Higher Standards for Reasonable Suspicion to Frisk: Fostering a Better Relationship Between Law Enforcement and the Community

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INTRODUCTION

A pat frisk is a limited search of a person's outer garments to find evidence of a crime or weapons.[1] Police officers are legally justified in stopping a person when they reasonably suspect that person is engaged in criminal activity.[2] A subsequent search for weapons, however, must be based on a reasonable, articulable suspicion that the person is armed and dangerous.[3] Ascertaining what exactly the standard is for such a search has troubled courts for decades.[4]

This Comment will propose that the Massachusetts Supreme Judicial Court's (hereinafter "SJC") decision in *Commonwealth v. Torres-Pagan* will benefit community interactions with law enforcement. Part I of this Comment will discuss the evolution of the pat frisk standard since its inception in 1968 and the effects of pat frisks on individuals. Part II will summarize the SJC's decision, explaining why the Court did not consider Torres-Pagan's actions as furtive movements and found that there was no reasonable suspicion that Torres-Pagan was armed and dangerous. Parts III and IV will analyze the effects of a heightened pat frisk standard and how it will help foster a better law enforcement-community relationship by clarifying the standard for police officers so they can make more informed

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[1] Terry v. Ohio, 392 U.S. 1, 8 (1968).

[2] *Id.* at 30.

[3] *Id.*

[4] *See, e.g.*, Commonwealth v. DePeiza, 868 N.E.2d 90, 96 (Mass. 2007); Commonwealth v. Stampley, 771 N.E.2d 784, 787–88 (Mass. 2002).

decisions in fast-paced, high-risk situations.

I. Background

A. *Articulation of the Pat Frisk Standard*

The sanctity of the individual is held in high regard in our society as the Fourth Amendment protects people from warrantless searches of their persons.[5] While reasonable suspicion of any criminal activity justifies an investigatory stop by the police, a subsequent search of a stopped individual requires further suspicion that the suspect is also armed with a weapon.[6] In *Terry v. Ohio*, the U.S. Supreme Court was confronted with a situation where a police officer saw what appeared to be criminal activity, approached the suspicious individuals, and then patted their outer clothing because he feared they had a weapon.[7] Since the officer found a weapon during this warrantless search, the Court had to decide whether to admit the weapon into evidence by questioning whether such a warrantless search was an arrest without probable cause.[8]

The Court held that a limited search of a suspect's outer clothing—a pat down or frisk—did not constitute an arrest within the Fourth Amendment.[9] The Court said this limited search is reasonable:

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[10]

By articulating this standard, the Court clarified that when a police officer has reasonable suspicion that a person is engaged in criminal activity, a limited search of that person is reasonable to protect the safety of the officer and the public if the police officer reasonably believes that the person may

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[5] U.S. CONST. amend. IV.

[6] *Terry*, 392 U.S. at 27.

[7] *Id.* at 27–28.

[8] *Id.* at 15–16.

[9] *Id.* at 30–31.

[10] *Id.* at 30.

be armed with a weapon.[11]

B. *Massachusetts Interpretation of the Pat Frisk Standard*

Although *Terry* created a national standard for warrantless searches, the Massachusetts legislature added extra protection for individuals who interact with police.[12] The *Terry* decision confused Massachusetts courts because reasonable suspicion that an officer's safety is in danger was the valid articulation for an exit order during a traffic stop, but some courts mistakenly conflated this standard with the *Terry* standard.[13] Adding further to this confusion was the question of how to determine whether a suspect is armed and dangerous and how specifically a police officer needs to articulate this determination.[14] Before and after *Terry*, Massachusetts courts often deferred to a police officer's experience when the officer could not articulate exactly why the officer thought a suspect was armed and dangerous.[15]

Recently, most courts have strayed away from the *Terry* standard and have required specific, articulable facts that a person is armed and dangerous to justify a frisk and have also required that the search must be for weapons.[16] This clarification is important because police officers often

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[11] *Id.*

[12] *See* MASS. CONST. pt. 1, art. XIV; Commonwealth v. Pierre, 893 N.E.2d 378, 380 (Mass. 2009) ("Under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, warrantless searches and seizures are presumptively invalid."); *see also* Commonwealth v. Cruz, 945 N.E.2d 899, 906 (Mass. 2011) (stating that under the Massachusetts Declaration of Rights, in the Fourth Amendment context, officers cannot issue routine exit orders to passengers in stopped vehicles); Commonwealth v. Matthews, 244 N.E.2d 908, 910 (Mass. 1969) (explaining that the "[s]tate is free to develop its own law of search and seizure to meet the needs of local law enforcement, and in the process it may call the standards it employs by any names it may choose").

