

# ARTICLES

## Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security

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## I. Introduction

As detectives entered the home of O.J. Simpson and as police officers repeatedly struck Rodney King,<sup>1</sup> the nation questioned whether these actions violated the Fourth Amendment, which protects an individual's right to personal security.<sup>2</sup> In both cases, officers asserted that their actions were reasonably based on their objective assessment of danger: providing aid to possible victims in Mr. Simpson's home and protecting themselves from a disobedient suspect. Resolution of these Fourth Amendment issues centered on how to assess danger to police officers and the community, with little consideration given to the right to personal security and privacy.

When police officers attempt to control suspects during arrests, they must exercise only reasonable force, because the Fourth Amendment provides that individuals have a right "to be secure in their persons . . . against unreasonable . . . seizures."<sup>3</sup> Officers must also act reasonably when they render aid to victims<sup>4</sup> or frisk suspects.<sup>5</sup> In evaluating the use of force, the United States Supreme Court has stated that reasonableness is an objective standard. In *Tennessee v. Garner*,<sup>6</sup> the Court addressed the issue of deadly force. The Court held that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."<sup>7</sup> In applying this standard to the use of nondeadly force, the Court in *Graham v. Connor*<sup>8</sup> articulated three factors that determine whether force was reasonable: (1) "the severity of the crime;" (2) "whether the suspect poses an immediate threat to the safety of the officers or others;" and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>9</sup>

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1. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 16 (1993) ("Mistrust and hostility predictably follow upon abuse and repression.").

2. The Fourth Amendment provides in part that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

3. U.S. CONST. amend. IV.

4. See *infra* text accompanying notes 153-161, 425-462.

5. See *infra* text accompanying notes 81-148, 367-405.

6. 471 U.S. 1 (1985). For a discussion of this case, see *infra* text accompanying notes 27-69.

7. *Garner*, 471 U.S. at 11-12.

8. 490 U.S. 386 (1989).

9. *Id.* at 396.

Although these decisions provide some guidelines for determining reasonable force, many courts have drastically limited the Fourth Amendment right to personal security by determining that the presence of danger automatically justifies both aggressive and preventive actions.

As a result of this interpretation of the Reasonableness Clause, courts have misperceived how to assess reasonableness. Too often the presence of any danger results in the court's failure to perceive other significant issues for resolving whether the conduct was reasonable: whether police officers created the need to use force; whether police officers should have used less intrusive means to apprehend a suspect; whether the Fourth Amendment, under some circumstances, mandates that police officers let suspects flee rather than use ever-increasing amounts of nonlethal force; whether juries are necessary to determine the reasonableness of a police practice; and whether police officers' actions before a seizure are relevant to the reasonableness inquiry. The courts should consider the presence of danger when they determine reasonableness; however, courts often erroneously assess the degree of danger by strongly deferring to the judgment of police officers. These serious misperceptions significantly diminish the Fourth Amendment right to personal security.

Because the Fourth Amendment reasonableness standard is an abstract standard, some guidelines are necessary to aid courts in discerning the balancing process of the Fourth Amendment. Without guidelines, the reasonableness standard may become more rule-like,<sup>10</sup> with courts continuing to create legal fictions<sup>11</sup> and automatic presumptions of constitutionality.<sup>12</sup> These guidelines must take into account the history of the Fourth Amendment, particularly the fear of an unchecked constabulary. As Professor Tracey Maclin has stated: "The constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central

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10. See, e.g., Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-69 (1992). Professor Kathleen Sullivan has stated that a rule "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. . . . A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness." *Id.* at 58. A standard, however, "allow[s] the decisionmaker to take into account all relevant factors or the totality of circumstances." *Id.* at 59. It thus has fewer problems with over- or under-inclusiveness. *Id.* at 58. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987) (balancing includes both weighing competing interests and discerning the presence of "'compelling' or 'important' state interests").

11. See *infra* text accompanying notes 463-475.

12. See *infra* text accompanying notes 216-260.

meaning of the Fourth Amendment is distrust of police power and discretion.”<sup>13</sup> However, when assessing the danger posed by suspects, courts have strongly deferred to the judgment of police officers and have not seriously questioned the need for force.<sup>14</sup> Were courts to consider the historical distrust of police power when reviewing reasonable force claims, one would expect less deference to police judgment and more concern for an individual’s interest in personal security. When courts evaluate whether the police used reasonable force, they should consider whether alternatives were available to the police officers, instead of rubber-stamping their actions. By closely scrutinizing the judgment of police officers, courts would limit the types of conduct that establish a reasonable belief that a suspect poses a danger to police officers and the community. A likely by-product of such an approach would be improved municipal training of police officers in using devices to restrain subjects.<sup>15</sup>

Rather than articulate an evolving standard of reasonableness, many courts erroneously use danger as a proxy for reasonableness and have defined danger too broadly.<sup>16</sup> The lack of scrutiny is clear when

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13. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993). See also *Kopf v. Skyrn*, 993 F.2d 374, 379 (4th Cir. 1993). In *Kopf*, the Fourth Circuit declared that history of the Fourth Amendment supports a robber’s right not to be subject to unreasonable force during his arrest:

[The robber] was a criminal. He deserved to be arrested and punished; his story stirs little sympathy, much less outrage, in the crowd. The courts cannot be so impassive. We must always remember that unreasonable searches and seizures helped drive our forefathers to revolution. One who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.

*Id.* at 379-80. The Fourth Circuit added, “[W]hile we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes of the Fourth Amendment.” *Id.* at 380 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

14. See Maclin, *supra* note 13, at 200 (“If the Court can identify any plausible goal or reason that promotes law enforcement interests, the challenged police practice is considered reasonable and the constitutional inquiry is over.”).

15. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (a municipality can be liable for its failure to train officers as to the constitutional limits on the use of deadly force).

16. See, e.g., *United States v. Bold*, 19 F.3d 99, 104 (2d Cir. 1994) (used statistics regarding the likelihood of gun possession by New York City residents to justify a frisk of an individual); *United States v. Villanueva*, 15 F.3d 197, 199 (1st Cir. 1994) (upheld frisk of disorderly youths because they had baggy clothing and may have been “emboldened” by the presence of a gun); *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (did not consider whether officer created need for force); *Kruegher v. Fuhr*, 991 F.2d 435 (8th Cir. 1993) (did not allow jury to determine whether suspect made a dangerous furtive gesture); *United States v. Michelletti*, 991 F.2d 183, 184-85 (5th Cir. 1993) (upheld frisk because suspect allegedly had hand in his pocket, had been drinking, and had a “cocky attitude”); *United*

courts permit police officers to frisk suspects for weapons.<sup>17</sup> Courts readily uphold frisks as preventive measures.<sup>18</sup> However, the degree of danger justifying a preventive measure, such as frisking, should not necessarily justify an aggressive measure, such as a shooting, because of the weighty interest in bodily integrity. Under the doctrine of furtive gestures, many courts have held that the same degree of danger justified both a frisk and a shooting.<sup>19</sup> In short, many courts, without considering other important issues, have erroneously held that officers could kill a suspect because the suspect moved after an order to freeze.<sup>20</sup>

This Article asserts that danger is not the only factor to consider in determining whether a police practice is unconstitutional. Other factors should affect the balancing process of the Fourth Amendment. The goal of this Article is to highlight the misperceptions of the Fourth Amendment. One common misperception is that the assessment of danger is the same as the assessment of reasonableness. Part II reveals that in both *Garner* and *Graham* danger was only a factor in determining the constitutionality of force during investigations and arrests. Part III shows that when police officers act preventively rather than aggressively, the presence of danger more readily justifies intrusive police action. This part examines the common practice of frisking suspects, in which police officers pat down the outer garments of suspects if they have reasonable suspicion to believe that the suspects may be "armed and dangerous."<sup>21</sup> Other common preventive practices include emergency searches and searches incident to arrests. Part IV demonstrates that danger is a factor in determining the constitutionality of both aggressive and preventive actions. Part V details the conflict in the lower courts as to how to measure reasonableness when officers act aggressively. The disagreement has centered on five important issues: what evidence is relevant, who decides whether conduct was reasonable, the significance of the offense allegedly committed by the suspect, the suspect's actions, and the availability of less intrusive alternatives. How courts resolve these issues depends upon how they analyze the presence of danger. Those that find danger to

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States v. Rideau, 969 F.2d 1572, 1575 (5th Cir. 1992) (upheld a frisk of an intoxicated suspect because a step back away from the officer signified that he might have been reaching for a gun).

17. See *infra* text accompanying notes 365-425.

18. See *infra* text accompanying notes 365-425.

19. See *infra* text accompanying notes 274-288, 387-390.

20. See *infra* text accompanying notes 216, 281-287.

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

be a weighty factor give little consideration to the other issues. Those that properly perceive the significance of danger are more likely to evaluate other factors. Part VI reveals that lower courts defer to officers' assertions of danger when the officers act preventively. Part VII discusses the lower courts' misperception of the Fourth Amendment and the results of that misperception: officers may frisk suspects for weapons upon mere suspicion, officers may use extremely intrusive means for conducting stops if drugs are involved, officers may view "emergencies" as opportunities for investigative searches, and officers may search an area incident to an arrest even if the suspect did not have access to that area at the time of the search.

To properly safeguard Fourth Amendment rights, Part VIII offers specific guidelines to assess the presence of danger and the constitutionality of both aggressive and preventive actions. These guidelines check the unnecessary deference courts give to police officers and compel courts to examine their serious misperceptions of the Fourth Amendment right to personal security.

The debate between Justices Stevens and Kennedy in *Maryland v. Buie*<sup>22</sup> captures the essence of the courts' misperceptions of the Fourth Amendment. Justice Stevens thought a police officer was foolish for searching a basement of a home after the resident of the home was arrested for armed robbery and taken outside.<sup>23</sup> Justice Kennedy thought the search of the basement represented good police work because a second person or accomplice might have been hiding in the basement.<sup>24</sup> To Justice Stevens, the mere fear of danger lurking in an unknown basement did not justify continuation of the search, because the officers had fulfilled the purpose of their entry—they had arrested the suspect. To Justice Kennedy, further intrusion was permissible because some danger was present. Even though Justice Kennedy's perspective is consistent with the trend in the lower courts, Justice Stevens' assessment of danger properly highlights the need to balance a variety of interests. Justice Stevens questioned whether the officers created the danger by descending the basement stairs.<sup>25</sup> He also recognized that the officers could have exercised alternatives to minimize any potential danger.<sup>26</sup> Because of the strong privacy interest in the home, and because the officers could have exercised alternative meas-

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22. 494 U.S. 325 (1990).

23. *Id.* at 337-38 (Stevens, J., concurring).

24. *Id.* at 339 (Kennedy, J., concurring).

25. *Id.* at 338 (Stevens, J., concurring).

26. *Id.* (Stevens, J., concurring).

ures to reduce the danger, Justice Stevens gave less consideration to the presence of danger. Justice Stevens' perspective highlights the issues explored in this Article. This Article demonstrates that one's view of danger in Fourth Amendment jurisprudence significantly affects the balance of interests.

## II. The Use of Physical Force to Seize Suspects: Aggressive Actions

For years, suspects have alleged that police officers use excessive force during arrests. It was not until 1985, however, that the United States Supreme Court interpreted these claims as implicating the Fourth Amendment, which prohibits "unreasonable" seizures.<sup>27</sup> In two decisions, *Tennessee v. Garner*<sup>28</sup> and *Graham v. Connor*,<sup>29</sup> the Supreme Court created a standard of analysis under the Fourth Amendment for claims involving both deadly and nondeadly force. The text and history of the Fourth Amendment were central to the Court's decisions.<sup>30</sup> In both decisions, the Court assessed the amount of danger a suspect posed to police and the community.<sup>31</sup>

In *Garner*, determining reasonableness required balancing a variety of interests: the right to personal security (which protects both the suspect and society from unreasonably intrusive police practices), society's interest in a fair adjudication of guilt, and society's interest in effective law enforcement.<sup>32</sup> Assessing danger required the Court to evaluate the offense allegedly committed by the suspect.<sup>33</sup> The Court measured the degree of danger to determine whether the danger outweighed the suspect's "fundamental interest in his own life."<sup>34</sup> The police could only use deadly force if the danger was significant.<sup>35</sup> In applying the balancing standard under the Fourth Amendment, the Court strongly emphasized the nature of the offense the suspect allegedly committed.

The Court's assessment of danger in *Garner* led to the conclusion that the police officer used unreasonable force in shooting a fleeing

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27. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

28. *Id.*

29. 490 U.S. 386, 394 (1989).

30. *Graham*, 490 U.S. at 394-97; *Garner*, 471 U.S. at 8-15.

31. *Graham*, 490 U.S. at 396; *Garner*, 471 U.S. at 10-11.

32. *Garner*, 471 U.S. at 9-10.

33. *Id.* at 11.

34. *Id.* at 9.

35. *Id.*



suspect.<sup>36</sup> In *Garner*, the police officer had probable cause to believe that a person running from a house at night had just attempted to burglarize the house.<sup>37</sup> The police officer, who did not believe the suspect was armed, ordered the suspect to halt.<sup>38</sup> When the suspect failed to follow the order, the officer shot the suspect in the back of the head.<sup>39</sup> A state statute authorized the use of deadly force to shoot any fleeing felon.<sup>40</sup> The Supreme Court held the statute was unconstitutional as applied because not all fleeing felons are dangerous.<sup>41</sup>

To justify the use of deadly force, the suspect's offense must create a significant degree of danger, in order to outweigh the suspect's fundamental interest in life. In describing the seriousness of the offense, the Court appeared to create both a "standard" and a "rule:"<sup>42</sup>

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>43</sup>

The first sentence contains a standard: police officers may kill a suspect when the suspect seriously endangers the lives of officers or others. This standard considers all of the circumstances at the time of the shooting. The second sentence, however, suggests a rule to determine the requisite danger: when suspects commit a certain type of offense, they automatically pose a danger to the officers or the community. Noticeably absent from the rule in the second sentence is a reference to *immediate* danger to officers or others. The literal language of the second part seems to suggest a mandatory presumption of danger for heinous offenses: until the person is caught, everyone is in danger. Thus, if a suspect commits an offense involving the infliction of serious bodily harm, officers may shoot him even if neither the officers nor the public is in immediate danger.<sup>44</sup> Such an interpreta-

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36. *Id.* at 21.

37. *Id.* at 3-4.

38. *Id.* at 4.

39. *Id.*

40. *Id.* at 4-5.

41. *Id.* at 20-21.

42. See Sullivan, *supra* note 10.

43. *Garner*, 471 U.S. at 11-12.

44. See John C. Hall, *Use of Deadly Force to Prevent Escape*, FBI L. BULL., Mar. 1994, at 27, 31 (Once suspect has committed an offense involving the infliction of serious bodily

tion, however, is inconsistent with the standard stated in *Garner*, which makes a logical distinction between actual danger and possible danger. A standard may include a non-mandatory presumption, because such a presumption still allows consideration of all the surrounding circumstances, the essential feature of a standard.<sup>45</sup> Immediacy should be considered in calculating reasonableness. Under this standard, police officers must explain how they or others were in danger at the time of the shooting. This interpretation is consistent with a statement made in *Garner*: “Where the suspect poses no *immediate* threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”<sup>46</sup> Read in context, some offenses may signify danger, but the degree of danger is determined by the surrounding circumstances.

In assessing danger, the Court examined the history of the Fourth Amendment.<sup>47</sup> At common law, police officers were permitted to shoot fleeing felons.<sup>48</sup> The Court, however, refused to interpret the Fourth Amendment as allowing police officers to kill fleeing felons because modern felonies are significantly different from felonies at common law, which generally allowed capital punishment upon conviction.<sup>49</sup> Instead, the Court adapted the common law rule to modern times by requiring a relationship between the alleged offense and the degree of danger to the community.<sup>50</sup> It also updated the common law by creating a standard, not a rule, for evaluating force.

In considering the history of the Fourth Amendment, the Court discussed the type of weapons available to police officers at common law.<sup>51</sup> It observed that at that time officers had “rudimentary” weapons, did not carry handguns “until the latter half of the last century,” and engaged in “hand-to-hand” struggles.<sup>52</sup> Applying the common

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harm, police officers do not need “to calculate the ‘probability’ of future danger if the suspects were permitted to escape.”).

45. Sullivan, *supra* note 10, at 61 (“[D]istinctions between rules and standards, categorization and balancing, mark a continuum, not a divide. A rule may be corrupted by exceptions to the point where it resembles a standard; likewise, a standard may attach such fixed weights to the multiple factors it considers that it resembles a rule.”).

46. *Garner*, 471 U.S. at 11 (emphasis added).

47. *Id.* at 12-15.

48. *Id.* at 12.

49. *Id.* at 13 n.11 (Although “[n]ot all felonies were always punishable by death . . . the link was profound.”).

50. *Id.* at 11.

51. *Id.* at 14-15.

52. *Garner*, 471 U.S. at 14-15.

law rule regarding shooting suspects to modern times would ignore significant "technological" changes.<sup>53</sup>

Thus, to determine the reasonableness of a shooting under the Fourth Amendment, a court must consider whether a suspect is dangerous. The Court noted that assessing dangerousness is difficult, yet it justified this requirement by stating that "similarly difficult judgments must be made by the police in equally uncertain circumstances."<sup>54</sup>

In light of the difficulty in determining dangerousness, it is not surprising that the Court was divided on the issue of whether the fleeing nighttime burglary suspect was a danger to the officer or the community. In her dissent, Justice O'Connor thought the offense satisfied the requisite danger.<sup>55</sup> She also interpreted the reasonableness standard of the Fourth Amendment as requiring a suspect to comply with an officer's command. She stated, "to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt."<sup>56</sup> In short, she thought the way to preserve a suspect's right to personal security was to require compliance with an officer's order. She also criticized the majority for considering whether officers may use deadly force, rather than limiting their analysis to whether officers may use handguns.<sup>57</sup> She wondered how officers are to know when a suspect is using a potentially lethal object. She questioned the limits on the use of knives, baseball bats, and ropes.<sup>58</sup> In addition, she emphasized the importance of deferring to the judgment of police officers who have to make split-second decisions.<sup>59</sup>

Dangerousness is also a factor when evaluating the use of nondeadly force. In *Graham v. Connor*,<sup>60</sup> the Supreme Court explained that the Fourth Amendment reasonableness standard described in *Garner* also applied to the use of nondeadly force. After noting the balancing of interests required by the Reasonableness Clause, the Court attempted to provide some factors to consider in determining reasonableness: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers

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53. *Id.* at 15.

54. *Id.* at 20.

55. *Id.* at 26-28 (O'Connor, J., dissenting).

56. *Id.* at 29 (O'Connor, J., dissenting).

57. *Id.* at 31 (O'Connor, J., dissenting).

58. *Id.* at 32 (O'Connor, J., dissenting).

59. *Id.* (O'Connor, J., dissenting).

60. *Graham*, 490 U.S. at 394-95.

or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>61</sup> The Court, however, did not explain how to weigh these factors. Although the *Garner* decision stated that the suspect has a fundamental interest in his life,<sup>62</sup> the *Graham* Court did not explain the importance of a suspect’s interest in personal security when police officers use nondeadly force. Yet, in examining the three factors discussed in *Graham*, it is easy to discern their derivation from *Garner*. In *Garner*, the Court considered the same factors articulated in *Graham*: the seriousness of the offense of burglary, the immediacy of danger to the police officer and the community, and the need to capture the fleeing felon.

In providing some guidelines for the use of nondeadly force, the *Graham* Court emphasized that the force police officers may use in apprehending suspects is governed by the word “reasonable,”<sup>63</sup> while the force prison officials may use is governed by the words “cruel” and “[unusual] punishments.”<sup>64</sup> Although prison officials are liable for the use of force only if they act maliciously, the *Graham* Court explained that police officers may violate the Fourth Amendment even if they act in subjective good faith.<sup>65</sup> A reasonableness standard provides greater protection to suspects because it limits the amount of force police officers can use based on objective factors.

However, in articulating this protective standard, the Court explained that the standard should be applied with consideration for the split-second decisions that police officers have to make.<sup>66</sup> Within that parameter, however, the Court emphasized that even split-second decisions must be reasonable and not made merely in subjective good-faith. Specifically, the Court held that it will evaluate the officer’s decision to use force from the perspective of “a reasonable police officer on the scene.”<sup>67</sup>

The *Garner* and *Graham* decisions thus provide only general guidelines as to how to measure reasonableness. An important factor in these guidelines is the danger created by a suspect. If an officer reasonably perceives the requisite immediate danger, the officer may aggressively apprehend the suspect to protect police officers and society because the need to apprehend the suspect outweighs the suspect’s

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61. *Id.* at 396.

62. *Garner*, 471 U.S. at 9.

63. *Graham*, 490 U.S. at 395-96.

64. *Id.* at 398 (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)).

65. *Id.* at 397-98.

66. *Id.* at 397.

67. *Id.* at 396.

right to bodily integrity. In recognizing the danger officers face in their work, the Court in both *Garner* and *Graham* noted that it had previously allowed officers to conduct a limited search of suspects during investigations in *Terry v. Ohio*.<sup>68</sup> Since the Court upheld the preventive police practice in *Terry* and its companion case of *Sibron v. New York*,<sup>69</sup> the Court has similarly considered the presence of danger in upholding numerous other preventive actions by police officers.<sup>70</sup>

### III. Frisking Suspects for Weapons: Preventive Actions

The need to protect police officers and innocent bystanders from danger is one factor courts use when determining the constitutionality of preventive police practices. These practices include searching a suspect,<sup>71</sup> conducting a protective sweep of an area,<sup>72</sup> ordering a suspect out of a vehicle,<sup>73</sup> taking a suspect to the police station,<sup>74</sup> taking inventory of the contents of a vehicle,<sup>75</sup> and even testing for illegal drugs.<sup>76</sup> When police officers decide to frisk a suspect, however, danger is the only factor courts consider.<sup>77</sup> In evaluating other police practices, the Supreme Court considered the government's justification for an intrusion.<sup>78</sup> *Terry v. Ohio*<sup>79</sup> and *Sibron v. New York*<sup>80</sup> established the significance of danger and its justification for intrusive police conduct. Since these decisions, danger has been an important factor in upholding numerous police practices.

#### A. Danger as the Justification for a *Terry* Frisk

In *Terry* and *Sibron*, the Court approved investigatory stops and limited searches under some circumstances. If police officers have reasonable suspicion to believe that a suspect is armed and dangerous,

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68. 392 U.S. 1, 24 (1968).

69. 392 U.S. 40, 64-65 (1968).

70. See *infra* text accompanying notes 153-169.

71. See *infra* text accompanying notes 81-130.

72. See *infra* text accompanying notes 131-148.

73. See *infra* text accompanying notes 419-420.

74. See *infra* text accompanying notes 163-169.

75. See *infra* text accompanying notes 158-161.

76. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (suspicionless urine testing of customs agents who carry firearms is reasonable; employees must be able to properly exercise "judgment and dexterity").

77. See *infra* text accompanying notes 81-85.

78. See *supra* text accompanying notes 43-65 and *infra* text accompanying notes 150-169.

79. *Terry*, 392 U.S. at 24-25.

80. *Sibron*, 392 U.S. at 64-65.

they may conduct a "frisk."<sup>81</sup> This search allows officers to pat down a suspect's clothing, and, if they feel an object that may be a weapon, to search further.<sup>82</sup> This preventive action allows police officers to investigate crimes without jeopardizing their safety or the community's safety. The *Terry* Court determined that the presence of danger in these circumstances outweighed an individual's interest in personal security under the Fourth Amendment.<sup>83</sup>

The Court interpreted the Fourth Amendment to allow police officers to seize and search suspects even if they did not have probable cause to arrest them.<sup>84</sup> Although the language of the amendment only refers to probable cause for warrants, the Court determined officers may stop someone if they have a reasonable suspicion a crime is about to occur, and may search a suspect if they have a reasonable suspicion the suspect is "armed and presently dangerous."<sup>85</sup> The Court explicitly linked the officer's ability to frisk to the officer's reasonable perception of danger.

