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THE RIGHT TO REMAIN ARMED

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ABSTRACT

The laws governing gun possession are changing rapidly. In the past two years, federal courts have wielded a revitalized Second Amendment to invalidate longstanding gun carrying restrictions in Chicago, the District of Columbia, and throughout California. Invoking similar Second Amendment themes, legislators across the country have steadily deregulated public gun carrying, preempting municipal gun control ordinances in cities like Philadelphia, Atlanta, and Cleveland.

These changes to substantive gun laws reverberate through the constitutional criminal procedure framework. By making it lawful for citizens to carry guns even in crowded urban areas, enhanced Second Amendment rights trigger Fourth Amendment protections that could radically transform American policing. Evidence of handgun possession—whether from a tip or observation—is increasingly an inadequate justification for a Fourth Amendment stop; officers will struggle to articulate legal grounds for temporarily disarming citizens during face-to-face encounters; and the promise of gun-detecting technology as an alternative to invasive investigative techniques, such as pretextual arrests and frisks, may be squelched. Whether observers view these implications as beneficial, disastrous, or something in between, one thing is clear: courts, policymakers, and academics must begin to address the dramatic Fourth Amendment implications of an expanding Second Amendment "right to remain armed."

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INTRODUCTION

In December 2012, a deranged gunman killed twenty children and six adults at the Sandy Hook Elementary School in Newtown, Connecticut.[1] The school shooting sparked a national debate about firearms and, momentarily, raised the specter of a renewed push for gun control legislation.[2] In the end, however, the tragedy served only to highlight the

1. Steve Vogel et al., *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST (Dec. 14, 2012), http://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html.

2. Philip Rucker & Peter Wallsten, *Biden's Gun Task Force Met with All Sides, but Kept Its Eye on the Target*, WASH. POST (Jan. 19, 2013), http://www.washingtonpost.com/politics/bidens-gun-task-force-met-with-all-sides-but-kept-its-eye-on-the-target/2013/01/19/520d77a6-60c5-11e2-b05a-605528

power of countervailing forces in American society. Guns were indeed on the legislative agenda following Sandy Hook, but legislators generally sought to expand, not restrict, gun rights. In the year following the Sandy Hook shooting, almost every state enacted at least one new gun law, but "[n]early two-thirds of the new laws ease restrictions and expand the rights of gun owners."[3] Punctuating this trend, in 2014, Georgia enacted the "Safe Carry Protection Act," labeled by critics the "Guns Everywhere" law.[4] The law abolishes most limits on where people can carry firearms, loosens restrictions on who can carry a gun, and curbs the ability of police to investigate whether a person carrying a gun possesses a license.[5]

In the dwindling number of jurisdictions where legislators continue to support strict gun regulation, judges, rather than politicians, spearhead the gun-rights movement. The United States Supreme Court opened the judicial front in 2008 in *District of Columbia v. Heller*,[6] ruling that "the District's ban on handgun possession in the home violates the Second Amendment."[7] *Heller*'s broader implications came into focus in 2014, when the Ninth Circuit applied the case to mandate that California cities permit law-abiding citizens to carry handguns in public.[8]

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f6b712_story.html (describing efforts of task force appointed by President Obama in wake of Sandy Hook shooting).

3. Karen Yourish et al., *State Gun Laws Enacted in the Year Since Newtown*, N.Y. TIMES (Dec. 10, 2013), http://www.nytimes.com/interactive/2013/12/10/us/state-gun-laws-enacted-in-the-year-since-newtown.html?_r=0 (surveying state legislation after Sandy Hook); *see also* Michael Cooper, *Debate on Gun Control Is Revived, amid a Trend Toward Fewer Restrictions*, N.Y. TIMES (Dec. 15, 2012), http://www.nytimes.com/2012/12/16/us/politics/connecticut-shooting-revives-gun-control-debate. html?_r=0 (contrasting anti-gun reaction to Sandy Hook with nationwide trend of expanding gun rights).

4. Larry Copeland & Doug Richards, *Ga. Governor Signs 'Guns Everywhere' into Law*, USA TODAY (Apr. 23, 2014, 4:17 PM), http://www.usatoday.com/story/news/nation/2014/04/23/georgia-gun-law/8046315/.

5. Safe Carry Protection Act, H.R. 60, 152d Gen. Assemb., Reg. Sess. § 1-5 (Ga. 2014), *available at* http://www.legis.ga.gov/legislation/en-US/display/20132014/HB/60 (amending Ga. Code to permit concealed firearms in bars, places of worship, and most government buildings); *id.* §§ 1-6, 1-9 (expanding authority to permit concealed firearms in schools); *id.* § 1-7 (providing that persons under twenty-one but at least eighteen years of age with military service can obtain a concealed carry license and removing disqualification for persons convicted of "[p]ointing a gun or a pistol at another"); *id.* § 1-10 (prohibiting detention for the sole purpose of determining whether a person with a weapon has a license).

6. 554 U.S. 570 (2008).

7. *Id.* at 635.

8. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014) (invalidating California's restrictive licensing framework as applied in San Diego), *vacated and reh'g granted en banc*, 781 F.3d 1106 (9th Cir. 2015); Ed Joyce, *With Restrictions Relaxed, Thousands Apply to Carry Concealed Firearms in OC*, KPCC (Apr. 14, 2014), http://www.scpr.org/news/2014/04/14/43439/good-cause-gone-orange-county-sheriff-issuing-conc/ (reporting that, after *Peruta*, "3,500 [people] have applied" in the county for a concealed weapons permit, even though the county "typically get[s] about 500 applications a year" and averages, "at any given time, about 940" licensed concealed weapons holders).

The sweeping changes to America's substantive gun laws reverberate throughout American policing. Particularly in America's cities, efforts to combat violent crime center on gun-policing strategies, colloquially known as "getting guns off the streets."[9] Echoes of this effort can be found in the earliest days of the Republic, and the strategy has become increasingly prominent in modern times.[10] Urban police chiefs identified handgun violence as the driving force in America's violent crime surge in the 1970s and 1980s.[11] Municipal policymakers reacted aggressively, enacting strict licensing regimes and handgun prohibitions.[12]

Strict gun regulations are designed to prevent violent crimes, like homicide and robbery, by empowering police to detect and deter public handgun carrying. Seeking to prevent incipient street crimes, officers stop people who appear to be armed—including those acting otherwise lawfully—citing suspicion of unlawful gun possession as the basis for the intrusion.[13] This form of gun policing drove the infamous New York City "stop and frisk" program; in the forms documenting the hundreds of thousands of stops conducted in the city in recent years, officers most frequently cited suspected "weapons possession" as the justification for a stop.[14]

Dramatic changes in the nation's substantive gun laws erode the constitutional underpinnings of urban gun policing. The Fourth

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9. *See* Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1500–20 (2014) (chronicling evolution of New York City Stop and Frisk); sources cited *infra* notes 11, 32.

10. *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013) (arguing that "perhaps no characteristic of gun control in the United States is as 'longstanding' as the stricter regulation of guns in cities than in rural areas" and providing examples); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1726 (2012) ("A broad range of restrictions on the use of arms in public, including bans on the right to carry in public, emerged in the decades after the adoption of the Second Amendment.").

11. *See, e.g.*, RUDOLPH W. GIULIANI & WILLIAM J. BRATTON, POLICE STRATEGY NO. 1: GETTING GUNS OFF THE STREETS OF NEW YORK 4 (1994) ("In 1960, there were 75 homicides committed in the city with handguns, representing a quarter of the total number of murders for the year. In 1992, there were 1,500 homicides . . . committed with handguns, representing three quarters of the total number of murders . . . ."); *see also* ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 17 (2011), *available at* http://www.bjs.gov/content/pub/pdf/htus8008.pdf (reflecting percentage of homicides from 1980 to 2008 that involved guns); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 470 (2000) ("Homicide trends in New York City since 1985 provided strong empirical support for emphasizing gun violence in enforcement policy.").

12. *See infra* Part I.A.

13. *See infra* Part I.B.

14. *See* Bellin, *supra* note 9, at 1500–20 (describing evolution of New York City Stop and Frisk); *see also infra* note 67 and accompanying text.

Amendment generally requires police to possess "individualized suspicion" of a crime prior to conducting any search or seizure.[15] When police try to preempt violent crime by stopping (i.e., seizing) armed citizens, the assumed violation of municipal gun laws supplies the requisite Fourth Amendment authority.[16] As gun carrying becomes both lawful and common, even in major cities, police lose the ability to invoke public gun possession as a Fourth-Amendment-satisfying basis for investigation.[17]

The emerging reality across America, including its cities, is that carrying a concealed handgun is a perfectly "lawful act."[18] In Florida alone, the number of active concealed handgun carrying ("concealed carry") licenses climbed from 33,000 in 1988 to just over 1.4 million in 2015—covering roughly eight percent of Floridians.[19] The most recent estimate of active concealed carry licenses across America places the number at over 11 million (up from 4.6 million in 2007), or almost five percent of the population.[20] These ballooning numbers will eventually force judges (and police officers) to acknowledge that gun possession alone is a constitutionally dubious justification for a search or seizure. In light of the resurgent Second Amendment's softening of gun restrictions, urban police long trained to spring into action at the sight of a firearm may now be violating the Fourth Amendment when they do so.[21] Once seen as a lawful basis for searches and seizures, reports and observations of armed people, whether in the District of Columbia's pedestrian mall or the local

15. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) (stating that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure").

16. *See infra* Part II.C.

17. *See infra* Part II.C.

18. *See, e.g.*, Bellotte v. Edwards, 629 F.3d 415, 423 (4th Cir. 2011) ("[C]arrying a concealed weapon pursuant to a valid concealed carry permit is a lawful act.").

19. DIV. OF LICENSING, FLA. DEP'T OF AGRIC. AND CONSUMER SERVS., NUMBER OF VALID FLORIDA CONCEALED WEAPON LICENSES (2015), *available at* http://www.freshfromflorida.com/content/download/7504/118881/NumberOfValidCWLicenses_FiscalYearEndSince1987-1988.pdf (noting total number of valid licenses as reported at the end of each fiscal year since 1988).

20. CRIME PREVENTION RESEARCH CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES 4–5 (2014), *available at* http://crimepreventionresearchcenter.org/wp-content/uploads/2014/07/Concealed-Carry-Permit-Holders-Across-the-United-States.pdf; *cf.* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-717, GUN CONTROL: STATES' LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION 1 (2012) [hereinafter GAO REPORT] (noting that States reported "approximately 8 million active concealed carry permits" as of December 31, 2011, but emphasizing that this "number is likely understated" because some states provided no estimate of permits issued); PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE 22, 107 (2014) (noting 8 million statistic without citation but labeling it "very conservative").

21. *See, e.g.*, Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1133–34 (6th Cir. 2015) (ruling that police officer, responding to 911 call, who stopped person carrying a handgun could be liable under 28 U.S.C. § 1983 for violating Fourth Amendment).

shopping mall, may increasingly be met with shrugs from police officers who, legally speaking, have no basis to act.

America is engaged in two great debates: one regarding the proper limits of police efforts to proactively suppress crime, and another about the proper role of firearms in public.[22] This Article demonstrates that these debates, while generally conducted in isolation, are closely intertwined. It does so in three parts, roughly delineating the past, present, and future. Part I (the past) describes the traditional gun-policing tactics employed by urban police forces to suppress violent crime. Part II (the present) explains how the transforming gun-rights landscape undermines the Fourth Amendment validity of these staples of gun-oriented policing. Part III (the future) analyzes legal strategies that cities will likely turn to as courts and legislators increasingly invalidate restrictive gun laws. This final Part forecasts that local policymakers will try to suppress gun carrying and detect and deter unlawful gun possession by: (1) raising the minimum age for obtaining a "concealed carry" license; and (2) requiring lawfully armed citizens to present their license, upon request, to inquiring police officers. These efforts to reduce the number of lawful gun possessors and facilitate the detection and disarming of unlicensed gun possessors could approach the effectiveness of traditional urban gun-policing efforts because licensed gun possessors commit only a tiny fraction of violent street crime.[23] As Part III explains, however, these approaches are themselves subject to constitutional challenge and may generate unintended negative policy consequences, such as abusive police practices and racial profiling.[24] The discussion ultimately raises as many questions as it answers, but one theme resonates throughout: the emerging Second *and* Fourth Amendment "right to remain armed" has the potential to radically transform American policing.

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22. *See* Bellin, *supra* note 9 (discussing controversy surrounding New York City Stop and Frisk); Jeffrey Bellin, *What We Should Learn from Garner and Ferguson Cases*, CNN (Dec. 9, 2014, 10:32 AM), http://www.cnn.com/2014/12/08/opinion/bellin-prosecutors-killings-by-police/index.html?hpt=hp_t1 (addressing controversy surrounding recent police deadly force cases); sources cited *supra* notes 2–3 (discussing controversy surrounding gun control proposals).

23. *See infra* Part III.A.

24. *See infra* Part III.B.2.

I. URBAN GUN POLICING

City residents absorb a fearsome and disproportionate share of America's gun crime, often in the form of robberies and murder.[25] Municipal efforts to combat these crimes target firearms, and particularly handguns.[26] One of the most vivid examples of this focus emerged in New York City in 1993 when voters, reacting to a cresting street crime epidemic, elected Mayor Rudolph Giuliani, who installed William Bratton as Police Commissioner.[27] Bratton crunched the numbers and determined that handguns were the principal driver of New York City's crime wave.[28] The first policy document promulgated by Bratton's police department (the "NYPD"), *Police Strategy No. 1: Getting Guns off the Streets of New York*, reported that between 1960 and 1992, the city experienced an almost *two-thousand percent* increase in homicides committed with handguns (a type of homicide that had grown from one quarter to three quarters of all

25. McDonald v. City of Chicago, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting) ("Urban areas such as Chicago suffer disproportionately from this epidemic of violence. Handguns contribute disproportionately to it."); DETIS T. DUHART, U.S. DEP'T OF JUSTICE, NCJ 182031, URBAN, SUBURBAN, AND RURAL VICTIMIZATION, 1993–98 4, 9 (2000), *available at* http://www.bjs.gov/content/pub/pdf/usrv98.pdf (reporting that urban residents were victimized by violent crime 74% more often than rural residents and 37% more often than suburbanites and that "[u]rban violent offenders were more likely than offenders elsewhere (12% urban versus 9% suburban and 8% rural) to use a firearm"); Blocher, *supra* note 10, at 100 (explaining that "though the empirics are messy and contested, gun crime is clearly an urban problem" and discussing empirical evidence); CDC, *Violence-Related Firearm Deaths Among Residents of Metropolitan Areas and Cities—United States, 2006-2007*, 60 MORBIDITY & MORTALITY WKLY. REP. 573, 574 (2011), *available at* http://www.cdc.gov/mmwr/pdf/wk/mm6018.pdf (concluding based on empirical analysis that "firearm homicide rates tended to be higher with increasing urbanization").

