contain a weapon and to which the suspect may have access.").

200. Terry v. Ohio, 392 U.S. at 23 (emphasis added).

201. *Id.* at 24 (emphasis added). *Accord* Michigan v. Long, 463 U.S. at 1047.

202. 392 U.S. at 29.

203. *See* State v. Smith, 693 A.2d 749, 754 (Md. 1997).

204. *Id.* at 754 (quoting Aguilar v. State, 594 A.2d 1167, 1172 (Md. Ct. Spec. App. 1991)).

safety."[205] The dissent in the intermediate appellate court would have permitted an even greater degree of assurance: "the police officer ought to be allowed to conduct a thorough protective pat-down search of that particular area on stopping the suspect, even though a mere cursory pat-down failed to reveal the object that had been *in fact* tucked into a shirt-covered waistband in back of appellant's pants."[206]

To permit the officer to obtain certainty or a high degree of confidence that the person is not armed would allow the most intrusive of searches, akin to a search incident to arrest. Such a rule eliminates the structure that *Terry* sought to create: for arrests, based on probable cause, a full search; for stops, based on articulable suspicion, a more limited intrusion to protect the police during their investigation. This two-level structure was designed to correlate the need to intrude with the degree of intrusion, thereby preventing unjustified intrusions into a person's security. Thus, *Terry* contemplated a more limited intrusion than would be obtained if complete assurance were the goal. The level of justification for an investigatory stop also points to the conclusion that the police may not obtain absolute assurance that the person is not armed. Investigative stops are justified by reasonable suspicion that the person has or is about to commit a crime and a protective search is similarly justified if the officer has reasonable suspicion that the suspect is armed and dangerous. Thus, the State's interest, its need, is not as great as in the search incident to arrest situation. Accordingly, the officer's level of assurance that the person is not armed should be analogous to the justification for the protective search. It follows that an officer must accept some uncertainty whether the person he is confronting is armed; he can be only reasonably assured that the suspect is not armed.

B. The Limits Of The Analogy To Search Incident To Arrest

Terry and its progeny have often relied on principles developed in the context of search incident to arrest but whose application to protective searches is not always proper. For example, the Court in *Long* relied on cases defining the scope of the area permissibly searched incident to arrest.[207] The primary case relied on, *Chimel v. California*,[208] had

205. *Id.* at 755 (Raker, J., dissenting) (citations omitted).

206. Smith v. State, 666 A.2d at 890 (Garrity, J., dissenting) (emphasis added). *See also* State v. Vasquez, 807 P.2d at 524 (holding that "[h]aving the right to conduct a pat-down search of the jacket, the officer had the right to make the search effective" by reaching into the pocket).

207. *See Long*, 463 U.S. at 1048-50.

208. 395 U.S. 752, 763 (1969).

limited the scope of such a search to the arrestee's person and to those areas where that person might reach in order to grab a weapon or evidentiary item. In so limiting the scope of a search incident to arrest, the *Chimel* Court explicitly relied on *Terry* for the proposition that "a search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[209] *Long* also cited another case, *New York v. Belton*,[210] which, in order to establish a "workable rule" for automobiles, permitted a search of the entire passenger compartment of the vehicle incident to an arrest and was a mere factual application of *Chimel* to the peculiar circumstances of motor vehicle arrests. *Long* in many respects simply adopted *Belton*'s per se rule as to the scope of the area a person may reach or grasp in a vehicle and applied it to the *Terry* context.

Given the relationship of the scope of *Terry* searches and searches incident to arrest, which are both premised in part on the need to safeguard the police from weapons,[211] the similarity of the scope of the area permissibly searched makes sense, as does the Court's reliance on cases discussing one rule in the context of the other rule. The analogy is well made between protective searches and searches incident to arrest as to the area searched because both types of searches depend on a factual analysis of how far a person may be able to reach and that fact certainly does not vary based on the police's justification for the search. But that is the extent to which the analogy has reason. In *Terry*, however, the Court used a description of a search incident to arrest when describing a pat-down:

> [T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.[212]

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209. *Id.* at 762 (citation omitted).

210. 453 U.S. 454 (1981).

211. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 234 (1973).