In both *Terry*<sup>86</sup> and *Sibron*<sup>87</sup> the Court considered the criminal nature of the suspect's activity as a factor in assessing the danger the suspect posed to the investigating officer. In *Terry*, an officer thought men were about to burglarize a store because he saw them repeatedly walk near a particular store.<sup>88</sup> In *Sibron*, the officer thought a suspect was buying drugs because he had spoken with drug addicts.<sup>89</sup> In addition to considering the alleged offense, the Court in both cases also considered whether the suspect's actions during the confrontation with the officer reasonably heightened the officer's sense of danger. In *Terry*, when the plain clothes officer approached the suspects, he identified himself as a police officer and asked them their names. When they "mumbled" a response, the officer grabbed one of the suspects and frisked him.<sup>90</sup> At this point, the officer reasonably thought

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

82. *Id.* at 29. The *Terry* Court implies that the intrusion is to be incremental, with reasonable suspicion that the suspect may be armed and dangerous justifying each intrusion. *Id.* at 29-30. Frisks, which include touching the chest and groin areas, may be "annoying, frightening, and perhaps humiliating experience[s]." *Id.* at 25.

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

84. *Id.* at 24.

85. *Id.* at 30-31.

86. *Id.* at 30.

87. 392 U.S. at 62.

88. *Terry*, 392 U.S. at 6.

89. *Sibron*, 392 U.S. at 62.

90. *Terry*, 392 U.S. at 7.

he was in danger and thus, a frisk was permissible.<sup>91</sup> In *Sibron*, however, the suspect's action of reaching into his pocket did not increase the sense of danger.<sup>92</sup> The Court held that the frisk in *Sibron* was unreasonable.<sup>93</sup> In contrast to the frisk in *Terry*, which was to protect the officer and others in the area,<sup>94</sup> the frisk in *Sibron* was conducted to gather evidence. The Court noted the officer did not specify any facts from which he could "reasonably infer[ ] that the individual was armed and dangerous."<sup>95</sup> The suspect did not lose his right to personal security merely because he spoke with drug addicts.<sup>96</sup> The Court stated, "the suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime."<sup>97</sup>

Although the language of the Fourth Amendment does not refer to frisks or reasonable suspicion, the Court believed that the Reasonableness Clause of the Fourth Amendment allowed frisks in some circumstances. Its rationale was built on a theory of exigent circumstances, with the frisk permissible based on reasonable suspicion, not probable cause.<sup>98</sup> It explained that police officers, who often do not have probable cause to arrest a suspect, still have a duty to investigate a crime that is about to occur.<sup>99</sup> The purpose of the stop is to dispel the officer's reasonable suspicion that a crime is about to occur.<sup>100</sup> If such an investigation is necessary, police officers should not put themselves in unnecessary danger. The Court declared that

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91. *Id.* at 7. The officer thought he felt a gun and later reached inside the suspect's pocket and removed it. *Id.*

92. *Sibron*, 392 U.S. at 45. When the officer approached the suspect and stated, "You know what I am after," the suspect "mumbled something and reached into his pocket." *Id.* The officer "simultaneously" put his hand in the pocket. *Id.*

93. *Id.* at 64-65.

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

95. *Sibron*, 392 U.S. at 64. Although the Court seemed to rely on the subjective belief of the officer that the suspect was not reaching for illegal drugs, the Court nevertheless reiterated the objective standard that it had established in *Terry*. *Id.*

96. *Id.* at 64. In the alternative, the Court noted that even if the officer had had reasonable suspicion to believe that the suspect was armed, the officer would have violated *Terry* by failing to first pat down the outer clothing of the suspect. *Id.* at 65-66. By thrusting his hand directly into the suspect's pocket, the officer acted unreasonably. *Id.*

97. *Id.* The Supreme Court explicitly rejected finding danger based on being part of a group. *Id.* at 65.

98. *Terry*, 392 U.S. at 20-24.

99. *Id.* at 24-25.

100. *Id.* at 30.

the presence of danger outweighed an individual's right to personal security.<sup>101</sup>

The balancing process for frisks resembles the balancing process in *Tennessee v. Garner*<sup>102</sup> and *Graham v. Connor*,<sup>103</sup> except that significantly greater protection attaches to the right to personal security when officers act aggressively. Although the suspects in both *Terry* and *Garner* were allegedly engaged in a burglary, the preventive action in *Terry* was reasonable to diffuse potential danger from an impending burglary, while the aggressive action in *Garner* was unreasonable because the officer shot the suspect to stop him from fleeing the scene of the crime.

In upholding the need for preventive frisks, the *Terry* Court did not completely diminish the right to personal security. It stated that a frisk is a "serious intrusion upon the sanctity of the person."<sup>104</sup> In evaluating an individual's right to personal security, the Court recognized that the practice of stopping and frisking suspects may severely undermine respect for the police if they use this practice to harass youths and minorities.<sup>105</sup>

Despite the strong interests in the right to personal security and the freedom from harassment, the Court nevertheless approved of frisks when officers have reasonable suspicion to believe that a suspect is dangerous.<sup>106</sup> The *Terry* Court cited the problem of violence in America as a justification for its holding:

Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and 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.<sup>107</sup>

In balancing the interests, the Court linked the analysis of reasonableness to the analysis of danger posed by a suspect. The *Terry* Court found that sufficient danger was present because the officer had rea-

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101. *Id.* at 23.

102. *See supra* text accompanying notes 32-59.

103. *See supra* text accompanying notes 60-67.

104. *Terry*, 392 U.S. at 17. The Court noted that a frisk may include a touching of a person's "arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." *Id.* at 17 (quoting *Priar and Martin, Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S. 481 (1954)).

105. *Terry*, 392 U.S. at 14-15 n.11.

106. *Id.* at 27.

107. *Id.* at 23-24.



sonable suspicion to believe that the suspects were about to burglarize a store.<sup>108</sup> The Court stated that a *Terry* frisk may be “designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”<sup>109</sup>

The suspect’s alleged offense and the suspect’s actions are factors to consider in determining whether a frisk is reasonable. In upholding the frisk in *Terry* and finding the frisk in *Sibron* unlawful, the Court aptly noted that the reasonableness of any frisk depends upon the facts of a particular case.<sup>110</sup> Although the *Terry* Court limited its holding to the facts of the case,<sup>111</sup> the Court analyzed the facts of other cases to determine whether the circumstances justified preventive frisks.

## B. The Progeny of *Terry*

The progeny of *Terry* reveal that only a reasonable perception of danger justifies a frisk. Several decisions have discussed frisks associated with illegal drug activity: *Minnesota v. Dickerson*<sup>112</sup> refused to extend *Terry* frisks to drug searches; *Ybarra v. Illinois*<sup>113</sup> prohibited police officers from frisking bar patrons when the officers executed a warrant to search the bar for drugs; and *Adams v. Williams*<sup>114</sup> suggested that even when the alleged offense is possession of drugs, other circumstances may nevertheless support an officer’s decision to frisk a suspect based on a reasonable perception of danger. These decisions reveal that the mere presence of drug activity does not justify searching individuals for weapons or drugs.

In *Dickerson*, the Supreme Court refused to extend the scope of a frisk to include a search for drugs.<sup>115</sup> The Court affirmed that a *Terry* frisk 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.’”<sup>116</sup> However, officers could search suspects for drugs if, after doing a pat down, their sense of touch gave them probable cause to believe the suspect carried illegal drugs.<sup>117</sup> By limiting the *Terry* frisk

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108. *Id.* at 28.

109. *Id.* at 29.

110. *Id.* (“These limitations will have to be developed in the concrete factual circumstances of individual cases.”).

111. *Id.* at 30.

112. *See infra* text accompanying notes 115-117.

113. *See infra* text accompanying notes 118-123.

114. *See infra* notes accompanying text 124-130.

115. *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2138-39 (1993).

116. *Id.* at 2136 (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)).

117. *Id.* at 2137.

to a search for weapons, the Court barred further encroachment into an individual's right to personal security.

The difficulty of assessing danger was discussed in *Ybarra v. Illinois*,<sup>118</sup> a decision in which a majority of the Court refused to accept the dissent's bright-line rule.<sup>119</sup> This rule provides that when officers are executing search warrants for drugs in a public place, officers may frisk the people present because guns are "tools of the trade"<sup>120</sup> of drug dealers and buyers. The majority reiterated that individualized suspicion is the standard for *Terry* frisks. It refused to assume that individuals present during the execution of a search warrant were likely to be armed or that the presence of a group automatically endangered the officers.<sup>121</sup> The dissent, however, believed that a "group" danger theory was valid because the officers were looking at the search area and not the people present.<sup>122</sup> In finding the frisk of a bar patron unreasonable, the Court noted that neither the customers' actions nor their attire created a sense of danger.<sup>123</sup>

Although the presence of drugs in *Ybarra* did not automatically signify danger, other offenses can. In *Adams v. Williams*,<sup>124</sup> the Court upheld a frisk of a suspect based on a tip that a person in the suspect's car had both a gun and some drugs.<sup>125</sup> The Court held the stop and the frisk was justifiable because the officer had probable cause to believe the suspect did not have a permit for his gun.<sup>126</sup> The Court's assessment of danger,<sup>127</sup> however, ignored one important fact—state

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118. 444 U.S. 85, 94-96 (1979).

119. *Id.* at 92-93.

120. *Id.* at 106 (Rehnquist, J., dissenting) (quoting *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977)).

121. *Id.* at 92-93. The police officers had a warrant to search a bar and the bartender. It did not authorize them to search the bar's patrons. Even though the bar was associated with illegal drugs and twelve customers filled the small search area, the Court refused to allow a general search for weapons. *Id.* at 90-92.

122. *Id.* at 106-07 (Rehnquist, J., dissenting). The dissent contended that executing search warrants creates more danger than investigating crimes. *Id.* at 107.

123. *Id.* at 93. The patron wore a large jacket, which could conceal weapons. The Court did not interpret the presence of baggy clothing as creating a need for a frisk. *Id.*

124. 407 U.S. 143 (1972).

125. *Id.* at 147-49.

126. *Id.* at 148.

127. *Id.* at 148. The facts of *Adams* reveal the complexities in assessing danger. At 2:15 a.m. an informant walked up to a police officer in his cruiser and told him that a man in a nearby car was carrying a gun at his waist and had drugs. *Id.* at 144-45. In this high crime area, the officer walked over to the car and tapped on the window, asking the driver to open the door. *Id.* at 145. When the suspect rolled down the window instead of opening the door, the officer reached inside the car, relying on an informant's tip that a gun was at the suspect's waist. *Id.* The officer took the gun, even though it was not visible when he saw the suspect. *Id.* Unlike the stop in *Terry*, the officer did not ask any questions to

law permitted citizens to carry weapons provided they were licensed.<sup>128</sup> In determining the requisite danger for a frisk, the Court seemed to rely upon the officer's mere suspicion that the driver had a weapon in a high-crime area at night. The dissent, however, did not believe the suspect's mere possession of a gun signified danger.<sup>129</sup> The dissent suggested that if gun control were necessary, the Court should "water down the Second rather than the Fourth Amendment."<sup>130</sup> However, the majority's assessment of danger prevailed, indicating the Court's strong concern for officer protection and minimal interest in a citizen's right to personal security.

The Court's heightened concern for police protection compelled it to expand the scope of a frisk to include a search of the area near a suspect. The constitutionality of this expanded search was determined by the same standard required for the frisk of a person: reasonable suspicion that the officer was in danger. In *Michigan v. Long*,<sup>131</sup> the Court permitted officers to "frisk" the passenger compartment of a car,<sup>132</sup> and in *Maryland v. Buie*,<sup>133</sup> the Court allowed officers to conduct a protective "sweep" of an area while executing a warrant.

Although the *Long* Court recognized that danger is present during all traffic stops,<sup>134</sup> such danger did not justify searching the vehicles of all suspects. The Court stated that the circumstances must

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dispel his suspicion. *Id.* Three factors were significant for the Court: the high-crime area, the suspect's failure to follow the officer's command, and the informant's tip that the suspect had a gun and some drugs. *Id.* at 147-49. The need for the frisk, according to the Court, did not arise simply because there was reasonable suspicion to believe that the suspect was involved in drugs. *Id.* at 148. The car's ability to block the officer's view of the suspect, according to the Court, created a "greater" threat to the officer's safety. *Id.*

128. *Adams*, 407 U.S. at 149-50 (Douglas, J., dissenting).

129. *Id.* (Douglas, J., dissenting). In another dissent, Justice Marshall perceived the majority as treating warrantless searches as the "rule rather than [as a] 'narrowly drawn' exception." *Id.* at 154 (Marshall, J., dissenting).

130. *Id.* at 151 (Douglas, J., dissenting).

131. 463 U.S. 1032 (1983).

132. *Id.* at 1050. In *Long*, the search of the passenger compartment occurred when an officer saw a large knife on the floor during a traffic stop. *Id.* The officer then frisked the suspect and searched the compartment. *Id.* The search was not limited to objects in plain view; it included opening containers. *Id.* at 1036. The officer in *Long* lifted an armrest, saw an open pouch, and found marijuana. *Id.* The Court upheld the search of the vehicle, finding that the officer had reasonable suspicion to perceive danger. *Id.* at 1050.

133. 494 U.S. 325 (1990).

134. *Id.* at 1047-48. The Court had previously recognized the danger inherent in traffic stops in *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). In *Mimms* the Court declared that police officers who lawfully stop drivers may order them out of the vehicle without any level of suspicion of danger. *Id.* at 111. The Court held that the intrusion on the driver's liberty was *de minimis* and the officers' interest in safety was significant. *Id.*

create a reasonable suspicion that the suspect is dangerous.<sup>135</sup> In short, it found no automatic right to search cars when the driver is charged with a traffic offense.

For an officer to lawfully search the passenger compartment, the facts must signify danger. In *Long*, the danger existed, according to the majority, because the officer saw a knife on the floor of the car.<sup>136</sup> The presence of this weapon gave the investigating officer the authority to search containers in the vehicle.<sup>137</sup> Although other facts also heightened the officer's perception of danger,<sup>138</sup> the Court placed special emphasis on the large hunting knife.<sup>139</sup>

The Court was divided on how to accurately measure the level of danger. The majority refused to evaluate closely whether the officer could have used other means to protect himself.<sup>140</sup> The dissent did analyze this factor, however, and concluded the officer could have protected himself by keeping the driver outside the car.<sup>141</sup> The officer could then safely enter the car.<sup>142</sup> The dissent added that interpreting these circumstances as constituting danger<sup>143</sup> and by failing to scrutinize the means used the majority did "violence to the requirements of the Fourth Amendment."<sup>144</sup>

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135. *Long*, 463 U.S. at 1049 n.14.

136. *Id.* at 1050.

137. *Id.*

138. *Id.* at 1035-37. The Court offered a lengthy description of the facts justifying the arrest: it was late at night in a rural area; the driver, who was under the influence of an "intoxicant," failed to respond coherently to the officer's requests for identification and registration; the officer saw a knife on the floor of the car; and the officer believed that the suspect, who was not arrested, might have access to other unknown weapons in the car when he returned to it. *Id.* at 1050.

139. *Id.* at 1052 n.16.

140. *Id.* at 1052. The Court declared, "we have not required that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter." *Id.* By limiting scrutiny of available alternatives, the Court diminished an individual's right to privacy by allowing officers to open containers in vehicles when they see a weapon.

141. *Id.* at 1065 (Brennan, J., dissenting).

142. *Id.* (Brennan, J., dissenting).

143. *Id.* at 1061 (Brennan, J., dissenting). The dissent wondered why the police officer should be able to search a closed container only because it "could have contained a weapon." *Id.* (Brennan, J., dissenting) (quoting *id.* at 1050-51). In addition, it questioned what objects will justify an officer's search for "other" weapons. *Id.* It noted that both a hammer and a baseball bat could be a deadly weapon. *Id.* Having these objects in a car should not allow police officers to search containers looking for other "weapons." *Id.* It also noted that the offense justifying the stop, driving under the influence of a drug, should not signify danger to a police officer. *Id.* at 1062. It contended that it "requires imagination to conclude that [the suspect] is presently dangerous." *Id.* at 1062.

144. *Id.* at 1064-65.

In contrast to the extremely heightened perception of danger in *Long*, the Court's view of danger in *Maryland v. Buie* was more rooted in the actual perception of danger, rather than mere possibility of danger. In *Buie*, the Court applied the *Terry* frisk doctrine, and allowed officers to conduct "protective sweeps" as they execute warrants. A protective sweep allows officers to inspect "those spaces where a person may be found"<sup>145</sup> if the officers have reasonable suspicion to believe that danger is present. Thus, as with *Terry* stops, police officers must have reasonable suspicion of danger.<sup>146</sup>

The *Buie* Court created the doctrine of protective sweeps based on the progeny of *Terry*. The Court relied on the safety concerns discussed in *Terry*, *Ybarra*, and *Long*.<sup>147</sup> The *Buie* Court found these cases supported the officers' authority to search the area imbued with the greatest expectation of privacy—the home. The Court noted that in contrast to an investigation on the street, an arrest in the home is more dangerous to police officers because someone may "unexpectedly launch an attack."<sup>148</sup> The only restrictions on this doctrine arise from the need to have reasonable suspicion that someone will harm the officers, and that the search will last no longer than necessary to effectuate the arrest.

In establishing the protective sweep doctrine, the Court merely cited prior case law. It failed to balance the competing interests explicitly. Although *Terry* and its progeny balanced the danger to police against an individual's interest in personal security and privacy, the *Buie* Court focused on danger as the central factor in analyzing the constitutionality of frisks.

Because reasonableness should be a flexible standard, one that balances competing interests, the Court has diminished the right to personal security by focusing solely on the mere *possibility* of danger.

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145. *Buie*, 494 U.S. at 335.

146. The task of ascertaining whether the facts create the requisite danger produced contrasting opinions in *Buie*. Although the majority remanded the case to the lower court for an application of its articulated standard for protective sweeps, *id.* at 336-37, Justices Stevens and Kennedy separately hinted how the lower court should decide the issue. Justice Stevens thought that a police officer's decision to go down basement stairs after arresting the person named in the warrant was inconsistent with the hypothesis that the danger of an attack by a hidden confederate existed. *Id.* at 337 (Stevens, J., concurring). Justice Kennedy, however, thought that the officer's decision was sound. Justice Kennedy stated, "the officers would have been remiss if they had not taken these precautions." *Id.* at 339 (Kennedy, J., dissenting). The contrasting views highlight the difficulty in assessing danger when it becomes the talisman for reasonableness.

147. *Id.* at 333-35.

148. *Id.* at 333.

By deferring too strongly to police safety, and by ignoring the alternatives available to police officers, the Court has sanctioned police practices that interfere with an individual's personal security and privacy.

#### **IV. Limiting Danger: Inherent Danger During Emergencies and Arrests**

The presence of danger has also been a significant factor in determining the actions police officers may take during emergencies and arrests. Although the Supreme Court has never created an "emergency" doctrine under the Fourth Amendment, it has stated that officers may perform community caretaking functions and may act without a warrant if they have both probable cause and exigent circumstances.<sup>149</sup> In noting that exigencies requiring prompt action often occur, the Court has justified police actions taken for the public good, even if these actions did not meet the standards for criminal investigations. In the criminal context, the Court has focused on protecting police when they arrest suspects. The justification for both actions is perceived danger, either to the community or to the officer. An examination of these doctrines reveals how misperceptions of danger can significantly erode the protections afforded by the Fourth Amendment.

##### **A. Emergencies: Community Caretaking Functions**

Under the community caretaking doctrine, police act to protect society during emergencies.<sup>150</sup> The justification for the police action is similar to the justification for conducting *Terry* frisks, except the police action is intended to protect the community rather than police

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149. Although many of the exigent circumstances cases deal with the fear of losing evidence, *see, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 753-54 (1984) (warrantless entry of home held impermissible; even though evidence of intoxication may have dissipated by the time the officer could have gotten a warrant, the evidence related to a minor offense), danger analysis has at times allowed officers to enter a person's home without a warrant.

The presence of drugs and weapons may also constitute exigencies which can justify entering a home without a warrant. Although a federal statute, 18 U.S.C.A. § 3109 (West 1985), limits a federal official's ability to enter without knocking, Justice White in *Illinois v. Condon* urged the Supreme Court to evaluate the need to knock when officers believe that the person to be arrested has both drugs and guns. 113 S.Ct. 1359, 1360 (1993) (White, J., dissenting from denial of order). Although he noted that some courts recognize exigent circumstances simply because drugs are inside, the decision did not address how to handle the entering when officers know that the suspect has just weapons. *Id.*

Recently the Supreme Court granted review to decide whether police officers must announce their presence and purpose before forcibly entering a residence. *See Wilson v. Arkansas*, 115 S. Ct. 571 (1994) (officers executed a search warrant for drugs and a gun).

150. *See infra* text accompanying notes 153-161.

officers, and, thus, the reasonable suspicion standard is inapplicable.<sup>151</sup> Under the community caretaking doctrine, the Court considers only whether the officers reasonably believed that an emergency existed.<sup>152</sup> Thus, the constitutionality of the police action depends upon the court's assessment of whether an "emergency," or a public need for action, exists.

Exigency based on the need for safety can arise when police officers enter a home without a warrant, either to apprehend a killer or to provide aid to those injured inside the home. The Supreme Court recognized this type of exigency in *Mincey v. Arizona*.<sup>153</sup> In *Mincey*, the Court held that police officers could not conduct a detailed search of a home without a warrant even though the suspect had allegedly committed a murder.<sup>154</sup> Even though murder is a serious offense, the Court examined all of the circumstances to determine whether the requisite exigency existed. The Court found an exigency did not arise solely from the nature of the offense because once the officers removed the suspect from the house, the exigency disappeared.<sup>155</sup> It did note, however, that an emergency does exist when police officers "reasonably believe that a person within is in need of immediate aid" or that a killer or other victims are inside.<sup>156</sup>

The Court has similarly allowed firefighters to enter burning buildings not only to extinguish a fire but to investigate the origins of the fire.<sup>157</sup> In these cases, the need to protect police officers and the public outweighs the suspect's interest in privacy.

After a suspect is arrested, the Court allows police officers to inventory the suspect's vehicle in order to protect community safety. The Court in *Cady v. Dombrowski*<sup>158</sup> stated that when police officers remove guns from vehicles left by arrested drivers they perform a "community caretaking function[ ]."<sup>159</sup> These actions, according to the Court, were divorced from criminal investigation.<sup>160</sup> In interpret-

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151. See *infra* text accompanying notes 153-161.

152. See *infra* text accompanying notes 153-161.

153. 437 U.S. 385, 392 (1978).

154. *Id.* at 393-94.

155. *Id.*

156. *Id.* at 392. See generally *Thompson v. Louisiana*, 469 U.S. 17, 21-23 (1984) (officers went to home after receiving a call that a suicidal mother shot her husband; search after mother was removed from the home was impermissible).

157. See *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) (plurality); *Michigan v. Tyler*, 436 U.S. 499, 506 (1978).

158. 413 U.S. 433 (1973).

159. *Id.* at 441.

160. *Id.*

ing the reasonableness of this preventive action, the Court refused to consider the availability of other alternatives.<sup>161</sup> Although the officer in *Dombrowski* had reason to believe the car contained a gun, the Court's interpretation of the inventory doctrine did not require such a belief. The search was reasonable because the Court considered it to be administrative rather than investigative.

The central question under the community caretaking doctrine is whether the balance of interests justifies an officer's intrusive actions. Reasonableness is determined by weighing the right to privacy and personal security against the perceived danger. The degree of importance one places on danger, as with the other doctrines, can skew the balance.