[13] Commonwealth v. Torres-Pagan, 138 N.E.3d 1012, 1016 (Mass. 2020).

[14] *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a) (6th ed. 2020).

[15] *See* Commonwealth v. Sumerlin, 469 N.E.2d 826, 828 (Mass. 1984) (deferring to officer's experience in drug situations); Commonwealth v. Ballou, 217 N.E.2d 187, 189–90 (Mass. 1966) (deferring to officer's knowledge of suspect's previous behavior).

[16] *See, e.g.*, Arizona v. Johnson, 555 U.S. 323, 327 (2009) ("To justify a patdown of the driver or a passenger during a traffic stop, . . . just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."); United States v. Romain, 393 F.3d 63, 72 (1st Cir. 2004) (acknowledging deference to officer's experience but explaining that the circumstances warranted a pat frisk due to the suspect's actions); Commonwealth v. Narcisse, 927 N.E.2d 439, 447–48 (Mass. 2010) (complying with officers and doing nothing furtive does not give

cite suspicion that individuals are armed and dangerous to initiate a search and then use the "plain feel" doctrine to justify seizing contraband that is not a weapon.[17] The "plain feel" doctrine allows a police officer to reach into a suspect's pockets if, during a pat frisk, the police officer feels an object that may reasonably be a weapon.[18] Even if the object is not a weapon, a court will consider it to have been lawfully discovered if it reasonably appeared to be a weapon.[19] "In fact, an officer who feels something during a *Terry* frisk that obviously [is not] a weapon, but is obviously contraband, can seize it."[20] Thus, even where a pat frisk is only justified because a police officer (wrongly) suspects that a person has a weapon, a seizure of other non-weapon contraband can still be valid.[21]

Further confusing a court's analysis of whether a police officer reasonably suspected that an individual was armed and dangerous is the evidentiary weight of the police officer's assessment of the suspect's "furtive movements."[22] Webster's Dictionary (which the *Torres-Pagan* Court cited to) defines furtive as "done by stealth" or "secret."[23] Stealthy movement may justify an officer's suspicion that a suspect is armed, but the circumstances must be analyzed in totality, not as incidents in isolation.[24] In *Commonwealth v. DePeiza*, the SJC found that the defendant, who walked with his right arm stiff and straight against his body, engaged in furtive movements, which justified the officer's suspicion that the defendant was armed.[25] In *Commonwealth v. Narcisse*, the SJC declined to find that a suspect's presence in a high-crime area constituted furtive action without any further stealthy conduct by the defendant.[26] Further, while in *Commonwealth v. Torres* the SJC

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reasonable suspicion that suspect was armed even though pat frisk did in fact reveal suspect had weapons).

[17] *See* Micah Schwartzbach, *Limits to Frisks by Police Officers*, NOLO, https://perma.cc/KG4R-D2AH (last visited Feb. 16, 2022).

[18] *See id.*

[19] *Id.*

[20] *Id.*

[21] *See* Minnesota v. Dickerson, 508 U.S. 366, 373–74 (1993).

[22] Commonwealth v. Torres-Pagan, 138 N.E.3d 1012, 1018–19 (Mass. 2020).

[23] *Id.* at 1018; *Furtive*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 924 (1963).

[24] *See* Commonwealth v. DePeiza, 868 N.E.2d 90, 96 (Mass. 2007) (explaining that walking with right arm stiff and straight against the body justified suspicion that defendant was armed); *but see* Commonwealth v. Torres, 674 N.E.2d 638, 642 (Mass. 1997) (alighting from vehicle insufficient to support defendant's continued detention); Commonwealth v. Brown, 915 N.E.2d 252, 256 (Mass. App. Ct. 2009).

[25] 868 N.E.2d at 97.