26. *See* Brief of Violence Policy Center and the Police Chiefs for the Cities of Los Angeles, Minneapolis, and Seattle as Amici Curiae in Support of Petitioners at 2, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 136348 (representing views of "the Chiefs of Police for three of the nation's largest cities: Los Angeles, Seattle, and Minneapolis" who "are keenly aware of the devastation caused by handguns in American cities" and "have a substantial interest in enacting and upholding handgun restrictions in order to protect the lives of their citizens and their officers"); GEORGE L. KELLING, U.S. DEP'T OF JUSTICE, NCJ 178259, "BROKEN WINDOWS" AND POLICE DISCRETION 9 (1999) ("Increasingly, police are under renewed and constant pressure from neighborhood groups and city halls across the country . . . to 'do something now' about . . . getting guns off the street, and regaining control over public places."); Jon S. Vernick et al., *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool*, 31 J.L. MED. & ETHICS 567, 567 (2003) ("In the 1980s and 1990s, police departments across the country began to develop and implement strategies to address illegal weapons carrying. Often these strategies have involved aggressive efforts to identify and physically search individuals suspected of illegally carrying a firearm.").

27. BERNARD E. HARCOURT, ILLUSION OF ORDER 47–48 (2001) (indicating that "Giuliani appointed William Bratton police commissioner in December 1993," soon after Giuliani was elected); WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND 194–95 (1998) (describing process of being hired to head NYPD in December 1993 to January 1994).

28. BRATTON, *supra* note 27, at 218.

city murders).[29] The strategy document concluded that "[i]llegal guns—particularly handguns—are an unrelenting and growing plague in New York."[30] This insight forecasted the NYPD's subsequent policing strategies. Over the next decades, the NYPD engaged in a concerted effort to rid the streets of handguns, employing specialized units tasked with seizing firearms, mass stop-and-frisk, pretextual arrests, and other measures—all intended to detect and deter public gun possession and "get[] guns off the streets."[31] While New York City's efforts received the most attention, they differed only in degree from those of American cities across the country.[32] This Part summarizes the legal framework that undergirds urban gun-suppression efforts—a framework that, as explained in Part II, may no longer be constitutional in light of sweeping changes to the nation's gun laws.

A. Strict Licensing Regimes

Efforts to keep guns off city streets begin with laws restricting public gun possession. American cities traditionally employed two approaches: prohibitions and licensing. Although prohibitions are all but extinct, they previously formed the backbone of urban gun-policing efforts in two major American cities. Most prominently, starting in the late 1970s and for decades thereafter, the District of Columbia essentially prohibited handguns after determining that the city's licensing regime had "not been sufficiently effective in reducing the potentiality of gun-related deaths and

29. GIULIANI & BRATTON, *supra* note 11, at 4.

30. *Id.* at 4–5 ("[New Yorkers] are afraid for a reason, and that reason has mainly to do with handguns.").

31. *See id.*; Bellin, *supra* note 9, at 1500–20 (chronicling evolution of New York City Stop and Frisk).

32. *See* Bernard E. Harcourt, *Introduction: Guns, Crime, and Punishment in America*, 43 ARIZ. L. REV. 261, 262 (2001) ("Urban police departments are pursuing gun-oriented policing strategies focused on increased stop-and-frisk encounters and misdemeanor arrests as a way to get guns off the streets."); Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 339 (2014) (explaining that "[s]cores of cities rushed to follow the Kansas City model [of gun-oriented policing], including perhaps most famously, New York City"); Lawrence W. Sherman, *In Remembrance: James Wilford Shaw, Criminologist*, THE CRIMINOLOGIST (AM. SOC'Y OF CRIMINOLOGY, Columbus, OH), Sept.–Oct. 1995, at 23 (emphasizing Shaw's influence by stating as "[a] conservative estimate" that "over 100 other police agencies adopted" aggressive gun interdiction efforts modeled on Shaw's empirical findings in Kansas City); Gus G. Sentementes, *Police Step up Frisking Tactic*, BALTIMORE SUN (Nov. 13, 2005), http://articles.baltimoresun.com/2005-11-13/news/0511130098_1_frisking-deter-crime-police-officers/3 (reporting on aggressive stop and frisk tactics in high crime areas of Baltimore intended to "seize guns and prevent violence").

gun-related crimes from occurring within the District of Columbia.'"[33] In 1983, Chicago similarly banned handguns to "protect its residents 'from the loss of property and injury or death from firearms.'"[34] Other cities, such as San Francisco, attempted to ban handguns at various points in their history with limited success.[35]

More commonly, cities limit public gun possession by restricting visible weapons carrying ("open carry") and prohibiting the carrying of concealed handguns without a "concealed carry" permit issued by local police authorities.[36] By giving local officials, such as the police commissioner, broad discretion to deny permits, states allow cities to severely limit public gun possession even as less crime-plagued rural areas freely allow licensed handgun carrying.[37]

Against a backdrop of "open carry" prohibitions in their respective states, New York City and San Diego exemplify the strict licensing model of gun control. To carry a concealed handgun in New York City, an applicant must demonstrate "proper cause" to the NYPD.[38] The standard is stringent: "the mere fact that an applicant has been the victim of a crime or resides in or is employed in a 'high crime area,' does not establish 'proper cause' for the issuance of a carry or special handgun license."[39] Instead,

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33. McIntosh v. Washington, 395 A.2d 744, 754 (D.C. 1978) (quoting STAFF OF H. COMM. ON THE DISTRICT OF COLUMBIA, 94TH CONG., REP. ON THE JUDICIARY & CRIM. LAW (Comm. Print 1976)).

34. McDonald v. City of Chicago, 561 U.S. 742, 750–51 (2010) (quoting city council proceedings).

35. Fiscal v. City of San Francisco, 70 Cal. Rptr. 3d 324, 335–36 (Ct. App. 2008) (invalidating San Francisco ordinance as preempted by state law); *see also McDonald*, 561 U.S. at 938 (Breyer, J., dissenting) (noting that "some municipalities ban handguns, even in States that constitutionally protect the right to bear arms," and citing examples); Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 145–46 (2009) ("At least ten municipalities, including San Francisco, Oakland, Chicago and many of its neighboring municipalities, Memphis, Toledo, and Cambridge, have at least at one time enacted handgun regulations comparable to those of the District.").

36. *See, e.g.*, Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1147–48 (9th Cir. 2014) (detailing California firearm licensing rules); N.Y. PENAL LAW § 265.03(3) (2014) (prohibiting an unlicensed person from "possess[ing] any loaded firearm" outside of the home or place of business). These laws have a lengthy pedigree. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012) ("In 1881, New York prohibited the concealed carrying of 'any kind of fire-arms.'").

37. *See, e.g.*, N.J. REV. STAT. § 2C:58-4(c) (2000) (requiring concealed carry license to be issued by "the chief police officer of the municipality in which the applicant resides"); N.Y. PENAL LAW § 265.00(10) (2014) (defining pertinent licensing officers under New York law).

38. N.Y.C., N.Y., RULES tit. 38, § 5-03 (2014), *available at* http://rules.cityofnewyork.us/content/section-5-03-carry-and-special-handgun-licenses; *see also* Sanchez v. Kelly, 799 N.Y.S.2d 164 (Sup. Ct. 2004) (unpublished table disposition) (describing NYPD's "[e]xtraordinary power" in issuing concealed carry permits); Goldstein v. Brown, 592 N.Y.S.2d 343, 344 (App. Div. 1993) (reviewing concealed carry permit denial and describing broad discretion provided to NYPD decisions).

39. § 5-03.

the NYPD requires evidence of "[e]xposure of the applicant to extraordinary personal danger, documented by proof of recurrent threats to life or safety requiring authorization to carry a handgun."[40] The NYPD rarely grants concealed carry licenses.[41]

San Diego similarly restricts issuance of concealed carry licenses to applicants showing "good cause," defined as "[a] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way"; concern for "one's personal safety alone is not considered good cause."[42] San Diego County delegates the determination of whether this standard is met to the County Sheriff.[43] Under the policy, there are about 1100 active concealed weapons permits in San Diego, representing slightly more than .03% of the population.[44] California's other major cities are reportedly even more restrictive: as of March 2014, "Los Angeles County had a few hundred [active concealed weapons permits], while counties in the Bay Area each have fewer than 200, with San Francisco clocking in with just two."[45]

B. Detecting Noncompliance

Laws prohibiting or severely restricting public gun possession do not enforce themselves. Consequently, urban policymakers expect police officers to seek out guns and arrest those who carry them unlawfully. The mechanisms for performing this task vary. This Part catalogues the most commonly employed tactics. As discussed in Part II, the recent expansion

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40. *Id.*

41. *See* Moore v. Madigan, 702 F.3d 933, 953 (7th Cir. 2012) (Williams, J., dissenting) (noting that "New York City rarely [issues permits] and so has been characterized as maintaining a virtual ban on handguns"); CRIME PREVENTION RESEARCH CTR., *supra* note 20, at 10, 13 (reporting that New York City had 5700 active permits as of 2010, or .09% of the population); Sewell Chan, *Annie Hall, Get Your Gun*, N.Y. TIMES CITY ROOM BLOG (Dec. 2, 2008, 1:13 PM), http://cityroom.blogs.nytimes.com/2008/12/02/a-guide-to-city-gun-licenses/?_r=0 (providing breakdown of concealed carry permit numbers for New York City and noting mayor's desire to reduce the number); John Marzulli, *Gun Permits KOD NYPD Shoots Down 55% Of Renewals*, N.Y. DAILY NEWS (May 4, 1999, 12:00 AM), http://www.nydailynews.com/archives/news/gun-permits-kod-nypd-shoots-55-renewals-article-1.835934 (detailing difficulty of obtaining a concealed carry license in New York City and the low number of permits issued).

42. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014) (citation omitted).

43. *Id.*

44. Randy Dotinga, *5 Things to Know About Concealed Guns in SD*, VOICE OF SAN DIEGO (Mar. 7, 2014), http://voiceofsandiego.org/2014/03/07/5-things-to-know-about-concealed-guns-in-sd/. About 3.2 million people live in San Diego County. U.S. Census Bureau, *State & County QuickFacts: San Diego County, California*, *available at* http://quickfacts.census.gov/qfd/states/06/06073.html (last visited Aug. 10, 2015).

45. Dotinga, *supra* note 44.

of gun rights calls into question the constitutionality of these gun-policing tactics. Interestingly, the most significant impact of changing gun laws may be on a tactic yet to see widespread adoption, but perhaps most important to future generations: gun-detection technology.

1. Observations, Tips, and Admissions

Police often detect guns through public observation. Officers patrol the streets alert to signs of gun possession, such as bulges under clothing or protruding handles. The late Jack Maple, a key Bratton deputy, describes in his memoir how he taught himself to "spot people carrying guns" so he could "save a few lives" by getting the guns off the street.[46] Maple explained the "drill" as follows: after seeing a suspicious bulge, he would make his "first move by grabbing the handle of [the suspect's] gun. [The suspect] freezes and usually obeys an order to put his hands on his head. If he doesn't, my hold on his gun and waistband put him off-balance, so I can spin him around and get cuffs on him anyway."[47] Maple bragged that as a patrol officer, he would "stop two or three people a day who were carrying concealed weapons."[48]

Police also receive reports from citizens about guns carried by others. A Seventh Circuit case provides a representative fact pattern:

> One afternoon a uniformed police officer on patrol in his car . . . received a message from his dispatcher conveying an anonymous tip that at the corner of Main and Calhoun Streets was a black man wearing a tan shirt and tan shorts who had a gun in his waistband.[49]

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46. JACK MAPLE, THE CRIME FIGHTER 42 (1999).

47. *Id.*

48. *Id.* Maple notes that "[m]any of the guns were licensed; some were not." *Id.*; *cf. Timothy McVeigh Trial: Documents Relating to McVeigh's Arrest and the Search of His Vehicle*, UMKC, http://law2.umkc.edu/faculty/projects/ftrials/mcveigh/mcveigharrest.html (last visited Nov. 3, 2015) [hereinafter *Testimony of Oklahoma State Trooper Hanger*] (providing a copy of the transcript of the testimony of Oklahoma State Trooper Charles J. Hanger discussing his stop of Timothy McVeigh when he noticed a "bulge under McVeigh's left arm"; after McVeigh said he had a gun, the trooper testified that he "grabbed for the bulge," "removed [his] pistol from [his] holster and stuck it to the back of [McVeigh's] head"); United States v. McVeigh, 940 F. Supp. 1541, 1546 (D. Colo. 1996) (discussing stop).

49. United States v. DeBerry, 76 F.3d 884, 885 (7th Cir. 1996) (upholding subsequent stop); *see also* United States v. Shaw, 874 F. Supp. 2d 13, 22 (D. Mass. 2012) (reporting confidential informant tip that "he had seen the two men [subsequently stopped by police] with the gun"); *In re* D.M., 781 A.2d 1161, 1164 (Pa. 2001) (evaluating Philadelphia stop initiated by "an anonymous telephone call reporting that appellant was on a specific corner with a gun" and deeming *Terry* stop constitutional when suspect fled upon approach of police).