## B. Searches Incident to Lawful Arrests: Inherent Danger

Inherent danger is a part of the justification for searches incident to arrests. The automatic right to search an arrested person is built on three rationales: preventing suspects from destroying evidence, decreasing the likelihood of escape, and protecting police officers.<sup>162</sup> Although these reasons justify the search, the Court in *Chimel v. California*<sup>163</sup> stated that danger is present during all arrests.<sup>164</sup>

Because the Court considered arrests to be inherently dangerous, the Court allowed officers to search an arrested person and the "area within his immediate control"<sup>165</sup> for weapons. By searching the suspect and the immediate area, the police officer could discover and seize any weapon that would endanger the officer or help the suspect escape.<sup>166</sup> The Court limited the search area to the area immediately surrounding the suspect, to safeguard the suspect's right to privacy.<sup>167</sup> The Court also required the search to be contemporaneous to the arrest because the need to conduct a search is based on the need to protect the police officer. Because the officers in *Chimel* had searched the entire house without a warrant, the search was unconstitutional.<sup>168</sup>

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161. *Id.* at 447. It stated: "The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id.*

162. *See, e.g., Chimel v. California*, 395 U.S. 752, 763 (1968).

163. 395 U.S. 752 (1969).

164. *Id.* at 762-63.

165. *Id.* at 763.

166. *Id.*

167. *Id.*

168. *Id.* at 768.



The authority to conduct a search incident to a lawful arrest differs from the authority to conduct a *Terry* frisk. To frisk a suspect, a police officer must have reasonable suspicion that the suspect is armed and dangerous; to conduct a search incident to a lawful arrest, the police officer must only execute a lawful arrest before the search. The officer's authority to search a suspect is automatically generated upon arrest, because the Court perceives arrest to be inherently dangerous. As a result, officers do not need to articulate reasons for their searches under these circumstances.

Although the Court considers danger in evaluating both preventive and aggressive police actions, a misperception of danger associated with the latter is more troublesome. The Court is more willing to tip the scales in favor of officer safety when the intrusion does not implicate bodily integrity. In recent evaluations of aggressive actions, the lower courts have readily recognized the presence of danger.<sup>169</sup> The lower courts have not properly weighed other Fourth Amendment interests, namely the suspect's and society's interests in personal integrity and privacy. By ignoring the alternatives available to police officers, the courts have deferred to the judgment of governmental officials. Such deference is erroneous because mistrust of governmental officials is implicit in the history of the Fourth Amendment.<sup>170</sup>

## V. Litigating Unreasonable Force Claims

Excessive force claims arise whenever police officers use force during investigations or arrests that is "unreasonable" within the meaning of the Fourth Amendment. In determining whether the officers used reasonable force, some courts have used the presence of danger as a litmus test.<sup>171</sup> Although most claims occur when police officers arrest suspects,<sup>172</sup> claims may also arise when officers conduct *Terry* stops, because officers often utilize intrusive means to check for potential danger.<sup>173</sup> An examination of these decisions reveals how courts, in trying to protect police officers and society, have undermined each citizen's right to personal security.

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169. See *infra* text accompanying notes 216-260.

170. See generally, Maclin, *supra* note , at 201

171. See *infra* text accompanying notes 216-260, 281-283.

172. See *infra* text accompanying notes 184-339.

173. See *infra* text accompanying notes 415-423.

### A. Danger to Police Officers and the Community During Arrests

In *Tennessee v. Garner*<sup>174</sup> and *Graham v. Connor*,<sup>175</sup> the Supreme Court made clear that the Fourth Amendment not only determines when police officers may arrest suspects, but also how police officers may arrest suspects. The *Graham* Court offered three factors to determine whether the police conducted an arrest reasonably: the nature of the offense committed, the immediate danger to police officers and others, and the suspect's resistance.<sup>176</sup> The Court, however, did not state that these were exclusive factors, nor did it explain the weight of each factor. The Court's indefiniteness is unsurprising, because no specific guidelines can precisely describe the parameters of reasonableness.

Even under a flexible standard, misperceptions are still possible. Numerous lower courts have misread *Garner* and *Graham* as requiring broad deference to police officers' statements that they feared for their lives.<sup>177</sup> When courts defer so broadly, the reasonableness inquiry loses meaning. Assessing the danger confronting police officers and the community requires consideration of numerous questions. What circumstances are relevant to the issue of reasonableness? Who decides what is reasonable? What offenses increase the likelihood of danger to police officers and others? What movements by suspects create the inference of serious danger? What level of scrutiny should courts use in considering the availability of less intrusive alternatives? An examination of these issues reveals the need to give police officers, juries, and courts greater guidance in determining the reasonableness of force. Without better guidelines, courts may continue to misperceive danger as the central issue in evaluating police practices.

#### 1. Facts Relevant to the Reasonableness Inquiry

Although danger is a factor in determining the constitutionality of the use of deadly force, courts disagree on the relevant time frame for evaluating an officer's actions. Some courts freeze the time frame to include only circumstances present at the moment the officer seized the suspect;<sup>178</sup> others include circumstances prior to the seizure.<sup>179</sup>

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174. See *supra* text accompanying notes 32-59.

175. See *supra* text accompanying notes 60-67.

176. *Graham*, 490 U.S. at 396.

177. See *infra* text accompanying notes 216-260.

178. See *infra* text and accompanying notes 184-195.

179. See *infra* text and accompanying notes 196-209.

How courts resolve this issue significantly affects their assessment of danger.

Resolution of this issue has in part depended upon how courts interpret the *Graham* decision. In *Graham*, the Supreme Court stated that the reasonableness inquiry must be rooted in the reasonable perceptions of an officer:

The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.<sup>180</sup>

The Court thus emphasized that built into the question of reasonableness is a consideration that police officers, unlike courts and juries, often need to make quick decisions. Yet, lower courts have interpreted this passage differently: some use it to construe narrowly the relevant facts,<sup>181</sup> some interpret it as requiring broad deference to the judgment of police officers,<sup>182</sup> and others find the language as only underscoring the nature of police work.<sup>183</sup> An examination of these contrasting views reveals the need for guidelines to assess relevancy.

One of the first cases to define the relevant circumstances narrowly was *Greenidge v. Ruffin*.<sup>184</sup> In *Greenidge*, an undercover officer observed a woman enter a man's car.<sup>185</sup> The officer thought the woman was a prostitute soliciting an illegal act.<sup>186</sup> Rather than requesting other officers for back up, the officer approached the vehicle

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180. *Graham*, 490 U.S. at 396-97.

181. See *infra* text accompanying notes 184-195.

182. See *infra* text accompanying notes 216-260.

183. See, e.g., *Dickerson v. McClellan*, 844 F. Supp. 391, 396 (M.D. Tenn. 1994). In *Dickerson*, the district court rejected the officer's argument for great deference:

[I]n some cases these tough decisions must be second guessed, for not every *post hoc* explanation, no matter how plausible or understandable, can justify every officer's behavior. The best a court can do is attempt to understand the situation as seen by the police and then apply standards of objective reasonableness within these confines. . . . the court would point out that of course not all hindsight is barred in these cases; rather, only antiseptic hindsight. Judging the weight to be assigned to evidence is entirely appropriate, not to mention inevitable.

*Id.* The court sent to the jury the issue of whether police officers had used unreasonable force. *Id.* The jury, the court held, was to determine the facts and apply the standard of reasonableness to the ascertained facts. *Id.*

184. 927 F.2d 789, 791-92 (4th Cir. 1991).

185. *Id.* at 790.

186. *Id.*

without bringing her flashlight.<sup>187</sup> With her police badge hanging from her neck, she went to the car, opened the door, identified herself as an officer, and ordered the two suspects “to place their hands in view.”<sup>188</sup> When the occupants did not respond, the officer drew her weapon and repeated her order. She saw the man “reach for a long cylindrical object from behind the seat.”<sup>189</sup> She then fired at the man, causing him serious injury.<sup>190</sup> The object turned out to be a wooden nightstick.<sup>191</sup>

The Fourth Circuit in *Greenidge* held that two facts were not relevant to the reasonableness inquiry: the officer’s failure to have a back-up and her failure to use her flashlight.<sup>192</sup> In determining whether the officer violated the Fourth Amendment, the court too narrowly defined the circumstances relevant to the issue of reasonableness. The court declared that the conditions confronting the officer the moment she pulled the trigger are the relevant circumstances.<sup>193</sup> In short, the court refused to consider the alternatives available to the officer to investigate the crime. To the Fourth Circuit, reasonableness did not include the officer’s conduct prior to the shooting that could have created the need to use deadly force. Since this decision, the Fourth Circuit has adhered to its narrow reading of relevance.<sup>194</sup> Other courts have also misread *Graham* to require a narrow time frame.<sup>195</sup>

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187. *Id.*

188. *Id.* at 790.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 791.

193. *Id.* at 792.

194. *See* *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993). In *Drewitt*, a plain clothes police officer attempted to stop a person who was driving recklessly. *Id.* at 776. The officer, who did not display his badge, drew his weapon and shouted to the driver to stop. *Id.* When the vehicle stopped, the officer walked in front of it. *Id.* While he was in front of it, the vehicle sped forward, hitting the officer. *Id.* After landing on the hood of the vehicle, he shot the driver twice. *Id.* The Fourth Circuit held that the officer’s failure to identify himself was not relevant to the determination of whether the shooting was reasonable. *Id.* at 780. After determining that there were no material facts in dispute, the court affirmed summary judgment for the officer. *Id.* *See generally* *James v. City of Chester*, 852 F. Supp. 1288, 1295 (D.S.C. 1994) (reasonableness requires examining the circumstances at the moment the officer used force; it was irrelevant that the officer did not “station a guard at the entrance to the . . . apartment, . . . [nor] the officer’s failure to employ proper back up and use a flash light”).

195. *See, e.g.,* *Carter v. Buscher*, 973 F.2d 1328, 1332-3 (7th Cir. 1992). In narrowly defining the relevant time frame, the Seventh Circuit in *Carter* refused to consider the serious misjudgments of several police officers. *Id.* Police officers believed that a suspect had hired someone to kill his wife. *Id.* at 1329. Because the suspect frequently bragged that he was always armed, police officers decided to create a ruse to arrest him on a high-

In contrast, other courts have broadly defined the relevant facts for the reasonableness inquiry.<sup>196</sup> By expanding the time frame, the fact-finder has greater opportunity to scrutinize police practices. In doing so, the fact-finder may perceive less danger.

A case that reveals the importance of utilizing a broader time frame is the Seventh Circuit's decision in *Estate of Starks v. Enyart*.<sup>197</sup> In *Estate of Starks*, the court found all of the police actions prior to a fatal shooting to be relevant.<sup>198</sup> The police knew the suspect had stolen a taxi without the use of violence.<sup>199</sup> The suspect later parked the taxi next to another car.<sup>200</sup> An officer then parked his police car behind the suspect.<sup>201</sup> Three officers then surrounded the vehicle: one at the driver's window, one at the rear, and another in front of the vehicle, standing behind a utility pole.<sup>202</sup> When the suspect refused to comply with an officer's request to get out of the taxi, he put the car in reverse to give him more space to make a sharp turn around the utility pole.<sup>203</sup> When the suspect drove forward, an officer behind the pole placed himself in danger by "moving out from behind the pole without

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way in order to protect themselves and limit the likelihood of injury to bystanders. *Id.* at 1329-30. When the suspect agreed to help a stranger who was allegedly stranded on the road, police officers pretended to be the stranded motorist. *Id.* at 1330. When the suspect failed to get out of his car and examine the engine of the allegedly malfunctioning car, police officers became restless and approached him as he sat in his car. *Id.* One officer shined a flashlight into his eyes and shouted "state police." *Id.* The suspect began firing and hit an officer. *Id.* After numerous rounds of fire, the suspect and an officer died. *Id.*

For the Seventh Circuit, the relevant time frame began once the suspect started shooting the officer. *Id.* at 1332. It refused to consider whether the officers had done anything to precipitate the gunfire. *Id.* at 1333. The officers' decision to arrest him on the road and to directly confront him as he was seated were not relevant to the issue of reasonableness. *Id.* The Seventh Circuit rooted its decision in the language of *Garner* and its view that the reasonableness inquiry began only when the suspect was actually seized. *Id.* at 1332-33. The reasonableness question arose at the moment the officer shot the suspect. *Id.* It stated: "The Fourth Amendment prohibits unreasonable *seizures* not unreasonable, unjustified or outrageous conduct in general." *Id.* at 1332. It explained that even if the plan to arrest him was poor, the reasonable inquiry began when the officers seized the suspect. *Id.* at 1332-33. It also quoted from the district court, which feared second-guessing the judgment of police officers: "[a] contrary holding would create a cottage industry wherein the federal courts would be called upon to second guess police officers as to every discretionary decision regarding time and place of arrest." *Id.* at 1331.

196. See, e.g., *Estate of Starks v. Enyart*, 5 F.3d 230, 233-35 (7th Cir. 1993); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1502 (11th Cir. 1985) (en banc), cert. denied, 476 U.S. 1115 (1986); *Dickerson v. McClellan*, 844 F. Supp. 391, 396-97 (M.D. Tenn. 1994).

197. 5 F.3d 230 (7th Cir. 1993).

198. *Id.* at 234.

199. *Id.* at 233.

200. *Id.* at 232.

201. *Id.*

202. *Id.*

203. *Starks*, 5 F.3d at 232.

leaving [the suspect] time to stop the car.”<sup>204</sup> All three officers then shot and killed the suspect.<sup>205</sup>

The Seventh Circuit criticized the actions of the officers and determined that under the suspect’s version of the facts, the officers created the dangerous situation that justified the use of deadly force.<sup>206</sup> It noted that the suspect’s original offense was nonviolent, and concluded that deadly force was impermissible.<sup>207</sup> It explained, “[i]f a fleeing felon is converted to a ‘threatening’ fleeing felon *solely* based on the actions of a police officer, the police should not increase the degree of intrusiveness.”<sup>208</sup> To find the shooting reasonable under these circumstances would be to find reasonable a shooting of a driver who accidentally is about to kill a police officer.<sup>209</sup>

Thus, the Seventh Circuit did not narrowly construe relevancy. In contrast to the *Greenidge* decision, which refused to consider that the officer failed to request back-up or to use her flashlight, the Seventh Circuit found the actions prior to the shooting to be relevant. In using a broader time frame, the court considered whether the officers created the need to use force as a factor in assessing danger. Other courts have similarly allowed broader time frames in assessing the degree of danger officers faced when they acted aggressively.<sup>210</sup>

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204. *Id.* at 234.

205. *Id.* at 232.

206. *Id.* at 233-34.

207. *Id.*

208. *Id.* at 234.

209. *Id.* at 235. The court also added that the two officers who were not behind the utility pole had to go to trial to resolve the Fourth Amendment claim against them. *Id.* It refused to grant them immunity simply because a fellow officer’s life was in danger based on his own misconduct. *Id.*

210. *See, e.g., Gilmore v. City of Atlanta*, 774 F.2d 1495, 1502 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986); *Dickerson v. McClellan*, 844 F. Supp. 391, 396-97 (M.D. Tenn. 1994).

The Eleventh Circuit in *Gilmore* considered all of the circumstances that preceded an officer shooting the suspect. *Gilmore*, 774 F.2d at 1502. Two officers believed that a suspect, who had been heavily drinking, had threatened another driver with a gun taken from the trunk of his car. *Id.* at 1496. The officers went to the suspect’s home and the suspect resisted going to the officers’ cruiser. *Id.* at 1496-97. An officer then began beating him. *Id.* at 1497. The suspect reached for one of the officer’s guns. *Id.* at 1497 n.1. It fell to the ground, and another officer shot the suspect as he “lunged toward” him. *Id.* In assessing the danger posed to the officer who shot the suspect, the Eleventh Circuit held that the shooting was unreasonable. *Id.* at 1501. It stated: “[A]ny fear on the officer’s part was the fear of retaliation against his own unjustified physical abuse. . . . [A] moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power.” *Id.* Danger was also lessened by the facts that the suspect was small, drunk, and lacked a weapon when the officers arrived. *Id.* at 1502. Danger arose because of the officers’ provocation, not the suspect’s conduct. *Id.* The court upheld the

The court's definition of the relevant time frame thus affects their determination of reasonableness and their perception of danger. Courts that narrowly define the relevant circumstances do not scrutinize police practices that occur before a shooting. Courts that broadly define the relevant circumstances do not freeze the time frame at the moment of the shooting, and consider the facts that occur before a shooting. Although the Supreme Court in both *Garner* and *Graham* recognized that police officers often have to make quick decisions, the Court did not equate deference with a lack of scrutiny. By broadly defining the relevant circumstances, a court acknowledges the importance of limiting governmental power that unduly infringes on an individual's right to personal security.

## 2. *The Jury's Role: Civil Fourth Amendment Claims*

When suspects sue police officers for injuries incurred during their arrests, they allege both that the officers seized them and that the officers used unreasonable force. The difficulty in establishing this type of claim centers on the second issue—reasonableness—because when police officers intentionally use physical force they have effectuated a Fourth Amendment seizure.<sup>211</sup> Although the issue of reasonableness seems like a classic issue for a jury, courts disagree on the jury's role in evaluating unreasonable force claims. The central issue in the controversy is whether the objective reasonableness standard established in *Garner* and *Graham* favors having the courts decide reasonableness on summary judgment.

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district court's judgment that the officers acted unreasonably in killing the suspect. *Id.* at 1505.

By expanding the time frame to conduct prior to a challenged shooting, a federal district judge in *Dickerson v. McClellan*, 844 F. Supp. 391, 396-97 (M.D. Tenn. 1994), also sent the issue of reasonableness to the jury. The officers in *Dickerson* entered a house without a warrant, without knocking, or announcing their presence. *Id.* at 392. All that they knew was that a shooting had occurred in the neighborhood and were directed to the suspect's home. *Id.* When the homeowner grabbed his gun to respond to unknown people entering his house, the officers shot him. *Id.* In dispute was whether the homeowner pointed a gun at the officers. *Id.* Instead of freezing the time frame at the moment of the shooting, the court held that the officers' misconduct prior to the shooting was relevant to the issue of reasonableness. *Id.* at 396. The court explained, "[a]cting on a hunch that someone could be in danger and then taking actions that could place themselves and anyone inside in greater danger are not objectively reasonable behaviors by an officer." *Id.* The court thus determined that the issue of reasonableness required consideration of the officer's conduct prior to the shooting. *Id.*

211. See, e.g., Kathryn R. Urbonya, "Accidental" Shootings as Fourth Amendment Seizures, 20 HASTINGS CONST. L.Q. 337, 354-367 (1993).

A typical unreasonable force case requires the trier of fact to determine what actually happened at the scene of the arrest. Police officers and suspects rarely agree on the facts. To resolve material, disputed facts, juries often have to make credibility determinations. In doing so, the jury fulfills its role as fact-finder.<sup>212</sup> The jury may also decide how to apply the reasonableness standard to the given facts.<sup>213</sup> Numerous courts have recognized the jury's role, and have properly denied summary judgment in unreasonable force cases.<sup>214</sup>

In contrast, some courts interpret the Supreme Court's decisions in *Garner* and *Graham* as requiring courts to strongly defer to the judgment of police officers in evaluating reasonableness.<sup>215</sup> This deference arises because courts perceive scrutiny as impermissible second-guessing of split-second judgments made by police officers. Under this interpretation reasonableness becomes a means of acknowledging the difficult nature of police work. With this perspective, many courts have misinterpreted the jury's role.

In *Krueger v. Fuhr*,<sup>216</sup> the Eighth Circuit usurped the jury's power to determine reasonableness by resolving a case on summary judgment. In *Krueger*, an officer alleged he heard the suspect withdraw a

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212. See, e.g., Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 363 (1994).

213. See *id.* at 364 (“[r]easonableness *vel non* was a classic question of fact for the jury”) (quoting Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179 (1991)).

214. See, e.g., *Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) (jury must decide whether police officers beat handcuffed suspect with a flashlight and kneed him in the groin); *Kane v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993) (jury must determine whether the officer who slammed the suspect's head into the pavement was in danger, in light of the fact that the suspect weighed 100 pounds and the officer weighed 200 pounds); *Spann v. Rainey*, 987 F.2d 1110, 1114-15 (5th Cir. 1993) (retrial granted because a jury could find unreasonable the striking of a suspect in a diabetic coma for failing to identify himself); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1045 (6th Cir. 1992) (jury might find unreasonable the officers' repeated use of their guns); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991) (jury must decide whether the force was objectively reasonable); *Walmsley v. City of Philadelphia*, 872 F.2d 546, 553 (3d Cir. 1989), *cert. denied*, 493 U.S. 955 (1989) (jury must decide whether officer hit the suspect); *Dickerson v. McClellan*, 844 F. Supp. 391, 397 (M.D. Tenn. 1994) (jury must determine whether the suspect presented a threat to the officers).

215. See *infra* text accompanying notes 216-260.

216. 991 F.2d 435, 439 (8th Cir. 1993). An officer in *Krueger* heard that a suspect had just assaulted someone, that he had a knife, and that he was using drugs. *Id.* at 436-37. When the officer saw a person lying on the ground and noted that he matched the description of the suspect, the officer withdrew his gun and ordered the suspect to freeze. *Id.* at 437. The suspect got up and began running. *Id.* When the officer was about three to four yards from the suspect, the officer believed that he could hear the suspect pull an object from his waist. *Id.* Because he was afraid that he would run into the suspect, the officer slowed down and shot the suspect in the back and head. *Id.*



knife as he chased after the suspect.<sup>217</sup> By allegedly reaching towards his waist, the suspect heightened the officer's perception of danger.<sup>218</sup> The court found the shooting was reasonable as a matter of law, even though the knife was found forty-three feet from the suspect's body.<sup>219</sup>

The Eighth Circuit stated it was not concerned with the knife's location because an officer need not see a weapon in order to believe the suspect is armed and dangerous.<sup>220</sup> The Court stated that a furtive gesture was sufficient; whether the suspect actually had a gun was deemed immaterial.<sup>221</sup> Furthermore, the officer's decision to shoot the suspect in the back and head was also immaterial because, the Court boldly stated, "it is not remarkable that an escaping felony suspect would be shot in the back."<sup>222</sup> It specifically refused to question whether, considering the circumstances, the officer should have allowed the suspect to flee rather than kill him.<sup>223</sup> Even if the Eighth Circuit's factual interpretations were uncontested, it is difficult to agree with the court's conclusion that the court, rather than the jury, should decide the issue of reasonableness under these circumstances.

The Sixth Circuit also diminished the importance of the jury in *Smith v. Freland*.<sup>224</sup> The court's review of police officers' conduct was extremely deferential, practically nonexistent. In *Smith*, a driver refused to pull over for police after running a stop sign.<sup>225</sup> A high-speed pursuit then occurred, during which the driver allegedly swerved his car towards the officer's police car twice.<sup>226</sup> When the suspect turned down a dead-end street, the police set up a roadblock at the entrance

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217. *Id.* at 437.

218. *Id.*

219. *Id.* at 439.

220. *Id.*

221. *Id.*; see also *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988). In *Sherrod*, the Seventh Circuit held that whether a suspect is in fact armed is not relevant. *Id.* at 807. It stated, "[W]e categorically reject the district court's assertion that fairness requires that the jury be presented with facts unknown and unavailable to Officer Berry at the time of the shooting (that Sherrod was unarmed)." *Id.* at 806. It also expressed great deference to decisions by police officers: "The Sioux Indians have a prayer that asks for this wisdom: 'Grant that I may not judge another until I have walked a mile in his moccasins.'" *Id.* The dissent, however, thought whether the suspect actually had something in his pocket would aid the jury in determining the type of gesture the suspect in fact had made and resolving conflicts in testimony. *Id.* at 810 (Cummings, J., dissenting).

222. *Krueger*, 991 F.2d at 439-40.

223. *Id.* at 440.

224. 954 F.2d 343 (6th Cir. 1992), *cert. denied*, 112 S.Ct. 1954 (1992).

225. *Id.* at 344.