[26] 927 N.E.2d 439, 448 (Mass. 2010).

held that exiting a vehicle was not furtive movement,[27] in *Commonwealth v. Stampley* the SJC found that the suspect's stealthy (but not threatening) movement within the car was furtive.[28]

C. *Intrusive Power Balance of Pat Frisks*

Rejecting the argument that a stop and frisk amounts to a mere "minor inconvenience and petty indignity," the U.S. Supreme Court characterized a frisk as 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."[29] While frisks are reasonably necessary in some situations to protect an officer's and the public's safety, it is important that officers do not wield too much power in interpreting who should be subject to a frisk, as the humiliating effects of such an intrusion can have lasting impacts on an individual.[30] "The pat or feel method will achieve partial results for the detection of bulky weapons and objects, but the officer must feel with sensitive fingers every portion of the [suspect's] body."[31]

The power balance in these scenarios resides with the officer—even a reasonable objection to inappropriate touching can result in an officer considering the conduct as resisting arrest.[32] In New York City, where stop and frisks have been the most prevalent, asking an officer for a reason for a stop has resulted in unnecessary police brutality even before a suspect is subjected to a frisk.[33] Further, empirical data shows that people of color are disproportionately affected by a relaxed pat frisk standard.[34] To ensure that vulnerable groups are not disproportionately harmed by police officers, some have argued that the government must clarify the standard to protect the sanctity of the individual and alleviate any ambiguity to allow police

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[27] 674 N.E.2d at 642.

[28] 771 N.E.2d 784, 787–88 (Mass. 2002).

[29] Terry v. Ohio, 392 U.S. 1, 10, 17 (1968).

[30] *See generally* CTR. CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 5–6 (2012), https://perma.cc/7UAV-LH7C [hereinafter STOP AND FRISK: THE HUMAN IMPACT] (illustrating the impact stop and frisk policies have on everyday life).

[31] L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1955), https://perma.cc/9TBT-3UJK.

[32] *See* STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 5.

[33] *See* STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 5.

[34] *See* JEFFREY FAGAN ET AL., FINAL REPORT: AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK, AND/OR SEARCH REPORTS 3 n.8, 8 (2015), https://perma.cc/3KQP-CJG4 ("Some 29.5% percent of White subjects were frisked/searched during an FIO relative to the 45.4% percent of Black subjects, 40.5% of Hispanic subjects, and 35.6% of Asian/other race subjects.").

officers to uniformly enforce laws without fear of violence.[35] The necessity of this clarification is emphasized by the recent police killings of Black Americans that began as routine traffic stops and quickly escalated to fatal incidents.[36]

II. The Court's Opinion

A. *Facts and Procedural History*

In the early evening of May 3, 2017, two Springfield police officers pulled over Manuel Torres-Pagan after they witnessed him driving with a cracked windshield and an expired registration sticker.[37] Torres-Pagan pulled into a residential driveway and exited his car before he realized he was being pulled over.[38] As the officers walked towards Torres-Pagan, he "stood between the open door and the front seat, facing the officers."[39] Torres-Pagan complied with all of the officers' orders and kept his hands visible at all times.[40] Because he looked back into the car on more than one occasion, the officers interpreted his conduct as furtive; therefore, they determined there was a reasonable suspicion that Torres-Pagan was armed and dangerous.[41] Accordingly, the officers placed Torres-Pagan in handcuffs and conducted a pat frisk, which revealed a knife in Torres-Pagan's pocket.[42] The officers then asked Torres-Pagan if he had other weapons in his vehicle; when he responded that he did, the officers searched his car and seized a firearm from the driver's seat floor.[43]

Torres-Pagan was subsequently charged with two motor vehicle infractions and three firearms charges as a result of the evidence found after the pat frisk.[44] He motioned to suppress the firearms charges and claimed

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[35] *See* Brief and Addendum for the Appellee/Defendant at 24–25, Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697).

[36] *See* Commonwealth v. Buckley, 90 N.E.3d 767, 781 n.3 (Mass. 2018) (Budd, J., concurring) (noting that Philando Castile, Walter Scott, Samuel Dubose, and Sandra Bland were all killed by police or died in police custody following car stops for motor vehicle infractions).

[37] *Torres-Pagan*, 138 N.E.3d 1012, 1014 (Mass. 2020); Brief and Addendum for the Appellee/Defendant at 10–11, Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697).

[38] *Torres-Pagan*, 138 N.E.3d at 1014–15.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1015.

