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# Conditioning Exercise of Firearms Rights on Unlimited Terry Stops

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# CONDITIONING EXERCISE OF FIREARMS RIGHTS ON UNLIMITED *TERRY* STOPS

ROYCE DE R. BARONDES\*

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## I. INTRODUCTION

The tenth anniversary of *Heller*<sup>1</sup> and the fiftieth anniversary of *Terry*<sup>2</sup> are in June 2018. On this occasion, it is timely to reflect on the interaction between these two seminal decisions.<sup>3</sup>

Most questions concerning the Second Amendment, including the interplay between *Terry* and *Heller*, are currently without definitive answers. The Supreme Court has addressed the application of *Heller* in only two cases over the last ten years.<sup>4</sup> One issue developing in the lower courts is whether merely exercising in public the civil right recognized in *Heller* (i.e., that alone, with nothing else) may

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

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

3. The extent to which *Terry* should inform the principles announced in *Heller* was discussed, for example, in a brief filed by the General Counsel of the U.S. Conference of Mayors and Prof. Lawrence Rosenthal of Chapman University in *McDonald v. City of Chicago*, which argues:

Firearms regulation plays a central role in enhancing police authority to engage in stop-and-frisk tactics. When applicable law bans the possession or carrying of firearms, a stop and frisk conducted by an officer who reasonably suspects that an individual is illegally carrying a firearm—such as a suspicious bulge in a waistband—is considered constitutionally reasonable. When applicable law generally permits individuals to carry firearms, however, the Fourth Amendment does not permit a stop-and-frisk even when there is reason to believe that a suspect is armed or dangerous because there is no indication of a violation of law.

Brief of the United States Conference of Mayors as Amicus Curiae Supporting Respondents at 14, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08–1521), 2010 WL 59030 at \*14 (citations omitted).

Contemporary academic work addressing the interface between these two rights includes, *inter alia*, Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 22–24, 44 (2015) (discussing, *inter alia*, the implications of technological developments that might facilitate firearms detection; and concluding, the expansion of gun rights will pressure the Court to further limit Fourth Amendment freedoms against search and seizure in order to protect the lives of police officers); George M. Dery III, *Unintended Consequences: The Supreme Court's Interpretation of the Second Amendment in District of Columbia v. Heller Could Water-Down Fourth Amendment Rights*, 13 U. PA. J.L. & SOC. CHANGE 1, 43 (2010) (previewing that author's views by beginning with the following quotation from Justice Douglas: "[I]f watering-down is the mood of the day, I would prefer to water down the Second rather than the Fourth Amendment." (quoting *Adams v. Williams*, 407 U.S. 143, 151 (1972) (Douglas, J., dissenting)), and concluding, "Yet, as discussed above, expanding gun rights may consequently impede individual rights that are arguably even more central to liberty: the Fourth Amendment's freedom from government intrusions into individual privacy and personal security."); Robert Leider, *May I See Your License? Terry Stops and License Verification*, 31 QUINNIPIAC L. REV. 387 (2013); J. Harrison Berry, Comment, *Arkansas Open Carry: Understanding Law Enforcement's Legal Capability under a Difficult Statute*, 70 ARK. L. REV. 139, 155 (2017); Kyle Gruca, Comment, *A Silver Bullet: Should the Mere Presence of Ammunition Create a Reasonable Suspicion of Criminal Activity?*, 48 J. MARSHALL L. REV. 843, 871 (2015) (ultimately concluding, "Given this Second Amendment jurisprudence, it is illogical, as a matter of policy, to have a fundamental right to keep and bear arms for self-defense both inside one's home and in public, yet hold that even when one does nothing to suggest criminal activity, an intrusion is justified. To condone such police conduct, in completely innocuous circumstances, would make the Second Amendment meaningless." (footnotes omitted)).

4. In the first case, it holds the articulated principles are incorporated by the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The second is a summary reversal of a patent misreading of the scope of arms protected by *Heller*. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016) (per curiam) (addressing possession of stun guns).

require submission to unfettered *Terry* frisks not restricted to a limited set of times or locations but virtually anywhere in public.

The risk of injury to the innocent in a *Terry* frisk is substantially heightened when the detainee is armed.<sup>5</sup> It's no small matter to have a loaded firearm pointed at one for engaging in innocent, protected activity. But this can happen where mere firearms possession is a basis for initiating a *Terry* stop.<sup>6</sup> The risk of death or serious bodily injury, coupled with perceptions that lawfully being armed results in other unwarranted law enforcement attention,<sup>7</sup> is sufficiently severe that evidently some would forego exercise<sup>8</sup> of what lower courts typically reference as a protected right.<sup>9</sup>

It is somewhat peculiar even to need to discuss the possibility that merely for exercising a constitutionally secured right one may be subject to having a firearm pointed at oneself. Now, the Supreme Court has not yet determined whether the rights recognized in *Heller* extend to firearms possession outside the home. However, lower courts generally have either concluded that they do,<sup>10</sup> or assumed that they do.<sup>11</sup>

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5. Such a stop may necessarily involve bringing to bear a loaded firearm, *see, e.g., infra* note 124 and accompanying text (discussing a *Terry* stop resulting in a lawyer having a firearm pointed at his head); *infra* note 111 (discussing a potentially deadly game warden stop); *infra* note 120 and accompanying text (identifying facts of a community caretaking stop resulting in a threat to shoot a detainee). *See generally infra* note 85 (discussing, *inter alia*, *Thornton v. City of Columbus*, No. 2:15–CV–1337, 2017 WL 2573252, at \*12 n.10 (S.D. Ohio June 14, 2017), *aff'd*, No. 17–3743, 2018 WL 1313419 (6th Cir. Mar. 14, 2018), in which the court notes, “In the past several years alone, there has been a rash of police shootings and other uses of excessive force against individuals who were either unarmed or presented no threat of physical harm to the officers.”). Of course, pointing a loaded firearm at a person increases danger, as evidenced by the standard four firearms safety rules including not pointing a loaded firearm at something one is unwilling to destroy. *See Perez v. City of Los Angeles*, 83 Cal. Rptr. 3d 821, 825–26 (Cal. Ct. App. 2008) (identifying this rule as one of the “four cardinal rules of firearm safety”); MASSAD AYOUB, GUN DIGEST BOOK OF CONCEALED CARRY 254 (2d ed. 2012) (“(2) Never point the gun at anything you are not prepared to see destroyed.”).

6. *See infra* note 124 and accompanying text. *See also infra* note 85 (discussing an innocent person killed as a result of surprise attempt by an officer to disarm him at his own dwelling); *infra* note 111 (discussing a game warden stop).

7. *See infra* note 87.

8. *See infra* notes 87–88 and accompanying text.

9. *See infra* notes 10–11 and accompanying text.

10. *E.g., Wrenn v. District of Columbia*, 864 F.3d 650, 659 (D.C. Cir. 2017) (“[T]he Amendment’s core generally covers carrying in public for self-defense.”); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (“A right to bear arms thus implies a right to carry a loaded gun outside the home.”); *People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013) (noting a conclusion “that the second amendment protects the right to possess and use a firearm for self-defense outside the home”); *cf. Norman v. State*, 215 So. 3d 18, 36 (Fla. 2017) (stating, “The law prohibits, in most instances, one manner of carrying arms in public, thereby implicating the ‘central component’ of the Second Amendment—the right of self-defense.”), *reh’g denied*, No. SC15–650, 2017 WL 1365211 (Fla. Apr. 13, 2017), *cert. denied*, 138 S. Ct. 469 (2017).

11. *E.g., Drake v. Filko*, 724 F.3d 426, 434 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (“[T]he Amendment must have *some* application in the very different context of the public possession of firearms. Our analysis proceeds on this assumption.” (citation omitted)). *See generally Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) (“We agree with Judge Wilkinson’s cautionary holding in *United States v. Masciandaro*, that we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home, including as to ‘what sliding scales of scrutiny might apply.’ As he said, the whole matter is a ‘vast

In the last few decades, in part prompted by *Heller*, states have increasingly authorized public firearms possession. Some states have adopted permit-free carrying of concealed firearms; others have adopted “shall-issue” licensing regimes, under which applications for licenses to possess concealed firearms must be granted unless specific (relatively limited) criteria are met.<sup>12</sup> This has been accompanied by a substantial increase in the frequency with which persons have permits to possess concealed firearms.

The number of holders of concealed firearms permits has grown explosively in recent years—according to a recent study, from “2.7 million in 1999 to 4.6 million in 2007, 11 million in 2014, and 14.5 million in 2016.”<sup>13</sup> The study further reports “[O]ur findings suggest that nearly 9 million US adult handgun owners carry loaded handguns monthly, approximately 3 million of whom do so every day, and that most report protection as the primary reason for carrying regardless of carrying frequency.”<sup>14</sup>

These developments have been accompanied by efforts by activists who openly carry firearms to normalize public firearms possession.<sup>15</sup> At times, the public response to this visible exercise of firearms rights has precipitated law enforcement attention directed to the activists.<sup>16</sup> These vignettes have played-out in a variety of ways.<sup>17</sup>

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*terra incognita* that courts should enter only upon necessity and only then by small degree.” (citation omitted) (quoting *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)).

However, the issue is often elided when the claim involves a challenge under 42 U.S.C. § 1983 to a more limited restriction that can be addressed by concluding that any such right is not “clearly established.” See generally *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (“The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”); *Deffert v. Moe*, 111 F. Supp. 3d 797, 811–12 (W.D. Mich. 2015) (citing *Pearson*, 555 U.S. at 236); *Jefferson v. Lewis*, 594 F.3d 454, 460 (6th Cir. 2010). Courts often elide developing affirmative Second Amendment rights by proceeding to the step in which they conclude any such right was not clearly established. E.g., *Burgess v. Town of Wallingford*, 569 F. App’x 21, 23 (2d Cir. 2014) (“Thus, the protection that Burgess claims he deserves under the Second Amendment—the right to carry a firearm openly outside the home—is not clearly established law.”); see also *infra* note 17 (discussing *Burgess*).

12. See *infra* Part II.

13. Ali Rowhani-Rahbar et al., *Loaded Handgun Carrying Among US Adults, 2015*, 107 AM. J. PUB. HEALTH 1930, 1930 (2017).

14. *Id.* at 1935. The authors report that they excluded from the data set, from which they report the frequency of carrying a firearm, persons who identified themselves as police officers and those who did not identify their employment. *Id.* at 1931.