A similar anonymous tip formed the prelude to a Supreme Court case, where police responded to a tip that a person "standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[50]

Another gun-detection tactic takes advantage of case law that deems "consensual encounters" unregulated by the Fourth Amendment.[51] Under this doctrine, officers can freely initiate conversations with anyone they encounter. During these conversations the police commonly inquire whether the person is armed.[52] If the person chooses to answer and the answer is "yes," officers have detected a weapon. If the answer is "no," the officer may ask and obtain permission to do a quick "pat down" search. After all, the officers will say, if you are not armed, as you claim, why object to a pat down?[53] No Fourth Amendment violation occurs in this scenario so long as a court rules that the subject of the encounter voluntarily agreed to stop, talk, and be frisked.[54]

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50. Florida v. J.L., 529 U.S. 266, 268 (2000); *see also* Stephanie Clifford, *In Brooklyn Gun Cases, Suspicion Turns to the Police*, N.Y. TIMES, Dec. 11, 2014, at A26 (discussing series of suspicious cases where officers based arrests on a confidential informer's tip that someone was armed). Often, the tip of gun possession is not anonymous. *See, e.g.*, United States v. Orman, 486 F.3d 1170, 1171 (9th Cir. 2007) ("An employee of the local utility company, Arizona Public Service ("APS"), reported to mall personnel that he observed a man (later identified as Orman) place a handgun in his boot before entering the mall."); United States v. Valentine, 232 F.3d 350, 352 (3d Cir. 2000) (upholding subsequent stop where "a young black man in his early twenties flagged [police] down and explained that he had just seen a man with a gun").

51. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification."); *see also* Florida v. Bostick, 501 U.S. 429, 434 (1991) (same); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) ("[A] search authorized by consent is wholly valid.").

52. *See* sources cited *infra* note 53.

53. *See* Mitchell v. United States, 233 F. App'x 547, 551 (6th Cir. 2007) (emphasizing that once suspect being questioned near the location of shots being fired "acknowledged that he had a weapon on him," the officers "were not only entitled to investigate further, but also to ensure their safety in the process by removing the gun"); United States v. McKinnon, 133 F. App'x 167, 169 (6th Cir. 2005) (upholding gun seizure where officer patrolling housing project obtained pedestrian's permission to do a pat down and found a gun); United States v. Williams, 215 F.3d 1323 (4th Cir. 2000) (unpublished table disposition) (upholding legality of officer's discovery of gun by asking suspect, Lawrence Marcell Williams, if he could search him and, after suspect indicated acquiescence, finding gun in suspect's jacket).

54. *Bostick*, 501 U.S. at 434–35 (citations omitted) ("[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required.").

2. Coercive Encounters

In most cases, people unlawfully carrying guns are discreet, foiling the direct gun-detection techniques described in the prior part. As a result, police interested in detecting and deterring public gun carrying must take more proactive measures. The most common techniques can be broken down by the legal doctrines that authorize them: pretextual arrests and *Terry* stop and frisks.[55]

When police possess "probable cause" to suspect a criminal offense has been committed, they can constitutionally arrest the offender and perform a search incident to arrest.[56] This rule applies regardless of the subjective intent of the officer or the seriousness of the offense.[57] As a consequence, police who have probable cause to suspect even relatively minor offenses, such as traffic infractions, jaywalking, drug possession, or trespassing, can leverage the minor offense into a search of the person, even if the actual motivation for the search is a speculative hope of detecting unlawful gun possession. Taking advantage of this doctrine, officers regularly investigate and detect gun possession through searches legally justified by suspicion of common, sometimes trivial, offenses.[58] Thus, New York City

55. Terry v. Ohio, 392 U.S. 1, 20–22 (1968).

56. *See* Virginia v. Moore, 553 U.S. 164, 176 (2008) ("[W]arrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and . . . while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."); Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); Arkansas v. Sullivan, 532 U.S. 769, 771 (2001).

57. Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); United States v. Simpson, 520 F.3d 531, 541 (6th Cir. 2008) ("[A] seizure for an ongoing violation of *any* crime—no matter how minor—is governed by the standard of reasonable suspicion . . . ."); Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011) (critiquing the Supreme Court's criminal procedure doctrine for failing to consider crime severity in the Fourth Amendment calculus).

58. *See* United States v. Washington, 559 F.3d 573, 578 (D.C. Cir. 2009) (reporting testimony of officer that "the [Washington, D.C.,] police were performing an 'aggressive traffic patrol'—looking 'for moving violations, tag violations, reasons to pull vehicles over'—because, as Officer Teixeira testified, 'that's normally how we get a lot of our narcotics and gun arrests,'" but emphasizing the irrelevance of the true motive for the traffic stop); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 869 (2008) (describing findings of the Mollen Commission that suggested the New York City police officers who believed a suspect might be carrying a gun would make up a pretextual reason for a stop and search, such as that "'they saw a bulge in a person's pocket'"); Eric Pooley & Elaine Rivera, *One Good Apple*, TIME, Jan. 15, 1996, at 54 (reporting on Maple's desire to "go after shootings" and his suggestion that confronting people for minor violations like having an open beer or public urination can lead to frisks—"'[m]aybe I bump against that bulge in your belt'"—that uncover weapons).

police officers could arrest someone "they observed . . . riding his bicycle on the sidewalk," a potential violation of the city's Administrative Code; their discovery of an unlicensed firearm in the search that followed constituted "a lawful search incident to a proper seizure."[59] Similarly, Columbia, Missouri, police could arrest someone for trespassing and rely on a handgun found in the search incident to arrest to support a subsequent firearm charge.[60]

Even when an officer does not possess probable cause to suspect an offense, the Fourth Amendment (as interpreted by the courts) permits a brief stop and cursory search based upon a lower level of suspicion. Specifically, under *Terry v. Ohio*, an officer may "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot."[61] A "frisk" may follow if there is reasonable suspicion to believe the person is armed and dangerous.[62] Again, there is no requirement that the suspected offense be violent or serious.[63] As explained by the late Bill Stuntz, this means that "*Terry*'s requirements are easily met. Reasonable suspicion may mean little more than being a young man in a high-crime neighborhood on a street corner where drug deals are thought to happen."[64] The doctrine permits, for example, Tulsa police to stop a person based on "reasonable suspicion" that he was violating a city ordinance that prohibits "walk[ing] in the road when there is a sidewalk available for pedestrian use," and rely on the gun found in the pat down that followed to support a later firearm prosecution.[65]

Like pretextual arrests, *Terry* stops provide a viable mechanism for motivated police officers to seek out unlawful gun possession.

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59. United States v. McFadden, 238 F.3d 198, 204 (2d Cir. 2001) (upholding search as described above as a valid search incident to arrest).

60. United States v. Griffith, 533 F.3d 979, 985 (8th Cir. 2008) (upholding search as described above); *cf.* BRATTON, *supra* note 27, at 154 (explaining an "unanticipated by-product" of fare-evader sweeps instituted under a "Broken Windows" paradigm in the New York subways was that stops for fare evasion uncovered unlawful weapons).

61. Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (explaining that "[i]n *Terry*, we held that an officer may . . . conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot," and that this is "a less demanding standard than probable cause"); Terry v. Ohio, 392 U.S. 1, 30 (1968).

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

63. David Keenan & Tina M. Thomas, *An Offense-Severity Model for Stop-and-Frisks*, 123 YALE L.J. 1448, 1458 & n.60 (2014) (stating that "lower courts routinely uphold stop-and-frisks for even the most minor offenses so long as an officer can articulate a reasonable suspicion" and citing cases supporting this assertion).

64. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2170 (2002).

65. *See, e.g.*, United States v. Birmingham, No. 13-CR-0237-CVE, 2014 WL 580138, at *4 (N.D. Okla. Feb. 12, 2014).

Presumably, this was the legal hook for Jack Maple's daily, coercive gun stops based only on the sight of a suspicious bulge.[66] Following Maple's example, in the hundreds of thousands of stop-and-frisks documented by the NYPD, officers most often list "weapons possession" as the suspected crime.[67] Taking full advantage of *Terry*'s applicability to all offenses, officers also frequently cited "trespassing" as a basis for gun-seeking stops.[68]

3. Gun-Detecting Technology

Gun-detecting technologies present an appealing alternative to intrusive and potentially discriminatory investigative techniques, such as pretextual arrests and "stop and frisks." These technologies already exist and, as they mature, may allow police to scan crowds for firearms without the public outcry and (perhaps) constitutional obstacles occasioned by practices such as "stop and frisk."[69]

Portable weapons scanners head the list of technologies with the greatest potential for urban policing.[70] The NYPD recently obtained a prototype scanner that can reveal concealed weapons by passively detecting background radiation differentials.[71] While scanners in their

66. *See* discussion *supra* Part I.B.1.

67. OFFICE OF MGMT. ANALYSIS AND PLANNING, NYPD, 2011 REASONABLE SUSPICION STOPS 4 (2012) (25.6% of all stops); OFFICE OF MGMT. ANALYSIS AND PLANNING, NYPD, 2012 REASONABLE SUSPICION STOPS 4 (2013) (24.3% of all stops), *available at* http://www.nyc.gov/html/nypd/html/analysis_and_planning/reports.shtml.

68. Floyd v. City of New York, 959 F. Supp. 2d 540, 639 (S.D.N.Y. 2013) (analyzing an NYPD stop based on "criminal trespass"); Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1 (describing NYPD's heavy reliance on minor violations, particularly violations of rules governing public housing projects, to justify stops).

69. W.R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.2(b) (3d ed. West 2014) ("Recent developments in concealed weapons detection technology will likely produce a variety of equipment which police will soon have available to detect weapons on persons or in other locations."); Vernick et al., *supra* note 26, at 567 ("Devices currently being developed and tested could permit the police to scan an individual from a distance—much as a hand-held radar gun enables the speed of a vehicle to be determined from a distance—to determine if a firearm is being carried under his or her clothing.").

70. James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAGAZINE, Mar. 20, 1994, at 47, *available at* http://www.nytimes.com/1994/03/20/magazine/just-take-away-their-guns.html?page wanted =1 ("What is needed is a device that will enable the police to detect the presence of a large lump of metal in someone's pocket from a distance of 10 or 15 feet.").

71. Rocco Parascandola, *NYPD Commissioner Says Department Will Begin Testing a New High-Tech Device that Scans for Concealed Weapons*, N.Y. DAILY NEWS (Jan. 23, 2013, 10:27 AM), http://www.nydailynews.com/new-york/nypd-readies-scan-and-frisk-article-1.1245663 (reporting that the NYPD "just received a machine that reads terahertz—the natural energy emitted by people and inanimate objects—and allows police to view concealed weapons from a distance" and explaining that the device "is small enough to be placed in a police vehicle"); Tamer El-Ghobashy, *Police Tool Targets Guns*, WALL ST. J. (Jan. 23, 2013, 9:20 PM), http://www.wsj.com/articles/SB1000142

current iteration can be deployed in patrol cars, departments are working toward models that would be "small enough to carry on an officer's gun belt."[72] As the technology improves, patrol officers could scan for guns from cars or while on foot in populated areas; authorities could also place scanners on fixed observation posts alongside proliferating surveillance cameras.[73] Although their constitutionality has not been tested, these devices could potentially permit officers to detect firearm carriers without stopping ("seizing") or frisking ("searching") anyone. Like radar devices used to determine the speed of passing vehicles, the scans would often be conducted without the subjects ever knowing they had taken place. Other forms of "technology," including dogs trained to sniff guns (or more precisely gun powder), can also be employed for the purpose of non-intrusive gun detection.[74] As the next Part chronicles, all of these methods of gun detection are called into question by the recent expansion of Second Amendment rights.

II. SECOND AMENDMENT CHALLENGES TO GUN POLICING

Parallel American norms of a robust, rural gun culture and strict, urban gun control have coexisted uneasily for centuries.[75] In recent years, the gun culture has gained the upper hand, methodically knocking down longstanding urban gun restrictions through legislative and judicial action. This Part illustrates these changes to substantive gun law and explores their Fourth Amendment implications.

412788732353980457826026157906818 2 (describing portable scanners being developed for NYPD and noting that "police aimed to get the T-Ray technology in a device small enough to carry on an officer's gun belt").

72. El-Ghobashy, *supra* note 71.

73. "[T]he New York City Police Department already has access to about 2,000 surveillance cameras on the island of Manhattan alone." Ken Hanly, *New York City Police Eye Drones for Surveillance Purposes*, DIGITAL J. (Jan. 17, 2013), http://www.digitaljournal.com/article/ 341541, *archived at* http://perma.cc/35WP-ZHL4.

74. Danielle E. Gaines, *County Police Introduce Gun-Sniffing Dogs*, WASH. POST (Nov. 23, 2011), https://www.washingtonpost.com/local/county-police-introduce-gun-sniffing-dogs/2011/11/21/gIQAL9ZKoN_story.html (discussing Montgomery County Police Department's "firearm-detecting dogs").

75. Blocher, *supra* note 10, at 90–103 (describing "two cultures"); Peterson v. Martinez, 707 F.3d 1197, 1211 (10th Cir. 2013) (collecting historical and scholarly sources demonstrating "the long history of concealed carry restrictions in this country"); NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 200 (5th Cir. 2012) ("[E]ven before the Revolution, gun use and gun control have been inextricably intertwined.").

A. Handgun Regulation Under Siege

The substantive laws undergirding urban gun policing are being hollowed out on two fronts. First, courts are scrutinizing gun regulations with renewed vigor after *District of Columbia v. Heller*. Second, state legislatures are preempting municipal gun regulations, requiring cities to allow public firearm possession irrespective of court intervention. The upshot of both of these changes, sometimes operating in tandem, is a steady trend of loosening gun restrictions.