[42] *Id.*

[43] *Id.*

[44] Brief and Addendum for the Appellee/Defendant at 9–10, Commonwealth v. Torres-

that the officers discovered the concerning evidence after they conducted an unlawful pat frisk.[45] A judge from Springfield District Court granted the defendant's motion, and the Commonwealth filed an interlocutory appeal; the Appeals Court reversed the order of the motion judge.[46] Torres-Pagan appealed to the SJC to determine if a pat frisk is permissible when the suspect voluntarily exits the car during a traffic stop, follows all of the officers' orders, keeps both hands in plain sight, and does nothing other than occasionally look back into his car.[47]

B. *The Court's Holding and Reasoning*

The SJC was called on to clarify what constitutes a reasonable suspicion that an individual is armed and dangerous.[48] One major hurdle the SJC had to clear in making this determination was the conflation of standards for exit orders and pat frisks.[49] In a 2001 decision, the SJC inaccurately stated that the standard for a pat frisk is the same as that which is required to justify an exit order.[50] The SJC also mistakenly described a pat frisk as "constitutionally justified when an officer reasonably fears for his own safety or the safety of the public . . . *or* when the police officer reasonably believes that the individual is armed and dangerous."[51] To clarify the issue here, the SJC articulated the two standards:

> Accordingly, we clarify today that an exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds. . . . Thus, in the absence of reasonable suspicion of a crime or justification to search the vehicle on other grounds, an exit order is justified during a traffic stop if officers have a reasonable suspicion of a threat to safety. A lawful patfrisk, however, requires more; that is, police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous.[52]

Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697).

[45] *Torres-Pagan*, 138 N.E.3d at 1014.

[46] *Id.*

[47] *Id.* at 1014–15.

[48] *Id.* at 1017–18.

[49] *See id.* at 1016–17.

[50] *See id.* at 951.

[51] *Torres-Pagan*, 138 N.E.3d at 1017 (citing Commonwealth v. Johnson, 908 N.E.2d 729, 732 (2009), quoting Commonwealth v. Isaiah I., 882 N.E.2d 328, 334 (2008)).

[52] *Id.* (citations omitted).

Because a pat frisk is a "severe . . . intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience[,]" the only legitimate reason for an officer to subject a suspect to a pat frisk is to determine whether he or she has concealed weapons on his or her person; therefore, such an intrusion is not allowed without reasonable suspicion that the suspect is dangerous *and has a weapon*.[53]

While acknowledging that the original traffic stop was permissible because the officers witnessed Torres-Pagan driving with a cracked windshield, the SJC noted that even during a stop for which there is constitutional justification, a pat frisk is only permissible when an officer has reasonable suspicion that a suspect is armed and dangerous.[54] The Commonwealth argued that the officers had reasonable suspicion that Torres-Pagan was armed and dangerous, thus making the pat frisk permissible: Torres-Pagan exited his vehicle without instruction from the police officers, and his actions were furtive.[55] The SJC disagreed that Torres-Pagan's actions were furtive and that the officers were justified in pat frisking Torres-Pagan solely because he exited his vehicle.[56]

The SJC concluded that Torres-Pagan's conduct did not warrant a reasonable suspicion that he was armed and dangerous, and thus, there was no justification to pat frisk him.[57] Referring to Webster's definition of furtive as "done by stealth" or "secret," the SJC found that Torres-Pagan's actions did not constitute furtive movements that would justify a suspicion that he had a weapon.[58] While exiting the car without being told to do so may be unexpected, it can hardly be characterized as furtive; either way, "surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous."[59] The SJC analyzed Torres-Pagan's actions against a backdrop of pat frisk cases and found that he did not act furtively or stealthily: he was not secreting or attempting to reach for anything, and he was facing the officers, neither of whom observed any indication of weapons.[60] "The fact that the defendant turned to look into the front seat of

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[53] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 24–28 (1968)).

[54] *Id.* at 1015–16 (citing Commonwealth v. Narcisse, 927 N.E.2d 439 (2010); Arizona v. Johnson, 555 U.S. 323, 326–27 (2009)).

[55] *Torres-Pagan*, 138 N.E.3d at 1018.

[56] *Id.*

[57] *Id.* at 1020.

[58] *Id.* at 1018.

[59] *Id.*; *see* Commonwealth v. Stampley, 771 N.E.2d 784, 788 (Mass. 2002).