15. E.g., Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1521 (2009).

16. *Id.* at 1522.

17. For example, the court in *Lovett v. State* affirmed a conviction of the charge of interfering with public duties for a person’s refusal to disarm—the person had a holstered antique pistol while spectating at a traffic stop, wearing a shirt with the slogan, “Keep Calm and Film the Police.” 523 S.W.3d 342, 346–50 (Tex. Ct. App. 2017), *petition for discretionary review refused* (Oct. 18, 2017). The opinion notes:

[T]he police’s specific ability to lawfully disarm someone is broad. The government code, for example, provides that a peace officer who is lawfully discharging his official duties “may disarm a license holder [to carry a handgun] at any time the officer reasonably believes it is necessary for the protection of the license holder, officer, or another individual.” If an

One suppressive tool in the law enforcement portfolio, responsive to demonstrations designed to further firearms rights, is to initiate a *Terry* stop. Of course, *Terry* stops may also be more broadly used, and restrict firearms possession by seizing those who are thought to possess firearms and have been ineffective in their concealment attempts. To a trained officer, the presence of a firearm can be more apparent than might be thought the case. That can be, for example, because there is a temporary “printing” of the outline of part of a firearm or the appearance of a mere bulge at one’s waistband that is perceived by the trained law enforcement eye,<sup>18</sup> or because the possessor engages in activity generally perceived as innocent, such as adjusting one’s belt.<sup>19</sup>

These circumstances present the following, fundamental issue: May a state curtail this activity (public firearms possession), which lower courts typically treat as an activity protected by the Bill of Rights, by conditioning it on submission to a *Terry* stop at any time? Because we are contemplating the interaction of two separate rights, assessment of the circumstances may be more complicated under the doctrine of unconstitutional conditions.<sup>20</sup>

A brief in support of a petition for certiorari in *Robinson v. United States* suggests the answer should be “No,”<sup>21</sup> citing authority to the effect that conditioning the exercise of one constitutional right on relinquishment of another is “intolerable” or “corrupt[ing]” or is an “affront[ to] our notions of basic fairness.”<sup>22</sup> The scope

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officer may disarm even a license holder for safety reasons, it follows that an officer may disarm anyone of a deadly weapon for the same reasons.

*Id.* at 350 (quoting TEX. GOV’T CODE ANN. § 411.207(a) (West 2012)). *See also, e.g.*, *Embody v. Ward*, 695 F.3d 577, 580–81 (6th Cir. 2012) (finding no cause of action for seizure at gunpoint of a person lawfully carrying an AK–47 pistol; rejecting the claim of a Second Amendment violation); *Deffert v. Moe*, 111 F. Supp. 3d 797, 810, 812 (W.D. Mich. 2015) (finding reasonable suspicion to detain and temporarily disarm a person openly carrying a firearm across the street from a church service, while singing *Hakuna Matata*; determining the right to carry a firearm openly in public was not clearly established, declining to ascertain whether the right exists); *Baker v. Smiscik*, 49 F. Supp. 3d 489, 500–01 (E.D. Mich. 2014) (finding no clearly establish right violated for temporary disarmament in a public donut shop); *Baker v. Schwarb*, 40 F. Supp. 3d 881, 887–88 (E.D. Mich. 2014) (holding officers reasonably could have believed open carriers were in violation of prohibitions on disturbing the peace, because they admittedly were walking to “desensitize the public to open carry, and to educate police officers with [sic] whom they may encounter on the legality of open carry;” also finding the apparent age of the individuals provided probable cause as to prohibited firearms possession by a minor); *Burgess v. Wallingford*, No. 11–CV–1129, 2013 WL 4494481, at \*1 (D. Conn. May 15, 2013) (addressing an unsuccessful section 1983 lawsuit concerning a disorderly conduct arrest of individual wearing a shirt quoting a state provision concerning the right to bear arms and carrying copies of a public interest group’s brochure concerning the legality of carrying firearms), *aff’d sub nom.* *Burgess v. Town of Wallingford*, 569 F. App’x 21 (2d Cir. 2014).

18. *See infra* note 28 and accompanying text.

19. *See infra* notes 121 and accompanying text. As noted *infra* note 28 and accompanying text, a bulge at a waistband that is momentarily revealed by ordinary motion, or other commonplace activity of one possessing a firearm, can provide the law enforcement official trained in identifying armed persons reasonable suspicion a person is armed.

20. *See infra* notes 297–305 and accompanying text.

21. *United States v. Robinson*, 846 F.3d 694 (4th Cir.), *cert. denied*, 138 S. Ct. 379 (2017).

22. Brief of Amici Curiae States of West Virginia, Indiana, Michigan, Texas, and Utah in Support of Petitioner at 7, *Robinson v. United States*, 138 S. Ct. 379 (2017) (No. 16–1532), 2017 WL 3189041 at \*7. The brief asserts:

of the intrusion is greater, however, in some jurisdictions. The law in some jurisdictions requires persons possessing firearms under a physical license to admit their possession and present a license upon interaction with law enforcement personnel.<sup>23</sup> And some authority makes supplemental authorization for a frisk automatic.<sup>24</sup> So, in those locations, the issue is: May a state curtail such an exercise of a right by conditioning it on submission at any time to a *Terry* stop and frisk, and being required to identify oneself through the provision of state-issued identification?

This Article focuses on the first question: Whether mere exercise of the civil right to bear arms for self-defense may subject one to unlimited, pretextual *Terry* stops, within the following framework: Parts II and III provide some basic background. Part II provides background on the licensure of firearms possession. Part III

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In *Simmons v. United States*, this Court considered whether a criminal defendant could be made to choose between testifying in support of a Fourth Amendment claim on a motion to suppress and invoking his Fifth Amendment right against self-incrimination. The Court found it “intolerable,” in those circumstances, “that one constitutional right should have to be surrendered in order to assert another.”

*Id.* (citation omitted) (quoting *Simmons v. United States*, 390 U.S. 377, 394 (1968)) (parenthetically quoting *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977), as follows, “When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.”); and *Miller v. Smith*, 115 F.3d 1136, 1150–51 (4th Cir. 1997), as follows, “Forcing an [individual] to choose between two rights guaranteed by the Constitution results in the denial of one right or the other . . . [and] affronts our notions of basic fairness.”). A more complete extract from *Simmons v. United States* provides illuminating context:

Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

*Simmons v. United States*, 390 U.S. 377, 394 (1968).

23. See *infra* note 84 and accompanying text.

24. Compare *Robinson*, 846 F.3d at 695–96 (“This appeal presents the question of whether a law enforcement officer is justified in frisking a person whom the officer has lawfully stopped and whom the officer reasonably believes to be armed, regardless of whether the person may legally be entitled to carry the firearm. . . . We . . . conclud[e] that an officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile’s occupants is armed may frisk that individual for the officer’s protection and the safety of everyone on the scene.”), and *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013) (“We will not deny an officer making a lawful investigatory stop the ability to protect himself from an armed suspect whose propensities are unknown. Officer Munoz did no more than was required to retrieve the gun. Officer Munoz was entitled to remove Defendant’s handgun, not to discover evidence of a crime, but to permit him and Officer Miller to pursue their investigation without fear of violence.”) (citation omitted), and *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007) (“Here Officer Ferragamo’s reasonable suspicion that Orman was carrying a gun, which is all that is required for a protective search under *Terry*, quickly rose to a certainty when Orman confirmed that he was carrying a gun.” (emphasis added)), with *United States v. House*, 463 F. App’x 783, 785, 788 (10th Cir. 2012) (holding there is not an adequate basis to initiate a frisk where an officer observes that a person possesses a folded pocket knife (of the type the officer carries on duty) and has a suspicious bulge under his jacket, but denies having a weapon), and *State v. Serna*, 331 P.3d 405, 410 (Ariz. 2014) (“We also disagree with the Ninth Circuit’s determination that mere knowledge or suspicion that a person is carrying a firearm satisfies the second prong of *Terry*, which itself involves a dual inquiry; it requires that a suspect be ‘armed and presently dangerous.’ 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.”).

recounts some of the basics of *Terry*, including whether pretextual *Terry* stops are now authorized.

In Part IV, we turn to the substance of the authority regarding whether *Terry* stops are authorized by mere firearms possession. Part IV summarizes the contemporary approaches. The typical approach revolves around whether firearms licensure is treated as an affirmative defense to a base firearms crime. If so, a *Terry* stop is authorized for mere firearms possession; and if non-licensure is an element, a *Terry* stop is not authorized by mere possession. That Part then summarizes some of the contemporary authority rejecting that approach. Contemporary courts that do not focus on the license requirement typically hold (although there is some disagreement), based on Second and Fourth Amendment principles, that firearms possession alone may not authorize a *Terry* stop.

Parts V and VI endeavor to derive the suitable approach. Part V briefly discusses the principles applicable in jurisdictions that generally allow public firearms possession without a possessor-specific license (sometimes termed *constitutional carry*).<sup>25</sup> There is little to be said for allowing firearms possession alone to operate as a basis to stop a person in such a jurisdiction. However, as noted in that Part, those locations might be more limited than one might think, by virtue of a plodding potential interpretation of the federal Gun-Free School Zones Act, as amended<sup>26</sup>—one proffered by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that might oddly require possessor-specific licensure within 1000 feet of any school.

This Article in Part VI then highlights weaknesses in the typical contemporary approach, which authorizes *Terry* stops when licensure is treated as an affirmative defense. This approach is unsustainable. It would, for example, ultimately result in casual, cryptic legislative drafting choices of decades ago to authorize *Terry* stops of numerous persons for simply entering a posted apartment complex. That's the kind of noxious scope of stops invalidated in New York City.<sup>27</sup> Moreover, insofar as there is a question whether a jurisdiction sought to authorize stops in such a context, principles of constitutional avoidance should militate against an interpretation that they are authorized in the context.

A variety of factors combine so that an officer often will have reasonable suspicion that a person who is carrying a firearm is doing so. The hint of an item on one's hip can be revealed as a person moves naturally.<sup>28</sup> There are numerous unconscious movements taken by persons who are armed that can be clues to the trained eyes of law enforcement, e.g., adjusting one's belt.<sup>29</sup> Or a person may be

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25. See *infra* note 47 for a discussion of the rather awkward phrasing "possessor-specific license."

26. 18 U.S.C. § 922(q) (Westlaw through Pub. L. No. 115–84).