1. Legislative Easing of Gun Regulation

State legislatures steadily eased gun restrictions over the past decade. In June 2002, seven states and the District of Columbia prohibited the concealed carrying of handguns.[76] Today, no such bans remain.[77] While American cities continue to restrict firearm carrying through licensing requirements, these licensing regimes are also under siege. States are steadily migrating from "no-issue" (i.e., no concealed carry permits) to "may-issue" (i.e., permits issued at the discretion of a police chief); from "may-issue" to "shall-issue" (i.e., permits must be issued to any qualified applicant); and from "shall-issue" to not requiring a permit at all.[78] Between 2002 and 2012, the number of "shall issue" states climbed from twenty-nine to thirty-nine, and the number of states where permits are unnecessary to carry a concealed firearm quadrupled from one to four.[79]

The steady erosion of gun regulations impacts even cities whose citizens favor strict gun control. State law trumps municipal ordinances, and consequently state lawmakers can easily override local gun control preferences.[80] Philadelphia regularly tries to impose gun restrictions analogous to those of other American cities. The Pennsylvania courts

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76. GAO REPORT, *supra* note 20, at 8 tbl.1, 9 fig.1 (Illinois, Kansas, Missouri, Nebraska, New Mexico, Ohio, and Wisconsin).

77. *See* discussion *infra* Part II.A.

78. GAO REPORT, *supra* note 20, at 8 tbl.1; Yourish et al., *supra* note 3.

79. GAO REPORT, *supra* note 20, at 8 tbl.1 (noting three fewer states in the "shall-issue" chart due to move to no permit required); *see also* Drake v. Filko, 724 F.3d 426, 441 (3d Cir. 2013) (Hardiman, J., dissenting) (cataloguing state gun laws).

80. District of Columbia v. Heller, 554 U.S. 570, 713 (2008) (Breyer, J., dissenting) (noting that "as many as 41 States may pre-empt local gun regulation"); Blocher, *supra* note 10, at 100, 133 (noting that "most states preempt some or all local gun control" and describing "dramatic change" in the past three decades of preemption of local gun control autonomy); Matt Valentine, *Disarmed: How Cities Are Losing the Power to Regulate Guns*, ATLANTIC (Mar. 6, 2014), http://www.theatlantic.com/politics/archive/2014/03/disarmed-how-cities-are-losing-the-power-to-regulate-guns/284220/ (describing the NRA's successful, nationwide effort to push states to preempt local gun control laws).

express empathy, but consistently strike down the restrictions: "[w]hile we understand the terrible problems gun violence poses for the city and sympathize with its efforts to use its police powers to create a safe environment for its citizens, these practical considerations do not alter the clear preemption imposed by the [Pennsylvania] legislature . . . ."[81] This pattern plays out in cities across the country, with recent examples from Atlanta,[82] Cleveland,[83] Phoenix,[84] and San Francisco.[85]

2. Judicial Invalidation of Gun Restrictions

Municipalities located in states where legislatures continue to favor strict gun laws face challenges from the judiciary. While the constitutional validity of restrictive urban licensing regimes remained unquestioned for most of American history, this changed in 2008, when the Supreme Court held in *Heller* that "the [District of Columbia]'s ban on handgun possession in the home violates the Second Amendment."[86] Although *Heller* limited its precise holding to the Capitol's ban on *in-home* guns, the Court's recognition of an individual right to handgun possession for self-

81. Clarke v. House of Representatives, 957 A.2d 361, 365 (Pa. Commw. Ct. 2008); *see also* Ortiz v. Pennsylvania, 681 A.2d 152, 156 (Pa. 1996) ("The constitution does not provide that the right to bear arms shall not be questioned in any part of the commonwealth except Philadelphia and Pittsburgh, where it may be abridged at will, but that it shall not be questioned in any part of the commonwealth.").

82. *See* GeorgiaCarry.Org, Inc. v. City of Roswell, 680 S.E.2d 697, 698 (Ga. Ct. App. 2009) (noting success of gun-rights group in trial court in suit against Atlanta and other Georgia cities to prevent them "from enforcing local ordinances that prohibited carrying firearms in city parks" as preempted, in resolving appeal of other issues in the case); Rachel Stockman, *Gun Rights Group Targets Atlanta Gun Ordinance*, WSB-TV (Jan. 17, 2013, 1:19 PM), http://www.wsbtv. com/news/news/local/gun-rights-group-targets-atlanta-gun-ordinance/nTzHm/ (reporting on GeorgiaCarry's threat to sue "Atlanta over a local ordinance which bans weapons at 'public assemblies' like festivals and parades" and noting that the group had "previously sued the city and won over a local ordinance banning guns at local parks").

83. City of Cleveland v. State, 942 N.E.2d 370, 373 (Ohio 2010) (upholding constitutionality of provision against challenge by Cleveland); Bob Driehaus, *Ohio Court Limits Power of Localities on Gun Laws*, N.Y. TIMES, Dec. 30, 2010, at A15 (quoting Cleveland official warning that "gun owners would now be able to walk through a public square with rifles, handguns and assault weapons").

84. *See* H.R. 2455, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (amending Arizona lost property law, which requires property to be sold back to the public, to include "surrendered" property); Mary Jo Pitzl, *New Arizona Gun Law Draws Outcry From Democrats*, ARIZ. REPUBLIC (Apr. 30, 2013, 10:49 PM), http://www.azcentral.com/news/politics/articles/20130430arizona-new-gun-law-draws-democrats-outcry.html?nclick_check=1 (reporting on Phoenix Police Department's scramble to salvage gun buy-back program after Arizona legislature mandated that guns had to be sold back to the public).

85. Fiscal v. City of San Francisco, 70 Cal. Rptr. 3d 324, 335 (Ct. App. 2008) (invalidating San Francisco voter initiative to ban handgun possession ordinance preempted by state law).

86. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

defense[87] signaled open season on gun restrictions outside the home. After all, the need for self-defense extends beyond the front door, particularly for city dwellers.[88] Furthermore, handguns, rather than rifles or other long guns, are well suited to mobile protection. Following this reasoning, the Seventh Circuit ruled in 2012 that *Heller* required the invalidation of Illinois' complete prohibition of *public* gun carrying.[89] A federal judge in Washington, D.C., adopted the same argument in 2014, striking down the Capitol's ban on handguns in public.[90]

The legal battle over the broader implications of *Heller* is ongoing, with the opinion itself providing ammunition for both sides in the debate.[91] The *Heller* Court recognized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited"[92] and that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[93] Picking up on these cues, the Second Circuit in *Kachalsky v. County of Westchester* rejected a post-*Heller* challenge to New York's restriction of concealed carry licenses to individuals demonstrating "proper cause."[94] The court concluded that New York's limits implicate the Second Amendment, but nonetheless survive constitutional scrutiny because "[r]estricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially related to New York's interests in public safety and crime

87. *Id.* at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

88. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012) (recognizing that a Second Amendment right to carry a gun for self-defense logically extends beyond the home).

89. *Id.* at 942 (citation omitted). The Seventh Circuit noted that "Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home." *Id.* at 940; *cf.* People v. Aguilar, 2 N.E.3d 321, 327 (Ill. 2013) ("[I]f *Heller* means what it says, and 'individual self-defense' is indeed 'the central component' of the second amendment right to keep and bear arms, then it would make little sense to restrict that right to the home.").

90. Ruling on Summary Judgment at 3–4, 15, Palmer v. District of Columbia, No. 1:09-cv-01482-FJS (D.D.C. July 2014) (describing D.C. framework prohibiting public handgun possession and noting that "[t]he District of Columbia appears to be the only jurisdiction that still has such a complete ban on the carrying of ready-to-use handguns outside the home"); *Moore*, 702 F.3d at 940 (recognizing the District of Columbia as the sole remaining jurisdiction with a handgun carry prohibition analogous to the one the court subsequently struck down).

91. *Cf.* Drake v. Filko, 724 F.3d 426, 430 (3d Cir. 2013) ("It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home."); McDonald v. City of Chicago, 561 U.S. 742, 860–61, 887 (2010) (Stevens, J., dissenting) (stating that arguments against gun restrictions "are much less compelling when applied outside the home" and noting that "[t]he historical case for regulation is likewise stronger outside the home").

92. *Heller*, 554 U.S. at 626.

93. *Id.*; *see also McDonald*, 561 U.S. at 786 (reiterating these "assurances") (plurality opinion).

94. 701 F.3d 81, 101 (2d Cir. 2012); *see supra* Part I.A (discussing "proper cause" standard).

prevention."[95] The Third Circuit reached a similar conclusion in 2013, rejecting a challenge to New Jersey's analogous "justifiable need" requirement for obtaining a concealed carry license.[96]

More recently, the Ninth Circuit reached the opposite conclusion in *Peruta v. County of San Diego*, where frustrated applicants challenged San Diego's implementation of California's requirement that citizens show "good cause" to obtain a concealed carry license.[97] The Ninth Circuit emphasized that state law prohibited open carrying of handguns, leaving concealed carry as the only option for citizens seeking to carry handguns in public.[98] Yet the "good cause" requirement, as interpreted by San Diego (and other California cities), made concealed carry permits unavailable to San Diegans with only a generic desire for self-defense. The court analogized this near-total infringement on these citizens' right to "bear" arms to the near-total infringement on the right to "keep" arms invalidated in *Heller*, and thus struck down San Diego's licensing regime.[99] The Ninth Circuit acknowledged the tradition of concealed carry prohibitions, but situated that prohibition in a historical context of widespread *open* firearm possession.[100] The post-*Heller* Second Amendment may not require open carry or concealed carry, the Ninth Circuit explained, but it "does require that the states permit *some form* of carry for self-defense outside the home."[101]

While the Supreme Court showed initial interest in resolving the Circuit split described above (distributing the New Jersey case three times for discussion at its conference before finally denying certiorari), it ultimately declined to intervene, suggesting that a resolution may be

95. *Kachalsky*, 701 F.3d at 98.

96. *Filko*, 724 F.3d at 433, 440 (noting that New Jersey presents a "close analogue" to "New York's permit schema" and concluding that "even if the 'justifiable need' standard" burdens the Second Amendment, "it nonetheless withstands intermediate scrutiny and is therefore constitutional").

97. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014).

98. *Id.* at 1171 (explaining that California's gun regulatory "scheme as *a whole* violates the Second Amendment because it precludes a responsible, law-abiding citizen from carrying a weapon in public for the purpose of lawful self-defense in *any* manner").

99. *Id.* at 1170, 1172 (noting that "*Heller* teaches that a near-total prohibition on keeping arms (*Heller*) is hardly better than a near-total prohibition on bearing them (this case)" and consequently "the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home"); *cf.* Baker v. Kealoha, 564 F. App'x 903, 904–05 (9th Cir. 2014) (applying *Peruta* to Hawaii's licensing scheme).

100. *Peruta*, 742 F.3d at 1171–72.

101. *Id.* at 1172. During the final editing phases of this Article, the Ninth Circuit agreed to reconsider the *Peruta* decision en banc. *See* 781 F.3d 1106 (9th Cir. 2015). Whatever the results of the reconsideration, the underlying constitutional question must inevitably be answered by the Supreme Court.

delayed for years.[102] When the Court finally does take up the question, it will undoubtedly stretch *Heller* beyond the home. Indeed, Justice Alito's 2010 opinion in *McDonald v. City of Chicago*[103] extending *Heller* to the states to strike down Chicago's (home) handgun ban reads like a springboard designed to propel *Heller* outdoors. The opinion stresses that "in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right," and repeatedly describes the right as one of self-defense generally without language restricting it to the home.[104] The next opinion virtually writes itself. If the Second Amendment right to "keep" arms requires states to allow law-abiding citizens to possess firearms in the home, the right to "bear" arms would seem to require states to allow analogous firearm possession outside the home. Some licensing will survive, but licensing regimes like those in New York City, San Francisco, and Los Angeles, where ordinary law-abiding residents cannot obtain a permit to carry a handgun in public, are in serious constitutional jeopardy. Absent an abrupt change of course at the Supreme Court, the future is clear. More and more Americans will be able to lawfully carry handguns on city streets, and this pattern will play out in cities across the country, regardless of whether a majority of the city's residents and officials favor strict gun control. The next parts analyze the Fourth Amendment implications of these developments for American policing.

B. Transforming Gun-Detector Scans into "Searches"

One of the least recognized, but perhaps most significant, effects of expanding gun rights is its impact on the constitutionality of gun-detecting technology. An expansive recognition of concealed carry rights may turn passive gun detection into a "search" under the Fourth Amendment. This counterintuitive implication derives from Supreme Court jurisprudence that holds that citizens enjoy no "reasonable expectation of privacy" in "contraband."[105] As guns detected in public spaces become less likely to constitute "contraband," courts will be unable to shrug off their detection in any jurisdiction as constitutional non-searches.

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102. *See* Drake v. Filko, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014); *see also* Drake v. Jerejian, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/drake-v-jerejian/ (last visited Apr. 13, 2015) (noting distribution for conference three separate times before the petition was denied).

103. 561 U.S. 742 (2010).

104. *Id.* at 767, 780.

105. *See* discussion *infra* Part II.B.

As discussed in Part I, police departments are seeking to develop viable passive-detection technologies that reveal the presence of concealed firearms, without the personal intrusion and dangers of a physical search. The constitutionality of suspicion-less weapons scans turns on whether such a scan constitutes a "search" under the Fourth Amendment.[106] This question, in turn, depends on whether a person walking on a public street has a "reasonable expectation of privacy" in the information that a gun scan would reveal.[107] Supreme Court case law currently offers no answer to this question. The strongest guidance comes from *United States v. Place*.[108] In *Place*, the Supreme Court ruled that a narcotics dog's sniff of a suspect's luggage was not a "search" under the Fourth Amendment and thus need not be preceded by individualized suspicion.[109] The Court emphasized characteristics of the sniff that also apply to gun detectors. As opposed to a "typical search," a dog sniff is "less intrusive" because it "does not require opening the luggage" and does not expose "noncontraband items that otherwise would remain hidden from public view."[110] Perhaps the most promising language from *Place* for the constitutionality of gun detectors is the following: "[t]his limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[111] The holding and the reasoning of *Place* thus resonate with the notion that relatively unobtrusive gun-detecting technology could replace more intrusive tactics (e.g., stop and frisks, pretextual arrests, consent searches) as a constitutional mechanism for detecting and deterring unlawful gun possession on city streets.