226. *Id.*

of the road.<sup>227</sup> On one side of the suspect was a fence and behind him was a public swimming pool.<sup>228</sup> An officer parked in front of the suspect's car and got out of his car.<sup>229</sup> The suspect then rammed the officer's car as he started driving away.<sup>230</sup> The officer, who was not in any danger, shot the driver as he headed for the roadblock.<sup>231</sup>

The Sixth Circuit justified the shooting by hypothesizing a need for the shooting: the suspect was headed toward the roadblock, and endangered the lives of the officers at the roadblock. Furthermore, the suspect seemed desperate to get away, and "could have stopped his car and entered one of the neighboring houses, hoping to take hostages."<sup>232</sup> This latter "justification" is just plain fanciful. In determining the conduct was reasonable as a matter of law, the Sixth Circuit refused to consider whether alternatives were available to the shooting officer:

[U]nder *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that the police face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.<sup>233</sup>

Although danger is a factor in determining reasonableness, the mere presence of danger does not justify absolute deference to police officers, or erosion of the jury's role in determining reasonableness.

The Ninth Circuit, in *Scott v. Henrich*,<sup>234</sup> also erroneously decided the reasonableness of a fatal shooting. The officers in *Scott* shot a suspect when he allegedly came to his door with a gun.<sup>235</sup>

The Ninth Circuit held the officer's conduct was reasonable as a matter of law, even though the gun allegedly possessed by the suspect

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227. *Id.*

228. *Id.*

229. *Id.* at 344.

230. *Id.*

231. *Id.*

232. *Id.* at 347.

233. *Id.* at 347.

234. 994 F.2d 1338 (9th Cir. 1992).

235. *Id.* at 1340-41. In *Henrich*, two police officers were investigating a shooting from a two-story apartment. A young child stated that he had seen a man with a gun on the second story. One of the officers then saw a man in a window on that floor. The officers went to an apartment, knocked and announced that they were police. According to the police officers, the suspect opened the door and had a gun in his hand. The officer nearest the door then fired a shot, missing the suspect. The second officer, believing that the suspect had fired, fired four shots at the suspect, killing him.

did not contain the suspect's fingerprints. Like the Sixth Circuit in *Smith*, the Ninth Circuit hypothesized reasons for the lack of fingerprints. The court suggested that perhaps the fingerprints were missing because the suspect did not sweat enough, because the surface of the gun was "too rough to take prints,"<sup>236</sup> or because the smooth part of the gun was too small for a fingerprint.<sup>237</sup> The court found the shooting reasonable as a matter of law, despite its recognition that police officers should not benefit from killing the only opposing witness—the suspect.<sup>238</sup> As with other courts deciding factual issues, the court stated it was not its duty to consider whether the police officers had alternatives available to them.<sup>239</sup>

The Seventh Circuit usurped the jury's role in *Ford v. Childers*<sup>240</sup> by affirming a district court's grant of a directed verdict for an officer at the close of the plaintiff's case. In *Childers*, a police officer observed a masked man robbing a bank.<sup>241</sup> However, the officer could not see what the suspect held in his outstretched hand.<sup>242</sup> The officer allegedly ordered the suspect to stop as he exited the bank.<sup>243</sup> A foot chase ensued, and the officer allegedly again ordered the suspect to stop.<sup>244</sup> When he did not, the officer shot him in the back.<sup>245</sup>

The Seventh Circuit held the officer's conduct was reasonable, relying on the nature of the offense committed by the suspect—armed robbery—to justify the shooting.<sup>246</sup> The court stated that this offense alone indicated the suspect posed "a danger of serious harm to others if not immediately apprehended."<sup>247</sup> The court rejected expert testimony that the officer should have considered other alternatives, and rejected the suspect's assertion that he did not hear the officer's commands to stop.<sup>248</sup> The court relied on language from *Garner* that stated that an officer may use deadly force on a suspect if he has "probable cause" to believe that the suspect has committed a violent

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236. *Id.* at 1343.

237. *Id.*

238. *Id.* at 1341.

239. *Id.* at 1342 ("Officers . . . need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.").

240. 855 F.2d 1271, 1277 (7th cir. 1988).

241. *Id.* at 1272.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 1275-76.

247. *Id.* at 1275.

248. *Id.* at 1276.

offense.<sup>249</sup> The court saw no room for disagreement regarding the serious nature of armed robbery. It justified the use of deadly force based upon the category of the offense. The court failed to consider that it was the jury's role to assess the reasonableness of this shooting. In determining the conduct was reasonable as a matter of law, the court cited the split-second nature of the officer's decision.<sup>250</sup> Although the court explicitly warned that shooting should not be "an automatic response to the law enforcement officer when attempting to capture a fleeing felon,"<sup>251</sup> the court failed to limit such shootings or have a jury determine the reasonableness of the such shootings.

Finally, in *Drewitt v. Pratt*,<sup>252</sup> the Fourth Circuit determined that a shooting was reasonable as a matter of law. Again, in interpreting reasonableness, the court granted significant deference to the judgment of police officers.<sup>253</sup> In *Drewitt*, a plain clothes police officer observed a reckless driver.<sup>254</sup> Without displaying his badge, the officer ordered the driver to stop.<sup>255</sup> When the driver stopped, the officer walked in front of the car.<sup>256</sup> The suspect then hit the officer with his car. The officer rolled onto the hood, fired two shots and killed the driver.<sup>257</sup> The court held that it could decide whether the officer's actions were reasonable.<sup>258</sup> The court deemed it unimportant that the officer walked in front of a vehicle with no lights at night, that had crashed into another vehicle.<sup>259</sup> The court stated that any dispute in facts was "more imagined than real," and thus the court robbed the jury of its role in determining whether the officer's conduct was reasonable.<sup>260</sup>

When courts grant extreme deference to the judgments of police officers, they deprive juries of their role in determining whether the officers used reasonable force within the meaning of the Fourth Amendment. Because a reasonableness standard does not create bright-line rules, juries are better able to examine the totality of circumstances in excessive force cases. Juries may help clarify important

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249. *Id.* at 1274.

250. *Id.* at 1276.

251. *Id.* at 1276 (emphasis omitted).

252. 999 F.2d 774, 780 (4th Cir. 1993).

253. *Id.* at 779-80.

254. *Id.* at 776.

255. *Id.*

256. *Id.*

257. *Id.* at 776.

258. *Id.* at 779-80.

259. *Id.* at 780.

260. *Id.*

elements of the reasonableness standard as applied to the use of force. Two important issues for juries are the significance of the nature of the suspect's offense, and whether the suspect's actions justified an officer's belief that the suspect was a danger to the police or the community.

### 3. *Offenses Signifying Danger to Officers and the Community*

In *Garner*, the Supreme Court allowed police officers to use deadly force if they had probable cause to believe a suspect "committed a crime involving the infliction or threatened infliction of serious physical harm."<sup>261</sup> This language suggests that an officer may shoot a serial killer in the back, even if the officer himself is not in danger. This passage from *Garner*, however, should be read with the Court's immediacy requirement. To justify a shooting, a police officer must perceive immediate danger, whether to himself or the community. Thus it is important to determine whether certain offenses automatically create an inference that the community is in danger unless the police immediately seize the suspect.

The *Garner* Court did not specify the types of offenses that would allow a police officer to shoot a suspect. It merely stated that a nighttime burglary suspect fleeing from a home does not signify the requisite danger to allow the police to shoot him.<sup>262</sup> In analyzing the *Garner* decision, a few courts are heavily influenced by whether the suspect committed a violent offense. In *Krueger v. Fuhr*,<sup>263</sup> the Eighth Circuit evaluated an armed assault, and in *Ford v. Childers*,<sup>264</sup> the Seventh Circuit considered an armed robbery. In both cases, the officers had reason to believe the suspects were armed and in both cases, the officers shot the suspects in the back after they failed to heed their commands to stop. *Krueger* and *Ford* appear to create a per se rule, allowing police to shoot fleeing suspects if the police had probable cause to believe the suspect committed a violent offense. This per se rule arises because the courts decided that the shootings were reasonable as a matter of law.

However, most courts do not center their analysis on the alleged offense. Rather, they focus on the suspect's actions during his confrontation with the police. When the confrontation involves a high-

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261. *Garner*, 471 U.S. at 11.

262. *Id.* at 25.

263. 991 F.2d 435 (8th Cir. 1993). For a discussion of this case, see *supra* text accompanying notes 216-223.

264. 855 F.2d 1271 (7th Cir. 1988). For a discussion of this case, see *supra* text accompanying notes 240-251.

speed pursuit, some courts consider the pursuit itself to be an indication that the suspect is a danger to the community.<sup>265</sup> Some courts believe high-speed pursuits increase danger, and possibly justify a shooting.<sup>266</sup> The Fourth Amendment does not apply when the Supreme Court decisions suggest police pursue suspects in cars because the police do not “seize” drivers during these pursuits.<sup>267</sup> Thus, although some courts often do not scrutinize officers’ decisions to engage in high-speed pursuits under the Fourth Amendment, they nevertheless consider the pursuits to assess whether the driver presented a danger. As a result of this peculiar view of the Fourth Amendment, some courts refuse to evaluate whether it is reasonable to initiate high-speed pursuits of suspects who speed,<sup>268</sup> fail to pay highway tolls,<sup>269</sup> drive through stop signs,<sup>270</sup> skid when leaving a gas station,<sup>271</sup> or drive while intoxicated.<sup>272</sup> Other courts, however, have properly questioned whether the officers conducting a pursuit have created the danger to the community.<sup>273</sup>

#### 4. *Furtive Gestures: Inferring Danger to Police Officers*

Some courts have determined that a “furtive gesture” by a suspect justifies an officer to reasonably believe the suspect was reaching

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265. See, e.g., *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992), *cert. denied*, 112 S. Ct. 1954 (1992).

266. See *supra* text accompanying notes 224-233.

267. See, e.g., Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 KY. L.J. 145, 162 (1994) (“The history of the chase cases suggests that the Court intends to achieve its agenda for enhancing police power by whatever means are necessary.”); Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 270-85 (1991).

268. See *Horta v. Sullivan*, 4 F.3d 2, 7 (1st Cir. 1993).

269. See *Cole v. Bone*, 993 F.2d 1328, 1330 (8th Cir. 1993).

270. See *Freland*, 954 F.2d at 344.

271. See *Temkin v. Frederick County Comm’rs*, 945 F.2d 716, 718 (4th Cir. 1991).

272. See *Fraire v. City of Arlington*, 957 F.2d 1268, 1270-71 (5th Cir. 1992). In *Fraire*, the Fifth Circuit stated that a suspect was dangerous within the meaning of *Garner* because he drank as he drove, drove erratically, and sped “through a residential subdivision, twice crashing the car.” *Id.* at 1276 n.30.

273. See, e.g., *Brower v. County of Inyo*, 884 F.2d 1316, 1317-18 n. 1 (9th Cir. 1989) (“[I]t might be argued that the substantial threat requirement was not met because any danger proceeded from the fact that the police gave chase. This is not to say that the police should never chase suspected car thieves, only that the danger created by the chase would not give them license to use deadly force when it is necessary to prevent escape.”); *Donovan v. City of Milwaukee*, 17 F.3d 944, 951 (7th Cir. 1994) (jury could find that ramming of motorcyclist during pursuit was unreasonable; officer chased suspect because he failed to answer questions about a nearby explosion). See generally *Fagan v. City of Vineland*, 22 F.3d 1283, 1294 (3d Cir. 1994) (municipality may be liable under the Fourteenth Amendment for failing to train police officers not to conduct pursuits for minor traffic offense when circumstances indicate danger to the public).

for a weapon.<sup>274</sup> To justify a shooting under the “furtive gesture” doctrine, officers do not need to see a gun, knife, or even a glint of steel because of the role of the action/reaction theory.<sup>275</sup>

Furtive gestures can create an inference of danger because experts believe that the suspect has time to kill the officer by the time a police officer sees a glint of steel.<sup>276</sup> In *Matthews v. City of Atlanta*,<sup>277</sup> a federal court judge stated that police officers may draw their guns in response to a suspect’s furtive gesture even if they would not be justified to draw their guns under the *Garner* standard. The court ruled that to find otherwise would be to constitutionally require police officers to put themselves in danger.<sup>278</sup>

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274. See, e.g., *Krueger*, 991 F.2d at 437. In *Krueger*, an armed assault suspect had allegedly made a furtive gesture by reaching for his waist. The officer, having other facts to support his belief that the suspect had a knife, shot him in the back. *Id.* The Eighth Circuit found the requisite danger because of the prior armed assault and the furtive gesture. *Id.* at 439.

275. See, e.g., *Sherrod v. Berry*, 856 F.2d 802, 806-07 (7th Cir. 1988). In *Sherrod*, the suspect had allegedly robbed a store and had previously committed other “assaultive crimes.” *Id.* at 803. After police officers stopped the suspect, one officer behind the vehicle had his weapon pointed at the car as did the officer who approached the car. *Id.* When the passenger failed to comply with an officer’s repeated commands to raise his hand, the passenger then allegedly made a furtive gesture by quickly moving “his hand into his coat . . . [as if] he was going to reach for a weapon.” *Id.* (quoting the police officer’s testimony) (brackets in original). The officer then killed the passenger. *Id.* The court stated that it was for the jury to determine whether this gesture justified the killing. *Id.* at 806-07. In determining that it was not relevant whether the suspect actually had a weapon, the court interpreted the Fourth Amendment to require consideration of the split-second nature of officers’ decisions. *Id.* at 805. The Seventh Circuit stated: “[C]ourts and juries must determine the propriety of the officer’s actions based upon a thorough review of the knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment as to whether the use of deadly force was warranted.” *Id.* at 805.

276. See, e.g., Kevin Parsons, *Decision to Use Force: The Confrontational Continuum*, in 8 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 115, 119-20 (1992). Dr. Parsons, a frequent expert in trials involving the use of unreasonable force, described the problem of officers dealing with knives:

Our own testing in conjunction with government contracts for the design of use of force training programs has shown that an individual can draw a knife from a concealed position and cover 21 feet to stab an individual in the face before the average police officer can unholster his weapon and fire one shot. Obviously, knowledge of such threats or lack of knowledge of such issues can have a significant impact upon the reasonableness of an officer’s actions.

*Id.* at 120. Under this theory, if the officer waited to see a glint of steel the suspect would have been able to assault him before he could have reached his gun. Dr. Parsons also noted that certain circumstances need to exist before a furtive gesture could create the inference of danger. In his example, the suspect must be within 21 feet of the officer. Thus, not all furtive gestures create the inference of danger.

277. 699 F. Supp. 1552, 1556-57 (N.D. Ga. 1988).

278. *Id.* at 1557.

To justify a shooting, police officers must reasonably believe a suspect has the ability and opportunity to harm them and that either their lives or the lives of others are in jeopardy.<sup>279</sup> The element of jeopardy captures *Garner's* requirement that the suspect present an immediate danger to officers or the community.<sup>280</sup> A suspect's furtive gestures place the lives of police officers in jeopardy. The act of reaching for an unknown object can justify a shooting if an officer believes a suspect has the ability and opportunity to harm her and the intention to kill the officer.

Under some circumstances a suspect's movement may create a reasonable belief that the suspect is reaching for a gun,<sup>281</sup> knife,<sup>282</sup> or other unknown, but possibly threatening, object on the floor or back-

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279. See, *Ellis v. Wynalda*, 999 F.2d 243, 246-47 (7th Cir. 1993). In *Ellis*, the Seventh Circuit explicitly linked the furtive gesture doctrine with the Fourth Amendment's requirement of jeopardy. The suspect in *Ellis* had allegedly burglarized a pharmacy. *Id.* at 245. He had broken into it by using a sledgehammer to create a hole in a back wall. *Id.* After returning the hammer to his car, the suspect surreptitiously took some drugs and money. *Id.* When the investigating officer saw the hole, he drew his gun and later noticed a person outside. *Id.* He ordered the suspect to stop. *Id.* When the suspect stopped walking and turned around, he suddenly tossed the bag containing drugs at the police officer. *Id.* This lightweight bag did not daze the officer or dislodge his gun. *Id.* When the suspect began running, the officer shot him in the back. *Id.* In analyzing all these facts, the court stated that a jury must decide the issue whether the shooting was reasonable. *Id.* at 247.

The court's discussion of furtive gestures focused on three facts: the suspect's clothing, the quick toss of the bag at the officer, and the lack of harm to the officer. *Id.* at 246-47. The suspect was wearing pants and a sleeveless shirt. *Id.* at 245. This attire, the Seventh Circuit stated, could not support a belief that the suspect had a hammer on him. *Id.* at 246-47. It explained, "[w]hile it was possible that [the suspect] carried a concealed weapon, as much as it is possible that every felon might be carrying a weapon, [the officer] had no particular reason to believe that [the suspect] was armed." *Id.* at 247. The court, in considering the clothing and the original offense, did not believe that it was reasonable at that moment to believe the suspect was armed. *Id.*

The act of tossing a bag at an officer could be a furtive gesture because the suspect could have disarmed or dazed the officer, allowing him to reach for a weapon. In this case, however, the court noted that after tossing the bag, the suspect did not reach for a weapon. *Id.* At that point, the court declared, a shooting would be unjustified because the officer could not reasonably believe that the suspect had a weapon. *Id.* The court wisely noted jeopardy is a necessary condition for a gesture to be "furtive": "When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity." *Id.* Because the tossing of the bag did not result in the suspect reaching for a weapon, the officer could not later shoot the suspect in the back since he was no longer in jeopardy. *Id.*

280. See generally *Samples v. City of Atlanta*, 916 F.2d 1548, 1551 (11th Cir. 1990) (expert testified that the three elements of ability, opportunity, and jeopardy represent the industry's standard for measuring force).

281. See *Sherrod*, 856 F.2d at 805.

282. See *Krueger*, 991 F.2d at 439.



seat of a car.<sup>283</sup> Furtive gestures also occur when a suspect throws an object at an officer.<sup>284</sup> Under these circumstances, the suspect's original offense may or may not influence the police officer's belief that the suspect reached for a weapon. If the suspect's original offense involved a weapon, the officer's belief that the suspect was reaching for a weapon is more reasonable.<sup>285</sup> In many cases, however, courts do not consider the original offense and declare that the furtive gesture itself signified the requisite danger justifying a shooting.<sup>286</sup> Some courts also fail to consider whether the officers could have prevented the furtive gesture by using other means to apprehend the suspect.<sup>287</sup>

The suspect's gesture must signify danger to the police officer before the police officer can justify shooting the suspect. In today's society, where so many citizens are armed, courts and juries may be more willing to assume that a furtive gesture justifies an officer's belief that the suspect was reaching for a weapon. The right to personal security is more symbolic than real, however, if courts and juries automatically make this inference without considering the surrounding circumstances. In most situations, police officers would be wise to ascertain other facts to support the belief of immediate danger.

##### 5. *Lunging at Police Officers: The Need for Escalating Force*

Other movements by suspects, though not actually furtive gestures, may also increase an officer's perception of danger. In contrast to the furtive gestures cases, in which police officers shoot suspects because they fear for their lives, police officers often escalate the amount of nonlethal force they use when suspects "lunge" at them.

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283. See *Greenidge v. Ruffin*, 927 F.2d 789, 790 (4th Cir. 1991) (reached toward backseat); *Young v. City of Killeen*, 775 F.2d 1349, 1351 (5th Cir. 1985) ("reached down to the seat or floorboard of his car").

284. See *Wynalda*, 999 F.2d at 247.

285. See *Krueger*, 991 F.2d at 436-37 (suspect had allegedly assaulted someone and had a knife); *Sherrod*, 856 F.2d at 803 (armed robbery suspect).

286. See, e.g., *Wynalda*, 999 F.2d at 247 (tossing a heavy object at officer could constitute a furtive gesture); *City of Killeen*, 775 F.2d at 1352 (alleged sudden movement created danger).

287. See, e.g., *Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991); *City of Killeen*, 775 F.2d at 1353 (even if the officer negligently created the situation that made the shooting more likely, the suspect's furtive gesture justified the shooting).

In *Reese*, nine police officers had surrounded a robber in his vehicle. *Reese*, 926 F.2d at 496. Even though an officer's siren made it difficult for the car's occupants to hear the commands to put their hands above their heads, the court nevertheless upheld a shooting that followed an alleged furtive gesture. *Id.* at 500-01. It stated that the officer's life would have been in danger if he would have had to shut off the sirens because the act would have "divert[ed] his attention." *Id.* at 496.

The issue in this area is the degree of danger a lunge represents and what type of force is a reasonable response to the suspect's aggressive action.

In evaluating the significance of a lunge, courts need to consider all of the circumstances to discern the danger presented by a suspect. In *Tom v. Volda*,<sup>288</sup> a suspect allegedly stole a bicycle and smashed a police officer's head into the pavement twice as the officer attempted to arrest him. The suspect subsequently lunged at the officer during a struggle.<sup>289</sup> The Seventh Circuit held that the suspect's act of lunging at the officer significantly heightened the officer's perception of danger.<sup>290</sup> The court, however, did not allow the jury to decide whether the suspect's motion was one of surrender or aggression.<sup>291</sup> Similarly, in *Pride v. Does*,<sup>292</sup> the Eighth Circuit allowed a police officer to choke a suspect to prevent him from lunging at her. The court held that the suspect was threatening as a matter of law because of his prior disorderly conduct, his use of profanity, the "intense expression on his face,"<sup>293</sup> and his intoxicated state.<sup>294</sup>

In contrast, the Eleventh Circuit in *Gilmere v. City of Atlanta* required the trial court to determine the significance of a suspect's act of lunging at a police officer.<sup>295</sup> The suspect allegedly threatened another person with a weapon.<sup>296</sup> In a bench trial, the trial court deter-

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288. 963 F.2d 952, 955 (7th cir. 1992). The court noted that the officer did not try to use a chemical repellant because in doing so, the suspect would have had access to her weapon. *Id.* at 962. It also noted that the officer did not have her nightstick with her. *Id.* In considering these facts, the court found her conduct reasonable as a matter of law. *Id.* The court stated that the medical evidence concerning the officer's injuries and numerous witnesses supported the officer's version of what happen. *Id.* at 961. It reasoned that no other alternatives were available to the officer other than killing the suspect. *Id.* at 962. The court thus appeared to consider the offenses that the suspect committed prior to the shooting to support the officer's judgment that her life was in danger when the suspect allegedly lunged at her.

289. *Id.* at 955.

290. *Id.* at 962.

291. *Id.*

292. 997 F.2d 712, 717 (10th Cir. 1993). The officer believed that her action was necessary "in order to restrain him from lunging toward her." *Id.* at 714.

293. *Id.*

294. *Id.* at 717. The handcuffed suspect, however, thought the force was merely retaliatory for his comments about her sexual orientation. *Id.* at 714. Even though the suspect denied getting out of his chair, the court held that the choking under the circumstances was reasonable as a matter of law. *Id.* at 717. It relied on her affidavit, which stated that intoxicated people are often violent. *Id.* Once again in assessing danger, the court broadly deferred to the officer's judgment as to the need for force. Once again a court erroneously deprived a jury of the opportunity to determine reasonableness.

295. 774 F.2d 1495 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

296. *Id.* at 1496.

mined the officers had provoked the suspect into lunging.<sup>297</sup> Because the officers provoked the suspect to lunge at them, they could not cite the suspect's act of lunging as justification for their use of deadly force.<sup>298</sup> In addition, the court noted that police officers' lives were not at risk because the suspect was physically smaller than the officers and inebriated at the time of the shooting.<sup>299</sup> The court held that the shooting was unreasonable.<sup>300</sup>

When suspects lunge at officers, the reasonableness inquiry mandates consideration of all of the circumstances. A lunge alone may not justify a shooting based on danger. The type of police response that is permissible depends not only upon the assessment of danger, but also upon the assessment of reasonableness.

Courts vary in their determination of reasonableness. Some courts consider whether the officers had alternative means available to seize the suspects. Other courts refuse to consider alternatives or fail to discuss the role of alternatives. This can result in conflicting determinations of reasonableness.