27. See *infra* note 331 and accompanying text.

28. Cf. *Byrd v. United States*, 579 A.2d 725, 729 (D.C. 1990) (holding that where a person had a drug pipe in his pocket, "the trial judge could properly find that the police had reasonable grounds to order appellant out of car and to frisk him upon seeing a bulge in appellant's pocket that was thought by the police officer possibly to be a gun."); *People v. Howard*, 542 N.Y.S.2d 536, 539 (N.Y. App. Div. 1989) ("Unlike a waistband bulge which is a telltale of a weapon, a pocket bulge could be caused by any number of innocuous objects.").

29. See *infra* note 122 and accompanying text.



subject to an encounter before being detained that, under state law, obligates him to inform an officer that his armed.<sup>30</sup> These circumstances, in combination with the low threshold for reasonable suspicion, combine to make a person who is considering carrying a firearm for self-defense to contemplate that carrying the firearm may result in his being subject to being stopped at any time.

Because we are examining whether the right to bear arms may be conditioned on consent to a *Terry* stop at essentially any time one is in public, Part VI continues by examining the doctrine of unconstitutional conditions. Some of that authority allows the condition to a governmental *subsidy*, but prohibits it where what is involved is avoidance of a non-de minimis *penalty* in exchange for relinquishment of a constitutional right.<sup>31</sup> Setting the frame of reference (the benchmark) in this type of analysis can be difficult. But in this case, it is set by referencing *United States v. Cruikshank*,<sup>32</sup> which would reject the notion that the right to bear arms for self-defense is birthed by governmental dispensation of largess.

Ultimately, the circumstance is most closely akin to that examined by *Delaware v. Prouse*.<sup>33</sup> In *Prouse*, the Court holds that the police may not stop drivers solely to check their licenses and registrations.<sup>34</sup> Neither driving a vehicle, as addressed in *Prouse*, nor exercising the right to bear arms for self-defense should alone authorize a stop without individualized suspicion of some crime (beyond engaging in ordinary activity that may be unlicensed), in the absence of “neutral criteria” that motivate the selection of one for detention.<sup>35</sup> Authorizing such stops, absent neutral criteria, of millions of persons at any time they are in public, which would be the result of firearms possession authorizing a stop, is aberrant. And that is the case even if firearms possession in the jurisdiction requires licensure, as does driving a car.

And there are three exacerbating factors. First, these stops necessarily involve interaction between persons who are armed, and the stops thus present heightened likelihood innocent persons will be injured or killed.<sup>36</sup> *Second*, there is at least anecdotal evidence those risks will prevent some people from exercising a right<sup>37</sup> lower courts typically hold is protected by the Second and Fourteenth Amendments. So, we are not discussing a negative impact limited to the stops themselves. Rather, the prospect of a stop may chill the exercise of a right. *Third*, language in *City of Indianapolis v. Edmond* would suggest that, as a general proposition, even checkpoints using neutral criteria cannot be adopted merely to ascertain whether someone is criminally possessing what is, for the possessor, contraband.<sup>38</sup> If such

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30. See *infra* note 84 and accompanying text.

31. See *infra* notes 297–305 and accompanying text.

32. 92 U.S. 542, 553 (1875).

33. 440 U.S. 648 (1979).

34. *Id.* at 663.

35. *Cf. id.* at 662 (“Otherwise, regulatory inspections unaccompanied by any quantum of individualized, articulable suspicion must be undertaken pursuant to previously specified ‘neutral criteria.’”).

36. See, e.g., *Schaefer v. Whitted*, 121 F. Supp. 3d 701 (W.D. Tex. 2015) (homeowner shot and killed on his own property by officer who sought to disarm him by surprise). See also *infra* note 85 and accompanying text.

37. See *infra* notes 87–88 and accompanying text.

38. 531 U.S. 32, 41 (2000); see also *infra* notes 278–279 and accompanying text.

checkpoints cannot be used to ascertain whether a person is possessing what is, for the possessor, contraband, then seizures involving selection without neutral criteria—the process we are examining—is unlawful, a fortiori.

That some higher number of firearms possessors are felons in a particular location does not change the analysis. Gross statistical information indicating that some large percentage of persons doing some otherwise innocent activity are engaging in criminal activity is not, by itself, sufficient to authorize seizures.<sup>39</sup> For *Terry* purposes, the high-crime neighborhood is the analogue of a may-issue jurisdiction, in which relatively fewer law-abiding persons are authorized to possess firearms. As mere presence in a high-crime neighborhood is insufficient to authorize a *Terry* stop,<sup>40</sup> so mere firearms possession in a may-issue jurisdiction should not authorize a *Terry* stop. The conclusion is cemented by some authority rejecting consideration of display of religious affiliation as a basis to initiate a *Terry* stop.<sup>41</sup>

## II. TYPES OF CARRY

All states now allow some form of public firearms possession.<sup>42</sup> As noted above,<sup>43</sup> the number of concealed firearms permit holders has grown over 400% from 1999 to 2016—to an estimated 14.5 million.<sup>44</sup> A study reports “[O]ur findings suggest that nearly 9 million US adult handgun owners carry loaded handguns monthly, approximately 3 million of whom do so every day, and that most report protection as the primary reason for carrying regardless of carrying frequency.”<sup>45</sup>

The restrictions on possessing a firearm vary substantially among the states. Because the nature of these restrictions influences the legitimacy of *Terry* stops of firearms possessors, it is helpful to sketch the range of state approaches.<sup>46</sup>

The mere possession of a firearm anywhere in a particular state may require licensure through licensee-specific application.<sup>47</sup> On the other hand, some states

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39. See *infra* notes 347, 353–355 and accompanying text.

40. See *infra* note 354 and accompanying text.

41. See *infra* notes 343–345 and accompanying text.

42. See generally *Culp v. Madigan*, 840 F.3d 400, 404 (7th Cir. 2016) (“It was only in response to our decision in *Moore* that Illinois finally became the last state in the nation to enact a concealed-carry law.” (citing *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012))).

43. See *supra* notes 13–14 and accompanying text.

44. Rowhani-Rahbar et al., *supra* note 13, at 1930.

45. *Id.* at 1935. The authors report that they excluded from the data set, from which they report the frequency of carrying a firearm, persons who identified themselves as police officers and those who did not identify their employment. *Id.* at 1931.

46. Much of the material in this Part II is based on Royce de R. Barondes, *Federalism Implications of Non-Recognition of Licensure Reciprocity under the Gun-Free School Zones Act*, 32 J.L. & POL. 139, Pt. II (2017).

47. *E.g.*, 430 ILL. COMP. STAT. ANN. 65/2(a) (Westlaw through P.A. 99–938 of the 2016 Reg. Sess.) (providing limited exceptions, e.g., for nonresidents who are at recognized shooting ranges, nonresident hunters with valid nonresident hunting licenses and nonresidents currently licensed or registered in their respective states of residence; *id.* §§ 2(b)(5), (7), (10)). See generally *Mishaga v. Schmitz*, 136 F. Supp. 3d 981, 997 (C.D. Ill. 2015) (identifying seven states requiring acquisition of a permit or license to purchase or possess certain firearms).

generally authorize public possession by those who can lawfully possess firearms<sup>48</sup>—which may be for both concealed and open (non-concealed) possession,<sup>49</sup> or may be limited to possession in a particular manner, e.g., openly carried.<sup>50</sup> Other states require possessor-specific authorization.<sup>51</sup> Possessor-specific authorization may be under a “shall-issue” process, in which an applicant is entitled to receive a

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We are here using “licensure through licensee-specific application” to address a circumstance where a person is authorized and the authorization arises from the person having made some application and the licensing entity having issued authorization specific to that person. The phrasing has been selected in light of the following issue: There is authority to the effect that governmental authorization directed to a broad set of individuals, who are authorized to do some act by virtue of that general authorization alone, constitutes being licensed by that governmental entity. *See Barondes, supra* note 46, at 152–63. This matter is relevant in firearms law because a federal statute references one being “licensed” by a state, and there is an interpretative question whether a statutory authorization that is not specific to the authorized person, but is some general authorization, is sufficient. *See generally id.*

48. *See, e.g., State v. Rosenthal*, 55 A. 610, 610–11 (1903) (“Under the general laws, therefore, a person not a member of a school may carry a dangerous or deadly weapon, openly or concealed, unless he does it with the intent or avowed purpose of injuring another; and a person who is a member of a school, but not in attendance upon it, is at liberty, in a similar way, to carry such weapons.”); *see also* Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 654 & n.351 (2012) (citing *Rosenthal* and stating, “As a result, the legal, permitless carrying of a concealed handgun often takes the colloquial name of ‘Vermont carry.’”).

49. *See, e.g., Rosenthal*, 55 A. at 610–11.

50. The jurisdictional counts are rapidly moving targets. The tally provided in 2013 in *Drake v. Filko*, 724 F.3d 426, 440–41 (3d Cir. 2013), is:

Thirty-one States currently allow open carry of a handgun without a permit, twelve States (including New Jersey) allow open carry with a permit, and seven States prohibit open carry entirely. By contrast, four States and parts of Montana allow concealed carry without a permit and forty-four States allow concealed carry with a permit. One State, Illinois, prohibited public carry of handguns altogether, but that law was struck down as violative of the Second Amendment by the United States Court of Appeals for the Seventh Circuit in December 2012.

However, in 2016 alone, Idaho, Mississippi, Missouri and West Virginia eliminated the permit requirement to carry a concealed weapon. IDAHO CODE ANN. § 18–3302(4)(f) (Westlaw through 2016 Second Regular Session), *amended by* S. 1389, 63d Leg., 2d Reg. Sess. (Idaho 2016) (adding, “(f) A concealed handgun by a person who is: (i) Over twenty-one (21) years of age; (ii) A resident of Idaho; and (iii) Is not disqualified from being issued a license under subsection (11) of this section.”); MISS. CODE ANN. § 45–9–101(24) (Westlaw through 2016 First and Second Extraordinary Sessions and the 2016 Regular Session), *amended by* H. 786, 2016 Leg., Reg. Sess. (Miss. 2016); MO. ANN. STAT. § 571.030 (Westlaw through the end of the 2016 Regular Session and Veto Session of the 98th General Assembly), *amended by* S. 656, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (amending MO. ANN. STAT. § 571.030(1), which defines “unlawful use of weapons” as including some carrying of a concealed weapon, to limit the offense of unlawful use of weapons arising from the carrying of a concealed weapon by adding the geographic limitation “into any area where firearms are restricted under section 571.107”); W. VA. CODE ANN. § 61–7–3 (Westlaw through legislation of the 2016 Regular Session), *amended by* H. 4145, 2016 Leg., Reg. Sess. (W. Va. 2016).