The analogy to *Place* is imperfect, however. *Place* emphasizes that a drug dog's sniff can only detect narcotics, a form of "contraband." Later, in *Illinois v. Caballes*, the Supreme Court honed in on this aspect of the case, explaining that sniffs were not searches because "any interest in possessing contraband cannot be deemed 'legitimate'"; thus, "governmental conduct that *only* reveals the possession of contraband

106. Gun detectors will be most effective if they can be deployed without individualized suspicion that each person scanned possesses a firearm (i.e., "suspicion-less" scans). As a consequence, absent special doctrinal treatment, their constitutionality will hinge on whether scans constitute a "search." *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."). If a scan is not a "search" or "seizure," the Fourth Amendment is not implicated by its use. *See* U.S. CONST. amend. IV.

107. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

108. 462 U.S. 696, 707 (1983).

109. *Id.*

110. *Id.*

111. *Id.*

'compromises no legitimate privacy interest.'"[112] Finding common ground with *Place*, *Caballes* distinguished the competing case of *Kyllo v. United States*[113] by stating that "[c]ritical to that decision [*Kyllo*] was the fact that the [technology at issue] was capable of detecting lawful activity."[114]

The central analytical component of *Place* and the cases that follow it, then, is the likelihood that items detected by police will be contraband. When cities like Chicago, the District of Columbia, San Francisco, and New York effectively outlawed handgun carrying, concealed guns detected by scanners could fairly be labeled "contraband." The analysis changes, however, as courts and legislators compel these cities to implement permissive licensing regimes. Even assuming passive gun scanners, like drug-sniffing dogs, could be configured to reveal only the presence of handguns, this output is no longer invariably contraband. With a constitutional right to public gun possession on the horizon and steadily easing statutory restrictions, courts will be unable to ignore the increasing likelihood that guns detected—whether in rural Montana or downtown Los Angeles—are lawfully carried. Consequently, gun detectors deployed on city streets will increasingly detect not just "contraband" (unlicensed handguns) but also "noncontraband items," such as lawfully carried guns "that otherwise would remain hidden from public view."[115] The transforming gun-rights landscape thus makes it increasingly unlikely that cities can invoke the *Place* line of cases to argue that suspicion-less gun

112. 543 U.S. 405, 408 (2005).

113. 533 U.S. 27, 34–35 (2001) (holding that the application of "sense-enhancing technology," if "not in general public use," to obtain "information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'" constitutes a "search").

114. *Caballes*, 543 U.S. at 409–10 ("The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car."); *see also* United States v. Jacobsen, 466 U.S. 109, 123–24 (1984) ("[G]overnmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest. . . . Here, as in *Place*, the likelihood that official conduct . . . will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment."); *cf.* David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 32–33 (1996) (recognizing the seemingly "strong analogy between [gun-detecting] devices and the reasoning of *Place* and *Jacobsen*," but arguing that those cases are "wrongheaded[]" and should not be followed); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246 (1983) ("[I]f a device could be invented that accurately detected weapons and did not disrupt the normal movement of people, there could be no fourth amendment objection to its use.").

115. *Caballes*, 543 U.S. at 409–10 (quoting United States v. Place, 462 U.S. 696, 707 (1983)).

detection is lawful because it is not a "search" under the Fourth Amendment.[116]

If expanding gun rights make it impossible to characterize suspicion-less gun detection as a constitutional "non-search," cities will seek out other doctrinal theories to preserve the promise of gun detectors. One likely argument will be that even though gun detection is a "search," it is reasonable even when not supported by a warrant and individualized suspicion under the "special needs" doctrine. Anticipating this argument, David Harris forcefully argues that gun scans do not qualify as "special needs" searches because scanners serve no "special need of the government, beyond the detection and prevention of crime."[117] Harris's observation that "[g]un detectors serve no non-criminal purpose: . . . they have nothing to do with regulated industries," may hint at the key to a viable "special needs" argument.[118] If a city can tie gun detection to its enforcement of a comprehensive concealed carry regulatory regime, courts may find suspicion-less, urban gun detection constitutional.[119] (Of course, as discussed in Part III, the regulatory regime itself must survive Second Amendment scrutiny). Thus, "special needs" may still hold some promise as a constitutional grounding for urban gun-detecting technology.

Nevertheless, as discussed in the next Part, a court ruling deeming suspicion-less gun detection constitutional (a notable result in itself) will only be a partial success for urban policymakers seeking to preserve traditional gun policing. The changing gun-rights landscape reduces the ability of police to act on a gun detection "hit" (i.e., information that someone is carrying a concealed firearm), no matter how that information is obtained.

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116. WAYNE R. LAFAVE, 1 SEARCH & SEIZURE § 2.2(d) (5th ed. 2015) (asserting that a "no-search characterization" following the reasoning in *Place* "will be possible as to gun detection devices in only about half of the states" and highlighting the "irony that at precisely the time when these weapons detection devices are being perfected, more and more states have adopted laws under which large numbers of citizens can lawfully carry concealed weapons"); Harris, *supra* note 114, at 58 (noting that the increasing prevalence of lawful gun carrying would render the conclusion that gun detectors only detect "contraband" "questionable at best"). A scanner could potentially be configured to detect both a firearm and a license, and to only indicate a "hit" when it detects the firearm, but no license. In that case, technology might be able to fit within the *Place-Caballes* framework of only detecting contraband (i.e., unlawfully carried weapons).

117. Harris, *supra* note 114, at 28.

118. *Id.*

119. *Cf.* Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001) (ruling that state hospital's drug tests violated the Fourth Amendment because the "primary purpose" hinged on the use of "the threat of arrest and prosecution in order to force women into [drug] treatment," and consequently fell outside "the closely guarded category of 'special needs'").

C. Decreasing the Relevance of Guns to "Reasonable Suspicion"

Perhaps the most immediate impact of expanding gun rights on policing tactics is legal uncertainty regarding what police can do when they observe, or learn of, a person carrying a firearm. Traditionally, courts (and police) assumed that officers could stop and question someone they observed with a concealed handgun, at least in jurisdictions with strict regulation of concealed weapon carrying.[120] Judges' (and officers') comfort with this scenario rested on a generally unstated empirical assumption that there was a significant likelihood that such a person was carrying the gun unlawfully.[121] In fact, one of the most famous arrests in American history, the fortuitous arrest of Timothy McVeigh by an Oklahoma State Trooper, follows this pattern.[122] The trooper arrested McVeigh for unlawful handgun possession after observing a bulge in McVeigh's jacket, unaware that McVeigh was fleeing from perpetrating one of the most horrific bombings in American history.[123] Although McVeigh's defense team litigated many aspects of the case, it conceded that his possession of a handgun constituted "probable cause" for his arrest.[124] As this Part explains, increasingly permissive gun-possession laws erode the assumption that public handgun possession is unlawful. Consequently, the Fourth Amendment authority flowing from that assumption must be reevaluated.[125]

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120. *See* discussion *infra* Part II.C; *see also* United States v. Cooper, 293 F. App'x 117, 119 (3d Cir. 2008) (explaining that "Pennsylvania courts have consistently held an officer's observance of an individual's possession of a firearm in a public place in Philadelphia is sufficient to create reasonable suspicion to detain that individual for further investigation" and collecting supporting cases); MAPLE, *supra* note 46, at 42 (discussing coercive action taken upon detection of a suspicious bulge in a citizen's pockets); sources cited *supra* note 67 (listing "weapons possession" as a primary basis for *Terry* stops).

121. *See* discussion *infra* Part II.C.

122. United States v. McVeigh, 153 F.3d 1166, 1178 (10th Cir. 1998) ("Hanger arrested McVeigh upon discovering that he was carrying a concealed, loaded gun."); United States v. McVeigh, 940 F. Supp. 1541, 1546 (D. Colo. 1996).

123. While McVeigh was in custody for unlawful possession of a firearm, authorities independently determined that he was responsible for the deaths of 168 people in the 1995 bombing of a federal building in Oklahoma City. *McVeigh*, 940 F. Supp. at 1546.

124. *Id.* at 1556. The trooper testified that while McVeigh was "very calm, polite" during a traffic stop, the trooper noticed a "bulge under his left arm"; after McVeigh said he had a gun, the trooper "grabbed for the bulge," "removed [his] pistol from [his] holster and stuck it to the back of [McVeigh's] head." *Testimony of Oklahoma State Trooper Hanger*, *supra* note 48.

125. Indeed, soon after McVeigh's arrest, Oklahoma enacted laws that would have made McVeigh's handgun possession lawful if, as reports suggest, he had a valid out-of-state permit. *See* OKLA. STAT. tit. 21, § 1290.3 (1996) (authorizing licensing of concealed weapons); OKLA. STAT. tit. 21, § 1290.26 (1996) (recognizing "any valid concealed or unconcealed carry weapons permit or license issued by another state"); OKLA. STAT. tit. 21, § 1289.13 (1996) (prohibiting transportation of

Fourth Amendment doctrine centers on probabilities.[126] An officer may well be wrong about whether someone seized or searched was engaged in wrongdoing. But the test for a constitutional violation focuses solely on what the officer knew *ex ante*, at the time she initiated the challenged action.[127] As first set out in *Terry v. Ohio*, the minimum *ex ante* probability level for a stop or search is "reasonable suspicion."[128] Although courts are reluctant to quantify the probability represented by this label, we know that the "reasonable suspicion" standard is low: "'considerably less than proof . . . by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause."[129] "[R]easonable suspicion 'need not rule out the possibility of innocent conduct.'"[130]

Despite this low standard, courts will be hard-pressed to accept, as constituting "reasonable suspicion" of a crime, an observation of an increasingly common activity that is not only lawful, but specifically protected by the Second Amendment. The post-*Heller* argument that a person's possession of a firearm cannot alone constitute reasonable suspicion to justify a stop is simply stated. In the words of a Florida court:

> Despite the obvious potential danger to officers and the public by a person in possession of a concealed gun in a crowd, this is not illegal in Florida unless the person does not have a concealed weapons permit, a fact that an officer cannot glean by mere observation. . . . [S]topping a person solely on the ground that the individual possesses a gun violates the Fourth Amendment.[131]

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loaded handgun except if transporting party is licensed); Harris, *supra* note 114, at 57 (noting that "[i]f many thousands of people can legally carry concealed firearms, detecting a gun on a person does not tell a police officer enough" to support an arrest and "[a]rguably it may not raise even a reasonable suspicion of criminal activity").

126. *See* Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1555 (2010) ("Fourth Amendment search-and-seizure law . . . has always treated probable cause as the princip[al] tool for balancing privacy and security."); Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 LAW & CONTEMP. PROBS. 69, 71 (2010) (discussing probability conundrums inherent in permitting officers to arrest based on "probable cause").

127. *See* Schubert v. City of Springfield, 589 F.3d 496, 502 (1st Cir. 2009) ("It is clear in this case that, in hindsight, Schubert in fact posed no threat to public safety. However, on these facts, Officer Stern certainly had reasonable suspicion to stop the unknown armed man in order to ascertain his identity, his authority to possess the gun, and his intentions.").

128. Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (summarizing *Terry*).

129. *Id.* (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

130. *Id.* at 1690–91 (setting out contours of reasonable suspicion standard).

131. Regalado v. State, 25 So.3d 600, 606 (Fla. Dist. Ct. App. 2009) (invalidating a stop after a civilian informed a police officer that a nearby person had a handgun in his waistband; the person was

The federal courts have largely declined to follow the Florida court's reasoning. While the Supreme Court has not directly spoken on the question, it suggested in the pre-*Heller* case of *Adams v. Williams* that possession of a concealed handgun constitutes at least "reasonable suspicion" to support a search or seizure.[132] In *Adams*, the Court held that once an officer found the suspect in possession of a gun, "probable cause existed to arrest [him] for unlawful possession of the weapon"—even though the arrest took place in a jurisdiction that allowed gun possession with a permit.[133] The question arose again in *Florida v. J.L.*, where the Court ruled that an anonymous tip that an individual waiting at a bus stop "was carrying a gun" was not sufficient to support a stop.[134] Although the Court based its ruling entirely on the unreliability of the tip, the discussion at oral argument revolved around the broader question of whether even a reliable tip that someone possessed a concealed handgun could support a stop.[135] During the discussion, Chief Justice Rehnquist asserted that the Court had already decided this question in *Adams* where, while recognizing that in "Connecticut you could carry with a permit," the Court "said that a frisk was nonetheless justified."[136]

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stopped at gunpoint and arrested for carrying a concealed handgun without a permit); *see also* St. John v. McColley, 653 F. Supp. 2d 1155, 1161 (D.N.M. 2009) ("Mr. St. John's lawful possession of a loaded firearm in a crowded place could not, by itself, create a reasonable suspicion sufficient to justify an investigatory detention."); State v. Williamson, 368 S.W.3d 468, 480–81 (Tenn. 2012) (rejecting argument that knowledge of a concealed weapon justified a *Terry* stop because "one's status as an 'armed party' is not per se illegal"); Commonwealth v. Hawkins, 692 A.2d 1068, 1071 (Pa. 1997) (ridiculing the government's "radical" position that police can "stop and frisk when they receive information from any source that a suspect has a gun" because "it is not illegal to carry a licensed gun in Pennsylvania").

132. 407 U.S. 143, 148–49 (1972).

133. *Id.* The majority explained that "the policeman found Williams in possession of a gun in precisely the place predicted by the informant [and that] tended to corroborate the reliability of the informant's further report of narcotics and, together with the surrounding circumstances, certainly suggested no lawful explanation for possession of the gun." *Id.* The dissenters pointed out that "'Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided only they have a permit, and gives its police officers no special authority to stop for the purpose of determining whether the citizen has one.'" *Id.* at 151 (Brennan, J., dissenting) (citation omitted) (quoting Williams v. Adams, 436 F.2d 30, 38–39 (2d Cir. 1970) (Friendly, J., dissenting)); *see also id.* at 149–50 (Douglas, J., dissenting) ("Can it be said that a man in possession of narcotics will not have a permit for his gun?").