#### 6. *Minimizing Danger: Available Alternative Analysis*

Courts most frequently dispute whether the reasonableness inquiry should include an analysis of alternatives available to the seizing officers.<sup>301</sup> The Supreme Court indirectly discussed the role of alternatives in *Tennessee v. Garner*,<sup>302</sup> as it examined whether the police may lawfully use deadly force to apprehend fleeing suspects. The *Garner* Court decided that under some circumstances, the use of deadly force is unconstitutional even if the officers may never apprehend the suspect.<sup>303</sup> In balancing the interests of suspects, society, and law enforcement officers, the Court recognized its decision limited the means police officers could use to apprehend suspects.<sup>304</sup> The Court noted, however, that by prohibiting some shootings, it was not neces-

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297. *Id.*

298. *Id.* at 1502.

299. *Id.*

300. *Id.* at 1505.

301. *See supra* text accompanying notes 184-210. In some respects this issue is similar to the issue of defining the relevant time frame for evaluating the officers' actions. The issues overlap to the extent that they both may discuss whether the officers' actions, which created the need for force, are relevant to resolving the issue of reasonableness. The issues are different in that if the officers did not create the need for force, the issue of alternatives focuses only the means that the officer used to seize a suspect.

302. 471 U.S. 1 (1985).

303. *Id.* at 11.

304. *Id.* at 9-10.

sarily barring police officers from apprehending fleeing suspects.<sup>305</sup> The Court explained that “failure to apprehend at the scene does not necessarily mean that the suspect will never be caught.”<sup>306</sup> In short, the Court recognized that police may utilize other means to seize suspects rather than rely on the use of deadly force. However, the issue of whether the reasonableness requirement mandates courts and juries to consider whether the seizing officers should have used less intrusive means also arises when officers use non-lethal means to seize suspects.<sup>307</sup> Most courts that have discussed the availability of alternatives have not clarified how closely they should scrutinize the alternatives available to police officers.<sup>308</sup> Some courts equate the consideration of alternatives available to officers’ with improper second-guessing of police officers judgment. The Sixth Circuit has strongly objected to second-guessing the judgment of police officers.<sup>309</sup> It stated, “We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.”<sup>310</sup> When the Sixth Circuit does examine alternatives available to police officers, it affords great deference to the judgment of officers when the officers used nonlethal force to seize suspects.<sup>311</sup>

The Fifth Circuit has also refused to explore the significance of alternatives. In *Young v. City of Killeen*,<sup>312</sup> an expert testified that the officer could have utilized six different actions to aid in the apprehension of the suspect. The Fifth Circuit refused to consider expert testimony regarding proper police procedure to analyze the Fourth Amendment reasonableness issue, but did consider the expert testimony in upholding the trial court’s state law negligence claim for the plaintiff.<sup>313</sup> The Fifth Circuit did not explain why the expert testimony was relevant to the negligence claim, but not to the Fourth Amendment reasonableness claim. In another case, the Fifth Circuit also

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305. *Id.* at 9 n.8.

306. *Id.*

307. *See, e.g.*, *Soares v. Connecticut*, 8 F.3d 917, 921 (2d Cir. 1993) (*Graham* did not create a *per se* rule allowing officers to use handcuffs during all arrests); *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993) (handcuffing may be unreasonable if officer knows that it would injure a suspect).

308. *See infra* text accompanying notes 314-323.

309. *See, e.g.*, *Freland*, 954 F.2d at 346-47.

310. 954 F.2d at 347.

311. *See, e.g.*, *Russo v. City of Cincinnati*, 953 F.2d 1036, 1044 (6th Cir. 1992) (by using a Taser, the officer sought “to obviate the need for lethal force”).

312. 775 F.2d 1349, 1351 (5th Cir. 1985).

313. *Id.* at 1352-54.

seemed to ignore a department investigative report that was critical of an officer.<sup>314</sup> The report criticized the officer for chasing a driver down a cul-de-sac and standing in front of the driver's vehicle, inviting "the truck to aim for him."<sup>315</sup> The court never mentioned that the officer could have used other means to seize the suspect.

The Seventh Circuit sent a mixed message regarding the role of alternatives in *Tom v. Volda*.<sup>316</sup> Although the Court noted that the officer's only means for self-defense at the time of an impending attack was her gun,<sup>317</sup> the court never discussed the significance of the officer's failure to have her nightstick with her. Although a baton can be both a lethal and nonlethal weapon, the court did not suggest this omission was relevant to the issue of reasonableness.

A similar issue arises when courts consider violations of department procedure. Many courts believe these violations are relevant to the reasonableness analysis.<sup>318</sup> All courts agree that such violations do not automatically signify a Fourth Amendment violation; however, some courts consider violations to be irrelevant to the reasonableness analysis.<sup>319</sup> Both the Ninth Circuit<sup>320</sup> and a federal district court<sup>321</sup> have failed to consider these violations as an aspect of reasonableness. The Ninth Circuit refused to consider violations of police guidelines dealing with barricaded suspects, because the guidelines were designed to protect police officers and the community, not suspects.<sup>322</sup> Similarly a federal district court held that even if the officers' plan to seize a mentally ill suspect was reckless, the plan had "no bearing on whether [the officer] reasonably believed plaintiff posed a threat of serious injury."<sup>323</sup>

Other courts, however, recognize that the reasonableness inquiry requires consideration of all circumstances facing an officer. These courts often assert they are not using hindsight to evaluate reasonableness, but are simply analyzing the officer's conduct in light of all the circumstances, including any available alternatives. Some Ninth

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314. See *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992).

315. *Id.* at 1272.

316. 963 F.2d 952, 958 (7th Cir. 1992).

317. *Id.* at 962.

318. See, e.g., *Soares*, 8 F.3d at 922 (department handcuffing policy was relevant to, but not dispositive of, the issue whether handcuffing constituted excessive force; reasonableness requires considering all of the circumstances of an arrest).

319. See *infra* text accompanying notes 320-323.

320. See *Scott v. Henrich*, 994 F.2d 1338, 1342 (9th Cir. 1992).

321. *O'Toole v. Kalmar*, No. 85-C 7380, 1990 WL 19542, at \*9 (N.D. Ill. Feb. 23, 1990).

322. *Scott*, 994 F.2d at 1342.

323. *O'Toole*, 1990 WL 19542, at \*9.

Circuit decisions have highlighted the importance of this inquiry. In *Brower v. County of Inyo*, the court interpreted the *Garner* standard as requiring two inquiries: (1) Did the suspect's conduct create a "significant threat" to the safety of officers; and (2) "[d]id a reasonable non-deadly alternative exist for apprehending the suspect?"<sup>324</sup> The court stated the second inquiry was focused on whether the use of force was necessary and compelled the consideration of alternatives.<sup>325</sup> In a later decision, the court similarly stated that reasonableness requires consideration of "alternative courses of actions" open to officers.<sup>326</sup>

In discussing the role of alternatives, the Fourth Circuit has found expert testimony helpful in determining reasonableness. In *Kopf v. Skyrm*,<sup>327</sup> the Fourth Circuit recognized that experts may explain what constitutes the "prevailing standard of conduct" for various weapons. For example, experts can explain how to effectively use canines, slapjacks, handcuffs, mace, and guns.<sup>328</sup> In describing these police tools, experts help the jury understand that while the jury should not use hindsight to judge the officers, neither should it use it to "absolve" them.<sup>329</sup> Other courts have similarly relied upon the use of expert

324. 884 F.2d 1316, 1317-18 (9th Cir. 1989).

325. *Id.* at 1318.

326. *Hopkins v. Andaya*, 958 F.2d 881, 887 (9th Cir. 1992) (italics omitted). In *Hopkins*, an officer hit a suspect with his baton. *Id.* at 883. When the suspect got the baton from the officer, he hit the officer. *Id.* The officer responded by shooting the suspect. *Id.* The officer then radioed for help, reloaded his gun, and hid behind a car. *Id.* When the suspect advanced again, the officer shot him. *Id.* In evaluating these facts, the Ninth Circuit stated the reasonableness of the second shooting required consideration of alternatives available to the officer:

[The officer] was armed with several weapons and could hide behind a car. [He] had already called for help; he needed only to delay [the suspect] for a short period of time. He could have evaded [the suspect], or he could have attempted to subdue him with his fists, his feet, his baton or the butt of his gun.

*Id.* at 887. The court held these alternatives supported its denial of summary judgment for the officer. *Id.* at 888. A jury would have to consider the significance of these alternatives. *Id.*

327. 993 F.2d 374, 379 (4th Cir. 1993).

328. *Id.*

329. *Id.* The court held that the trial court erred in excluding the expert testimony on the proper use of canines and slapjacks. *Id.* It explained that the role of experts depends upon the facts of each case:

Where force is reduced to its most primitive form—the bare hands—expert testimony might not be helpful. Add handcuffs, a gun, a slapjack, mace, or some other tool, and the jury may start to ask itself: what is mace? what is an officer's training on using a gun? how much damage can a slapjack do? Answering these questions may often be assisted by expert testimony.

testimony<sup>330</sup> and have distinguished between automatic deference to the judgment of officers, and reasonable scrutiny of the officers' actions on the scene of the arrest.<sup>331</sup>

The Seventh Circuit, in *Villanova v. Abrams*,<sup>332</sup> stated that the availability of alternatives is a part of the reasonableness inquiry under the Fourth Amendment. In evaluating a Fourth Amendment claim based on an unlawful seizure during a civil commitment, the court held that unreasonableness under the Fourth Amendment is the same issue as unreasonableness for negligence claims.<sup>333</sup> It stated that Justice Learned Hand's formula for negligence applied to the Fourth Amendment reasonableness standard: negligence occurs when the "burden of precautions" was less than the "loss if there is an accident that the precaution could have prevented" and "the probability of an accident."<sup>334</sup> This formula, the court observed, considers the burden of alternatives, a burden evaluated in light of the likelihood of harm to individuals and the community.<sup>335</sup> The court explicitly measured dangerousness based on the probability that the suspect would cause harm if free.<sup>336</sup> It also noted that under the reasonableness standard, less intrusion is permitted if the person has committed "a trivial crime,"<sup>337</sup> a factor specifically articulated in *Graham v. Connor*.<sup>338</sup> The Seventh Circuit concluded that this algebraic formula is nevertheless a standard requiring judgment on the part of officials.<sup>339</sup>

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*Id.* The court added that even if the jury would not have difficulty understanding the police weapon, sometimes it must permit experts to testify as to the standard for using the weapon. *Id.*

330. *See, e.g.,* *Samples v. City of Atlanta*, 916 F.2d 1548, 1551-52 (11th Cir. 1990) (trial court properly allowed experts to testify as to the "prevailing standards in the field of law enforcement" on the use of force and as to whether the physical evidence supported the officer's testimony as to the suspect's acts and reactions to his use of force).

331. *See, e.g., Childers*, 855 F.2d at 1276 ("[A]n officer oftentimes has only a split second to make the critical judgment of whether to use his weapon. But this fact alone will never immunize an otherwise unreasonable use of deadly force."); *Dickerson*, 844 F. Supp. at 396 (Sometimes "tough decisions must be second guessed, for not every *post hoc* explanation, no matter how plausible or understandable, can justify every officer's behavior.").

332. 972 F.2d 792 (7th Cir. 1992).

333. *Id.* at 796. It stated, "The test of negligence at common law and of unlawful search or seizure challenged under the Fourth Amendment is the same: unreasonableness in the circumstances." *Id.*

334. *Id.*

335. *Id.* at 796-97.

336. *Id.*

337. *Id.* at 797.

338. 490 U.S. 386, 396 (1989).

339. *Abrams*, 972 F.2d at 796.

Thus the circuit courts of appeals disagree as to how to evaluate reasonableness; however, all courts focus on danger, whether to the officer or the community. The issue of available alternatives invites consideration of whether officers had less intrusive means to apprehend suspects. This issue for some courts, however, is intertwined with the difficult nature of police work, which often compels quick decisions. Alternative analysis can therefore limit the scope of deference juries and courts afford police officers' assessments of danger.

The difficulty of alternative analysis is perhaps most obvious when courts consider how police officers should apprehend suspects who suffer serious psychological problems. In apprehending these suspects, the police must not only consider the danger facing themselves and the community, but also the danger the suspect presents to himself.

#### **B. Psychologically Disturbed Suspects and the Danger to Officers and the Community**

The presence of danger is also a crucial issue when police officers seize an individual to protect the individual from harming him or herself. In this context, police have neither reasonable suspicion nor probable cause to believe that the individual committed a crime. The seizure is justifiable, because it protects the individual from him or herself. In evaluating whether these seizures are reasonable under the Fourth Amendment, courts focus on the degree of danger present. Courts have considered three different issues: whether the officer had probable cause to believe the individual was a danger to himself,<sup>340</sup> whether unsolicited assistance by police officers, known as a "welfare" stop, was reasonable within the meaning of the Fourth Amendment,<sup>341</sup> and whether the officers used reasonable force when they confronted a disturbed person.<sup>342</sup>

A number of courts have noted that when police officers take a psychologically disturbed individual to a mental institution, they have seized the individual under the Fourth Amendment.<sup>343</sup> The issue in these cases is whether the circumstances known to the officers created probable cause to believe the suspect was a danger to himself.<sup>344</sup>

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340. See *infra* text accompanying notes 344-348.

341. See *infra* text accompanying notes 442-462.

342. See *infra* text accompanying notes 350-360.

343. See, e.g., *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993); *Harris v. Pirch*, 677 F.2d 681, 686 (8th Cir. 1982); *Maag v. Wessler*, 960 F.2d 773, 775-76 (9th Cir. 1991).

344. See, e.g., *Glass*, 984 F.2d at 58 (officers acted pursuant to a state law that allowed an emergency psychiatric examination when they have "reason to believe that the individ-



When officers seize individuals under these circumstances, they must analyze the psychological state of individuals. The Fourth Circuit, in *Gooden v. Howard County*,<sup>345</sup> described the problem of such seizures. It explained that although officers cannot arbitrarily subject citizens to psychological evaluations, the standard for such seizures has not been defined by courts:

Certainly the concept of "dangerousness" which calls on lay police to make a psychological judgment is far more elusive than the question of whether there is probable cause to believe someone has in fact committed a crime. The lack of clarity in the law governing seizures for psychological evaluations is striking when compared to the standards detailed in other Fourth Amendment contexts, where probable cause to suspect criminal misconduct has been painstakingly defined.<sup>346</sup>

After recognizing the problem of asking police officers to assess "psychological" dangerousness, the court further confused this difficult task by placing broad ranging deference in the police officers' alleged facts. It found that case law had not defined "dangerousness with the requisite particularity" to give officers guidance as to what conduct compels psychological evaluations.<sup>347</sup> It strongly deferred to the judgment of police officers, criticizing the dissent for making every encounter with police officers into "credibility contest[s]."<sup>348</sup> In assessing danger, the majority thought that repeated screams from an apartment occupied by a single woman indicated that she was psychologically disturbed.<sup>349</sup>

In addition to assessing psychological harm, officers also have to consider danger in the manner of their seizures. Sometimes officers have to use force to control a psychologically disturbed individual. When courts consider these claims, the officers generally assert that their forceful actions were in self-defense. What began as an act to render aid became an act of self-protection. Although this type of self-defense claim is similar to the assertions officers make in defending their use of force during arrest, the context is different because the officer is dealing with psychologically impaired citizens. A few cases have examined the use of force against such individuals.

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ual has mental disorder and that there is clear and imminent danger of the individual's doing bodily harm to the individual or another") (quoting state law); *Maag*, 960 F.2d at 776 (officer had probable cause to believe that suspect was a danger to himself).

345. 954 F.2d 960, 968 (4th Cir. 1992).

346. *Id.*

347. *Id.*

348. *Id.* at 966 n.1.

349. *Id.*

When a suspect is psychologically impaired, many courts do not discuss whether the suspect's condition affects the determination of reasonableness. In *Krueger v. City of Algoma*,<sup>350</sup> the Seventh Circuit did not discuss the officer's failure to know that a driver was suicidal, even though other officials knew. The court never questioned whether the officer should have used other means to seize the disturbed driver.

Similarly, the Sixth Circuit in *Russo v. City of Cincinnati*<sup>351</sup> never mentioned whether officers should closely examine the means they use to seize a person believed to be both suicidal and homicidal.<sup>352</sup> In analyzing the use of force, the court appeared to show greater deference to the officer's decision to use nonlethal force to seize the individual than to the officer's decision to use lethal force.<sup>353</sup> Perhaps, by sanctioning the initial use of a Taser on the subject, the court recognized the volatile task of seizing a disturbed individual.

The question of whether an officer shot a mentally unbalanced person in self-defense was an issue for the jury in *Samples v. City of Atlanta*.<sup>354</sup> An officer observed a person in a telephone both "screaming like a demented person."<sup>355</sup> When the officer approached the person, he threw a bottle at the officer.<sup>356</sup> The individual then approached the officer with a knife, and the officer shot him until he fell to the ground.<sup>357</sup> In determining that the lower court erred in granting summary judgment for the officer, the court did not mention

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350. 1 F.3d 537, 540-41 (7th Cir. 1993). The court granted summary judgment for the officer, who stopped the driver. *Id.* at 540. Prior to committing a traffic violation, the driver had been taken into custody and threatened to kill himself if he got a ticket. *Id.* at 538. After the parents notified the police that his son had taken a gun, an officer stopped the son. *Id.* at 538-39. According to the officer, the individual got out of the car, pointed a gun at the officer, who hid behind his car. *Id.* at 539. The driver then attempted suicide by shooting himself. *Id.* In analyzing the stop, the court justified the stop because the driver had allegedly committed a traffic offense. *Id.* at 540. It appeared immaterial to the court that the police department knew that the driver was suicidal. The court never mentioned whether the officer should have seized the suspect in another manner.

351. 953 F.2d 1036 (6th Cir. 1992).

352. *Id.* at 1044.

353. *Id.* at 1044-45. It twice stated that the use of nonlethal force demonstrated "an effort to obviate the need for lethal force." *Id.*

354. 846 F.2d 1328, 1332-33 (11th Cir. 1988).

355. *Id.* at 1331.

356. *Id.*

357. *Id.* at 1331-32. Another court has held that once an officer lawfully shoots an individual, the officer may continue to shoot until the suspect ceases presenting any harm. *O'Neal v. DeKalb County*, 667 F. Supp. 853, 858 (N.D. Ga. 1987) ("[T]he Constitution does not require police officers to use a minimum of violence when attempting to stop a suspect from using deadly force against police officers or others.").

whether the officer properly approached the demented individual.<sup>358</sup> The court only stated that a jury must resolve the disputed facts.<sup>359</sup>

Thus, when officers encounter psychologically disturbed individuals, the courts do not seem to analyze the means officers use to apprehend these individuals, nor do they question whether the act of dealing with these individuals affects the reasonableness analysis. As with "welfare stops,"<sup>360</sup> the courts recognize that officers need to seize unbalanced individuals who may be a danger to themselves, police officers and society. Many courts appear to decide that danger was present, but do not set limits on when action based on danger unnecessarily infringes on the right to privacy and personal security.

## VI. Litigating Preventive Actions: Asserting Authority and Self-Protective Searches

The Supreme Court has interpreted the Fourth Amendment to allow police officers to conduct protective searches, under some circumstances, when they investigate crimes. As with the use of force in apprehending suspects, the means officers use to conduct their investigations must be reasonable within the meaning of the Fourth Amendment. Courts typically find protective searches to be reasonable when officers act to safeguard their well-being. Courts have allowed officers to conduct *Terry* frisks,<sup>361</sup> to search suspects incident to the officers' arrest,<sup>362</sup> to search areas that pose a danger to the officers,<sup>363</sup> and to enter a home without knocking and without a warrant in order to safeguard their lives or the lives of others.<sup>364</sup> Often these actions are deemed reasonable because they decrease the potential harm to the officers or others. Preventive searches raise two important issues: (1) what types of circumstances signify danger justifying the use of preventive measures; and (2) if danger is present, what types of preventive measures are constitutionally reasonable? An examination of the decisions discussing preventive actions reveals the complexity of these issues and the trend towards affording police officers great deference in their assessment of danger.

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358. *Id.* at 1333.

359. *Id.* at 1332-33.

360. *See infra* text and accompanying notes 442-462.

361. *See infra* text accompanying notes 367-405.

362. *See infra* text accompanying notes 463-474.

363. *See infra* text accompanying notes 404-405.

364. *See infra* text accompanying notes 442-444.

### A. Danger during *Terry* Stops: Protective Frisks and Protective Sweeps

To lawfully frisk a suspect, police officers must believe that danger is present. In *Terry v. Ohio*,<sup>365</sup> the Court stated that a frisk is lawful if the officer has reasonable suspicion to believe the suspect “is” armed and dangerous or that the suspect “may be” armed and dangerous.<sup>366</sup> Since this decision in 1968, there is little doubt that courts only require reasonable suspicion that the suspect “may be” armed.<sup>367</sup> Similarly courts today allow officers to use more intrusive actions to protect themselves than previous courts would have allowed.<sup>368</sup> Today, many courts and officers perceive the high degree of danger when officers seize suspects.

To justify frisking a suspect, an officer must articulate why he thought the suspect was potentially armed.<sup>369</sup> If an officer sees a gun on a suspect before he lawfully stops him,<sup>370</sup> the officer clearly has reason to believe the suspect is armed. An officer also has reason to believe a suspect is armed when the officer has a reasonable suspicion that the suspect just committed an offense using a weapon, even if the officer did not see the weapon. In most situations, however, the circumstances are less clear cut, and courts and officers simply draw inferences from the circumstances at the time of the seizure. Thus, it is important to determine what type of circumstances reasonably signify danger justifying a frisk. Most courts consider all of the circumstances in analyzing whether a suspect may have been armed and dangerous,<sup>371</sup> which is logical, because the reasonableness inquiry mandates that the courts weigh all the circumstances. Nevertheless, courts give particularly strong weight to certain factors.

An anonymous tip that an individual at a particular location was armed persuaded two courts in two separate cases to find a frisk rea-

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365. 392 U.S. 1, 24 (1967).

366. *Id.* at 30.

367. *See, e.g.*, *United States v. Clark*, 24 F.3d 299, 304 (D.C. Cir. 1994) (In the past, the standard might have required a belief that the suspect was armed; today the standard is that the suspect may have been armed).

368. *Id.* (Modern courts approve of preventive actions that “might have raised judicial eyebrows at the time the *Terry* decision was issued.”).

369. *Terry*, 392 U.S. at 21.

370. For an excellent discussion of lawful *Terry* stops, see Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 *CORNELL L. REV.* 1258, 1264-83 (1990).

371. *See infra* text accompanying notes 377-390.

sonable.<sup>372</sup> Although the only corroborating evidence in these cases was that the police located the described person, both the Court of Appeal for the District of Columbia and Second Circuit found the stop and the frisk procedures to be reasonable under the circumstances.<sup>373</sup> These courts held that a frisk was the only way the officers could safely investigate the alleged crime of possessing a gun.<sup>374</sup> The Second Circuit did not want to require an officer to “wait until the individual brandishes or uses the gun.”<sup>375</sup> Both courts relied on statistics to show the prevalence of gun possession and to document the danger from the misuse.<sup>376</sup>

Courts also strongly weigh facts indicating that a suspect has a history of using weapons to commit crime. Although no courts have found this fact to be dispositive in upholding a *Terry* frisk, one court seemed to suggest that this fact goes a long way towards establishing

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372. *United States v. Bold*, 19 F.3d 99, 104 (2d Cir. 1994); *United States v. Clipper*, 973 F.2d 944, 951 (D.C. Cir. 1992).

373. *Id.*

374. *Id.*

375. *Bold*, 19 F.3d at 104.

376. *Id.*; *Clipper*, 973 F.2d at 951. The Second Circuit in *Bold* described in detail the dangers of guns throughout the nation and in New York, the place where the frisk occurred:

The district court painted a frightening picture when it noted that (1) 200 million handguns and other lethal weapons are in circulation in the United States, (2) more than 4.2 million firearms are added to that total each year, and (3) these weapons caused some 37,000 gunshot deaths in the United States in 1990, and approximately 259,000 nonfatal injuries. . . . Moreover, New York City has a population of approximately eight million, yet as the district court found, only 122,137 pistols are licensed in the city. Those circumstances might be supplemented by the facts that (1) the City of New York, where those officers served and protected, has a well-documented history of illegal hand-gun possession . . . and (2) New York State has approximately eighteen million people according to the 1990 census, yet has only issued gun permits to approximately eighteen thousand people a year from 1982 to 1992. . . . In short, the overwhelming majority of the people in New York State and City are not licensed to carry handguns.