New Hampshire and North Dakota eliminated their permit requirements in 2017. S. 12, 2017 Leg., Reg. Sess. (N.H. 2017); H. 1169, 65th Leg., Reg. Sess. (N.D. 2017). Missouri’s neighbor to the West, Kansas, eliminated the permit requirement to possess a concealed firearm in 2015. *See* 2015 Kan. Sess. Laws 231, 237.

51. *See supra* note 50 (noting a 2013 jurisdictional count finding “forty-four States allow concealed carry with a permit”).

permit unless a specified disqualifying factor is present (and typically some perfunctory instruction or testing)—the regime in a majority of states.<sup>52</sup> Other jurisdictions have a discretionary regime. The latter approach is potentially corrupting.<sup>53</sup>

Among states that do not provide a blanket authorization for public firearms possession but, rather, require some possessor-specific authorization to have been granted, there is a variation in the extent to which nonresidents can be licensed and whether their out-of-state licenses will be recognized. Some jurisdictions recognize all firearms permits; others recognize only some; others do not recognize permits issued by other jurisdictions.<sup>54</sup>

### III. BASICS OF TERRY

Investigating the relationship between the Second Amendment and whether reasonable suspicion a person is armed authorizes a *Terry* stop presents a style of issue common in the law. There are some extant, fundamental principles articulated in a primary instrument, in this case the Bill of Rights; but the law has developed, over time, an incoherent mosaic of details purporting to give substance to the basic principles. Meanders and detours in specific analyses have, over time, produced Byzantine boundaries. To navigate the contours, and identify what legal developments carve blind alleys, it is helpful to use as a lodestar the seminal principles. So, we shall introduce our discussion of the basics of *Terry* stops by recounting, in Part III.A, some familiar aspects of the circumstances that birthed the Fourth Amendment and some basic principles that guide its interpretation. In Part III.B, we shall sketch some of the basics of the doctrine applicable to *Terry* stops allowing seizures based on individualized suspicion.

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52. *E.g.*, Brief of Arizona, Alabama, Arkansas, Indiana, Missouri, Montana, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming in Support of Plaintiffs-Appellees at 14, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), 2016 WL 4269351, at \*14. (“Forty-two states already have implemented essentially the same kind of handgun carry authorization system that Appellees correctly argue the Second Amendment requires, or do not require a license to carry a firearm. These states are commonly called ‘shall issue’ states.”).

53. *E.g.*, Complaint, *United States v. Lichtenstein*, No. 16–MAG–2541, at 6 (Apr. 18, 2016) (recounting the defendant having admitted offering \$6,000 per gun license the officer helped the defendant obtain, and providing an estimate of 150 licenses), <https://www.justice.gov/usao-sdny/file/842346/download>; Victoria Bekiempis & Graham Rayman, *Brooklyn Gun Broker Secretly Recorded Conversations with Corrupt NYPD Cops*, N.Y. DAILY NEWS (Jan. 26, 2017), <http://www.nydailynews.com/new-york/brooklyn/brooklyn-gun-broker-secretly-recorded-corrupt-nypd-cops-article-1.2956091> (reporting a guilty plea of the broker and an officer, with another accused); Tracy Seipel, *Santa Clara County Sheriff Draws Legal Fire for Way She Hands out Concealed-Gun Permits*, MERCURY NEWS (Dec. 10, 2011), <http://www.mercurynews.com/2011/12/10/santa-clara-county-sheriff-draws-legal-fire-for-way-she-hands-out-concealed-gun-permits/> (stating in referencing permits issued to putative residents, “In fact, some of those who currently hold permits don’t appear to fit the ordinary definition of that word, including the scion of the Eggo frozen-waffle fortune who lives in Russia and the 86-year-old patriarch of Bechtel, the international engineering and construction firm. He lives in San Francisco;” and stating, “An analysis by this newspaper of campaign contributions to Smith since 2004 shows that the sheriff has received thousands of dollars from current permit holders and their relatives, or companies they own or work for—although Stevens, the deputy county counsel, insists there is no connection.”). See generally *infra* note 346 (discussing details of who receives permits).

54. See Barondes, *supra* note 46, at 148–51.

Some other principles, not involving arrests with probable cause and not involving *Terry* stops based on individualized suspicion, might be raised to justify seizures of armed persons, e.g., those governing administrative searches, community caretaking functions and circumstances raising “special needs.” Although space constraints do not make it practicable to discuss them in detail, before turning to the development of *Terry* stops as applied to mere suspicion of firearms possession, Part III.C identifies some of the alternative principles that could be employed to justify searches of armed persons.

#### A. Origins and Foundational Principles of the Fourth Amendment, and Contemporary Focus on Particular Demographic Groups

Implementation of processes by which inferior governmental functionaries could, at whim, search members of the public represented a core component of the governmental abuses that gave rise to the Revolutionary War. No benefit can be added by attempting to provide original exposition here. Reference to extant descriptions provides suitable context for our investigation:

The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;” since they placed “the liberty of every man in the hands of every petty officer.” This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.

“Then and there,” said John Adams, “then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”<sup>55</sup>

Evidently embedded in the objection was particular distaste for vesting the discretionary decision-making in ordinary officials—persons of lower social status.<sup>56</sup>

More recently, Justice Brandeis, famously dissenting in *Olmstead v. United States*, notes the Founding Fathers “conferred, as against the government, the right

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55. *Boyd v. United States*, 116 U.S. 616, 625 (1886).

56. See generally ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 38 (2006) (quoting what he describes as “widely publicized remarks of the Boston town meeting of 1772” as stating, “Thus our houses and even our bed chambers, are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants . . . .” Taslitz quotes others as describing those who implemented searches as follows: “Such officers were described as ‘odious harpies,’ ‘servants,’ ‘villains[,]’ ‘dregs,’ ‘most despicable wretches,’ and ‘ruffians.’” *Id.*

For an illustrative discussion of the detour the Court has taken from the implementation of the Fourth Amendment contemplated by the Court in *Boyd*, see, e.g., Richard A. Epstein, *Entick v Carrington and Boyd v United States: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27 (2015).

to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>57</sup>

To be clear, the focus of this Article is on activity (possessing a firearm for self-defense) that inherently contemplates its exercise without material mandated temporal gaps. There is no proxy for being deprived of the ability to defend oneself on the unexpected occasion that it becomes necessary; the activity inherently contemplates its continual exercise.<sup>58</sup> So, if the subjugation to intrusive seizure may be occasioned by bearing arms for self-defense, that essentially contemplates ceaselessly being at risk of suspicionless search.<sup>59</sup> There is a substantial dissonance between that construct and a right designed to address the governmental intrusions Adams discusses as birthing the American Revolution.<sup>60</sup>

As noted below, seizures of armed persons are fraught with danger, and can easily result in the death or serious injury of an innocent person.<sup>61</sup> So, we are not discussing the possibility of a seized person’s simply displaying a permit and going on one’s way.

The basic tone these understandings of the principles underlying the Fourth Amendment is in tension with allowing the exercise of a basic civil right to subject oneself to a seizure and potential manipulation of one’s body, at any time and at the whim of an inferior officer. That unwarranted seizures in this context also have enhanced likelihood of yielding death or serious bodily injury of the innocent magnifies the concerns.

Some would be inclined to focus on the impact on particular demographic groups of allowing the unfettered intrusion into personal sanctity that would arise if firearms possession alone can occasion a *Terry* stop. Surveys show a substantial increase in household firearms ownership by Blacks in just the last few years.<sup>62</sup> One might wish to posture the problem by highlighting the potential for race-conscious abuse of the rights, as did one amicus brief on the petition for certiorari in *Robinson*:

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57. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by* *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967).

58. Volokh, *supra* note 15, at 1459 (“[A] ban on carrying guns in public can’t be justified as a place restriction: It leaves people without ample alternative means of defending themselves in public places”).

59. *Cf. infra* note 265 and accompanying text.

60. *See Boyd*, 116 U.S. at 625.

61. *See infra* notes 85–88, 111, 120, 124 and accompanying text.

62. Pew Research Center surveys show, from 2013 to 2017, the percentage of Black survey participants who had a firearm in their household increased from 21% to 32%, a nine percentage point increase. In particular, they show the percentages of persons who have a firearm in their household, by race, are 49, 32 and 21, for White, Black and Hispanic respondents respectively in 2017; and 46, 21 and 17 in 2013. Kim Parker et al., *America’s Complex Relationship with Guns*, PEW RES. CTR. (June 22, 2017), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/06/06151541/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf>; PEW RES. CTR., *Why Own a Gun? Protection Is Now Top Reason: Perspectives of Gun Owners, Non-Owners* (Mar. 12, 2013), <http://www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason/>. So, the proportion for Black respondents a few years increased by fifty-two percent (nine percentage points). *See* Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 6, *Robinson v. United States*, 138 S. Ct. 379 (2017) (No. 16–1532), 2017 WL 3189042 [hereinafter Amicus Brief for Robinson] (discussing some Pew Research Center data).

As it becomes increasingly common to carry a firearm in public, a per se assumption of dangerousness makes less and less sense and is more and more hazardous to law-abiding citizens, especially minorities. . . .

. . . .

While most officers will use this newfound power appropriately, it is too easily abused. Empirical evidence suggests that “individuals of color are more likely than white Americans to be stopped, questioned, searched, and arrested by police.” And this pattern appears to be persistent.<sup>63</sup>

Women are also increasingly carrying firearms for self-defense; permitting of women from 2007 until 2015 increased 270% (substantially higher than the 156% increase for men).<sup>64</sup> Jurisdictions frequently do not require frisks be conducted by same-sex officers.<sup>65</sup> A focus on this change in demographics may be of particular relevance to persons concerned for the possibility of pretextual *Terry* frisks instigated in fact by sexual predation.<sup>66</sup>

Focus on these demographic impacts may be thought particularly helpful in engaging a segment of the judiciary, the bar or the public as a whole that is otherwise dismissive of firearms rights. However, it is submitted that one need not speculate as to the frequency of racially-motivated or prurient misuse of the authority to seize individuals if firearms possession alone authorizes a *Terry* stop. It is submitted that, as discussed below, an assessment of the intrusion into personal liberty occasioned by that approach is anathema to the core of the Fourth Amendment, even if evenhandedly applied across demographic groups.