134. 529 U.S. 266, 268 (2000).

135. The issue came up repeatedly in oral argument, with the Justices emphasizing at points that while concealed carry was lawful in Florida, it was not lawful for a minor such as J.L. Transcript of Oral Argument, *J.L.*, 529 U.S. 266 (No. 98-1993), *available at* http://www.oyez.org/cases/1990-1999/1999/1999_98_1993 (last visited Apr. 13, 2015); *J.L.*, 529 U.S. at 269 (noting J.L.'s age and that he was convicted of possessing a concealed weapon without a license while under the age of 18).

136. Transcript of Oral Argument, *supra* note 135. The attorney for the United States took a narrower view, emphasizing that "it is critical . . . that there be reasonable suspicion that the person

The view that concealed handgun possession constitutes reasonable suspicion for a *Terry* stop finds broad support in the lower federal courts. For example, in *Schubert v. City of Springfield*, the First Circuit rejected a lawsuit challenging an officer's *Terry* stop of an attorney carrying a handgun under his suit jacket.[137] The court explained that "the officer observed Schubert walking toward the Springfield courthouse carrying a gun" and warned that it "need not outline in detail the obvious and potentially horrific events that could have transpired had an officer noted a man walking toward the courthouse with a gun and chosen not to intervene."[138] Similarly, the Fourth Circuit upheld a *Terry* stop based, in large part, on indicia that "suggested [the suspect] might be carrying a gun," and echoed the Supreme Court in *Adams* by stating that after a frisk "revealed [a] gun," the "officers had probable cause to arrest" for carrying a handgun (without a permit).[139] The Eleventh Circuit recently ruled that a person's "admission that he was carrying a handgun in his waistband" constituted "reasonable suspicion to believe that [he] was committing a crime under Florida law—carrying a concealed weapon."[140] As it turns out, the person, like the attorney in *Schubert*, had a valid concealed carry permit.[141] The court emphasized that "reasonable suspicion analysis is not concerned with 'hard certainties, but with probabilities,'"[142] and the possibility of unlawful possession of the weapon "was sufficient to justify

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does not have a license, and that's furnished in this case by the fact that there's reasonable suspicion that he's under 21." *Id.*

137. 589 F.3d 496, 502 (1st Cir. 2009).

138. *Id.* at 501–02 (upholding investigatory stop where "the officer saw a man [a prominent defense attorney] carrying a gun in a high-crime area, walking toward an important public building [the Springfield courthouse]").

139. United States v. Mayo, 361 F.3d 802, 807–08 (4th Cir. 2004).

140. United States v. Lewis, 674 F.3d 1298, 1304–05 (11th Cir. 2012).

141. *Id. See also* United States v. Rodriguez, 739 F.3d 481, 487 (10th Cir. 2013) (relying on similar reasoning to uphold stop of person when officer observed firearm in his pants: "most assuredly, the Government need not negate these exceptions to N.M. Stat. Ann § 30–7–2(A) to establish the crime of 'carrying a concealed loaded firearm . . . anywhere' in New Mexico"); United States v. Bold, 19 F.3d 99, 104 (2d Cir. 1994) (emphasizing that "the overwhelming majority of the people in New York State and City are not licensed to carry handguns," "the limited ability of the officers to confirm all of the anonymous tip information, the report that the occupants of the car possessed a gun, and the statistical likelihood that the gun was illegal" in upholding *Terry* stop of car); United States v. King, 990 F.2d 1552, 1561 (10th Cir. 1993) ("Officer LeMasters' observation of an apparently loaded pistol . . . would justify her separation of Defendants from the pistol in order to ensure her own safety during the encounter."); State v. Taylor, No. 92382, 2009 WL 3647052, at *2 (Ohio Ct. App. Nov. 5, 2009) (upholding stop where officer observed gun concealed on person based on suspicion that the person did not have a license).

142. *Lewis*, 674 F.3d at 1304 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

briefly stopping him before inquiring" about whether he had "a valid concealed-weapons permit."[143]

Reacting to the perceived prevalence of gun stops, recent pro-gun laws include provisions that limit police investigative authority. For example, a provision added to Georgia's gun laws by the "Safe Carry Protection Act," and mirrored in other states, provides that "[a] person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license."[144] Other state laws say the opposite. New Jersey law states that when the lawfulness of a person's gun possession "depends on his possession of a license or permit . . . , it shall be presumed that he does not possess such a license or permit . . . until he establishes the contrary."[145] Importantly, these provisions express only state law preferences and cannot change the Fourth Amendment calculus.[146]

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143. *Id.* Another line of federal cases upholds gun stops on the (spurious) ground that "the possession of a valid permit for a concealed weapon is not related to the elements of the crime, but rather is an affirmative defense." *Lewis*, 674 F.3d at 1304 (citing FLA. STAT. § 790.01(2-3)); United States v. Gatlin, 613 F.3d 374, 378–79 (3d Cir. 2010) (citing Delaware case law regarding the burden of proof for unlicensed possession charge at trial); United States v. Cooper, 293 F. App'x 117, 120 (3d Cir. 2008) (rejecting challenge to stop based on officer's observation of a handgun in suspect's waistband because "licensure is an affirmative defense" under Pennsylvania law); GeorgiaCarry.Org, Inc. v. Metro. Atlanta Rapid Transit Auth., No. 1:09-CV-594-TWT, 2009 WL 5033444, at *5 (N.D. Ga. Dec. 14, 2009) ("Because a Georgia firearms license is an affirmative defense to . . . the crime of carrying a concealed weapon, it does not matter if there was no reason to suspect that Raissi did not have a Georgia firearms license."). *But see* United States v. Ubiles, 224 F.3d 213, 217 (3d Cir. 2000) (holding that "a mere allegation that a suspect possesses a firearm" does not "justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry*"). The licensing statutes do not support the conclusion that a license is an "affirmative defense," but even if they did, states cannot so easily avoid the dictates of the Fourth Amendment. *See infra* notes 147–48 and accompanying text. The licensing statutes, in fact, mirror driver's license regulations; but no one suggests that possessing a driver's license is an affirmative defense to the offense of driving without a license. *See infra* note 188 and accompanying text.

144. GA. CODE. ANN. § 16-11-137(b) (2015); *see also* ALA. CODE § 13A-11-7(c) (2014) (enacting "rebuttable presumption that the mere carrying of a visible pistol, holstered or secured, in a public place, in and of itself, is not" unlawful).

145. N.J. STAT. ANN. § 2C:39-2(b) (2014); *see also* United States v. Horne, 386 F. App'x 313, 315 n.1 (3d Cir. 2010) (unpublished) ("Taken at face value . . . the presumption would dictate that when police in New Jersey reasonably suspect that a person is carrying a firearm, they also have reasonable suspicion that he is committing a crime unless the circumstances affirmatively suggest he has a permit."); United States v. Valentine, 232 F.3d 350, 357 (3d Cir. 2000) (noting potential applicability of this aspect of "New Jersey's regulatory scheme" in assessing legality of *Terry* stop for gun possession, but declining to assess its impact in light of alternative grounds for upholding stop).

146. *See* Virginia v. Moore, 553 U.S. 164, 176, 178 (2008) (explaining that "state restrictions do not alter the Fourth Amendment's protections" and, consequently, whatever state law says on the question, "[w]hen officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest").

With respect to the Fourth Amendment, police officers' authority to stop an armed person depends on the constitutional standard[147] —whether there is "reasonable suspicion" to suspect that the person is committing an offense (e.g., unlicensed firearm possession). Officers in Georgia may be prohibited by the United States Constitution from stopping an armed person to find out if the person has a license; and officers in New Jersey may be permitted to conduct such a stop. But the question will be resolved without reference to local statutory provisions that purport to limit or expand officer authority.[148] The permissibility of a stop under the Fourth Amendment depends on the *ex ante* probability that the suspect is breaking the law. As explained above, that probability, when based on suspected gun carrying, depends on the strictness of the jurisdiction's handgun licensing laws and the prevalence of licensees. Given the changes in substantive law described in Part II.A, these variables will increasingly lead to the conclusion that stops justified only by an officer's observation of a gun are unconstitutional.

D. Preventing Officers from Temporarily Disarming Gun Carriers

Expanding gun rights also restrict the actions police can take when interacting with armed citizens. The widespread assumption in urban areas that armed people can be, at least temporarily, disarmed during police encounters may no longer hold sway in a post-*Heller* world.[149] Indeed, expanding gun rights may mean that officers must ignore the guns they come across and learn to interact on equal footing with their fellow arms-bearing citizens.

Although often overlooked, *Terry* authorizes two distinct actions, a "stop" and a "frisk," each controlled by a separate test. Police can stop persons who appear to be engaged in crime. They can frisk if there is reasonable suspicion to believe the person "is armed and presently dangerous to the officer or to others."[150] Weapons seizures are not an explicit part of the *Terry* framework, but a necessary implication of the

147. *Id.*

148. *Id.*; *cf.* Robert Leider, *May I See Your License?* Terry *Stops and License Verification*, 31 QUINNIPIAC L. REV. 387, 424–25 (2013) (arguing that "[t]he element/defense distinction has no relevance for Fourth Amendment search and seizure jurisprudence" because "[r]egardless of whether the legislature classifies the licensing issue as an element or a defense, the statute permits and prohibits exactly the same conduct").

149. *See supra* Part II.C.

150. Terry v. Ohio, 392 U.S. 1, 24, 27 (1968) (noting that an officer can conduct a search if he has "reason to believe that he is dealing with an armed and dangerous individual").

case is that guns can be seized, at least temporarily, under both prongs: either as part of the stop, if the gun possession is unlawful, or as part of the frisk, if the firearm makes the person "presently dangerous."[151]

In the past, the assumption that a person carrying a concealed weapon was engaged in the crime of unlawful weapons possession allowed courts to uphold the disarming of an individual with little analysis. If police suspect that someone unlawfully possesses a firearm, it follows that the officer can remove the gun to discontinue the suspected crime. Critically, this means that confiscation of the weapon is justified under *Terry*'s first analytical prong (suspicion of a crime), not necessarily the second (suspicion of dangerousness). The weapon, once detected, is suspected contraband, and contraband can be seized upon detection.[152]

As discussed above, the assumption that the mere possession of a firearm constitutes a crime is crumbling. This means that absent evidence that a person's firearm possession is unlicensed, the first prong of *Terry* no longer justifies the seizure of the firearm. Police authority to disarm persons, then, will regularly depend on *Terry*'s second ("frisk") prong. Under this prong, a police officer interacting with an armed member of the public will need "reasonable suspicion" that the person is "presently dangerous to the officer or to others" to seize the firearm.[153] Courts may agree that the inherent dangers of firearms make this showing essentially automatic whenever officers encounter armed persons in public.[154] But given *Terry*'s requirement of "specific and articulable facts" to justify a stop or frisk, that is hardly a foregone conclusion.[155] And if courts do not

151. *See, e.g.*, United States v. Fisher, 364 F.3d 970, 974 (8th Cir. 2004) (citing *Terry* for the proposition that "officers had authority to seize the [defendant's] firearm to ensure their safety").

152. *See* Minnesota v. Dickerson, 508 U.S. 366, 376 (1993) (holding that an officer engaged in lawful activity who encounters contraband can seize the contraband, "[r]egardless of whether the officer detects the contraband by sight or by touch").

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

154. *See* United States v. Orman, 486 F.3d 1170, 1176 (9th Cir. 2007) (stating that "Officer Ferragamo's reasonable suspicion that Orman was carrying a gun [was] all that is required for a protective search under *Terry*"); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1692 (1998) (reading Justice Harlan's concurrence in *Terry* to suggest "that the stop of a suspect is itself a critical event that almost automatically generates a dangerousness concern that authorizes a weapons frisk of the suspect"); *cf.* Maryland v. Wilson, 519 U.S. 408, 415 (1997) (crafting blanket rule that it is reasonable under the Fourth Amendment for "an officer making a traffic stop" to "order passengers to get out of the car pending completion of the stop").

155. *Terry*, 392 U.S. at 21; State v. Serna, 331 P.3d 405, 410 (Ariz. 2014) ("In a state such as Arizona that freely permits citizens to carry weapons, both visible and concealed, the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous."); Harris, *supra* note 114, at 58 ("[P]olice cannot assume the existence of danger just because a person carries a gun.").

accept this blanket assumption of dangerousness, officers will be forced to interact with armed citizens on equal terms (i.e., both parties are armed). That fact itself may discourage investigations of armed individuals more than any of the legal doctrines discussed above. The most common reaction of officers in the new gun-friendly era to tips, observations, or discoveries of concealed weapons may be to steer clear.

III. GUN POLICING IN AN ERA OF CONCEALED CARRY

The previous Parts explain how expanding Second Amendment rights trigger Fourth Amendment protections that jeopardize traditional (and futuristic) urban gun-policing tactics. But city officials will not easily abandon crime-prevention techniques that they believe save lives. This Part analyzes the constitutionality of responses policymakers might adopt to try to continue proactive, gun-oriented policing in an era of concealed carry. A starting point for these efforts will undoubtedly be the empirical data on the relative rarity of crimes committed by *licensed* gun carriers.

A. The Relatively Small Danger Posed by Licensed Gun Carriers

Although there is a robust debate about the effect of gun carrying on crime,[156] there is general consensus that licensed gun possessors rarely use their firearms to commit violent street crimes such as robberies or murders.[157] Thus, even if licensed gun carriers swarm city streets in the wake of the legal changes chronicled above, strategies to suppress murders

156. *See, e.g.*, COMM. ON LAW & JUSTICE, NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (Charles F. Wellford et al. eds., 2004) ("[D]espite a large body of research, the committee found no credible evidence that the passage of right-to-carry laws decreases or increases violent crime.").