[60] *Torres-Pagan*, 138 N.E.3d at 1018.

his vehicle more than once after he got out adds little if anything to the analysis. At most, such action would suggest that the defendant had something of interest in his vehicle, not that he had a weapon on his person."[61]

Responding to the Commonwealth's last-ditch effort to preserve the assertion that the officers had reasonable suspicion because the stop occurred in a high-crime area, the SJC provided clarity on the weight of such evidence in the reasonable suspicion analysis.[62] "At the suppression hearing, an officer testified regarding numerous reports of shots fired, individuals being shot, and gang activity as well as arrests, including for violent crimes, in the vicinity of three specific streets in Springfield within a week of [Torres-Pagan's] arrest."[63] Thus, the motion judge was provided with information that showed a direct connection between the specific location and the investigated activity.[64] Presence in a high-crime area is given weight in deciding whether there is reasonable suspicion that a person is armed and dangerous, but the SJC was careful to emphasize that this factor alone cannot justify a pat frisk.[65] Although Torres-Pagan was in a high-crime area, the factors surrounding the traffic stop did not justify the officers' belief that Torres-Pagan was armed and dangerous when the officers pat frisked him, and the evidence seized as a result of the unlawful pat frisk was suppressed by the SJC.[66]

ANALYSIS

III. The SJC Clarified the Pat Frisk Standard and the Evidentiary Weight of Furtive Movements and High-Crime Areas

A. *The SJC Articulated and Differentiated the Pat Frisk Standard from the Exit Order Standard*

In past decisions, the SJC created confusion regarding the proper articulation of the pat frisk standard because the Court conflated it with the exit order standard.[67] In 2007, the SJC stated, "under our State Constitution, neither an exit order nor a patfrisk can be justified unless 'a reasonably

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[61] *Id.* at 1019.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Torres-Pagan*, 138 N.E.3d at 1019.

[67] *See id.* at 1016.

prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger.'"[68] In 2016, the SJC stated that "[w]here an officer has issued an exit order based on safety concerns, the officer may conduct a reasonable search for weapons in the absence of probable cause to arrest."[69] However, the *Torres-Pagan* Court noted that while both are technically correct statements of the law—a pat frisk is not justified unless an officer has safety concerns, and a pat frisk may be conducted in the absence of probable cause—the SJC did not (in either case) specify that an officer needs more than safety concerns to justify a pat frisk; thus in *Torres-Pagan*, the SJC clarified that in addition to safety concerns, an officer must have a reasonable suspicion that a suspect is armed and dangerous.[70]

In *Torres-Pagan*, the SJC was careful to note the distinction between an exit order and a pat frisk.[71] While both scenarios implicate an officer's safety concerns, in an exit order such concerns may be resolved once a suspect exits the vehicle.[72] Thus, the SJC correctly clarified that the standards for exit orders and pat frisks are different: the former can quickly ameliorate any suspicion that a suspect could use the vehicle as a weapon, whereas the latter constitutes a "severe intrusion" on the sanctity of the individual.[73]

This clarification will change the way police officers interact with citizens during traffic stops, as an exit order now does not justify an automatic pat frisk.[74] The reason for the change is logical: an exit order resolves a safety concern related to the car—without the greater intrusion of putting hands on the suspect to check the suspect's body for weapons.[75]

> As much as a person's body, clothing, and hand-held belongings make good places to hide weapons, a car certainly provides more opportunity to store and conceal weapons . . . . Once an officer issues the exit order for safety concerns and removes the driver or passengers, their ability to use the car as a weapon or to access

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[68] Commonwealth v. Washington, 869 N.E.2d 605, 612 (Mass. 2007) (citations omitted).

[69] Commonwealth v. Amado, 48 N.E.3d 414, 420 (Mass. 2016).

[70] 138 N.E.3d at 1016.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 37; Terry v. Ohio, 392 U.S. 1, 24–26 (1968).

[74] John Sofis Scheft, *Officer Safety During MV Stops, January 30, 2020: Important Update for the Massachusetts Law Enforcement Community*, LAW ENFORCEMENT DIMENSIONS (Jan. 30, 2020), https://perma.cc/USU7-862E; *contra* Commonwealth v. Torres, 745 N.E.2d 945, 951–52 (Mass. 2001) (allowing officers to automatically frisk an occupant once they ordered him to get out because he posed a safety risk).