212. Terry v. Ohio, 392 U.S. at 17 n.13 (citation omitted). *See also* Minnesota v. Dickerson, 508 U.S. at 381-82 (Scalia, J., concurring) (quoting J. Moynahan, POLICE SEARCHING PROCEDURES 7 (1963)) (citations omitted):

> Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked.
>
> A check should be made of the upper part of the man's chest and the lower re-

Yet, the limited intrusion permitted by *Terry* is to find weapons for the assault of the police officer and not merely weapons;[213] thus, there is "no reason to cover every square inch of the suspect's body."[214] Rather, "[t]he need is only to find implements which could readily be grasped by the suspect during the brief face-to-face encounter, not to uncover items which are cleverly concealed and which could be brought out only with considerable delay and difficulty."[215] This is to say that the coincidence between a search incident to arrest and protective searches relates to the breadth of the search; it does not relate to the intensity of the search in the defined area. Thus, for searches incident to arrest, the officer may search the area and the person arrested as intensively as the officer desires to look for weapons or for evidence. There is no case-by-case analysis of the permissibility of the intensity of the search; this is because a search incident to arrest is a per se rule applicable to all arrests,[216] and justified not only to protect the officer but also to locate evidence. In contrast, a *Terry* search must be justified by articulable suspicion in each case[217] and its goal is to locate weapons that may be used to assault the officer while the officer is conducting a brief investigation. Thus, the intensity of the search should not be as great; only locations where a weapon may be found can be searched. "General exploratory searches are not permitted, and police officers must distinguish between the need to protect themselves and the desire to uncover incriminating evidence."[218] Moreover, given that the police are only allowed to be reasonably assured that the person they are investigating is not armed and, given that the level of justification for such protective searches, articulable suspicion, as compared to the level of justification for searches incident to arrest, which is probable cause to arrest, the intensity of a permissible protective search is much less than a search incident to arrest.

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gion around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and the crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.

213. *See Terry*, 392 U.S. at 29.
214. 4 LAFAVE, *supra* note 58, § 9.5(b), at 274.
215. *Id.*
216. *See Robinson*, 414 U.S. at 234-36.
217. *See id.* at 227-28.
218. Smith v. State, 693 A.2d at 751.

C. Limits Based on Weapons Size

A third limitation on the scope of protective searches relates to weapons size. Weapons come in a variety of forms and sizes. In a world where technological innovation continues to confound traditional Fourth Amendment principles, the police may in the future be confronted with more danger from small but deadly weapons. That is not, however, the situation typically faced by the police today. Guns and knives are the weapons of choice for assaults on police officers.[219] This raises the question whether the police should be routinely allowed to satisfy themselves that the person accosted does not have any weapon, even a razor blade. Some courts permit such searches but others do not.

> Some courts "condone fanciful speculation" on this point. Illustrative are cases holding that an object thought to be a cigarette lighter may be searched for because "it could be used in a doubled up fist as a punch or thrown at the officer or used to burn the officer or the police unit," that a soft object may be searched for because it might be "a rubber water pistol loaded with carbolic acid or some other liquid, which if used by a suspect could permanently blind an officer," and that an object thought to be a shotgun shell could be searched for because it could be detonated by a sharp object and the suspect "might want to explode the shell even in a way which might entail considerable personal risk to himself."[220]

Professor LaFave correctly observes that decisions of this type are unsound. He maintains that the correct view "reflects two very sensible considerations: (1) To allow a search for anything which could under some circumstances be employed as a weapon would be to permit a search" not dissimilar in intensity from a search incident to arrest;[221] and (2) "[i]n determining what objects might be a weapon, consideration must be given to what types of objects could be employed in the setting of the particular case."[222] To these considerations a third should be added; that is, the principle that an officer may obtain only reasonable

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219. *See* Terry v. Ohio, 392 U.S. at 23-24 ("Virtually all of these deaths and a substantial portion of the injuries [received by the police] are inflicted with guns and knives.").

220. 4 LAFAVE, *supra* note 58, § 9.5(b), at 277.

221. *Id. See also* United States v. Del Toro, 464 F.2d 520, 522 n.6 (2nd Cir. 1972) ("To take an extreme example, a razor blade could readily be sewn into clothing, and so support a purported limited search for weapons which included shredding a suspect's clothing or dismantling his shoes.").

222. 4 LAFAVE, *supra* note 58, § 9.5(b), at 277.

assurance that the person is not armed.