*Bold*, 19 F.3d at 104 (citations omitted). In citing these statistics, the court was attempting to justify the officer's belief both that the stop and frisk were reasonable, despite the Second Amendment, which allows citizens to bear arms. *See generally* STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES*, at x (1989) (“The complete history of the right to keep and bear arms remains hidden in many respects.”); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 146 (1987) (“[T]here is a neat role reversal in the mostly liberal advocates of gun control urging reliance on settled precedent while many conservative anticontrol partisans plead for a radical judicial reinterpretation of this element of the Bill of Rights.”); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *DUKE L.J.* 1236, 1254 (1994) (the Second Amendment right to bear arms is limited; one may not have a right to own a howitzer or to carry a weapon into courtrooms or schools); Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 *How. L.J.* 589, 597 (1991) (Second Amendment is about liberty).

the requisite danger. In *State v. Valentine*,<sup>377</sup> the New Jersey Supreme Court upheld a frisk,<sup>378</sup> stating that the fact that the suspect had previously used a weapon to commit a crime did not automatically create an inference of danger.<sup>379</sup> The court explained that other facts contributed to the officer's reasonable suspicion, such as the suspect's presence in a high-crime area late at night and his "weak alibi" when asked what he was doing.<sup>380</sup> However, these circumstances are frequently present during most police stops. The court emphasized the need for officer safety, noting that it "'should not set the test of sufficient suspicion that the individual is 'armed and presently dangerous' too high when protection of the investigating officer is at stake."<sup>381</sup> Deference to the officer's split-second judgment was appropriate, the court stated, because the decision could have "life-and-death consequences."<sup>382</sup> The court thus considered the frisk reasonable because it was a minimal intrusion and because there was a great need for officer safety.<sup>383</sup>

Another fact often justifying a frisk is the type of crime the suspect allegedly committed. For some courts, certain crimes automatically create an assumption that a weapon is present. Numerous courts today believe that if an officer has a reasonable suspicion to believe the suspect possesses drugs, the officer also has a reasonable suspicion to believe the suspect has a weapon.<sup>384</sup> When courts draw this inference, they automatically uphold the officer's frisk. Some courts, however, limit the presumption by requiring officers to reasonably believe the suspects were involved in "serious" drug offenses, such as heavy

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377. *See, e.g.*, *State v. Valentine*, 636 A.2d 505 (N.J. 1994).

378. *Id.* at 514.

379. *Id.* at 510-11.

380. *Id.*

381. *Id.* at 509 (quoting *United States v. Riggs*, 474 F.2d 699, 705 (2d Cir. 1973), *cert. denied*, 414 U.S. 820 (1973)).

382. *Valentine*, 636 A.2d at 509.

383. *Id.* at 513-14.

384. *See, e.g.*, *United States v. Cannon*, 15 F.3d 896, 900 (9th Cir. 1994) (frisk permissible when officer reasonably believed that suspect was a cocaine dealer); *United States v. Miller*, 974 F.2d 953, 957 (8th Cir. 1992) ("drug trafficking . . . created a wholly credible concern that at least some of the suspects might be armed"); *United States v. Alexander*, 907 F.2d 269, 273 (2d Cir. 1990) ("this Court has repeatedly acknowledged the dangerous nature of the drug trade and the genuine need of law enforcement agents to protect themselves from the deadly threat it may pose"); *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977) (guns are "tools of the trade" for narcotics dealers); *State v. Evans*, 618 N.E.2d 162, 169 (Ohio 1993) ("right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed").

drug trafficking or selling cocaine.<sup>385</sup> Other offenses such as robbery<sup>386</sup> may also create an automatic presumption that the suspect has a weapon.

Actions, such as furtive gestures, by suspects or passengers in a vehicle may also signify danger. As with unreasonable force claims, furtive gestures often allow officers to frisk an individual on the street<sup>387</sup> or in a car.<sup>388</sup> In most cases, unexplained hand movement constitutes a furtive action, and create a reasonable belief that the individual is reaching for a weapon, because many courts believe that traffic stops are inherently dangerous.<sup>389</sup> The Fifth Circuit interpreted a suspect's act of stepping back after an officer ordered the suspect to

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385. *See, e.g.*, *State v. Thomas*, 542 A.2d 912, 916 (N.J. 1988). *But see* *State v. Guy*, 492 N.W.2d 311, 316 (Wis. 1992), *cert. denied*, 113 S. Ct. 3020 (1993) ("To require police to distinguish between major and insignificant dealers or users before making a limited frisk for weapons would be impractical and could unreasonably put officers in danger." Yet the court refused to apply an automatic frisk rule, stating that "the constitutionality of each such frisk will continue to depend upon its facts.").

386. *See, e.g.*, *United States v. Rundle*, 461 F.2d 860, 864 (3d Cir. 1972). *But see* *People v. Hampton*, 606 N.Y.S.2d 628, 629 (1994) (even if officer had reasonable suspicion to believe that suspect was about to rob a taxidriver, frisk was unreasonable).

387. *See, e.g.*, *United States v. Michelletti*, 991 F.2d 183, 184-85 (5th Cir. 1993) (suspect, who had a "cocky attitude," exited bar with drink in one hand and his hand in his pocket; officer thought the hand should not have stayed in the pocket so long); *Poole v. State*, 639 So.2d 96, 97-98 (Fla. 1994) (drug suspect, who reached for his waistband and put something in his pocket, refused to take his hand out of his pocket, creating a "bulge").

388. *See, e.g.*, *United States v. Evans*, 994 F.2d 317, 320-21 (7th Cir. 1993) (frisk of suspect and car were reasonable; the driver "leaned forward at a forty-five degree angle for several seconds"); *People v. Corpany*, 859 P.2d 865, 871 (Colo. 1993) (officer properly frisked fanny pack after passengers in the back seat appeared to be putting something underneath the seat); *State v. Smith*, 637 A.2d 158, 168-9 (N.J. 1994) (person in back seat of car leaned forward, possibly passing an object; the passenger appeared nervous, cried after officer told her he was going to frisk her; her later statement, "It's not mine, they made me put it in there," justified the frisk).

389. *See, e.g.*, *United States v. Tellez*, 11 F.3d 530, 533 (5th Cir. 1993) (stopping car with three passengers, one of whom may have violated parole, was "potentially dangerous"); *Cousart v. United States*, 618 A.2d 96, 101 (App. D.C. 1992) ("While the progress of the auto may have stopped at the time [the officer] arrived, there was nothing to suggest or show to the responding officers the danger was over."). *But see* *State v. Pierce*, 642 A.2d 947, 963 (N.J. 1994). In *Pierce*, the New Jersey Supreme Court, after noting the danger arising from traffic stops, determined that some police practices designed to protect officers can be too intrusive:

We are mindful that police officers are at risk whenever they make a vehicular stop, and that a significant percentage of assaults on police officers occur in the course of traffic stops. . . . Nevertheless, out of the substantial number of ordinary citizens who might on occasion commit commonplace traffic offenses, the vast majority are unarmed.

*Id.* at 960. It held that under its state constitution that officers could not automatically search a vehicle when the driver is arrested for a traffic offense. *Id.* at 959.

stop, as indicating that the suspect was giving “himself [some] space to draw a weapon.”<sup>390</sup>

Some courts more readily perceive danger when an officer conducts an investigation with many individuals present. No court would justify a frisk of an individual just because the person was part of a group; however, when one person in a group may be involved in crime, some courts more easily draw the inference of danger and permit the officer to act preventively.

An extreme example of how some courts readily conclude that a person is armed is the federal district court case of *United States v. Jaramillo*.<sup>391</sup> In *Jaramillo*, officers believed that a man returning from the restroom in a small bar might be armed because two other men had tossed a gun on the floor when the police ordered everyone in the bar to freeze.<sup>392</sup> The court held the officer’s frisk of the suspect was reasonable because the person was standing near the men who previously had a gun.<sup>393</sup> The presence of an actual gun aided the belief that another person in a bar may have one as well.

Other courts<sup>394</sup> have similarly relied upon a “group danger” theory. The Fifth Circuit Court of Appeals<sup>395</sup> interpreted the presence of many individuals as justifying two contrasting police actions: an officer was allowed to frisk a suspect in part because the presence of three

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390. *United States v. Rideau*, 969 F.2d 1572, 1575 (5th Cir. 1992). In *Rideau*, the dissent properly criticized the majority for allowing a frisk of an alleged inebriated person just because he stepped backward:

[I]f [the suspect] had stepped forward, [the officer] most certainly would have viewed it as threatening. Had the defendant stepped to the right or left, it would have been interpreted as nervousness or an attempt to flee. If [the suspect] had remained stiffly frozen in place, it would have been viewed, presumably, as a show of guilt or of abnormal behavior caused by drugs or alcohol.

Perhaps if [the suspect] had graduated from charm school and had been taught how to look “cool and collected” in the face of approaching uniformed officers, he could have managed to avoid the patdown.

*Id.* at 1581. (Smith, J., dissenting). The dissent stated that by finding danger justifying the frisk, the majority nullified the Fourth Amendment right to personal security. *Id.* at 1584-85 (Smith, J., dissenting). It explained that although officers do often face danger, the Fourth Amendment does protect them from unnecessary danger: to frisk, they must have reasonable suspicion that a suspect is armed and dangerous. *Id.* at 1585 (Smith, J., dissenting).

391. 822 F. Supp. 118, 120 (E.D.N.Y. 1993).

392. *Id.* at 119-20.

393. *Id.* at 120.

394. *See, e.g.*, *United States v. Tellez*, 11 F.3d 530, 533 (5th Cir.1993) (Officers “knew that they were entering a potentially dangerous situation by stopping a truck with three passengers, one of whom they believed to be a parole violator.”); *see also* *United States v. Michelletti*, 991 F.2d 183, 185 (5th Cir. 1993).

395. *Michelletti*, 991 F.2d at 185.



men near the suspect increased the officer's sense of danger; the frisk of the suspect was permissible to protect the three men and the officer from possible danger by the suspect.<sup>396</sup> Officers also sometimes assert that the sense of danger was heightened because of the suspect's attitude.<sup>397</sup> One court approved of the frisking of young disorderly kids who wore baggy clothing because the Court felt the youth's bold behavior could indicate they carried a weapon.<sup>398</sup>

Another important issue is whether a person's presence at a location that officers are searching to find illegal drugs inherently signifies that the person present is armed and dangerous.<sup>399</sup> The Supreme Court refused to address this issue in *Guy v. Wisconsin*;<sup>400</sup> only Justices White and Thomas, in their dissent from the Court's denial of certiorari, thought assessing danger in this context was necessary to resolve the sharp conflict in the lower courts.<sup>401</sup> Some courts uphold these types of frisks by automatically drawing two inferences: people present must have some involvement with drugs and people involved with drugs often possess weapons.<sup>402</sup> Other courts, however, hold that a person's mere presence at a searched place is too tenuous a connec-

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396. *Id.* The court upheld the frisk of a person who exited a bar with a drink in one hand and his hand in his pocket:

The officer appreciated the risk involved if indeed there was some criminal intent on the part of the four men. The officer also surmised, in the alternative, that the three men and the police might be in danger if the [suspect] had ill intent and was actually armed. The fact that he kept his right hand in his pocket at all times, given the surrounding circumstances, was reason enough to suspect [him] of possibly being armed and warranted the pat down frisk for the officers' and, possibly, the bystanders' safety.

*Id.* The court thus found that a frisk was permissible in part because of the danger presented by four individuals and in part because of the need to protect three of those same individuals.

397. *United States v. Villanueva*, 15 F.3d 197, 199 (1st Cir. 1994) (disorderly conduct by suspect increases sense of danger); *Michelletti*, 991 F.2d at 185 (suspect had "a bit of a cocky attitude").

398. *Villanueva*, 15 F.3d at 199 ("With the plethora of gun carrying, particularly by the young, we must have sympathy, to an extent, with police officers' apprehension."). In *Villanueva*, the First Circuit noted that baggy clothing can increase an officer's sense of danger: "While defendant's clothing was in current style, and so could not affirmatively be held against him, its capacity for concealment was not irrelevant." *Id.* (citations omitted). The type of clothing that the suspects were wearing thus became one fact increasing the officer's sense of danger.

399. *See United States v. Reid*, 997 F.2d 1576, 1577, 1579 (D.C. Cir. 1993) (upholding frisk of person who had just left an apartment that the officers were just about to search; court determined that an officer reasonably believed that he was in danger by having the person "behind" him as he executed the search warrant for drugs).

400. 113 S. Ct. 3020, 3021 (1993).

401. *Id.*

402. *Id.* (collecting cases).

tion to drug activity.<sup>403</sup> The central issue in this disagreement is the court's assessment of danger.

A person present when officers conduct protective sweeps while executing an arrest warrant may also be subject to frisking. In a protective sweep, officers search an area rather than a person. To frisk a person at the scene, officers must have a reasonable suspicion that the person present poses a danger. Some courts believe the presence of drugs justifies such searches<sup>404</sup> while other courts believe the connection between drugs and danger is too remote to justify a search of persons present.<sup>405</sup>

Courts will consider all the facts known to an officer in determining whether the officer had a reasonable suspicion to believe that either a search of an area or a person was necessary. While many courts refrain from finding a single fact dispositive, they nevertheless use common circumstances such as a high-crime area or the lateness of the hour to create an inference of danger. When officers frisk individuals or search areas, courts seem to easily conclude that the requisite danger was present. Such conclusions are often rooted in the need for officers to take preventive actions to minimize the harm to themselves and sometimes to others. This deference is also apparent when courts evaluate the means officers use during *Terry* stops.

## B. Preventive Actions During *Terry* Stops

An officer's perception of danger determines whether an officer may constitutionally execute a *Terry* stop. As with the use of force to arrest a suspect, reasonableness is the standard, and courts view this

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403. *Id.* (collecting cases).

404. *See, e.g.*, *United States v. Horne*, 4 F.3d 579, 586 (8th Cir. 1993) (Protective sweep was permissible because officers, while executing a search warrant for a fugitive at a home where drugs had been previously seized, "had no way of knowing how many people were there."); *United States v. Coleman*, 969 F.2d 126, 131 n. 20 (5th Cir. 1992) (valid search of pouch in a car because "[w]eapons and violence are frequently associated with drug transactions").

405. *See, e.g.*, *United States v. McQuagge*, 787 F. Supp. 637, 654-55 (E.D. Tex. 1991) (search of van was not a protective sweep). A federal district court in *McQuagge* explicitly rejected the link between drugs and weapons:

The Court has . . . repeatedly repudiated the notion that peace officers can assume danger merely from the nature of a crime, the area in which the confrontation occurred, or the likelihood of danger in a situation. These pronouncements similarly mandate that this court reject the idea that the peace officers can assume danger merely because many, or even most drug dealers are armed and dangerous.

*Id.* at 654. Thus, the court did not infer that because a suspect was involved with drugs he had a gun in his van.

standard with the same focus—danger to the officers. In evaluating whether an officer used unreasonable force, most courts have applied the factors to distinguish *Terry* stops from arrests. The Seventh Circuit,<sup>406</sup> however, has also considered the three factors detailed in *Graham v. Connor*: the type of crime, the threat to officers and others, and the suspect's resistance and flight.<sup>407</sup> Examination of the methods officers use to execute *Terry* stops reveals that the perception of danger has permitted officers to use psychologically and physically intrusive force during *Terry* stops.

Most courts analyze the totality of the circumstances to evaluate whether the actions of police officers during *Terry* stops were reasonable.<sup>408</sup> The Eighth Circuit<sup>409</sup> has specified factors, which other courts have also applied,<sup>410</sup> to evaluate an officer's use of force:

the number of officers and police cars involved, the nature of the crime and whether there is reason to believe the suspect might be armed, the strength of the officers' articulable, objective suspicions, the erratic behavior of or suspicious movements by the persons under observation, and the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.<sup>411</sup>

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406. See, e.g., *United States v. Weaver*, 8 F.3d 1240, 1244 (7th Cir. 1993) (tackling suspect during stop was reasonable); *Tom v. Volda*, 963 F.2d 952, 958 (7th Cir. 1992) (handcuffing during stop was reasonable).

407. Professor Richard Williamson has also properly noted that the means officers use during *Terry* stops should be evaluated in light of the Fourth Amendment standard articulated in *Tennessee v. Garner*. Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and Miranda's Concept of Custody*, 1993 U. ILL. L. REV. 379, 403 (1993) ("Just as killing a fleeing felon suspect under certain conditions may constitute an unreasonable means of seizing a person, so too would the use of excessive force or other debilitating tactics—such as handcuffing—during the period of a nonarrest detention.").

408. See, e.g., *United States v. Perea*, 986 F.2d 633, 644-45 (2d Cir. 1993); *United States v. Harrington*, 923 F.2d 1371, 1373 (9th Cir. 1991), cert. denied, 112 S. Ct. 164 (1991); *United States v. Jones*, 759 F.2d 633, 638 (8th Cir. 1985), cert. denied, 474 U.S. 837 (1985).

409. *Jones*, 759 F.2d at 638-40.

410. See, e.g., *Perea*, 986 F.2d at 644-45. The Second Circuit in *Perea* listed the following factors to aid courts in distinguishing arrests from stops:

The amount of force used by police, the need for such force, and the extent to which the individual's freedom of movement was restrained, and in particular such factors as the number of agents involved; whether the target of the stop was suspected of being armed; the duration of the stop; the physical treatment of the suspect, including whether or not handcuffs were used.

*Id.* at 645 (citations omitted). The court stated that if the force used was too intrusive for a stop, then the suspect was de facto arrested. *Id.* Accord *United States v. Hastamorir*, 881 F.2d 1551, 1556 (11th Cir. 1989).

411. *Jones*, 759 F.2d at 639-40.

These factors raise many of the same factual issues that courts consider when officers act aggressively and use force to arrest a suspect: the alleged crime committed, the need to act quickly for protection, and the suspect's resistance and furtive gestures. In analyzing the methods police use to execute a *Terry* stop, courts grant broad deference to police officers' decisions. During *Terry* stops, police officers are required to use means that quickly "confirm or dispel their suspicions,"<sup>412</sup> some courts have interpreted the United States Supreme Court's decision in *United States v. Sharpe*<sup>413</sup> as requiring minimal scrutiny. In *Sharpe*, the Court stated that courts should not indulge in unrealistic second-guessing:

The fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself render the search unreasonable. The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it.<sup>414</sup>

As with the force used during arrests, reasonableness is the touchstone for evaluating the use of force during *Terry* stops.

As a result of this perceived deference and danger, courts usually uphold *Terry* stops, even though the officers used intrusive means generally associated only with arrests.<sup>415</sup> In executing *Terry* stops, officers have pointed guns at suspects,<sup>416</sup> handcuffed<sup>417</sup> and tackled sus-

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412. *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

413. 470 U.S. 675 (1985).

414. *Sharpe*, 470 U.S. at 687 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)).

415. *See, e.g.*, *United States v. Tilmon*, 19 F.3d 1221, 1224-25 (7th Cir. 1994) ("For better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures either of force more traditionally associated with arrest than with investigatory detention."); *United States v. Harrington*, 923 F.2d 1371, 1373 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 164 (1991) ("Use of force during a *Terry* stop does not convert the stop into an arrest if the force is justified by concern for the safety of the officer or others.").

416. *See, e.g.*, *Tilmon*, 19 F.3d at 1227 ("It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal, so there is a complex tradeoff involved in any proposal to reduce (or increase) the permissible scope of investigatory stops.") (quoting *United States v. Serna-Barreto*, 842 F.2d 965, 968 (7th Cir. 1988)); *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993) ("Courts have generally upheld . . . stops 'with weapons drawn.'") (quoting *United States v. Hardnett*, 804 F.2d 353, 357 (6th Cir. 1986), *cert. denied*, 479 U.S. 1097 (1987)); *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) ("Although effectuating a *Terry* stop by pointing guns at a suspect may elevate a seizure to an 'arrest' in most scenarios, it was not unreasonable under these circumstances."); *Sanders*, 994 F.2d at 205 ("Other circuits have held uniformly that, in and of itself, the mere act of drawing or pointing a weapon during an investigatory detention does not cause it to exceed the permissible bounds of a *Terry* stop or to become a de facto arrest.") (collecting cases). *But see* *People v. Hampton*, 606 N.Y.S.2d 628, 630 (N.Y. App.

pects,<sup>418</sup> compelled suspects to lie on the ground,<sup>419</sup> and put suspects in police cruisers.<sup>420</sup> Although the courts have not created per se rules

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Div. 1994) (both stop and frisk were invalid; officer, who thought a cab driver was being robbed in a high-crime area, impermissibly pointed his gun at a suspect).

417. See, e.g., *Tilmon*, 19 F.3d at 1228 (“Handcuffing—once highly problematic—is becoming quite acceptable in the context of a *Terry* analysis.”); *United States v. Wilson*, 2 F.3d 226, 232 (7th Cir. 1993). The Seventh Circuit in *Wilson* upheld the officer’s decision to handcuff a suspect during a *Terry* stop because of its assessment of danger:

[T]he encounter occurred in the dead of night in a residential community. We have no information about how well illuminated the area was, but it is safe to assume that the hour considerably increased the potential danger level. Furthermore, when he finally accosted [the suspect], [the officer] was not accompanied by other officers. The suspect was hiding under a porch and the officer ordered him to crawl out. At this point, we believe that the officer was justified in handcuffing [the suspect] in the interest of his own safety and the safety of anyone else who might have been in the area.

*Id.* The court upheld the use of handcuffs, even though it did not know the officer’s ability to see the suspect, nor what crime the person had allegedly committed. Other courts have similarly upheld the use of handcuffs during *Terry* stops as sound preventive measures. See *Sanders*, 994 F.2d at 205 (quoting *United States v. Taylor*, 716 F.2d 701, 708 (9th Cir. 1983)) (Handcuffing in some circumstances is permissible even though “it substantially aggravates the intrusiveness and is not typically part of a *Terry* stop.”); *United States v. Miller*, 974 F.2d 953, 957 (8th Cir. 1992) (Handcuffing is permissible because the “suspects in the vicinity outnumbered the officers by six to three” and because the officers had reason to believe that the suspects were involved in drug trafficking.); *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989).

418. *Voida*, 963 F.2d at 958.

419. See, e.g., *Tilmon*, 19 F.3d at 1228 (“When a suspect is considered dangerous, requiring him to lie face down on the ground is the safest way for police officers to approach him, handcuff him and finally determine whether he carries any weapons.”); *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) (“Directing the suspect to lie on the ground provided the officers with a better view of the suspect and prevented him from obtaining weapons which might have been in the car or on his person.”); *Courson v. McMillian*, 939 F.2d 1479, 1496 (11th Cir. 1991) (officer reasonably ordered passenger in car to lie on the ground because her companions were difficult to handle). The Fifth Circuit in *Sanders* found reasonable an officer’s decision to force a suspect to lie on the ground while pointing a gun at him:

Admittedly, being held at gunpoint by the police would be a powerful incentive for most persons neither to flee nor resist an impending investigation. Such a situation is not, however, equally inspirational for everyone. For example, some individuals will be sufficiently familiar with police procedures to believe that the officer will not actually use deadly force against them—particularly in close proximity to innocent bystanders—or will be so hesitant to use force that the suspect can “get the jump” on the officer. Others, such as persons who have been consuming drugs or alcoholic beverages, might misjudge the gravity of the situation or might be confused as to which responses on their part are or are not appropriate. A third group will be so desperate to avoid apprehension that they will knowingly take any risk to evade the police.

*Sanders*, 994 F.2d at 207. Although the court refused to create a rule automatically justifying such use of force, it may offer similar conjectures in other cases. *Id.* at 206.