[75] Scheft, *supra* note 74.

hidden weapons is eliminated.[76]

Police officers remain free to give an exit order when they see abnormal behavior inside a car or notice a driver scanning the surroundings or perhaps leaving the car in drive in a manner suggesting possible flight (endangering officers and the public).[77] At the same time, officers must decide whether what they saw or learned about an occupant equates to a reasonable suspicion that the person is armed and dangerous.[78] That separate assessment is necessary to perform a pat frisk.[79]

In clarifying the difference between the two standards, the SJC provided clear guidance to police officers by confirming a single standard for every pat frisk: wherever police stop a person, whether on the street or in a car, police must have a reasonable suspicion that the person is armed and dangerous before officers may pat frisk that person for weapons.[80] This clarification will help both police officers and the public because "police work is fast-paced, can be dangerous at times, and requires [an] understanding of a broad set of rules in order to ensure that the rights of citizens are upheld."[81]

B. *The SJC Clarified the Evidentiary Weight of Furtive Movements and High-Crime Areas*

In *Torres-Pagan*, the SJC also clarified how to factor furtive movements and presence in a high-crime area into the reasonable suspicion of weapons analysis.[82] The SJC noted that neither factor on its own justifies a frisk but must be assessed "[g]iven the other circumstances presented."[83] Torres-Pagan's ordeal makes evident the dangers of deferring to an officer's view of a suspect's movements as furtive and the idea that presence in a high-crime area justifies the belief that a suspect is armed and dangerous.[84] While the police officers justified their suspicion that Torres-Pagan was armed and dangerous because of his presence in a high-crime area coupled with his

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[76] Scheft, *supra* note 74.

[77] Scheft, *supra* note 74.

[78] Scheft, *supra* note 74.

[79] Scheft, *supra* note 74.

[80] Commonwealth v. Torres-Pagan, 138 N.E.3d 1012, 1015 (Mass. 2020).

[81] Brief for Manuel Torres Pagan at 24, Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697) (quoting Commonwealth v. Gonsalves, 711 N.E.2d 108, 113 (Mass. 1999)).

[82] 138 N.E.3d at 1019.

[83] *Id.*

[84] *See id.*

actions of exiting and looking into the car, the SJC dispelled these arguments, relying on the facts and not the officers' subjective beliefs.[85]

In finding that Torres-Pagan's actions created no reasonable suspicion that he was armed and dangerous, the SJC noted that while his actions may have been "unexpected" they could hardly be considered furtive.[86] This effectively rebutted the Commonwealth's argument that deference should be given to the police officers because the situation unfolded rapidly.[87] In finding that Torres-Pagan's presence in a high-crime area "did not carry the day" with regard to whether he was armed and dangerous, the SJC, following its own advice, urged caution in the use of this consideration—many honest, law-abiding citizens live and work in high-crime areas, and those citizens are entitled to the same protections of the federal and state constitutions, regardless of the character of the area.[88]

Hereafter, courts should hesitantly approach factoring in presence in a high-crime area into the reasonable suspicion analysis, as Fourth Amendment protections should not be different simply because of the neighborhood in which the police observation occurs.[89] The high-crime designation is hardly ever supported by empirical data, and the arresting officers are rarely attacked on their subjective belief of being in a high-crime area.[90] Rarely is there any analysis of why a particular area has a high-crime designation, and officers do not state if they knew the designation before they made the stop.[91] "In fact, trial courts rarely seem to question whether there is even an official definition of a high-crime area in their jurisdiction, on what facts that definition is based, whether the definition changes over time, and whether there are different types of offense-specific areas."[92]

Restricting the evidentiary weight of presence in a high-crime area will result in better policing, as officers will thus need "specific" and "objective" reasons to articulate reasonable suspicion that a person is armed and

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[85] *Id.* at 41.

[86] *Id.* at 40.

[87] *Id.* at 41.

[88] *See Torres-Pagan*, 138 N.E.3d at 1019–20; Brief for Manuel Torres Pagan at 32–33 Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697) (citing Commonwealth v. Cordero, 477 Mass. 237, 245 (2017) (quoting Commonwealth v. Gomes, 453 Mass. 506, 512 (2009))).

[89] *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1588 (2008).