#### B. Basics of *Terry*

We shall supply a relatively abbreviated discussion of the basic contours of stops arising from individualized suspicion as authorized by *Terry*. Numerous additional details no doubt will be provided in the accompanying symposium works. We shall limit our introduction here of the general principles to what is necessary to provide a free-standing discussion of whether reasonable suspicion of firearms possession alone can justify a *Terry* stop.

Under *Terry* and its progeny, “reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of

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63. Amicus Brief for Robinson, *supra* note 62, at 7–9 (quoting Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L. J.* 457, 458 (2000)).

64. John R. Lott et al., *Concealed Carry Permit Holders Across the United States*, at 1, 4 (July 16, 2015), <http://ssrn.com/abstract=2629704>.

65. I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 *U.C. DAVIS L. REV.* 855, 865–66 (2015) (and, necessarily, by same-sex, heterosexual officers).

66. Frisks of all persons in a group of seized persons may be authorized by the fact that one of those persons is armed. *See generally* 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.6(a) (5th ed. Westlaw through Oct. 2017) (discussing a “frisk-of-companion rule”); *see generally infra* note 165 (concerning seizures of persons in the company of armed persons). So, one supposes the predation is not necessarily restricted to women who carry firearms, if they are in the company of others who do.

the stop.”<sup>67</sup> Significantly for our purposes, the Supreme Court has, in concluding a *Terry* stop was *not* justified in a particular context, relied on the fact that relevant factors alleged to support the stop “describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.”<sup>68</sup> If mere firearms possession may authorize a *Terry* stop, that description would seem similarly to fit those exercising the civil right to bear arms in self-defense, including the estimated three million who do so daily.

In *Whren v. United States*, the Supreme Court holds that where there is probable cause a crime has been committed, that the choice to detain a subject is pretextual, i.e., for purposes of investigating other potential crimes, does not make the stop unconstitutional.<sup>69</sup> A close reading of *Whren* indicates it does not necessarily foreclose the possibility that a pretextual *Terry* stop (as distinguished from a pretextual arrest with probable cause for a traffic violation, which was at issue there)<sup>70</sup> is unconstitutional. The *Whren* opinion repeatedly distinguishes the circumstances it is addressing (involving a traffic stop with probable cause) from those where there is a level of suspicion less than probable cause.<sup>71</sup> One can encounter occasional lower-court statements to the effect that the authorization of pretextual stops with probable cause allowed by *Whren* does not extend to pretextual *Terry* stops.<sup>72</sup>

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67. *Florida v. Royer*, 460 U.S. 491, 498 (1983).

68. *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (discussing innocuous travel arrangements); see also *United States v. Jones*, 606 F.3d 964, 967–68 (8th Cir. 2010) (quoting *Reid*).

69. See *Whren v. United States*, 517 U.S. 806, 814 (1996) (“Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent”); see also *United States v. Roggeman*, 279 F.3d 573, 581 (8th Cir. 2002) (citation omitted) (discussing *Whren* and other authority).

Of course, a pretextual stop may be prohibited under state law. See, e.g., *State v. Ladson*, 979 P.2d 833, 836 (Wash. 1999); Michael Sievers, *State v. Ochoa: The End of Pretextual Stops in New Mexico?*, 42 N.M. L. Rev. 595, 595 (2012) (identifying three jurisdictions).

Additionally, there is authority to the effect that the justifying pretextual circumstance must actually have been perceived. See *United States v. Lewis*, 672 F.3d 232, 237–40 (3d Cir. 2012) (also following the approach of *United States v. Ubiles*, 224 F.3d 213, 217–18 (3d Cir. 2000)). But see *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016) (holding the exclusionary rule did not prevent introduction of evidence discovered in an arrest following an invalid stop, where the person was subject to an outstanding warrant unknown to the detaining officer).

It is easy to identify circumstances where engaging in innocuous activity is sufficient to make a person subject to unbridled searches. See *infra* note 125 and accompanying text.

70. *Whren*, 517 U.S. at 810 (“Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Columbia traffic code had been violated”).

71. *Id.* at 811–12, 817–18. See generally *United States v. Johnson*, 874 F.3d 571 (7th Cir. 2017) (en banc) (validating investigatory stop arising from parking violation).

72. *Mason v. Commonwealth*, 767 S.E.2d 726, 738–39 (Va. Ct. App. 2015) (Humphreys, J., dissenting) (“Moreover, while pretextual stops are permissible under the Supreme Court’s holding in *Whren v. United States*, 517 U.S. 806 (1996), that is only so if probable cause exists that an offense has been committed. Thus, even though the offense for which probable cause exists is a pretext for the real reason for the detention, the existence of probable cause for any offense, satisfies the Fourth Amendment. Here, there is no suggestion of probable cause for any offense whatsoever and therefore any detention that does not serve the limited purpose of a *Terry* stop, is necessarily unconstitutional”) (parallel citation omitted), *aff’d*,



There are, however, statements to the contrary,<sup>73</sup> which appear to be the current majority.<sup>74</sup>

As a general matter, a person who is approached by a law enforcement officer is free not to entertain the encounter when the officer does not otherwise have an adequate basis to detain or arrest the person.<sup>75</sup> An unwillingness to communicate with law enforcement is not a basis to initiate a detention under *Terry*.<sup>76</sup>

Some courts have concluded reasonable suspicion a person stopped under *Terry* has a firearm is by itself sufficient to initiate a frisk.<sup>77</sup> The intrusiveness of a frisk or “pat-down” accompanying a *Terry* stop has been highlighted by contemporary jurists of both the right—Justice Scalia referenced it as an indignity to which it is doubtful the founders would have allowed themselves to be subjected<sup>78</sup>—and the left—Justice Sotomayor provides more detail in describing a degrading process and the accompanying indignity.<sup>79</sup> Judge Wald described a *Terry* frisk as a “groin

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786 S.E.2d 148 (Va. 2016). See generally *United States v. Knights*, 534 U.S. 112, 122 (2001) (stating, in validating a search of a probationer’s apartment on reasonable suspicion, “Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose. With the limited exception of some special needs and administrative search cases, ‘we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.’” (citation omitted) (quoting *Whren*, 517 U.S. at 813)); JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 3:4 (3d ed. Westlaw through June 2017) (“Decisions are not entirely in agreement when there is evidence that the detention was pretextual. Most courts hold that if the officer could have detained the individual legitimately then her actual motivation is immaterial. A few courts, however, require the prosecution to show not only that the officer could have detained but that she would have detained the party absent the ulterior motive. In any event, if reasonable suspicion is present at the time of the stop, that it turns out to be ill-founded is inconsequential” (footnotes omitted)).

73. *United States v. Miles*, No. 3:05CR204 (EBB), 2006 WL 1405577, at \*4 (D. Conn. May 18, 2006) (“As an initial matter, the subjective intent of an officer making a *Terry* stop is of no moment where the officer has an objectively reasonable basis for the stop.”), *aff’d*, 263 F. App’x 77 (2d Cir. 2008) (discussing, however, a traffic stop and a traffic violation); *State v. Heminover*, 619 N.W.2d 353, 360–61 (Iowa 2000) (“[W]e think there should be no distinction between a stop based on probable cause and a stop based on reasonable suspicion, i.e., a *Terry* stop. . . . In other words, both tests are objective”), *abrogated in part by State v. Turner*, 630 N.W.2d 601 (Iowa 2001).

74. *Cook*, *supra* note 72, § 3:4; see *supra* note 72 (quoting the relevant language).

75. *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (plurality opinion). The plurality opinion states:

Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

*Id.* (citations omitted).

76. *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (“We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”). See *Royer*, 460 U.S. at 498 (plurality opinion) (“He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.”).

77. See *supra* note 24 and accompanying text.

78. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (“I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity . . .”).

79. Justice Sotomayor in dissent writes:

grope.”<sup>80</sup> One can note, for example, it is a practice that provides a practitioner the opportunity to touch often, and to gain expertise on the comparative feel of, a testicle.<sup>81</sup>

The indignity may be compounded by the fact that a mere claim that the search involved unnecessarily rough handling in this sensitive area, an activity that typically will give rise only to limited means of proof, may be found inadequately evidenced to be actionable.<sup>82</sup> So, insofar as the mere exercise of a basic civil right

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. . . .

The indignity of the stop is not limited to an officer telling you that you look like a criminal. . . . If the officer thinks you might be dangerous, he may then “frisk” you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may “feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.”

Utah v. Strieff, 136 S. Ct. 2056, 2069–70 (2016) (Sotomayor, J., dissenting) (citations omitted).

80. Patricia M. Wald, *Guilty Beyond A Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 U. CHI. LEGAL F. 101, 102–03 (1993) (“This so-called ‘reasonable suspicion,’ in turn, permits the officer to detain the citizen for a reasonable time (reasonable varies with the circumstances, but can stretch as long as over an hour), interrogate him, and pat him down for weapons (including what we call a ‘groin grope.’” (footnotes omitted)).

81. An officer’s testimony in *Commonwealth v. Johnson* includes the following:

Q. Okay. What did you discover upon crunching his clothes as you say?

A. In—I did a squeeze of his entire body and then when I went into—in his crotch area, I—crotch area I could—I though [sic] I felt a controlled substance there.

Q. What makes you think that? What was it you felt in particular that led you to believe it was a controlled substance?

A. When I went under—in his testicle area, I felt something crunchy.

Q. So, you felt the area between his testicles and his anus then.

A. Yes, sir.

. . . .

Q. Have you had occasion, on these—on these other searches to, in fact, touch—occasion to touch testicles in the process of conducting such a search?

A. I—I feel—I feel a lot of guys’ crotches, yes.

Q. Okay. Did this feel like a testicle?

A. No. It didn’t. No, no—the . . .

Q. Very good.

631 A.2d 1335, 1336–37 (Pa. Super. Ct. 1993).

82. For example, *Bowie v. City of Livonia* involves an officer on patrol, looking for a wild coyote, who encountered and stopped a man dressed as a giant pink rabbit. As to the basis of the search, the opinion recites the subject allegedly “appeared ‘bizarre and unusual’” and whom the officer allegedly suspected “may be armed or under the influence of alcohol or controlled substances.” No. 05–CV–74411, 2007 WL 2050415, at \*1 (E.D. Mich. July 17, 2007). For this, the individual was the subject of an allegedly excessive frisk, which the court summarily rejects:

Here, Plaintiff alleges Parinello patted him down in an “excessively rough, intrusive, and hostile manner,” including “a thorough search in and around Plaintiff’s groin area.” Plaintiff’s

may result in such an intrusion at the whim of an inferior governmental official, the impact of the restriction is manifestly not de minimis.