420. See, e.g., *United States v. Cannon*, 15 F.3d 896, 900 (9th Cir. 1994) (having suspect sit in cruiser was a “reasonable precautionary measure” as the officer did a computer check).

allowing officers to always use these means,<sup>421</sup> they often perceive sufficient danger to justify these actions. For example, the Seventh Circuit<sup>422</sup> stated that even if the force used was too intrusive for a *Terry* stop, the force may nevertheless be reasonable depending on the “degree of suspicion” and the “duration of restraint.”<sup>423</sup> The court implied that a continuum of force exists for *Terry* stops as well as arrests: if officers lack probable cause for an arrest, but use more force than permitted for a *Terry* stop, the force used may nevertheless be reasonable, depending upon the officer’s suspicion and the degree of intrusion.<sup>424</sup>

Most courts uphold the use of intrusive means to execute a *Terry* stop. Although the means officers use during these stops can be psychologically jarring, the implicit message of many courts is that these means are designed to prevent further harm to the officer, suspect, and perhaps the community. They very easily perceive danger when officers act preventively.

In addition to analyzing danger associated with *Terry* stops and arrests, courts also consider danger the key issue in determining whether officers may enter a home without a warrant to aid someone during emergencies. How courts assess danger in this context is important because the home, unlike other places, signifies a profound expectation of privacy, an expectation worthy of consideration in balancing interests under the Fourth Amendment.

### C. Rescue Actions: Emergencies as Inherent Danger

Occasionally, police officers claim the use of aggressive action was necessary to protect the community from harm. In these instances, officers perform “community caretaking” functions, as first discussed by the Supreme Court in *Cady v. Dombrowski*.<sup>425</sup> In *Cady*, the Court held that officers who are not suspicious of any criminal activity may still act to protect the public if their actions are reasonable within the meaning of the Fourth Amendment.<sup>426</sup> Courts disagree regarding the degree of danger that must be present to justify

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421. See, e.g., *Sanders*, 994 F.2d at 206.

422. *Tilmon*, 19 F.3d at 1226 (court adopted a “sliding scale” to evaluate how intrusive police means may be under certain circumstances).

423. *Id.* (quoting *United States v. Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990), *cert. denied*, 502 U.S. 872 (1991)).

424. *Id.*

425. 413 U.S. 433 (1973).

426. *Id.* at 446-47.

these suspicionless seizures, and do not uniformly weigh the interests of the seized individual, society, and the need for caretaking.

The court's assessment of danger was key to the resolution of the motion to suppress evidence at O.J. Simpson's preliminary hearing.<sup>427</sup> The court's ruling centered on whether the detectives who entered Mr. Simpson's home reasonably believed that an emergency existed.<sup>428</sup> To support its conclusion that an emergency existed, the court detailed its findings of fact, stating that the definition of an "emergency" is "a gray area of the law."<sup>429</sup>

In the *Simpson* case, detectives went to Mr. Simpson's house after observing the bloody crime scene of the murder of Nicole Brown Simpson and Ronald Goldman.<sup>430</sup> The court concluded that the detectives initially went to the house for two reasons: to inform Mr. Simpson of the deaths and to have him assume responsibility for his two children, who had been taken to the police station.<sup>431</sup> After ringing the doorbell for fifteen minutes and noticing that lights were on inside the house and vehicles were parked in the driveway, they called Mr. Simpson's home security company.<sup>432</sup> When the security company arrived and provided the detectives with Mr. Simpson's number, a detective called and got the answering machine.<sup>433</sup> Then a detective noticed blood on a vehicle rented by Mr. Simpson.<sup>434</sup> Based on these facts, the court determined that it was reasonable to believe that an emergency existed, which justified a detective climbing a wall that surrounded three residences.<sup>435</sup>

The court also held that the emergency authorized a detective to enter Simpson's guest quarters and speak with a man who stated that he had heard a loud noise earlier that had worried him.<sup>436</sup> The detective then examined tennis shoes found in the guest room.<sup>437</sup> The court found this action was reasonable because an emergency still existed.<sup>438</sup> According to the court, the detective could examine the shoes because

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427. Transcript of Preliminary Hearing, *People v. Simpson*, BA097211, July 7, 1994 (available on Prodigy).

428. *Id.* at \*1.

429. *Id.*

430. *Id.* at \*2.

431. *Id.*

432. *Id.* at \*3.

433. *Id.*

434. *Id.*

435. *Id.* at \*6.

436. *Id.*

437. *Id.* at \*4.

438. *Id.*

he had previously seen bloody footprints at the crime scene.<sup>439</sup> Yet in justifying the officer's other actions, the court linked each action to the detectives' goal of locating people in the houses who could have been harmed by the killer.<sup>440</sup> Thus, the Court believed that the officers' actions did not violate the Fourth Amendment because the officers reasonably believed that other people could have been in danger.<sup>441</sup>

Other courts have also allowed police officers to enter homes to provide aid to a person,<sup>442</sup> to search for unknown victims,<sup>443</sup> and to seize weapons that are a potential danger to residents.<sup>444</sup> Other courts, however, more closely scrutinized the entering of a home.<sup>445</sup>

Courts have also recognized that police officers may perform community caretaking functions in other contexts.<sup>446</sup> One court has

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439. *Id.*

440. *Id.* at \*5-6.

441. *Id.* at \*6.

442. *See, e.g.,* *Wayne v. United States*, 318 F.2d 205, 211 (D.C. App. 1963) (need to give aid to unconscious person); *State v. Plant*, 461 N.W.2d 253, 263 (Neb. 1990) (officer reasonably believed that entering house was necessary "for the protection of the three small unaccounted-for children"); *Duquette v. Godbout*, 471 A.2d 1359, 1362 (R.I. 1984) (A "distraught mother. . . believed [her] child to be in peril within the apartment."). When officers reasonably believe that an emergency exists, some courts also uphold warrantless entries on the ground that if they had not acted they would "have been derelict in their duty in light of all the knowledge they possessed." *Plant*, 461 N.W.2d at 263.

In *Wayne*, the District of Columbia Appellate Court stated that courts should defer to the judgment of police officers in assessing the danger:

People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response. A myriad of circumstances . . . [exist:] smoke coming out of a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe that an injured or seriously ill person is being held within.

*Wayne*, 318 F.2d at 212. In these situations, the court determined that deference is reasonable. *Id.* at 214.

443. *See, e.g.,* *People v. Davis*, 497 N.W.2d 910, 915 (Mich. 1993) (Emergency entries "need not be subject to traditional probable cause analysis, but . . . their legality should be evaluated on the basis of whether the police 'reasonably believed' a person needed aid.").

444. *See, e.g.,* *United States v. Doe*, 764 F.2d 695, 698 (9th Cir. 1985) (after son killed his father on the porch, officer could reasonably enter house to retrieve the gun put in the house by a bystander); *State v. Illig*, 467 N.W.2d 375, 382 (Neb. 1991) (person in house shot person on porch; officer reasonably entered the house and seized gun in the house to "protect the lives" of those near and "to determine if there were any other victims").

445. *See, e.g.,* *People v. Davis*, 497 N.W.2d 910, 920-21 (Mich. 1993) (officers who entered a motel room after a reported shooting should have asked desk clerk in which room the shooting had occurred; level of intrusiveness is a factor in determining the reasonableness of emergency assistance).

446. *See, e.g.,* *In re Forfeiture of \$176,598*, 505 N.W.2d 201, 207 (Mich. 1993) (The following are emergencies: "remov[ing] a former girlfriend following a domestic dispute, removing an intoxicated person from the street, entering an abandoned boat to ascertain



interpreted the Fourth Amendment to severely limit an officer's ability to perform "welfare stops."<sup>447</sup> The Utah Court of Appeals in *Provo City v. Warden*<sup>448</sup> stated that in some circumstances officers may perform suspicionless seizures to assist citizens. In balancing the Fourth Amendment interests, the court stated that such seizures are permissible only when "the circumstances demonstrate an imminent danger to life or limb."<sup>449</sup> The court found that the facts of the case signified danger because the officer acted on information from two individuals that a driver planned to commit suicide. The Court's decision paid great deference to a citizen's right to privacy and personal security.<sup>450</sup> This deference, the court reasoned, was necessary to prohibit "pretextual police activities."<sup>451</sup> Other courts, though not specifically limiting stops related to imminent danger, have stated that serious safety concerns would justify an officer's suspicionless intrusion.<sup>452</sup>

Other courts, however, appear to trust that police officers perform such acts out of concern for citizens rather than as a subterfuge seizure or search.<sup>453</sup> These courts have not interpreted reasonableness to require danger to a person's life or bodily integrity. These courts consider all of the circumstances to determine whether the aid

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ownership and the safety of the mariners, [and] searching an unconscious person for identification.") (footnotes omitted).

447. See, e.g., *Provo City v. Warden*, 844 P.2d 360, 362 (Utah App. 1992), *aff'd*, No. 930059, 1994 WL 257117 (Utah June 10, 1994).

448. *Id.*

449. *Id.* at 364.

450. *Id.*

451. *Id.*

452. See, e.g., *United States v. King*, 990 F.2d 1552, 1560-63 (10th Cir. 1993) (police officer, who was about to ask driver at jammed intersection to quit honking, could ask him to leave his car upon seeing a loaded weapon in the car; officer erred in drawing her weapon, in a state where citizens may carry guns, and threatening to kill him if he failed to follow her order); *United States v. Dunbar*, 470 F. Supp. 704, 707 (D. Conn. 1979), *aff'd*, 610 F.2d 807 (2d Cir. 1979). The district court stated that the purpose of the Fourth Amendment was "to minimize governmental confrontations with the individual." 470 F. Supp. at 708. It nevertheless held that suspicionless stops were permissible when the officers would be providing significant aid to an individual:

The most rigorous view of the Fourth Amendment would not bar police officers from stopping a motorist to inform him that a bridge beyond a bend in the road had just been washed away. Some might contend that, as soon as time permitted, even this situation could be handled less intrusively by placing barricades to close the road, but a stopping of cars to warn and suggest alternate routes scarcely seems unreasonable.

*Id.* at 707. The court thus recognized that in emergencies police officers may seize individuals without reasonable suspicion.

453. See *infra* text accompanying notes 454-459.

was reasonable. For example, some courts have found the following stops of drivers to reasonable caretaking actions: stopping those who have mist on their rear windows,<sup>454</sup> those who are driving on the shoulder of a road late at night with a flashing turn signal,<sup>455</sup> and those who slow down in a turn lane and roll down their window when near an officer.<sup>456</sup> In addition, one court remanded so the trial court could determine whether an officer acted reasonably in stopping a driver to prevent a hat from blowing out of the driver's truck.<sup>457</sup> In resolving the issue of reasonableness, one court<sup>458</sup> stated that it must consider whether alternatives were available to the officer to provide the aid.<sup>459</sup>

Even courts that use a general reasonableness standard occasionally strike down alleged "caretaking" actions. Some courts find it is unreasonable to stop a driver to discuss possible past parking violations,<sup>460</sup> to finish a previously consensual conversation,<sup>461</sup> or to give directions to someone who appears lost.<sup>462</sup> These courts find the action by the police officers unreasonable because of the slight weight they give to the interest in helping individuals under these circumstances and the great weight accorded to a citizen's interest in personal security and privacy.

Determining what constitutes an emergency thus requires consideration of the presence of danger. Some courts require significant danger while other courts look at the circumstances to determine whether the aid was reasonable. In deriving these different standards, the courts implicitly disagree regarding whether the Fourth Amendment presumptively trusts the officers' decisions to search and seize individuals.

#### **D. Protective Searches Incident to Lawful Arrests: Brightline Fictions**

Officers can justify a search incident to a suspect's arrest in three situations: to protect the officer as he takes a suspect into custody, to

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454. *Russell v. Municipality of Anchorage*, 706 P.2d 687, 688 (Alaska Ct. App. 1985).

455. *State v. Goetaski*, 507 A.2d 751, 752 (N.J. Super. Ct. App. Div. 1986).

456. *Crauthers v. State*, 727 P.2d 9, 10 (Alaska Ct. App. 1986).

457. *State v. Chisholm*, 696 P.2d 41, 42 (Wash. Ct. App. 1985).

458. *State v. Anderson*, 439 N.W.2d 840, 848 (Wis. Ct. App. 1989), *rev'd on other grounds*, 454 N.W.2d 763 (Wis. 1990).

459. *Id.* (Court is to consider "the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.").

460. *Id.* at 847.

461. *McDougal v. State*, 580 So.2d 324, 324 (Fla. Dist. Ct. App. 1991).

462. *United States v. Dunbar*, 470 F. Supp. 704, 707 (D. Conn. 1979), *aff'd* 610 F.2d 807 (2d Cir. 1979).

limit escapes, and to prevent the destruction of evidence.<sup>463</sup> When courts uphold these searches, they rarely specify how the searches furthered these justifications. The only issues generally mentioned under this doctrine are whether the areas searched were within the suspect's control and whether the search was contemporaneous with the arrest. Two of these doctrinal elements, however, have become meaningless for many courts. Instead of analyzing the facts of a particular case, courts have upheld searches even though the facts do not support the justification for the search.

The most blatant disregard of the facts has centered on the suspect's immediate control of evidence of weapons. Courts have created a fiction that suspects have access when they do not. Courts have upheld the following searches: searches of a suspect's vehicle, even though at the time of the search the suspect was detained in a police cruiser;<sup>464</sup> searches of the suspect's car, even though the suspect was shot, handcuffed, and surrounded by police officers;<sup>465</sup> searches behind a dresser, even though it was unlikely that the suspect could have reached behind the dresser;<sup>466</sup> searches of a closet, even though the suspect was handcuffed and surrounded by police officers;<sup>467</sup> searches of handbags and suitcases held by the suspect at time of his arrest, even though the officer seized them upon arrest.<sup>468</sup> These bizarre interpretations of the search incident to an arrest doctrine indicate absolute deference to the officer's decision to search an area. Only a few courts have placed realistic boundaries on this discretion.<sup>469</sup>

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463. See *supra* notes 163-165 and accompanying text.

464. See, e.g., *United States v. Lugo*, 978 F.2d 631, 634-35 (10th Cir. 1992); *United States v. Karlin*, 852 F.2d 968, 971 (7th Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989); *Davis v. Robbs*, 794 F.2d 1129, 1130-31 (6th Cir. 1986), *cert. denied*, 479 U.S. 992 (1986).

465. See, e.g., *State v. Calovine*, 579 A.2d 126, 128 (Conn. App. Ct. 1990).

466. *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir. 1984), *cert. denied*, 469 U.S. 934 (1984).

467. *United States v. Queen*, 847 F.2d 346, 353-55 (7th Cir. 1988).

468. *United States v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993); *United States v. Morales*, 923 F.2d 621, 627 (8th Cir. 1991).

469. See, e.g., *United States v. Lugo*, 978 F.2d 631, 634-35 (10th Cir. 1992) (invalid search because "[o]nce [the suspect] had been taken from the scene, there was obviously no threat that he might reach in his vehicle and grab a weapon or destroy evidence"); *United States v. Fafowora*, 865 F.2d 360, 362 (D.C. Cir.), *cert. denied*, 493 U.S. 829 (1989) (police officers who approach individuals outside their vehicle may not search the car); *United States v. Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985) (search may be broader when officers search vehicles as opposed to other areas because of the diminished expectation of privacy); *United States v. Lyons*, 706 F.2d 321, 330 n. 12 (D.C. Cir. 1983) (once police have control of an object and "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer incident to the arrest.").

Several courts explicitly state that officers need not closely examine the facts of a particular case to determine whether the suspect had actual access to the searched area.<sup>470</sup> A search may be reasonable even if access was “slight.”<sup>471</sup> Although one court stated that an officer should not consider a suspect to be either “an acrobat” or “Houdini,”<sup>472</sup> searches are routinely upheld that require such rare physical skills. Similarly, some courts fail to give meaning to the doctrinal requirement that searches must be contemporaneous with arrests.<sup>473</sup>

Prior to the embedding of these fictions in Fourth Amendment jurisprudence, some circuits examined the totality of the circumstances to assess actual access.<sup>474</sup> The standard for this assessment was similar to the standard for analyzing the means officers use during *Terry* stops. For example, the Ninth Circuit<sup>475</sup> considered the number of suspects and officers, the suspects’ location, and the use of guns. This totality of circumstances standard, however, later gave way to the fiction, which did not require actual access.

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470. See, e.g., *United States v. Arango*, 879 F.2d 1501, 1506-07 (7th Cir. 1989), cert. denied, 493 U.S. 1069 (1990). In *Arango*, the Seventh Circuit described this common deference:

[The law] does not require the arresting officer to undergo a detailed analysis, at the time of arrest, of whether the arrestee, handcuffed or not, could reach into the car to seize some item within, either as a weapon or to destroy evidence, or for some altogether different reason. The facts surrounding each arrest are unique, and it is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile. The law simply does not require the arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle.

*Id.* (citing *United States v. Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985). See also *United States v. Queen*, 847 F.2d 346, 353 (7th Cir. 1988) (courts should not second-guess police officers because they “cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee’s ‘immediate control’”).

471. *Queen*, 847 F.2d at 353 (quoting *United States v. Lyons*, 706 F.2d 321, 330 (D.C. Cir. 1983)).

472. *United States v. Lyons*, 706 F.2d 321, 330 (D.C. Cir. 1983) (quoting *United States v. Mapp*, 476 F.2d 67, 80 (2d Cir. 1973)).

473. See, e.g., *Karlin*, 852 F.2d at 971 (issue is whether suspect had access to area at time of arrest, not at time of search); *Palumbo*, 735 F.2d at 1097 (upheld search even though it was unlikely that suspect had access to area at time of arrest).

474. See, e.g., *United States v. McConney*, 728 F.2d 1195, 1207 (9th Cir.), cert. denied, 469 U.S. 824 (1984).

475. *Id.* Later the Ninth Circuit replaced the actual access standard with a fiction. See *United States v. Turner*, 926 F.2d 883, 887-88 (9th Cir.), cert. denied, 112 S. Ct. 103 (1991). In *Turner*, the Ninth Circuit held that officers may search an area if the suspect had access to it at the time he was arrested, even if later he was removed in handcuffs. *Id.*

In determining the constitutionality of searches incident to arrests, some courts have not applied a totality of circumstances standard. The fiction adopted by some courts is not linked to any of the justifications supporting the search. Rather, many courts allow these searches based merely on the belief that police officers should have broad discretion in deciding whether to search the area.

Although a reasonableness standard does not provide police officers with bright lines to guide their actions, analyzing circumstances based upon doctrinal justifications seems to be at least a floor for judicial scrutiny. In assessing the circumstances surrounding preventive actions by police officers, such as *Terry* frisks and emergencies, courts have often fused the issue of reasonableness with the issue of danger. Often, in the context of searches incident to arrest, the danger analysis has not only disappeared from the analysis but is nonexistent. The common thread to these doctrines is the Fourth Amendment reasonableness standard.

## **VII. Dangerous Misperceptions of the Fourth Amendment: The Substitution of Judicial Perspective for Executive Judgments**

When police officers strike suspects or act preventively by performing frisks, searches incident to arrests, or community caretaking functions, the constitutionality of their actions depends upon whether their actions were reasonable under the Fourth Amendment. Although in each of these areas the Supreme Court has articulated doctrinal elements for this reasonableness inquiry, in evaluating the police conduct, many courts focus almost exclusively on the danger presented by the situation. This focus has at times resulted in courts finding the assessment of danger to be synonymous with the reasonableness inquiry. Although the reasonableness inquiry under the Fourth Amendment is not formulaic, it does include more than an assessment of danger. In addition to society's interest in law enforcement, the reasonableness inquiry encompasses both society's and the individual's interest in personal security. By centering the inquiry on the danger presented by circumstances, some courts err by interpreting the Fourth Amendment to require almost absolute deference to an officer's perception of danger. In doing so, they have often failed to scrutinize other important aspects of the confrontation: the gravity of the offense committed by a suspect, the availability of other means to apprehend the suspect, the role officers played in creating the need for force, the jury's role in determining what actually happened, and the

intrusive nature of many preventive actions. This misapplied deference is pronounced when the circumstances involve a psychologically disturbed individual, a frisk, a community caretaking function, or a search incident to an arrest. An examination of each of these misperceptions reveals how courts should interpret the reasonableness inquiry.

### A. Danger is Only a Factor in Determining Reasonableness

The right to be free from “unreasonable searches and seizures” is a right that courts should interpret in light of the history and purpose of the Fourth Amendment. These two inquiries shape the reasonableness standard and reveal that the assessment of danger is not synonymous with the determination of reasonableness. The constitutionality of a police practice requires consideration of numerous issues, with the assessment of danger as only a single factor. Although scholars disagree as to the role the warrant clause plays in the Fourth Amendment analysis, they nevertheless recognize that reasonableness compels consideration of numerous interests.<sup>476</sup> Describing and weighing these interests are key issues in litigation arising from officers’ preventive actions and their use of physical force against a suspect.

The Fourth Amendment was designed to protect individuals from oppressive governmental actions. Because governmental practices during the colonial era were intrusive and arbitrary, the framers of the Fourth Amendment erected a shield to protect citizens from unreasonable government actions. After examining this history, Professor Tracey Maclin soundly concluded that the Reasonableness Clause represents a mistrust of police power. Evaluating how police officers use this police power, however, is not limited to examining only those practices present at common law, because the Framers could not have intended to freeze from scrutiny newer methods arising from technological developments. As Professor Carol Steiker has noted, “use of the term ‘reasonable’ . . . positively invites constructions that change with changing circumstances.”<sup>477</sup> The history and purpose of the Amendment thus indicate a need to evaluate police practices to ensure they do not unreasonably infringe upon the “right of the people to be secure.”<sup>478</sup>

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476. See, e.g., Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759-61 (1994); Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 824 (1994).

477. Steiker, *supra* note 476, at 824.

478. U.S. CONST. Amend. IV.

Thus, determining the scope of an individual's right to be secure is the same question as determining what is an unreasonable search or seizure. Reasonableness emerges as the standard for measuring police practices. This inquiry, however, requires a balancing of interests, not a quick glance to determine if the practices are rational. Although reasonableness as a standard cannot be precisely described, the history and purpose of the Amendment should nevertheless guide how courts identify and weigh the interests.

Balancing interests under the Fourth Amendment, as with balancing interests under other amendments, is a process linked to perceived values represented in the Amendment. In the context of aggressive actions against suspects, the United States Supreme Court in *Tennessee v. Garner*<sup>479</sup> and *Graham v. Connor*<sup>480</sup> emphasized the importance of personal security both to the individual seized and to society. In *Garner*, the Court valued highly an individual's right to life and society's interest in a fair adjudication of guilt.<sup>481</sup> It held that in some situations these interests outweigh society's interest in effective law enforcement.<sup>482</sup> It thus held that officers may act unreasonably when they shoot fleeing felons. Similarly, in *Graham*, the Court detailed three factors that help to measure the degree of intrusiveness of police practices: the crime committed, the immediacy of harm to officers or the community, and the suspect's resistance.<sup>483</sup> In listing these factors, the Court offered guidelines to evaluate police practices.

The Court in *Terry v. Ohio* also described the importance of the right to personal security as it upheld an officer's limited ability to frisk suspects.<sup>484</sup> It stated, "[A frisk] is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."<sup>485</sup> It held that this preventive action, one not designed to inflict bodily injury, must be carefully limited to the need to protect officers from armed and dangerous suspects.<sup>486</sup> Only under these circumstances would the Fourth Amendment permit officers to pat down a suspect because the right to personal security "belongs as much to the citizen on the

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479. 471 U.S. at 11-12.

480. 490 U.S. at 395 ("'[R]easonableness' of a particular seizure depends not only on when it is made, but also on how it is carried out.").

481. *Garner*, 471 U.S. at 9.

482. *Id.* at 19.

483. *Graham*, 490 U.S. at 395.

484. *Terry*, 392 U.S. at 8.

485. *Id.* at 17.