[90] *Id.* at 1591.

[91] *Id.*

[92] *Id.*

dangerous; whether the person is standing on a street corner in a poverty-stricken neighborhood or a gated community should not change that analysis.[93] The reasonable, articulable pat frisk standard, strengthened by the SJC's clarification of the evidentiary weights of facts considered in that assessment, will foster better decision making by police officers, and thus a better law enforcement-community relationship.[94]

IV. The SJC's Decision Will Foster a Better Relationship Between Law Enforcement and the Community

A. *Excluding Evidence Obtained in Violation of the Clarified Standard Will Deter Illegal Police Conduct*

The single and distinct purpose of excluding illegally obtained evidence is to deter law enforcement officers from the forbidden behavior.[95] The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against a defendant is weakened or destroyed.[96] Being stopped and frisked by the police can have lasting emotional, psychological, social, and economic impact on the lives of the people subjected to such police interaction.[97] Requiring police officers to have a reasonable articulable suspicion that a person is armed and dangerous before they can justifiably search the person will reduce the number of unjustified arrests that occur each year.[98] The drop in arrests will likely not harm the governmental interest in curbing criminal activity; as an example, the New York City stop and frisk policy—the most aggressive frisk policy aimed at confiscating illegal weapons— yielded a confiscation rate of only 1.14% in all stop and frisks.[99]

The deterrent effects of changes in policing are evident by the

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[93] *See id.* at 1591–95.

[94] *See infra* Part IV.

[95] Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI L. REV. 665, 666 (1970).

[96] *See* Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and Lost Cases: The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1039 (1991).

[97] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 1.

[98] *See* STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 4 ("These numbers are all the more significant in light of evidence that an alarming number of these stops, frisks, and searches are illegal, in part because they are not based on the required level of suspicion of criminal activity.").

[99] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 4.

implementation of the exclusionary rule by the states following the *Mapp v. Ohio* decision.[100] After the U.S. Supreme Court ruled that impermissible searches would result in the exclusion of illegally obtained evidence, police departments issued sweeping changes in training and dramatically increased the number of search warrants issued in order to comply with the requirements of legal searches.[101] On the other hand, the exclusion of illegally obtained evidence results in trial delays and extra hearings, clogging up the criminal justice system.[102] This delay can be avoided by curbing the number of illegal searches that yield excluded evidence.[103]

Requiring officers to have an articulable suspicion that a suspect has a weapon, and subsequently excluding evidence obtained without officers meeting this standard, might result in some guilty individuals walking free; however, condemning these illegal searches will "maintain respect for [the] law and promote confidence in the administration of justice."[104] Under the New York City Stop, Question, and Frisk policy, about 40% of the stops made by the police were based on observations or other factors that had only a 1% chance of finding a weapon, and these low-yield stops disproportionately affected Black and Latino communities.[105] By contrast, stops that were based on more reliable factors were 6% more likely to result in the discovery of weapons and simultaneously mitigate racial disparities.[106] A higher, more articulable standard will reduce the use of ineffective, subjective observations that do not infer that a person has weapons.[107]

"A stop and frisk can leave people feeling unsafe, fearful of police, afraid to leave their homes, or re-living the experience whenever they see police."[108] By clarifying the standard as a reasonable articulable suspicion that a person is armed and dangerous, the deterrent effect on over-policing will result in fewer instances of police paranoia, as citizens in low-income areas will have less fear of random police interactions where "they just pull

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[100] *See* Uchida & Bynum, *supra* note 96, at 1038–39 (citing U.S. v. Calandra, 414 U.S. 338 (1974)).

[101] *See* Uchida & Bynum, *supra* note 96, at 1037.

[102] *See* Oaks, *supra* note 95, at 667, 742–45.

[103] *See generally* Oaks, *supra* note 95, at 667, 742–45.

[104] Oaks, *supra*, note 95, at 669 (quoting Justice Brandeis).

[105] David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501, 517 (2018).