Thus, on the one hand, when an officer has particular information about the nature of the weapon carried by the suspect but none as to its location, a fairly intrusive search would be permitted if the weapon were small. For example, if an officer is confronting a person reasonably suspected of using a razor blade as a weapon, then a careful examination to locate that object is justified.[223] On the other hand, when an officer has no specific information about the possible location of a weapon on the suspect or any information about the type of weapon the suspect may have, the search must be limited to fairly large objects such as guns and knives.[224] Thus, when an officer, during the course of a protective search, discovers a matchbox, even though such boxes "could hold a razor blade," he has no right to open it absent any information that the suspect is carrying such a weapon.[225] As one judge has reasoned in concluding that an officer exceeded the permissible scope of a protective search when the officer examined the contents of a man's wallet:

> [I]n this case there were no circumstances which would support a reasonable belief that what the officer felt with his hand contained a weapon. True, it might, and possibly could, contain a very small but potentially lethal weapon. Nevertheless, it was an innocuous and ordinary size common men's wallet without any bulge or other telltale sign, resting in a commonly located place. The limited authority to intrude . . . in a frisk, when the police do not yet have probable cause, covers objects which may be weapons but not objects which possibly could contain weapons. If that were the law, then an officer could reach in and retrieve any item which felt like a container, including anybody's wallet, because even a very small container could harbor a razor blade.[226]

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223. *Cf.* State v. Williams, 544 N.W.2d 350, 351-54 (Neb. 1996) (police officers permitted to force open clinched fist of suspect to determine if she had a razor blade or small knife when investigating report of boy that his mother was being beaten by suspects armed with knives).

224. *See, e.g.*, United States v. Swann, 149 F.3d 271, 276-77 (4th Cir. 1998) (permissible to remove object from sock when, during frisk of suspect, officer encountered hard object of "approximately the same size and shape as a box cutter with a sharp blade, which is often used as a weapon"); State v. Ashbrook, 586 N.W.2d 503, 508-09 (S.D. 1998) (officer acted within scope of protective search when he examined containers in car that were large enough and heavy enough to hold a weapon but did not look into smaller containers).

225. *But see* Jackson v. State, 804 S.W.2d 735, 740 (Ark. Ct. App. 1991).

226. State v. Newton, 489 S.E.2d 147, 152-53 (Ga. Ct. App. 1997) (Beasley, J., concurring). *See also* State v. Crook, 485 N.W.2d 726, 729-30 (Minn. Ct. App. 1992) (holding that removal of hat to search for razor blade or other small weapon improper); People v. Collins,

This judge's reasoning reflects an analysis of the proper considerations that govern the scope of a protective search. An officer can only achieve reasonable assurance that the suspect is not armed. Absent information that the suspect utilizes razor blades or another small weapon, the officer must accept some uncertainty that the suspect may be harboring a small weapon. The police cannot search small containers or other areas based on the speculation that it might contain a small or atypical weapon absent any information that the suspect is armed with such a weapon. Otherwise, the balance struck by *Terry* would be eliminated, and a protective search would be no different in intensity than a search incident to arrest.

VII. CONCLUSION

A typical protective search is usually limited to an external pat-down of the suspect's clothing. Indeed, courts often characterize the limits of a protective search as being either a pat-down or a frisk. However, an external pat-down is a prototypical *Terry* frisk; it is not the sole type of limited intrusion contemplated by *Terry* and its progeny. The objective of a protective search is to discover weapons readily available to a suspect that may be used against the officer, not to ferret out carefully concealed items that could be accessed only with some difficulty. Reasonableness contemplates that, of a range of options available to an officer, several options may be acceptable and the mere fact that the officer has not chosen the most minimally intrusive option or engaged in a preliminary pat-down does not *a fortiori* invalidate the officer's actions. In assessing whether the police officer's protective actions are proper, three interrelated considerations limit the scope of the search. The first and most fundamental consideration is the level of assurance a police officer may obtain that the person he or she is confronting is not armed. The police may not be certain that the person is not carrying any weapon; they may be only reasonably assured that the person is not armed. Otherwise, as the second concern teaches, the intensity of the search would be the same as that for searches incident to arrest. Yet, to permit such searches defeats the purpose of *Terry*, which had the goal of achieving a balance between individual interests and governmental interests by lim-

463 P.2d 403, 406 (Cal. 1970) (concluding that an officer cannot exceed the scope of a lawful pat-down upon speculation that object might be a razor blade or other atypical weapon because, to do so, "would render meaningless *Terry*'s requirement that pat-downs be limited in scope absent articulable grounds for an additional intrusion").

iting such searches. The third factor refers to limits on the types of weapons for which a search can be made; that is, absent information that the suspect is armed with an unusual weapon, the officer may search for only guns, knives, and other commonly used weapons. Within that framework, the proper scope of a protective search is based on the circumstances of each case, guided by the principle that the scope of the protective search must be reasonably related to its purpose.