Failure to identify oneself during a lawful *Terry* stop may be criminalized<sup>83</sup> if reasonably related to the circumstances justifying the stop.<sup>84</sup> Thus, if mere suspicion that an individual is possessing a firearm is an adequate basis for initiating a *Terry* stop, state law may thus subject a person who has merely exercised a fundamental right both to being stopped and to being required to identify himself or herself and, by statute, with government-issued identification. We are thus contemplating exercise of a civil right imposing an otherwise extraordinary subjugation to government monitoring and subjected to intrusive physical contact.

Additionally, a *Terry* stop of a person known to be armed is qualitatively different. “In the past several years alone, there has been a rash of police shootings and other uses of excessive force against individuals who were either unarmed or

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allegation of excessive force is conclusory and is unsupported by factual evidence. To effectuate a lawful investigatory *Terry* stop, Parinello was authorized to apply reasonable force to effectuate his investigation. Plaintiff has not come forward with evidence indicating that Parinello’s actions were gratuitous or otherwise did and comport with a legitimated investigatory frisk. [] “[T]he officer must feel with sensitive fingers ever portion of the prisoner’s body. A thorough search must be made of the prisoner’s . . . groin and area about the testicles.”[] Plaintiff’s excessive force claim fails as a matter of law.

*Id.* at \*4 (parenthetically quoting *Terry v. Ohio*, 392 U.S. 1, 17 n.10 (1968)). An excessively forceful search of this body area often will not yield evidence of proof other than what was available to this alleged victim. This court’s approach, dismissing the claim on summary judgment, *id.* at \*6, exculpates a substantial amount of potential misconduct.

83. *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 187 (2004) (“The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop.”). See generally *Berry*, *supra* note 3, at 155 (noting obstruction of governmental operations conviction, and revocation of a firearms license, for an open carrier’s failure to provide identification).

84. *Hiibel*, 542 U.S. at 188.

Some state law requires that a person encountering a police officer while carrying a firearm pursuant to a permit advise the officer of this possession and present his or her permit. *E.g.*, ALASKA STAT. ANN. § 11.61.220(a)(1)(A)(i) (West, Westlaw through 2017 First Regular Session and Fourth Special Session of the 30th Legislature in effect through January 26, 2018) (criminalizing the failure of a possessor of a concealed firearm, who is contacted by a peace officer (as defined), to inform immediately the officer of that possession); MICH. COMP. LAWS ANN. § 28.517 Sec. 7(3) (Westlaw through P.A.2018, No. 2, of the 2018 Regular Session, 99th Legislature) (requiring immediate disclosure upon being stopped by a peace officer).

Courts have stated that Wisconsin and New Mexico require a person carrying a concealed firearm pursuant to a license display the license upon an officer’s request. *United States v. Winters*, No. 16–CR–146–JPS, 2017 WL 2703527, at \*3 n.4 (E.D. Wis. June 22, 2017), *appeal dismissed*, 2017 WL 6946245 (7th Cir. Sept. 19, 2017); *United States v. Rodriguez*, 739 F.3d 481, 488 n.4 (10th Cir. 2013) (citing N.M. CODE R. § 10.8.2.16(D) (referencing a duty triggered “upon demand by a peace officer”). See also, *e.g.*, ARIZ. REV. STAT. ANN. § 13–3102(A)(1)(b) (Westlaw through First Regular Session of the Fifty-Third Legislature (2017)) (criminalizing failure to answer truthfully a question where in possession of a deadly weapon in a “means of transportation”); ARIZ. REV. STAT. ANN. § 13–3112(C) (Westlaw through First Regular Session of the Fifty-Third Legislature (2017)) (imposing \$300 fine on permit holder who fails to present it upon request); TEX. GOV’T CODE ANN. § 411.205 (Westlaw through 2017 Regular and First Called Sessions of the 85th Legislature) (upon demand). Illustrating the difficulty that firearms regulation imposes on those who seek to exercise the right, a detailed state-by-state discussion of the duty to inform officers identifies only one of the two provisions for Arizona referenced above. G. Halek, *Do You Have A Duty To Inform When Carrying Concealed? We Look At All 50 States For The Answers* (Aug. 31, 2015), <http://concealednation.org/2015/07/do-you-have-a-duty-to-inform-when-carrying-concealed-we-look-at-all-50-states-for-the-answers>.

presented no threat of physical harm to the officers.”<sup>85</sup> The nature of the search is thus qualitatively different.<sup>86</sup> In addition, merely possessing a firearm may draw other, less severe law enforcement attention perceived by the citizen as unwarranted.<sup>87</sup> Anecdotal evidence would indicate the risks of serious injury and other unwarranted attention can cause some simply to avoid exercising their right to bear arms.<sup>88</sup>

A concurrence in a recent Fourth Circuit en banc opinion expressly asserts, “Accordingly, the majority decision today necessarily leads to the conclusion that individuals who elect to carry firearms forego other constitutional rights, like the Fourth Amendment right to have law enforcement officers ‘knock-and-announce’

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85. Thornton v. City of Columbus, No. 2:15–CV–1337, 2017 WL 2573252, at \*12 n.10 (S.D. Ohio June 14, 2017) (further noting, “Philando Castile, lawfully registered to carry a firearm, was shot and killed by an officer who suspected him of a robbery based on his appearance. Mr. Castile’s girlfriend, present at the time of the shooting, stated that the officer fired his weapon four times after Mr. Castile attempted to get his ID and wallet.”). See also, e.g., Schaefer v. Whitted, 121 F. Supp. 3d 701, 706 (W.D. Tex. 2015) (homeowner shot and killed on his own property by officer who sought to disarm him by surprise); Lisa Marie Pane, *Black Women Picking up Firearms for Self-Defense*, U.S. NEWS & WORLD REP. (July 24, 2017) <https://www.usnews.com/news/politics/articles/2017-07-24/black-women-picking-up-firearms-for-self-defense> (“It’s disheartening to think that you have everything in order: Your license to carry. You comply. You’re not breaking the law. You’re not doing anything wrong. And there’s a possibility you could be shot and killed,” said Laura Manning, a 50-year-old payroll specialist for ADP from Atlanta.”).

There also may be concerns that the carrying of a firearm may give rise to allegedly pretextual charges. See, e.g., Complaint at 5, 9, Picard v. Torneo (D. Conn. Sept. 15, 2016) (No. 3:16–cv–01564–WWE) (alleging manufactured allegations that “someone called in’ a complaint about a man ‘waving a gun and pointing it at people’” in connection with the arrest of an open carrier protesting at a DUI stop; further alleging as to one defendant, one Patrick Torneo, a master sergeant with the state police, “Defendant Torneo said that the defendants should issue Mr. Picard a public disturbance charge, ‘then we claim that in backup we had *multiple* [motorists] stopped to complain about’ a man waving a gun, ‘but that no one wanted to stop and give a statement.’ Torneo emphasized the words ‘then’ and ‘multiple’ when speaking, as if formulating the defendants’ cover story aloud.”).

86. See generally *infra* notes 120, 124 and accompanying text (providing illustrations of excessive stops resulting in firearms being pointed at persons).

87. See, e.g., David A. Graham, *Do African Americans Have a Right to Bear Arms?*, ATLANTIC (June 21, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-continued-erosion-of-the-african-american-right-to-bear-arms/531093/> (“In the course of her interviews, Carlson found that in practice the exercise of the right to bear arms created more trouble than protection for African Americans: ‘Gun carriers of color told me they experienced unwanted police attention, and their guns heightened their existing vulnerability to police.’”).

88. E.g., Julia Craven, *Why Black People Own Guns*, HUFFPOST (Dec. 26, 2017), [https://www.huffingtonpost.com/entry/black-gun-ownership\\_us\\_5a33fc38e4b040881bea2f37](https://www.huffingtonpost.com/entry/black-gun-ownership_us_5a33fc38e4b040881bea2f37) (quoting a person identified as certified as a pistol instructor as follows: “And I have a duty to inform any officer who stops me that I am carrying and that I have a permit for it. But how they react to that, I can’t say. And that scares me. So I would rather not have a firearm on me and give someone a reason, even in their minds, to shoot.”); Tracy Mumford, *To Be Black and Armed in Minnesota*, MPRNEWS (June 23, 2017), <https://www.mprnews.org/story/2017/06/23/black-gun-owners-on-yanez-verdict> (reporting discussion between a Black trainer and a former student concerning whether the former student should continue to carry a firearm). Cf. Philip Smith, *Is Open Carry Too Dangerous For African Americans?*, AMMOLAND (Mar. 7, 2016), <https://www.ammoland.com/2016/03/is-open-carry-too-dangerous-for-african-americans/#axzz53PLuv1nh> (“The second school of thought is that if you ‘Open Carry’ you put yourself in harms way with the public as an African American because you have a gun and it can be a big problem for some local law enforcement and the general public. . . . Why put yourself in that type of problem when you can avoid it all together.”).

before forcibly entering homes.”<sup>89</sup> Justice Alito has implicitly cautioned against treating the rights secured under the Second Amendment as second-class.<sup>90</sup> But, to describe the rights under the Second Amendment as “second class” would seem to understate the derogation of rights that this approach to *Terry* would countenance.

### C. Alternatives not Involving Individualized Suspicion

Assorted theories may be asserted to detain a person for reasons short of individualized suspicion. Some merit brief mention, to contextualize our discussion.

“[The Supreme Court has] held that brief, suspicionless seizures at highway checkpoints for the purposes of combating drunk driving and intercepting illegal immigrants were constitutional.”<sup>91</sup> However, in *City of Indianapolis v. Edmond*, it invalidates “a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics.”<sup>92</sup> The context being examined in this Article does not involve fixed checkpoints.

#### i. Regulated Industries

In *Delaware v. Prouse*, Justice White notes, “There are certain ‘relatively unique circumstances’ in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise.”<sup>93</sup> He then proceeds to cite as contexts “federal regulation of firearms,”<sup>94</sup> the seminal authority, and “federal regulation of liquor.”<sup>95</sup> He then continues, “Otherwise, regulatory inspections

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89. *United States v. Robinson*, 846 F.3d 694, 706 (4th Cir.) (Wynn, J., concurring), *cert. denied*, 138 S. Ct. 379 (2017).