157. Moore v. Madigan, 702 F.3d 933, 937–38 (7th Cir. 2012) (quoting Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009) ("The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders.")); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1245 (1996) (noting that "[t]he homicide data collected over the past thirty-five years have consistently shown that 70–80% of those charged with murder had prior adult records, with an average adult criminal career of six or more years, including four major adult felony arrests," with a significant portion of the remainder, about 14%, being juveniles); Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 579–80 (1995) (discussing empirical literature that shows "it simply is not true that previously law abiding citizens commit most murders or many murders or virtually any murders" (or other violent crimes), but rather "approximately 75% of murderers have adult criminal records," with the remainder made up largely of juveniles); Vernick et al., *supra* note 26, at 568 (noting that "permit holders tend to be a low-risk group for both offending and victimization").

and robberies through gun detection may remain viable so long as police can lawfully distinguish licensed from unlicensed gun carriers and disarm only the latter group.

Statistics published by the State of Texas reflect that people with concealed handgun licenses (CHL) commit only a small fraction of the street crime associated with public weapons possession.[158] For example, of the roughly 4,000 people convicted for robbery or aggravated robbery in Texas in 2011, only two possessed a CHL.[159] The same 2011 Texas data shows that CHL carriers included four (of over 500) convicted murderers, three (of 112) people convicted of manslaughter, and three (of 2,765) people convicted of assault with a deadly weapon.[160] This data shows that the vast majority of these crimes and others like them appear to be committed by people who do not possess a license to carry a firearm. To the extent these offenses are committed with guns, the perpetrators are almost always unlicensed.

The relatively low incidence of violent crimes committed by licensed gun carriers fits with other data about the link between guns and crime. Many of those most likely to commit firearm violence, in particular teenagers and felons, cannot lawfully obtain a license even if they were so inclined.[161] Federal law criminalizes firearm possession by juveniles (under age eighteen), fugitives, felons, domestic violence misdemeanants, drug users, certain persons with mental illness, and those illegally present in the country.[162] State licensing regimes provide overlapping and sometimes broader prohibitions.[163]

Empirical evidence supports the intuition that those disqualified from possessing a firearm are among the most likely to use guns unlawfully. In

158. REGULATORY SERV. DIV., TEX. DEP'T OF PUB. SAFETY, CONVICTION RATES FOR CONCEALED HANDGUN LICENSE HOLDERS (2012), *available at* http://www.txdps.state.tx.us/RSD/CHL/Reports/ConvictionRatesReport2011.pdf (reporting statistics for 2011 calendar year).

159. *Id.* at 1, 3.

160. *Id.* at 1–2; Florida provides statistics on the number of firearms revoked. The summary is not a model of clarity, but appears to record 168 license revocations, out of over 1 million active licenses, since 1987 for improper utilization of the firearm. DIV. OF LICENSING, FLA. DEP'T OF AGRIC. AND CONSUMER SERVS., CONCEALED WEAPON OR FIREARM LICENSE SUMMARY REPORT, OCTOBER 1, 1987–MARCH 31, 2015 (2015), *available at* http://www.freshfromflorida.com/content/download/7499/118851/cw_monthly.pdf.

161. CDC, *supra* note 25, at 573 (finding that the youth (under nineteen) committed a disproportionate number of firearm homicides); Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 25 (1995) (noting "steady growth in the use of guns by juveniles" to commit homicides beginning in 1985); *see also* COMM. ON LAW & JUSTICE, *supra* note 156.

162. 18 U.S.C. § 922(g) (2013); 18 U.S.C. § 922(x)(2), (5) (defining juveniles as those under 18).

163. *See, e.g.*, TEX. GOV'T CODE ANN. § 411.172 (2013); *see generally* GAO Report, *supra* note 20, at 14–15 (surveying state licensing requirements).

2001, the Department of Justice studied state and federal inmates who had committed serious crimes with firearms.[164] The authors determined that federal law likely barred over eighty percent of these inmates from possessing a firearm at the time they committed a gun crime.[165] About half of the inmates had previously been incarcerated for a serious offense, about a third were on probation or parole at the time of their gun crime, and a small but significant percentage had potentially disqualifying mental health issues.[166] In addition, close to sixty percent of the inmates who used a firearm reported using illegal drugs shortly before committing their offense—although the likelihood that this disqualifying factor would actually have prevented issuance of a gun license is small, since periodic drug testing is not (yet) included in licensing regimes.[167] Furthermore, there is reason to suspect that even among eligible citizens, many of those most likely to commit violent crimes will fail to obtain a license. People planning unlawful activity (e.g., premeditated killers) or immersed in it (e.g., drug dealers) may eschew licenses to minimize official scrutiny. Thus, there is empirical and theoretical support for the proposition that police can achieve a large proportion of the goals of traditional gun-oriented policing by disarming *unlicensed* gun carriers even if licensed gun carrying remains prevalent. The challenge is crafting a lawful mechanism for police officers to distinguish licensed from unlicensed gun carriers.

B. Policing-Friendly Licensing Regimes?

Even as it expanded gun rights in recent years, the Supreme Court acknowledged that "the right secured by the Second Amendment is not unlimited" and thus can be regulated.[168] As early as the country's

164. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 189369, FIREARM USE BY OFFENDERS (2001).

165. *Id.* at 10.

166. *Id.* (six to ten percent); *see also* 18 U.S.C. § 922(g)(4) (prohibiting gun possession by a person "who has been adjudicated as a mental defective or who has been committed to a mental institution"). Another significant potentially disqualifying factor was non-citizen status (five to eight percent). BUREAU OF JUSTICE STATISTICS, *supra* note 164, at 10; *see also* COMM. ON LAW & JUSTICE, *supra* note 156.

167. BUREAU OF JUSTICE STATISTICS, *supra* note 164, at 10; *see generally* GAO Report, *supra* note 20 (discussing common state licensing requirements).

168. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . ."); McDonald v. City of Chicago, 561 U.S. 742, 785 (2010) (quoting with approval statement in amicus brief that

founding, many jurisdictions severely restricted firearm possession, including concealed firearms.[169] In fact, many state constitutional provisions affirm the legislature's ability to "enact laws to prevent persons from carrying concealed weapons."[170] The Texas Constitution most clearly reflects this longstanding connection between gun regulation and crime, stating: "[e]very citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."[171]

In light of the permissibility of regulation, jurisdictions that seek to preserve police authority to detect and deter unlawful gun possession can try to construct permissive licensing regimes that nonetheless aid police in distinguishing licensed from unlicensed gun possessors. This Part analyzes two possible strategies cities may employ in an effort to achieve the goals of traditional urban gun policing in a new gun-friendly constitutional and statutory landscape.

1. High Minimum Age Requirements

If forced to license gun possession, cities seeking to prevent gun violence could react by imposing a high minimum age for obtaining a concealed handgun permit. Federal law already imposes a *de facto* minimum by prohibiting possession of a handgun by anyone under the age of eighteen.[172] A minimum age provides officers with "reasonable suspicion" to stop gun carriers who appear to be younger than the

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"'[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment'").

169. Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 155 (2001) ("Every state had gun control legislation on its books at the time the Second Amendment was approved. Every state continued to pass such legislation after the Second Amendment became the law of the land, and they were joined in such regulatory efforts by the federal government, starting [in] 1792."); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1726 (2012) ("A broad range of restrictions on the use of arms in public, including bans on the right to carry in public, emerged in the decades after the adoption of the Second Amendment.").

170. KY. CONST. BILL OF RIGHTS § 1; *see also* David B. Kopel, *The Supreme Court's Thirty-Five* Other *Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 114 & n.43 (1999) (providing now-outdated list of constitutional provisions of the "[f]orty-four states [that] guarantee a right to arms in their state constitution," which reflects explicit authority to regulate concealed weapons possession in Colorado, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, and North Carolina).

171. TEX. CONST. art. I, § 23; *see also* English v. State, 35 Tex. 473, 478 (1872) (interpreting earlier version of similar constitutional language).

172. 18 U.S.C. § 922(x)(2)(A), (5) (2013).

specified age. The higher the minimum age, the more (underage) gun carriers the police can stop on this basis.

Currently, the most common (and highest) statewide minimum age for concealed carry licenses is twenty-one,[173] although many states with the twenty-one-year minimum reduce the minimum age to eighteen for people who are serving or have served in the military.[174] States also commonly recognize permits from other jurisdictions, where the legal age for concealed carry may be only eighteen.[175] As a result, police in many cities cannot assume that even armed eighteen-year-olds are carrying handguns unlawfully.

A state law or municipal ordinance raising the minimum age to twenty-one, without exception, would expand the universe of persons police can lawfully stop on suspicion of unlawful gun possession. In fact, cities could justify a significantly higher minimum concealed carry age. Social scientists define the upper bound of adolescence, a time of increased risk-taking, as age twenty-five.[176] Consistent with this demarcation, the Department of Justice recently reported that "[f]rom 2002 to 2011, young adults ages 18 to 24 had the highest homicide [offender] rate of any age group . . . ."[177] This demographic pattern holds across other crimes, such

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173. Brief of Amici Curiae Brady Ctr. to Prevent Gun Violence et al. at 20–21 & n.11, NRA v. McCraw, 719 F.3d 338 (5th Cir. 2013) (No. 12-10091), 2012 WL 9085244 (explaining that thirty-eight states either prohibit concealed weapons possession or require applicants to be at least twenty-one to receive a concealed carry license, and listing pertinent statutes); David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 521 (2009) ("[I]n the large majority of 'Shall Issue' states the minimum age for being able to apply for a permit is twenty-one. There are six 'Shall Issue' states in which the minimum age is eighteen.").

174. *See, e.g.*, TEX. GOV'T CODE ANN. § 411.172(g) (2013) (extending eligibility to a person "who is at least 18 years of age but not yet 21 years of age" and is a member or veteran of the U.S. military); Safe Carry Protection Act, H.R. 60, 152d Gen. Assemb., Reg. Sess. § 1-7 (Ga. 2014) (amending GA. CODE ANN. § 16-11-129 to provide that persons under twenty-one but at least eighteen years of age with military service can obtain a concealed carry license); *see also* MO. REV. STAT. § 571.101.2(2) (2014) (same).

175. *See, e.g.*, TEX. GOV'T CODE ANN. § 411.173 (2013) (providing for reciprocity with other states as negotiated by the Governor). Some states limit reciprocity to persons twenty-one years of age. *See, e.g.*, VA. CODE ANN. § 18.2-308.014(A) (2015) ("A valid concealed handgun or concealed weapon permit or license issued by another state shall authorize the holder of such permit or license who is at least 21 years of age to carry a concealed handgun in the Commonwealth . . . ."); WIS. STAT. ANN. § 175.60(1)(g) (2015) (defining "[o]ut-of-state licensee" to be an "individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license").

176. *See, e.g.*, Diana Baumrind, *A Developmental Perspective on Adolescent Risk Taking in Contemporary America*, *in* ADOLESCENT SOCIAL BEHAV. AND HEALTH 97–98 (Charles E. Irwin, Jr. ed., 1987).

177. ERICA L. SMITH & ALEXIA COOPER, U.S. DEP'T OF JUSTICE, NCJ 243035, HOMICIDE IN THE U.S. KNOWN TO LAW ENFORCEMENT, 2011 1 (2013), *available at* http://www.bjs.gov/content/pub/pdf/hus11.pdf; *see also* JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE U.S. (2007), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=966

as robbery and aggravated assault.[178] Perhaps cognizant of these statistics, Missouri once prohibited anyone under age twenty-four from obtaining a concealed carry license, but lowered the minimum age to twenty-one in 2011.[179] As young people represent a significant chunk of gun offenders,[180] an ordinance raising the minimum age for concealed carry within city limits would allow police to endeavor to suppress violent crime by disarming potential (youthful) offenders.

In states where preemption is not a problem, cities could enact minimum age requirements through an ordinance or append the requirements to existing concealed carry licensing provisions. In cities where municipal gun regulations are preempted by state law, municipal lawmakers would need to clear the restrictions with state lawmakers. Their argument, in this context, would be straightforward. The higher the minimum age in a particular jurisdiction, the broader the category of armed people police would be able to stop and question, consistent with the Fourth Amendment, upon developing reasonable suspicion of (underage) gun carrying.

Aside from the policy question of the appropriate minimum age for issuing a concealed carry license, there is a constitutional question as to the permissible bounds of such limits. The Supreme Court has not yet addressed the constitutionality of conditioning firearm possession on a minimum age. The federal appeals courts have thus far rejected post-*Heller* challenges to federal and state restrictions that burden the Second

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(showing that almost half of homicide offenders were under the age of twenty-four, while only sixteen percent were over thirty-four, and explaining that "[y]oung adults (18–24 years -old) have historically had the highest offending rates and their rates nearly doubled from 1985 to 1993"); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 ANN. REV. LAW & SOC. SCI. 125, 132 & fig.6 (highlighting disproportionate use of handguns in murders committed by juveniles and persons aged eighteen to twenty-four).

178. The FBI publishes a breakdown of arrests by age that reveals a pattern of escalating violent crime in the late teenage years with the prevalence of robberies peaking at age eighteen, intentional homicides at age twenty, and aggravated assaults at age twenty-one. For each crime, the incidences by age gradually tail off, but remain high at least until age twenty-four. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 2012 tbl.38, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/38tabledatadecoverviewpdf.

179. *See* 32 ROBERT H. DIERKER, MISSOURI PRACTICE SERIES, MISSOURI CRIMINAL LAW § 41.10 (2d ed. 2004 & Supp. 2015) (relying on prior statute to state that "[p]ersons under the age of 23" are unable to obtain permits); MO. REV. STAT. § 571.101.2(2) (2014) (requiring applicants to be at least twenty-one); Jason Hancock, *Missouri Senate Passes Bill to Drop Minimum Age for Concealed Carry Permit*, ST. LOUIS POST-DISPATCH, May 12, 2011, at A5 (reporting on passage of bill in Missouri Senate to reduce "[t]he age requirement to obtain a conceal-and-carry firearm permit . . . from 23 to 21").

180. *See* sources cited *supra* note 161.