486. *Id.* at 26.

streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”<sup>487</sup> This right thus broadly protects both bodily integrity and privacy.

However, when interpreting these decisions, some lower courts, have misunderstood the reasonableness inquiry. They have interpreted the Court’s discussion of danger in *Garner*, *Graham*, and *Terry* as the standard for measuring reasonableness. In doing so, they have shifted the balance to the goal of promoting law enforcement. Woe-fully absent from this perspective is a recognition of the history of the Fourth Amendment. If mistrust of police power was the impetus for passage of the Fourth Amendment, then interpreting the Fourth Amendment to strongly further law enforcement interests makes no sense. Thus, balancing requires evaluating conflicting interests, not just discerning the presence of danger. When courts focus their attention solely on the issue of danger, they fail to consider other interests furthered by the Fourth Amendment.

### **B. The Gravity of the Offense is a Factor in Determining Reasonableness**

An important factor in the calculation of reasonableness is the offense the suspect allegedly committed, which compelled an investigation, an attempt to apprehend, or any protective measure. The Supreme Court explicitly mentioned this factor in both *Garner* and *Graham* as it described how to evaluate the use of force by police officers.<sup>488</sup> It also stated in *Wisconsin v. Welsh*<sup>489</sup> that the gravity of the offense is an important factor in determining the presence of exigent circumstances. In *Terry*, the Court also used the nature of the suspected offense, armed robbery, as a factor in determining whether the investigating officer could have believed that the suspect was armed and dangerous.<sup>490</sup>

In assessing the use of force against suspects, many courts have failed to consider the nature of the alleged offense. They have instead focused on two issues: the threat posed by the suspect and the suspect’s resistance. They have interpreted these factors as creating a “dangerousness” standard. Such an interpretation, however, is misguided. The second *Graham* factor questions not only whether there was a threat, but also if the threat was present at the time the officer

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487. *Id.* at 9.

488. See *Garner*, 471 U.S. at 11; *Graham*, 490 U.S. at 395.

489. 466 U.S. 740, 752 (1984).

490. *Terry*, 392 U.S. at 28.



acted. This immediacy requirement limits the use of force by focusing on the force actually necessary. Similarly, the third factor simply questions whether the suspect resisted. It does not necessarily imply that all resistance must be checked by ever increasing uses of force.

These erroneous interpretations do not adequately consider the first factor listed in *Graham*: the crime the person allegedly committed that required police officers to seize him. If an eleven-year-old boy stole a pair of sunglasses from a discount store and resisted the officers' commands to stop, should they tackle him and use pain compliance techniques to control him, if they know the boy, where he lives and that their actions may incite nearby youths observing the confrontation? Because the Reasonableness Clause requires a balancing of interests, such an action is unreasonable in light of the offense committed and the surrounding circumstances.

The significance of the crime allegedly committed depends upon the circumstances of the confrontation between the officer and suspect. For example, if a childless suspect has just killed his wife, he has just committed a crime involving the "serious infliction of bodily injury." A literal reading of this language from *Garner* might seem to suggest that officers could automatically shoot him when they see him. Yet, under some circumstances he may not pose an immediate danger to anyone else. In short, even though he committed a heinous act, he may not be an immediate threat to anyone else. He may have already killed the only person that was logically at risk. Although he may pose a threat to himself, it would be unreasonable to kill him unless the surrounding circumstances change drastically to signify an immediate danger to police officers and the community. By barring officers from shooting, both the suspect's right to personal security and society's interest in a fair adjudication of his guilt are preserved.

The focus on danger analysis perhaps has risen from reliance on the continuum-of-force model for apprehending suspects. Many officers are trained to escalate the degree of force if a suspect resists their commands. The continuum itself does not signify that there ever is any need to let the suspect go. Only at the end of the continuum, which authorizes the use of deadly force, is there a check, one established by the Supreme Court in *Tennessee v. Garner*. In the nondeadly force context, officers may be constitutionally required to let suspects go rather than use escalating force.

The balance of interests, represented by the reasonableness standard, at times should limit the use of nondeadly force in apprehending suspects, even when they flee. An interest that sometimes tilts the

balance toward allowing flight is the individual's right to bodily integrity. Although the dissent in *Garner* argued that all suspects can maintain this interest by stopping,<sup>491</sup> the majority properly interpreted the balancing process to protect a suspect's *fundamental* interest in his life.<sup>492</sup> The suspect in *Garner* was not required to stop for the Constitution to protect this interest. Although one's interest in life is significantly stronger than one's interest in bodily integrity, the balancing process should question whether at times this interest, as in *Garner*, outweighs the interest in law enforcement. By considering the nature of the alleged offense, courts and officers can better distinguish the scope of reasonable conduct. Determining when police officers should cease using nonlethal force and let a suspect flee is also linked to the availability of alternative means to seize suspects. This issue, like the alleged offense, is also frequently ignored by courts.

### C. Judicial Scrutiny Does Not Constitute Impermissible Second-Guessing of Police Officers' Split-Second Judgments

Courts often fail to consider the availability of alternative means of action because of an implicit belief that such scrutiny constitutes impermissible second-guessing of officers' split-second judgments. Such broad-ranging deference, however, is inappropriate and contrary to our well-established doctrine of judicial review. Analyzing the availability of alternative means should be an important factor in determining reasonableness.

It is difficult to understand the role of available alternatives because the Supreme Court has not specifically addressed this issue. When considering some preventive actions, the Court has not carefully evaluated available alternatives. However, in the seminal decisions of *Garner* and *Terry*, the Court limited the means officers could employ when investigating and apprehending suspects.<sup>493</sup> Scrutiny of means, however, does not necessarily require identifying the least intrusive practice. It entails consideration of whether the police practice was reasonable in light of available alternatives.

One of the Court's most deferential opinions addressing preventive actions is *Michigan Dep't of State Police v. Sitz*,<sup>494</sup> in which the Court held that police officers may stop drivers at roadblocks for the purpose of determining whether they are intoxicated. The Court up-

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491. *Garner*, 471 U.S. at 29 (O'Connor, J., dissenting).

492. *Id.* at 9.

493. *Garner*, 471 U.S. at 11-12; *Terry*, 392 U.S. at 26.

494. 496 U.S. 444, 447-55 (1990).

held the practice as a safety measure, which allows officers to seize individuals even though they have no reason to believe they are intoxicated.<sup>495</sup> In balancing the interests of the parties, the Court determined that this practice compelled a driver to stop for only a few seconds, that the police officers' actions were not arbitrary, that drunk driving was a serious problem, and that roadblocks were an "effective" means of stopping drunk drivers.<sup>496</sup> Although the Court explicitly evaluated the means used by the officers, it was reluctant to subject the means to heightened review. It stated, "[F]or the purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."<sup>497</sup> It nevertheless determined that the practice was reasonable. It merely refused to decide which plan for stopping drunk driving was "ideal."<sup>498</sup>

The Court in other preventive decisions has expressed a reluctance for close scrutiny of means. In *Cady v. Dombrowski*<sup>499</sup> and *Pennsylvania v. Mimms*,<sup>500</sup> the Court held that a police officer's decision to search a towed car for a gun and to order a suspect out of a car during a traffic stop was reasonable. In *Cady*, the Court examined community safety,<sup>501</sup> however, in *Mimms*, the issue was the officer's safety.<sup>502</sup> In both decisions, the Court did not determine the least intrusive means available.<sup>503</sup>

When the practice involves, however, serious infringements of bodily integrity and privacy, the Court is more willing to closely evaluate the means. For example, *Garner* limited the use of deadly force,<sup>504</sup> *Graham* limited the use of nondeadly force,<sup>505</sup> *Terry* limited the nature of a frisk,<sup>506</sup> and *Winston v. Lee*<sup>507</sup> limited the government's abil-

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495. *Id.* at 435.

496. *Id.*

497. *Id.* at 453-54.

498. *Id.* at 453.

499. 413 U.S. 433, 446 (1973).

500. 434 U.S. 106, 110-11 (1977).

501. *Cady*, 413 U.S. at 447.

502. *Mimms*, 434 U.S. at 111.

503. See, e.g., 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, 1176 (1988) ("The Court's fourth amendment balancing analyses have neither systematically evaluated the marginal law enforcement benefits of challenged searches and seizures, nor regularly incorporated the 'least intrusive alternative' requirement.").

504. *Garner*, 471 U.S. at 11.

505. *Graham*, 490 U.S. at 396-97.

506. *Terry*, 392 U.S. at 25-27.

ity to obtain evidence by performing surgery on a suspect. The heightened scrutiny of means in these situations is proper because police practices significantly intrudes upon bodily security and privacy.

When the balance is so heavily weighted against the police practice, the lack of alternatives is an important issue. In this situation, the lack of another alternative is relevant, but not dispositive, of the reasonableness question. For example, in *Garner*, the Court barred killing the fleeing burglary suspect, even though it assumed that the officers would not apprehend him later.<sup>508</sup> Similarly, in *Winston*, the Court barred surgery to remove a bullet from the suspect, even though it was the only way to retrieve this evidence.<sup>509</sup> The availability of alternatives thus becomes one issue in the reasonableness inquiry, and its significance depends upon the circumstances of each case.

#### **D. Conduct Prior to a Seizure May Be Relevant in Determining Reasonableness**

Examining alternatives requires consideration of when to begin scrutinizing the means used by officials. This question arises when officers believe that greater force is necessary because of the suspect's prior conduct. Some courts limit their scrutiny of means to the point the officers seized a suspect. Such bright-line temporal limitations, however, seriously undermine the right to personal security by failing to consider prior conduct. The confusion as to when to evaluate the means used by the officers results from the Supreme Court's language regarding the nature of policing and its incredibly narrowing "seizure" definitions.

The disagreement as to temporal limitations stems from the Supreme Court's discussion of policing in *Graham*. The *Graham* Court stated that when courts and juries determine reasonableness, they should remember that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."<sup>510</sup> In examining this language, some courts confuse the nature of policing with deference to police officers' decisions. Although the Court stated that the dangerous nature of policing is a factor in determining reasonableness, it did not state that strong deference is necessary because policing is difficult. Such an in-

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507. 470 U.S. 753, 766 (1985).

508. *Garner*, 471 U.S. at 11.

509. *Winston*, 470 U.S. at 766.

510. *Graham*, 490 U.S. at 397.

terpretation fails to take into consideration how police officers are trained. When police officers practice shooting their weapons, they often do so in conditions designed to simulate situations requiring quick judgment. An ability to make quick decisions simply describes a skill required of police officers. It does not prohibit examining whether their actions prior to the seizure created the need for force.

Determining how far back in time courts and juries should look when determining whether officers created the need for force is the most difficult issue associated with temporal limitations. Although the moment an officer seizes a suspect seems like a logical starting point, conduct prior to seizure at times may be significantly linked to the seizure. Like the classic question of proximate cause, this question is a policy question implicit in the standard of reasonableness.

The temporal question probably would not exist except for the Court's ever narrowing seizure definitions. Prior to the Court's seizure definition in *California v. Hodari D.*,<sup>511</sup> courts more readily determined that officers had seized suspects by their actions. The *Hodari D.* Court drastically limited the circumstances constituting seizure as it held that a "show of authority" by police officers does not automatically constitute a seizure within the meaning of the Fourth Amendment.<sup>512</sup> By adding to its definition of seizure that the suspect must comply with the assertion of authority, the Court moved the point of seizure further ahead in time.

By considering actions prior to a seizure, courts do not expand the scope of the Fourth Amendment because only those actions causally linked with the seizure are relevant to the reasonableness inquiry. Thus, if the suspect never complied with the show of authority, then no seizure occurred and the prior conduct is not governed by the Fourth Amendment. If, however, the officers shot the suspect because he failed to comply with the show of authority, the officers' prior actions may be causally linked to the seizure. Considering actions prior to the seizure may in some circumstances further the constitutional right to personal security, because reasonableness is the applicable standard and the Federal Rules broadly define relevance.

#### **E. Reasonableness is a Constitutional Standard, Not One Governed by State Law or National Police Practices**

Although the Fourth Amendment prohibits unreasonable searches and seizures, it does not specify how courts should determine

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511. 499 U.S. 621 (1991).

512. *Id.* at 625-26.

reasonableness. Such an open-ended standard invites consideration of a variety of sources to ascertain its meaning. When courts and juries determine whether officers violated the Fourth Amendment, they necessarily distinguish a constitutional violation from a state law violation, such as battery or trespass. This distinction is important when considering the role of experts in determining the reasonableness of a police practice. Although their testimony may be relevant to resolve reasonableness, their opinion does not resolve the Fourth Amendment question.

If policing experts resolved the issue of reasonableness, the judiciary would be stripped of its power to interpret the Constitution. The Supreme Court, in *Garner*, recognized its role when it rejected the well-established police practice of killing fleeing felons.<sup>513</sup> Although this practice was established at common law and a majority of police departments still adhered to the common law rule, the Court nevertheless interpreted the balancing process implicit in the Reasonableness Clause as prohibiting the practice.<sup>514</sup> Similarly, in *Graham*, the Court affirmed that arbitrary use of physical force does not necessarily violate the Fourth Amendment.<sup>515</sup> Arbitrary force must rise to the level of a constitutional violation to be actionable.

Distinguishing constitutional torts from state torts, however, has been difficult for courts. Some courts have erroneously interpreted the Fourth Amendment as creating a negligence standard. Such an interpretation, however, strips from the Amendment its rich history that instructs courts and juries to protect the interests of citizens and society. Even though the Fourth Amendment and negligence claims both consider the availability of alternatives, they are different. Although no treatise could clearly delineate how to make this distinction, courts and juries properly interpret the Fourth Amendment when they consider the interests it protects. Simple reliance on the common law or national police standards undervalues the right to personal security.

#### **F. In Civil Cases Juries Must Often Determine What Constitutes Objective Reasonableness**

Who determines what constitutes objectively reasonable conduct is an important issue when the Fourth Amendment issue arises in a

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513. *Garner*, 471 U.S. at 11.

514. *Id.*

515. *Graham*, 490 U.S. at 396-97.

civil action under section 1983.<sup>516</sup> Although courts in criminal cases find facts during suppression hearings on Fourth Amendment issues, when civil cases raise Fourth Amendment issues, courts sometimes misunderstand the objective reasonableness standard.<sup>517</sup> Some courts deprive the jury of its role of determining the facts of the case and applying the standard of reasonableness.

Although the jury system is still not free from the significant problem of racial bias, it nevertheless plays an important role in evaluating police practices. Many courts, however, have erroneously interpreted the decisions in *Garner* and *Graham* as urging courts to resolve the issue of reasonableness.<sup>518</sup> This error arises from perceiving the decisions as requiring broad deference to police officers' decisions. One of the most important functions of the jury is to determine credibility. This is particularly important when officers kill a suspect without witnesses present and later justify their actions by asserting that the suspect made a furtive gesture. Determining whether a suspect's action was "furtive" is an extremely important jury issue because when courts automatically defer to the officers' written assertions they may unknowingly give the officers a license to murder at will. In this situation, assessing credibility is essential. One scholar has further advocated the use of a jury in criminal cases to resolve Fourth Amendment suppression motions.<sup>519</sup> This practice would allow juries to reject some legal fictions easily accepted by some courts, such as the broad searches permitted by the courts' interpretation of the search incident to arrest doctrine. Few jurors would believe that suspects possess unusual skills to reach guns and contraband. Yet, even if juries were to review these claims, such review would not overly deter police practices because many jurors believe that criminal defendants are only "second-class citizens."<sup>520</sup>

Although some cases involving police practices can be resolved on summary judgment when material facts are not in dispute, courts should not infringe upon the jury's role as fact-finder when credibility is a key issue, as it is in many police misconduct cases.

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516. 42 U.S.C. 1983.

517. See *supra* text accompanying notes \_\_\_\_.

518. See *supra* text accompanying notes .

519. See generally Bacigal, *supra* note 212.

520. Maclin, *supra* note 13, at 238. Juries also often fail to check the misuse of police power because of racial prejudices. See, e.g., Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 784 (1994) ("Exploitation of racial fears [was] evident in the trial of the four white Los Angeles police officers who beat Rodney King.").

### **G. Justifying Preventive Actions Based on Danger vs. Justifying Aggressive Actions Based on Danger**

Although fact-finders assess danger when examining both aggressive and preventive actions by police officers, danger justifying preventive actions is different from danger justifying aggressive actions. Although danger in one context should constitute the same perception of danger in the other context, the lower courts' interpretations of preventive actions signify a presumption that many preventive actions based on danger are reasonable. Such a presumption applied to aggressive actions would seriously undermine the right to personal security.

The need for a dual standard of danger is apparent when considering a fact-finder's assessment that a suspect was armed and dangerous, justifying a protective frisk, and the finding that the suspect was armed, justifying the use of deadly force. When many courts determine the constitutionality of a particular frisk, they easily perceive that the officers were in danger. For example, many courts seem to presume that if an officer is investigating a suspect for drug possession, the officer may frisk the suspect because he is "armed and dangerous." Similarly, courts have allowed officers to use incredibly intrusive measures during *Terry* stops as preventive measures. Although pointing guns at suspects should convert most stops into arrests, many courts have allowed this intensive show of authority as a preventive measure. In addition, courts have allowed officers to frisk suspects merely because they failed to comply with the officer's command to freeze. The war on drugs has resulted in police officers having greater preventive power to control suspects.

These same facts, however, applied in the context of aggressive actions should not justify the use of significant force. Although many courts fail to recognize that frisks constitute "serious intrusion[s],"<sup>521</sup> they should assess differently the need to strike or shoot suspects based on similar facts. When officers act aggressively, they significantly infringe upon the individual's constitutional right to personal security. In this context, because of the heightened interest associated with bodily integrity, the availability of alternative methods of apprehending becomes more important than in the context of preventive actions. A suspicious movement by a suspect more readily supports a frisk than a strike by a police officer.

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521. *Terry*, 392 U.S. at 17.



Although such a distinction in danger analysis may seem obvious, the broad language that some courts use in discussing danger does not suggest such a limitation. In determining reasonableness, courts must consider all of the circumstances. An important circumstance in determining reasonableness is the magnitude of the infringement caused by the officer. The perception of danger is thus not an automatic justification for an aggressive action by police officers.

#### **H. The Community Caretaking Function Doctrine Requires Reasonable Conduct**

Danger analysis has also been a significant aspect of the community caretaking function doctrine. The doctrine by its very nature emphasizes that in some situations officers may avoid compliance with the usual procedures of the Fourth Amendment in order to aid society. Interpreted broadly, however, this doctrine can seriously undermine the Fourth Amendment right to personal security. The need for a narrow scope of this doctrine is apparent when considering the magistrate's ruling on the motion to suppress evidence at O.J. Simpson's preliminary hearing.

The court held that detectives lawfully entered Mr. Simpson's house to render aid to possible victims inside. Under this doctrine, officers did not need probable cause to believe that someone was in danger. They merely needed a reasonable belief that someone may be hurt. What is reasonable in this context, however, should also depend upon the degree of infringement on the right to personal security. If the justification for entering a home is to save a person known to be hurt, the balance tips in favor of entry. On the other hand, when speculation is the basis of entry, entry may still be permissible if officers do not invoke the plain view doctrine to justify seizing items they would not have had access to but for the entry. In that situation, the officers truly perform an act of public service; they leave at the doorstep any desire to investigate criminal conduct.

Although the community caretaking function and its relationship to the exclusionary rule is a topic mandating extensive scrutiny, it is an important piece of the courts' assessment of danger under the Fourth Amendment. As with other doctrines, the exigencies of the day may too often tip the balance to the side of law enforcement. The right to personal security and privacy must also weigh heavily in assessing the need to act as the community's caretaker.

## I. Reasonableness Requires an Actual Access Standard for Searches Incident To Arrests

Determining what constitutes reasonable police practice is difficult. Yet when the police practice is a search incident to an arrest, many courts have abandoned the reasonableness inquiry for a bright-line fiction: the area in a suspect's control is the area he had access to prior to being arrested. In doing so, courts do not require the suspect to have actual access to the areas at the time of the search. This fiction thus cuts the doctrine loose from its underlying justifications of protecting officers, preventing escapes, and preserving evidence. The development of this fiction underscores the need for a reasonableness standard that seriously considers the right to personal security.

When the Court in *Chimel v. California*<sup>522</sup> detailed the scope of searches incident to arrests, it scrutinized the means used by the officers. The Court refused to allow officers to search an entire house simply because the homeowner had allegedly committed a crime. In analyzing this decision, Professor Nadine Strossen commended the Court for its emphasis on narrowly tailored means.<sup>523</sup> She interpreted the decision as requiring police officers to use the least intrusive police practice to further their reasonable concerns about safety and destruction of evidence. The decision thus signified that the Fourth Amendment required scrutiny of intrusive police practices.

Through the years many courts have abandoned such scrutiny, interpreting the progeny of *Chimel* as documenting the need for a bright-line rule. That bright line became the area not in the defendant's actual control, but the area where he had been prior to the search. Although the need for bright-line rules is understandable, the rules must have some relationship to the doctrinal justifications.

By discarding reasonableness as the standard for evaluating such searches, some courts failed to give any weight to the right of privacy protected by the Fourth Amendment. Such a decline in analysis can occur when courts give broad deference to police officers' decisions and little weight to the right to personal security. Such deference has crept into the consideration of other preventive actions. When deference becomes routine, courts are more likely to create legal fictions—fictions not rooted in the facts of the case nor the history of the Amendment. Perhaps the development of the search incident to arrest doctrine signifies the scope of the reasonableness analysis for

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522. 395 U.S. 752 (1969).

523. See Strossen, *supra* note 503.

other Fourth Amendment doctrines if the courts fail to discard their misperceptions. Abandoning the legal fiction associated with searches incident to arrest is a beginning towards restoring reasonableness to its place in Fourth Amendment jurisprudence.

### VIII. Conclusion

Dangerous misperceptions of the Fourth Amendment have seriously eroded the constitutional right to personal security, a right that protects both suspects and society from unreasonable police practices. These misperceptions have occurred because courts have erroneously interpreted the Fourth Amendment's prohibition of "unreasonable searches and seizures" as raising a single question: Does the challenged police practice rationally further protecting police officers and society from danger? By fusing the reasonableness standard with the assessment of danger, many courts fail to understand the history of the Fourth Amendment and the balancing of interests mandated by the Reasonableness Clause.

The history of the Fourth Amendment reveals a mistrust of unchecked police power. The strong deference courts grant the judgments of police officers conflicts with this history of mistrust. By failing to recognize this important historical perspective, courts have skewed the balance of interests in favor of upholding intrusive police practices rather than beginning the balancing process with level scales.

This pronounced deference has affected the balancing process in numerous ways. By focusing solely on the danger a suspect represents to police officers and society, courts often fail to discern society's interest in personal security. The devaluation of this right is particularly apparent when courts refuse to consider whether officers could have used less intrusive means to apprehend suspects. Courts also undermine the right to personal security by not considering the nature of the offense that first prompted investigation. The type of offense is important because officers should recognize that sometimes they are constitutionally required to let suspects go rather than use ever increasing amounts of force. This highly deferential standard of review has resulted in courts refusing to consider whether the officers' created the need for force and deciding fact-bound cases on summary judgment.

In determining reasonableness, courts should consider that danger is only one factor, which may be outweighed by the suspect's right to personal security and privacy. Inherent in this balancing process is a recognition that aggressive police actions, such as the use of force

during arrests, are markedly different from preventive actions, such as *Terry* frisks, searches incident to arrests, and community caretaking functions. Even though preventive actions also intrude upon the right to personal security, the perception of possible danger more easily justifies upholding a preventive action than an aggressive action. The goal of a preventive action is to protect suspects, officers and others from possible bodily harm; the goal of an aggressive action, however, is to protect officers and others from possible harm by directly attacking a suspect's interest in bodily integrity. Courts should thus balance differently the need to frisk suspects for weapons and the need to strike or shoot them. The broad language many courts use in describing the danger officers face during investigations masks this important difference. The right to personal security deserves protection from the courts' dangerous misperceptions of the Fourth Amendment.