90. The opinion in *McDonald v. City of Chicago* states:

Municipal respondents’ remaining arguments are at war with our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.

*McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

91. *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000).

92. *Id.* at 34, 48 (“Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.”).

93. *Delaware v. Prouse*, 440 U.S. 648, 662 (1979) (citation omitted) (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978)).

94. *Id.* (citing *United States v. Biswell*, 406 U.S. 311 (1972)).

95. *Id.* (citing *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)).

unaccompanied by any quantum of individualized, articulable suspicion must be undertaken pursuant to previously specified ‘neutral criteria.’”<sup>96</sup> The federal regulation of firearms there referenced involved firearms dealers;<sup>97</sup> it did not apply to non-commercial activity.<sup>98</sup>

The Court later noted, “These cases are indeed exceptions, but they represent responses to relatively unique circumstances.”<sup>99</sup> More recently in *City of Los Angeles, California v. Patel*, the Supreme Court references “only four industries that ‘have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise,’” adding to the list automobile junkyards and mining.<sup>100</sup> *Patel* further notes, “Moreover, ‘[t]he clear import of our cases is that the closely regulated industry . . . is the exception.’ To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule.”<sup>101</sup>

*Marshall v. Barlow’s, Inc.*, invalidates warrantless inspections for safety hazards and violations of federal occupational safety regulations.<sup>102</sup> OSHA’s website reports there were “4,379 worker fatalities in private industry in calendar year 2015.”<sup>103</sup> At an abstract level, *Barlow’s* would militate against allowing firearms possession alone to authorize a seizure. The number of deaths in the covered activity is of the same magnitude as (about 46% of) the number of murders using firearms.<sup>104</sup> But the intrusion at issue in *Barlow’s* is much less—it is focused on business activity, it does not allow, for example, government detention of millions of people simply going about their ordinary affairs, potentially subjecting them to have loaded

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96. *Id.*

97. *Id.* (citing *United States v. Biswell*, 406 U.S. 311, 311 (referencing authorization to search a “firearms or ammunition . . . dealer”).

98. See *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978) (“The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception.”); see also *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 534 (1967) (requiring warrant for housing code violation inspection).

99. *Barlow’s*, 436 U.S. at 313.

100. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015) (quoting *Barlow’s*, 436 U.S. at 313). But see *Leider*, *supra* note 3, at 405 (“Lower courts have extended the authority to search without a warrant for pervasively regulated activities beyond businesses.”).

*Leider* favorably discusses suspicionless seizures of public transit riders who are required to present tickets “on demand,” stating, “Focusing on (1) the necessity for random inspections to effectuate a licensing regime and (2) the burdens caused by the method of license verification also helps explain why random license checks are allowed in situations where the state’s interests may seem not weighty.” *Leider*, *supra* note 3, at 411. He further notes other systems have technology that obviates that need. *Id.* It is submitted that the fact that this practice (one that is different from seeking tickets on a train of all persons who do not display their tickets) is persistent does not mean it is sound.

101. *Patel*, 135 S. Ct. at 2455 (quoting *Barlow’s*, 436 U.S. at 313).

102. *Barlow’s*, 436 U.S. at 309–11.

103. *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://web.archive.org/web/20171127071224/https://www.osha.gov/oshstats/commonstats.html> (last visited Nov. 27, 2017).

104. The F.B.I. reports there were 9,916 murders with firearms in the United States in 2015. *Expanded Homicide Data Table 9*, FED. BUREAU OF INVESTIGATION, [https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded\\_homicide\\_data\\_table\\_9\\_murder\\_victims\\_by\\_age\\_by\\_weapon\\_2015.xls](https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_9_murder_victims_by_age_by_weapon_2015.xls) (visited Jan. 26, 2018).

firearms pointed at them, collection of their locations and (in some courts' views) contact with their privates.

ii. "Special Needs" in the Supreme Court

On occasion, the Supreme Court has held the presence of "special needs" may authorize seizures in "the absence of a warrant or individualized suspicion . . . divorced from the State's general interest in law enforcement."<sup>105</sup> In *Ferguson v. City of Charleston*, the Court holds this "special needs" exception does not extend to the testing, without individualized suspicion, of pregnant women for drug usage, stating:

Because the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients, this case differs from the four previous cases in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches." In three of those cases, we sustained drug tests for railway employees involved in train accidents, for United States Customs Service employees seeking promotion to certain sensitive positions, and for high school students participating in interscholastic sports. In the fourth case, we struck down such testing for candidates for designated state offices as unreasonable.

. . . .

The critical difference between those four drug-testing cases and this one, however, lies in the nature of the "special need" asserted as justification for the warrantless searches. In each of those earlier cases, the "special need" that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement. . . . In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.<sup>106</sup>

As often is the case in construing constitutional taxonomy, it is not clear precisely what is an interest "divorced from the State's general interest in law enforcement." One's understanding may be informed by Justice Kennedy's statement, in concurrence—a statement subsequently quoted by Justice Stevens in dissent:<sup>107</sup> "None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives."<sup>108</sup>

The issue at hand involves law enforcement personnel, while at unrestricted locations, stopping persons suspected of carrying firearms for purposes of increasing arrests. Such stops, involving law enforcement stopping a person for no reason

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105. *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001).

106. *Id.* at 77–80 (quoting *Chandler v. Miller*, 520 U.S. 305, 309 (1997)).

107. *Samson v. California*, 547 U.S. 843, 860 (2006) (Stevens, J., dissenting in case applying the special needs doctrine to suspicionless searches of criminals on parole).

108. *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring).

other than firearms possession, seem necessarily to involve a “State’s general interest in law enforcement” and thus are qualitatively different from (and more objectionable than) the actions justified by the “special needs” exception.

### iii. Game Wardens and the Like

Concurring in *Delaware v. Prouse*, Justice Blackmun wrote:

And I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties. In a situation of that type, it seems to me, the Court’s balancing process, and the value factors under consideration, would be quite different.<sup>109</sup>

One might derisively note the presence of this view expressed in a concurrence joined by only one justice in an 8–1 decision,<sup>110</sup> making it inherently a minority view.

Yet a number of lower courts have addressed actions of game wardens and similar contexts, often hewing to the approach for which Justice Blackmun could arouse only the support of one other justice.<sup>111</sup> For example, a recent 4–3 decision from the Supreme Judicial Court of Maine allows the suspicionless seizure of an ATV driver.<sup>112</sup> The thrust of the court’s analysis is conclusory. It provides parenthetical summaries of other authority authorizing searches.<sup>113</sup> It then concludes:

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109. *Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Blackmun, J., concurring).

110. *Id.* at 663.

111. *See generally id.* at 663. These intrusions by wardens are not necessarily benign. Consider the following:

The evidence was sufficient in the instant case because a reasonable fact-finder could have determined that the defendant reasonably believed that the two men who accosted him with weapons on his land and on land upon which he had an easement were not wardens with the Wisconsin Department of Natural Resources; that the defendant reasonably believed that the two men were trespassers hunting illegally; that because the two men forcibly wrested his rifle from him and then drew their handguns on him, the defendant reasonably believed that the two men were unlawfully interfering with his person; that the two men pointing handguns at the defendant caused him to fear for his life; and that the defendant pointed his handgun at the two men believing he had to defend himself. In sum, the jury could conclude that the defendant threatened to use force as he reasonably believed necessary to prevent or terminate the interference with his person.

*State v. Stietz*, 895 N.W.2d 796, 800 (Wis. 2017) (footnote omitted) (holding a defendant was entitled to a self-defense charge to the jury).

Leider sets-up an argument concerning a social value assessment approach (illustrated between driving stops and stops of hunters), balancing assorted activities, which he ultimately rejects. Leider, *supra* note 3, at 398–99 (noting, “[D]etermining net social worth is very difficult.”).

112. *See generally State v. McKeen*, 977 A.2d 382 (Me. 2009).

113. The referenced summaries include:

(i) “noting the ‘special exigencies of sea travel’ in upholding the routine stop of a boat without articulable suspicion;” *id.* at 386 (quoting *State v. Giles*, 669 A.2d 192, 193 (Me. 1996));



Because ATVs are designed, regulated, and primarily used for off-road recreation, and given the State's legitimate and substantial interest in its natural resources and the safety of all involved, operators like McKeen have a limited expectation of privacy, even though some operators may use ATVs as a mode of transportation. The intrusiveness of the stops . . . is minimal when compared with the State's legitimate and substantial interests in regulating ATVs.<sup>114</sup>

Putting aside whether this authority is sound, it does not appear to provide support, by analogy, for suspicionless stops at any time of the perhaps three million persons who carry handguns daily, as well as stops on occasional days of others who carry firearms less frequently. This Maine authority addresses a more limited scope.

#### iv. Community Caretaking

There are additional "community caretaking" principles validating certain officer interactions.<sup>115</sup> Because it is impracticable to detail all the ancillary principles, our purpose here is simply to mention it and provide an illustration. We have chosen to provide an illustration that also shows the substantial personal risk to innocents that can arise in the context of stops of armed persons for any reason.

*United States v. King* provides an illustration of a circumstance where a court states that an officer engaging in "community caretaking" may be authorized to disarm someone.<sup>116</sup> To describe the acts taken there as community "caretaking" is oxymoronic.

The case involves an officer who detained a person stopped in traffic, one King, under a community caretaking rubric "in order to inform King of the hazardous conditions and to advise him to cease honking, regardless of whether King's actions violated any traffic laws."<sup>117</sup> The officer saw a pistol.<sup>118</sup> The court concludes that observation of a pistol "would justify [the officer's] separation of Defendants from

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(ii) "upholding the use of road blocks by game wardens to enforce fishing laws due to the State's substantial interest in protecting natural resources;" *id.* (citing *State v. Sherburne*, 571 A.2d 1181, 1184–85 (Me. 1990));

(iii) "stating that '[t]he roving conservation officer patrol stopping hunters, encountered in the field . . . does not violate the fourth amendment' because hunters are deemed to have consented to some intrusions when they get a hunting license or hunt without one;" *id.* (quoting *State v. Layton*, 552 N.E.2d 1280, 1287 (Ill. App. Ct. 1990)); and

(iv) "holding that 'a game warden may request production of a valid hunting or fishing license when the circumstances reasonably indicate that an individual has been engaged in those activities;" *id.* (quoting *State v. Boyer*, 42 P.3d 771, 775 (Mont. 2002).