Amendment rights of those under twenty-one, including a prohibition on the issuance of concealed carry licenses.[181] The courts emphasize that restricting young people's access to handguns serves a legitimate state interest and that age-related burdens are only temporary.[182] But the ultimate test of such restrictions at the Supreme Court level may well be a historical one, and portions of the historical record already cited by the majority in *Heller* reference eighteen as the pertinent cutoff.[183] Consequently, while age-related restrictions on concealed weapons carrying may make policy sense, their constitutionality remains an open question.

2. "Gun-License Inquiries"

Local governments compelled to issue concealed carry licenses may also react by enhancing the authority of police to investigate the lawfulness of public gun possession. Statutes along these lines already exist in some states, and will likely proliferate in the new era of concealed carry. Specifically, jurisdictions seeking to facilitate police investigation of firearm possession will (or already do) incorporate the following three provisions into their concealed carry licensing regulations:

(1) a requirement that gun carriers carry their licenses in public;

(2) a condition of the license that license holders present their license to police upon request;[184]

(3) a database that an officer can query to confirm the validity of licenses.[185]

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181. *See* NRA v. McCraw, 719 F.3d 338, 349 (5th Cir. 2013) (rejecting constitutional challenge to Texas law prohibiting public handgun possession by persons under twenty-one); NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 209 (5th Cir. 2012) [hereinafter *BATFE*] (rejecting constitutional challenge to restrictions on commercial firearm sales to persons under twenty-one).

182. *See BATFE*, 700 F.3d at 207; *McCraw*, 719 F.3d at 347–48.

183. District of Columbia v. Heller, 554 U.S. 570, 596 (2008) (determining content of Second Amendment provisions through historical analysis and noting, along the way, that Congress' first Militia Act specified members of the militia as people who "shall be of the age of eighteen years").

184. *See, e.g.*, ARIZ. REV. STAT. § 13-3112(A)-(C) (2015) (requiring licensees "to carry the permit" and "present the permit for inspection to any law enforcement officer on request"); D.C. CODE § 7-2502.08(c) (2015) (same); TEX. GOV'T CODE ANN. § 411.205 (2013) (same); VA. CODE ANN. § 18.2-308.01(A) (2015) (same); WIS. STAT. ANN. § 175.60(2g)(b)-(c) (2015) (same); *cf.* NEW YORK CITY, N.Y., RULES tit. 38, § 5-22(6) (2014) ("The licensee shall be in possession of her/his license at all times while carrying, transporting, possessing at residence, business, or authorized small arms range/shooting club, the handgun(s) indicated on said license.").

185. *See* VA. CODE ANN. § 18.2-308.07(A) (2015) (requiring permit information to be entered into

This three-tiered licensing suite purports to authorize police who lawfully detect a concealed weapon (either by a citizen's tip, weapons-detection technology, or observation) to approach the firearm carrier and request a license. If the person produces a valid license, the officer's suspicion of a weapons-possession offense will be dispelled. If the person does not produce a valid license, the officer now possesses at least "reasonable suspicion" of a violation of the firearm licensing laws. The officer could confiscate the firearm and arrest the suspected offender.

It is not clear, however, that the licensing framework described above can survive constitutional scrutiny. The framework's constitutionality depends on whether police can compel gun carriers to stop what they are doing and produce a firearm license.[186] Courts have accepted an analogous licensing framework in the motor vehicle context, where drivers are routinely arrested for failing to produce a valid driver's license upon an officer's request,[187] but as noted below there is a significant distinction.

Cases from the driving context consistently consider requests for a driver's license *after a person has been lawfully stopped*.[188] The same qualification appears in the Supreme Court case most directly on point, *Hiibel v. Sixth Judicial District Court of Nevada*.[189] There, the Court held that a state could criminalize a person's failure to identify himself to a police officer in the context of an otherwise lawful *Terry* stop.[190] As long as the request for information "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop," and the stop was

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a database "so that the permit's existence and current status will be made known to law-enforcement personnel accessing the Network for investigative purposes"); WIS. STAT. ANN. § 175.60(12)(a)-(b) (2015) (providing for database that can be queried "to confirm that a license . . . is valid" and when "an individual is carrying a concealed weapon and claims to hold a valid license . . . but does not have his or her license document or certification card, to confirm that the individual holds a valid license or certification card"); *but see* Safe Carry Protection Act, H.R. 60, 152d Gen. Assemb., Reg. Sess. § 1-7(k) (Ga. 2014) (prohibiting "multijurisdictional data base of information regarding persons issued weapons carry licenses").

186. Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) ("[T]he person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.").

187. *See, e.g.*, Williams v. Vasquez, 62 F. App'x 686, 690 (7th Cir. 2003) (upholding constitutionality of stop where officer possessed probable cause to arrest for "failure to produce a valid driver's license and failure to produce proof of insurance"); Wos v. Sheahan, 57 F. App'x 694, 696 (7th Cir. 2002) ("When Mr. Wos failed to produce a valid license . . . deputies had probable cause to believe he had violated the law and to arrest him.").

188. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that without "at least articulable and reasonable suspicion that a motorist is unlicensed . . . , stopping an automobile and detaining the driver in order to check his driver's license . . . [is] unreasonable under the Fourth Amendment").

189. 542 U.S. 177, 187 (2004).

190. *Id.* at 187–88.

"justified at its inception," a mandatory request to identify oneself falls within the bounds of Fourth Amendment reasonableness.[191]

Regulations that authorize gun-license inquiries can be distinguished from laws requiring the production of drivers' licenses and the regulation upheld in *Hiibel*. Gun-license-inquiry provisions purport to authorize police to request a license *prior* to the officer's development of "reasonable suspicion" to suspect a gun carrier of any offense. The proper analogy would be to a police officer pulling over a driver who had not violated any traffic law and asking the driver to produce a license; or accosting Mr. Hiibel on the street and requesting his name based on a hunch that he might be a fugitive. As these analogies show, existing case law does not support the constitutionality of state laws that mandate that an armed person queried by a police officer stop and provide a gun license. This is critical to an officer's Fourth Amendment authority to investigate public gun possession. If the police cannot constitutionally require gun carriers to produce a license, officers cannot consider a failure to respond to a *voluntary* license inquiry as a basis for "reasonable suspicion."[192]

To the extent the "gun-license inquiries" already present in state codes, and likely to proliferate in coming years, purport to provide police with authority to stop gun carriers, they constitute a novel and as-yet-untested augmentation of traditional Fourth Amendment investigative bounds. As will be discussed below, whether this authority will survive the legal developments described in Parts I and II is an open question. Importantly, though, gun-license inquiries are only vulnerable to constitutional challenge when unlawful gun possession is the sole justification for the stop. As described in Part I.B.2, police already seek out unlicensed gun possession by stopping people on suspicion of committing non-gun offenses, such as trespassing. If an officer comes across a gun in the context of a lawful stop for some other violation (e.g., bicycling on the sidewalk), a gun-license inquiry would likely survive constitutional scrutiny, just as the name inquiry during an otherwise lawful stop survived

191. *Id.* at 188.

192. *See* Florida v. Bostick, 501 U.S. 429, 437 (1991) ("[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); INS v. Delgado, 466 U.S. 210, 218 (1984) (emphasizing that no seizure occurred when INS agents' conduct "should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer"); Brown v. Texas, 443 U.S. 47, 53 (1979) (holding that a seizure conducted to "require [Brown] to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct"); State v. Griffith, 613 N.W.2d 72, 82 (Wis. 2000) (emphasizing that because encounter was consensual, suspect's "refusal to answer [an officer's questions] would not have given rise to any reasonable suspicion of wrongdoing").

constitutional scrutiny in *Hiibel*.[193] This raises the specter that police seeking out unlicensed firearm carriers may be pushed by more robust Second Amendment protections toward pretextual stops and arrests (see Part I.B.2), rather than less intrusive and more direct means of gun detection, such as gun scanners.

The best argument for the constitutionality of gun-license inquiries invokes the generic Fourth Amendment "reasonableness" command. The Supreme Court repeatedly emphasizes that the ultimate constitutional test of a Fourth Amendment search or seizure is "reasonableness," and that reasonableness depends on balancing "the public interest and the individual's right to personal security."[194] Applying this standard, the Justices could find gun-license-inquiry stops "reasonable" given the government's interest in assessing the lawfulness of guns detected by police in public spaces.[195] Likely factors cited in evaluating this balance would be: the licensee's prior agreement as a condition of obtaining a gun license to display a license upon request; the relatively brief and non-intrusive nature of the stop; the stop would occur in public;[196] and licensed gun carriers could readily and predictably conclude the encounter by showing a valid license.[197] The Court's precedents dictate analyzing the intrusion from the perspective of someone *lawfully* carrying a firearm.[198]

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193. 542 U.S. at 188.

194. *Brown*, 443 U.S. at 50–51; United States v. Knights, 534 U.S. 112, 118–19 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999) ("[R]easonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'")); Bellin, *supra* note 57, at 37–39 (emphasizing malleability of Fourth Amendment rules interpreting reasonableness command).

195. *See* United States v. Lewis, 674 F.3d 1298, 1304 (11th Cir. 2012) (ruling that the possibility of unlawful possession of the weapon "was sufficient to justify briefly stopping [suspect] before inquiring" about whether he had "a valid concealed-weapons permit"); Nichols v. Harris, 17 F. Supp. 3d 989, 1009 (C.D. Cal. 2014) (rejecting challenge to California law that criminalizes refusal to allow a police officer to assess whether a handgun observed in public is loaded because: "[a] chamber check is arguably not a 'search' because it does not infringe on a reasonable expectation of privacy and even if it is, the Fourth Amendment is not implicated because such a search is reasonable"); People v. DeLong, 90 Cal. Rptr. 193, 196 (Ct. App. 1970) (emphasizing that a chamber check is "limited to a single purpose"; "does not have about it any except the slightest element of embarrassment or annoyance, elements overbalanced by far by the purpose of preventing violence or threats of violence"; and its "minimal instrusion does not begin to approach the indignity of the frisk").

196. Berkemer v. McCarty, 468 U.S. 420, 438 (1984) (emphasizing that "the typical traffic stop is public, at least to some degree," in deciding that traffic stops did not constitute custody for *Miranda* purposes).

197. *Cf.* United States v. Mendenhall, 446 U.S. 544, 555 (1980) (emphasizing that approach of law enforcement to ask for ticket and identification in airport concourse "did not amount to an intrusion upon any constitutionally protected interest" where, *inter alia*, "[t]he events took place in the public concourse" and were non-coercive).

198. *See* Florida v. Bostick, 501 U.S. 429, 438 (1991) (explaining that "the 'reasonable person'

Nevertheless, the framework described above would place a unique burden on handgun carriers. The significance of this burden depends on how effective gun-detection methods become and the type of policy police adopt for reacting to detected guns. If police become very effective (for example, by using gun-detecting technology) and respond to each "hit" by requesting a license, gun possessors would be subjected to routine stops in public, accompanied by mandatory requests to display their license. The stops may be intrusive if police employ more than a simple verbal request (e.g., physical contact, handcuffs, drawn weapons, or multiple officers). From an officer's perspective, a polite request may be too passive as "the answer to the question propounded by the policeman may be a bullet."[199] A city policing effort that leads to routine and invasive gun-license inquiries could constitute such a burden on gun possession that the policing practice itself violates the Second Amendment, even if the underlying stops were deemed reasonable under the Fourth Amendment.

If gun-detection efforts are more haphazard, or officers exercise discretion in choosing to stop a small proportion of detected gun possessors, the burden on Second Amendment rights becomes less acute. But this easing of the Second Amendment burden raises familiar worries about police discretion and racial profiling, generating Fourth and Fourteenth Amendment questions.[200] Already, critics of law enforcement perceive that "in America's style of policing, gun or appearance of a gun in . . . possession of a person of color equals criminal."[201]

CONCLUSION

In the wake of *Heller* and parallel legislative initiatives that make the country increasingly concealed carry friendly, urban police departments must adapt to a new era of lawful gun possession, including lawfully-carried, concealed handguns in crowded public areas. Cities previously

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test [for purposes of assessing whether a Fourth Amendment seizure has occurred] presupposes an *innocent* person").

199. Sibron v. New York, 392 U.S. 40, 63–64 (1968) (quoting People v. Rivera, 201 N.E.2d 32, 35 (N.Y. Ct. App. 1964)).

200. *See* Bellin, *supra* note 9, at 1535–49 (concluding that New York City's gun-policing efforts violated Fourth and Fourteenth Amendments).

201. *Former Officer: Policing Takes Patience, but Black Suspects Get Little*, NPR (Dec. 12, 2014, 5:01 AM), http://www.npr.org/2014/12/12/370264858/former-officer-policing-takes-patience-but-black-suspects-get-little (quoting former NYPD officer and now Brooklyn Borough president, Eric Adams); H. A. Goodman, *Three Reasons Why Black Men Should Openly Carry a Gun After Trayvon, Ferguson and John Crawford*, HUFFINGTON POST (Dec. 1, 2014, 3:12 AM), http://www.huffingtonpost.com/h-a-goodman/three-reasons-why-black-m_b_6245962.html (commenting that police shooting "signifies that . . . the mere sight of a black man with a gun instantly equated to danger").

committed to preventing violent street crime by detecting and deterring public gun carrying are not likely to give up these strategies entirely. Rather, many urban police forces will try to replicate traditional gun-policing regimes by focusing on detecting and deterring *unlicensed* gun carrying. Yet the Fourth Amendment places a series of hurdles in the way of officers attempting to lawfully distinguish between licensed and unlicensed handgun possessors. Depending on how the case law unfolds, these obstacles may be insurmountable. As a result, we may be witnessing the beginning of the end of a form of proactive gun policing long viewed by city residents and their police chiefs as essential to public safety. Indeed, the nascent "right to remain armed" may, with shockingly little fanfare, become one of the pivotal cultural changes in the relationship between America's police and its citizens. The implications, legal and otherwise, of this change are impossible to forecast with precision, but a serious conversation about them is long overdue. There is no sign that judges and legislators are aware of the dramatic implications of sweeping gun rights for American policing and little indication that scholars are focused on the powerful Fourth Amendment implications of resurgent Second Amendment rights.