[106] *Id.*

[107] *See id.*

[108] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 6.

you . . . no matter what, any reason[,] [a]nd they won't tell you anything."[109] The clarification will yield positive results because lower reasonable suspicion standards make policing less effective at controlling crime while the heightened probable cause standard actually results in reductions in crime.[110] Effectively showing the public that the new standard is being taken seriously will improve police-community relations by building trust with the community.[111]

B. *The* Torres-Pagan *Decision Will Change the Approach of Policing with Lasting Beneficial Effects for Over-Policed Communities*

Proactive policing has radically changed how America experiences public safety.[112] "Instead of reacting to calls for service as was typical through the 1950s, police agencies now seek to prevent crimes by proactively deploying officers in places where crime is likely to be reported and interacting with the people most likely to be accused of crimes."[113] Allowing a person's presence in a high-crime area to be a factor in considering whether the person is armed and dangerous results in a disproportionate number of citizens in low-income areas being targeted by the police.[114] These police contacts in high-crime areas are premised on a deterrence theory; general deterrence "predicts that the publicity of punishment indirectly deters all individuals' engagement in future crime, whereas specific deterrence argues that the punishment of individuals who engage in crime will deter those individuals' future lawbreaking behavior."[115]

Increased police contacts with people in high-crime areas actually have the opposite effect, according to one study.[116] In a study of over 600 nonwhite high school students in an urban environment, over 40% of the students reported being stopped by the police during the two years of the study.[117] The students stopped by the police were more likely to participate in subsequent delinquent behavior, while inversely, those who reported prior

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[109] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 6.

[110] Rudovsky & Harris, *supra* note 105, at 517–18.

[111] *See* Rudovsky & Harris, *supra* note 105, at 518.

[112] Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. OF THE NAT'L ACAD. OF SCI. 8261, 8261 (2019), https://perma.cc/S4CB-CTPB.

[113] *Id.*

[114] *See* Rudovsky & Harris, *supra* note 105, at 516–17.

[115] Del Toro et al., *supra* note 112, at 8261.

[116] Del Toro et al., *supra* note 112, at 8261.

[117] Del Toro et al., *supra* note 112, at 8262, 8267.

subsequent delinquency were not more likely to be stopped by the police.[118] In other words, boys who reported little or no delinquent behavior at one point were just as likely to be stopped six months later as were boys who reported any or a great deal of delinquency.[119] "Moreover, regardless of whether a boy had committed any prior delinquent acts, a police stop was associated with more frequent delinquent behavior in the future."[120]

If police officers stop using presence in a high-crime area as a justification to pat frisk a person, it may actually deter criminal activity, as the people who used to be subject to the most stops will no longer face psychological and social effects stemming from embarrassing police interactions.[121] When police officers harass non-rule breakers, it actually creates more distrust of law enforcement and exacerbates the problems in community relations.[122] Limiting the use of the high-crime area factor, while requiring police officers to have a more articulable suspicion that an individual is armed and dangerous before stopping and frisking the individual, will result in more trust between the community and law enforcement and will subsequently result in less crime—a goal that helps both sides of the relationship.[123]

CONCLUSION

Commonwealth v. Torres-Pagan resolved the conflation between the pat frisk and exit order standards.[124] Reviewing the past inconsistent articulations of the standard, the SJC provided a clear and simple-to-follow rule that will improve police interactions with the community.[125] In determining that exiting a car, without more, does not constitute a furtive movement that justifies a pat frisk, the SJC provided clarity as to what constitutes behavior raising suspicion of possession of weapons.[126] The SJC went further, explaining the evidentiary weight of furtive movements and presence in a high-crime area in the reasonable suspicion analysis, and

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[118] Del Toro et al., *supra* note 112, at 8266–67.

[119] Del Toro et al., *supra* note 112, at 8266–67.

[120] Del Toro et al., *supra* note 112, at 8266–67.

[121] *See* Del Toro et al., *supra* note 112, at 8267.

[122] *See* Del Toro et al., *supra* note 112, at 8267.

[123] *See* Del Toro et al., *supra* note 112, at 8267.

[124] 138 N.E.3d. 1012, 1020 (Mass. 2020).

[125] *Id.* at 1017.

[126] *Id.* at 1018.

noting that these factors cannot, by themselves, justify a frisk.[127] These clarifications will have a positive effect on the relationship between law enforcement and the community; the higher standard should result in fewer arrests and fewer police interactions, and limiting the evidentiary weight of furtive movements and high-crime areas will benefit the psyche of people in high-crime areas while also potentially decreasing the amount of future crime.[128]

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[127] *Id.* at 1018–20.

[128] *See* Del Toro, *supra* note 112, at 8267.