Discussion of game warden stops is subject to its own, detailed literature. Summarizing it would take us too far afield.

114. *McKeen*, 977 A.2d at 386.

115. *United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993).

116. *Id.*

117. *Id.* at 1561.

118. *Id.*

the pistol in order to ensure her own safety during the encounter,<sup>119</sup> but holds the following mechanics of the seizure were unreasonable: “Officer LeMasters drew her gun and pointed it at King, threatening to shoot him if he did not comply with her order. Her call for backup assistance led other officers to encircle Defendants’ car with weapons drawn.”<sup>120</sup>

This 1993 case precedes *Heller* and thus does not provide discussion informative of the interaction between these principles and the contemporary understanding of the Second Amendment. But a more complete picture of the limits on exercise of firearms rights may be gleaned by referencing that principle governing community caretaking—one outside the scope of this Article—as well.

#### IV. EXTANT DOCTRINE

##### A. Introduction

We shall examine in this Part IV how extant authority has addressed whether reasonable suspicion that a person possesses a firearm is, by itself, sufficient to initiate a *Terry* stop. One might credibly take the position that inquiry is a pedantic, merely academic exercise.<sup>121</sup> Other commonly-present factors may be relied-upon

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119. *Id.* The court notes:

[A] person’s Fourth Amendment rights are not eviscerated simply because a police officer may be acting in a noninvestigatory capacity for “[i]t is surely anomalous to say that the individual . . . [is] fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.” Whether the seizure of a person by a police officer acting in his or her noninvestigatory capacity is reasonable depends on whether it is based on specific articulable facts and requires a reviewing court to balance the governmental interest in the police officer’s exercise of his or her “community caretaking function” and the individual’s interest in being free from arbitrary government interference.

*Id.* at 1560 (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 530 (1967) (footnote omitted)).

120. *King*, 990 F.2d at 1562.

121. Although this discussion is focused on circumstances where it is clear a person is armed, numerous factors may be considered in ascertaining whether there is a reasonable suspicion a person is armed, including:

(i) an attempt to leave an officer’s vicinity in light of an otherwise proper an unwillingness to speak with an officer;

(ii) blading (not presenting a square orientation to an officer), *see* *United States v. Winters*, No. 16–CR–146–JPS, 2017 WL 2703527, at \*5 (E.D. Wis. June 22, 2017) (including “blading” in a list of indicators of criminal conduct), *appeal dismissed*, 2017 WL 6946245 (7th Cir. Sept. 19, 2017);

(iii) a “security-check,” *see id.* at \*5 (including this in a list of indicators of criminal conduct); and

(iv) specifically checking one’s belt or waist area, *see, e.g.*, *Plummer v. United States*, 983 A.2d 323, 333–34 (D.C. 2009); *State v. Norfolk*, 366 S.W.3d 528, 532, 534 (Mo. 2012) (quoting the following police officer testimony: “In the past of every weapons arrest I’ve been assisting or been on, a lot of individuals that carry weapons happen to adjust the weapon for some reason when the police come.”). *But see, e.g.*, *People v. Parra*, 817 N.E.2d 141, 145 (Ill.

for purposes of justifying a conclusion there is reasonable suspicion that criminal activity is afoot.<sup>122</sup> One illustration is presence in a high-crime neighborhood.<sup>123</sup>

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App. Ct. 2004) (holding inadequate basis to stop arising from observation a vehicle contained latex gloves, observation of a state firearms ownership (FOID) card and presence in a “high-crime” area); *In re Jeremy P.*, 11 A.3d 830, 838 (Md. Ct. Spec. App. 2011) (“Appellant cites a number of ‘waistband’ cases decided in other jurisdictions and our research uncovered others. Although there can be no bright-line rule given the individualized nature of such cases, our review indicates that a police officer’s observation of a suspect making an adjustment in the vicinity of his waistband does not give rise to reasonable suspicion sufficient to justify a *Terry* stop.”).

122. Additional bases identified in one section of LaFave’s treatise include:  
persons already suspected to some degree who:

- “appeared startled to see the police,”
- kept a watch upon the police,
- declined to look in the direction of the police,
- attempted to conceal something from the police,
- made what appears to be a “security check” for a weapon,
- tried to conceal themselves from the police,
- changed direction to avoid the police, or
- drove away, ran away or walked off at a fast pace upon the approach of the police, or
- “made furtive gestures consistent with hiding or retrieving a weapon in response to being confronted by police officers.”

4 LAFAVE, *supra* note 66, at § 9.5(g) (footnotes omitted) (bullet points added) (further stating, “More difficult, however, is the question of whether such actions as these (when not themselves criminal) may, *in and of themselves*, justify a stopping for investigation. Perhaps at least some of them do . . .” (footnote omitted)). Other circumstances include that a person falsely denies he is armed. For example, *Mackey v. State*, 124 So. 3d 176, 184 (Fla. 2013), notes:

When the person blatantly lied to the police officer here about possession of a firearm while he was in a geographic area well known for illegal narcotics and firearms with the weapon in view, we conclude that the officer had a reasonable, articulable suspicion that the person may have been engaged in illegal activity, and this brief detention to further investigate whether a crime was being committed is constitutionally valid.

On the other hand, *Hall v. Dodge*, No. 6:12–CV–1808–MC, 2013 WL 4782208, at \*3 (D. Or. Sept. 5, 2013), states:

Defendant contends that he had reasonable suspicion to detain Hall based upon: (1) Hall’s presence in a high crime area; (2) Hall’s manner of dress; (3) Hall’s display of a firearm, (4) Hall’s refusal to answer posed questions; and (5), Hall’s “suspicious” behavior and movement. These facts, even when combined with the experience and legitimate concerns of a trained police officer, do not rise to the level of reasonable suspicion required for temporary detention.

123. *E.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (“The question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seat-belt violation punishable only by a fine. We hold that it does not.”). *See generally infra* notes 353–354 and

It is helpful to illustrate concerns with relying on these types of factors by noting how these factors combined to produce a manifestly unsatisfactory stop. A prominent lawyer, for approaching a courthouse with a licensed, concealed firearm, had an officer point a firearm at his head.<sup>124</sup>

Or there may be some trivial offense for which an officer may have probable cause to arrest an individual,<sup>125</sup> and, one supposes, do so using the same type of display of force to which that lawyer was subjected, merely for exercising what lower courts consider a constitutional right. Nevertheless, we shall examine

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accompanying text (noting that factor alone (presence in a high-crime neighborhood) cannot authorize a Terry stop).

124. Schubert v. City of Springfield, 589 F.3d 496, 499–502 (1st Cir. 2009). See generally United States v. Perkins, 363 F.3d 317, 321, 325, 327 (4th Cir. 2004) (adequate suspicion to stop in a high-crime neighborhood where “tip alleged that two males were displaying and pointing rifles in various directions in a residential neighborhood,” discounting that “people in West Virginia display their hunting and sporting rifles all the time”).

125. For example, *Baker v. Schwarb*, 40 F. Supp. 3d 881 (E.D. Mich. 2014), references the style of clothing being worn as a factor in concluding an officer:

had reasonable cause to believe that Plaintiffs were “[loitering] in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity” in violation of Sterling Heights, MI., Ordinance 35–17(A).

*Id.* at 889 (referencing the individual’s “all-black garb and ominous rifle with a 30–round magazine, coupled with his proximity to an institution—a hospital”). *Mason v. Commonwealth*, 767 S.E.2d 726, 733 (Va. Ct. App. 2015), *aff’d*, 786 S.E.2d 148 (Va. 2016), states, “Given these facts, we agree with the trial court that a reasonable officer could suspect that the opaque, five-by-three-inch parking pass dangling from a rearview mirror might violate Code § 46.2–1054 and thus warrant an investigatory stop.” See generally *Bellin*, *supra* note 3, at 13–14 (providing illustrations of trivial criminal offenses). However, *State v. Broadus*, 111 A.3d 57, 61 (N.H. 2015), states:

To justify the frisk, the State relies upon only three facts that are specific to the defendant: (1) Locke believed that the defendant lied when she denied drinking alcohol in the vehicle; (2) she did not maintain eye contact with Locke; and (3) she wore baggy clothes. None of these facts, alone or together, could have supported a reasonable suspicion that the defendant was armed and presently dangerous.

*Baker v. Schwarb*, *Burgess v. Wallingford*, No. 11–CV–112, 2013 WL 4494481, at \*1 (D. Conn. May 15, 2013) (discussed *supra* note 17), *aff’d sub nom.* *Burgess v. Town of Wallingford*, 569 F. App’x 21 (2d Cir. 2014), and *Hall v. Dodge*, No. 6:12–CV–1808–MC, 2013 WL 4782208, at \*3 (D. Or. Sept. 5, 2013) (discussed *supra* note 122), came to this author’s attention through an excellent student paper by Aaron Wynn n.d. (on file with author), which also discusses some other cases discussed in this Article).

whether reasonable suspicion a person possesses a firearm<sup>126</sup> is, by itself, sufficient to initiate a *Terry* stop.<sup>127</sup>

One common approach involves assessing whether, under state law, the legality of the possession requires licensure and that licensure is merely an affirmative defense to a firearms crime—as opposed to non-licensure being an element of the crime.<sup>128</sup> (Treatment of licensure as a defense is apparently common.)<sup>129</sup> In this view, where licensure is an affirmative defense, reasonable suspicion one is armed authorizes a *Terry* stop. We discuss this approach in more detail in Part IV.B.

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126. Of course, numerous ordinary items may allegedly be weapons. Dissenting in *Wright v. New Jersey*, Justice Brennan quoted the following:

If read literally, the statutory language would encompass countless situations which the Legislature could not have intended as the subject of prosecution. The workman carrying home a linoleum knife earlier used in his work; the paring knife inadvertently left on an automobile floor after being used for a lawful purpose; a stevedore's hook or a fisherman's gaff thrown into a vehicle and forgotten. A "weapon" could include a brick, a baseball bat, a hammer, a broken bottle, a fishing knife, barbed wire, a knitting needle, a sharpened pencil, a riding crop, a jagged can, rope, a screwdriver, an ice pick, a tire iron, garden shears, a pitch fork, a shovel, a length of chain, a penknife, a fork, metal pipe, a stick, etc. The foregoing only illustrate the variety of lawful objects which are often innocently possessed without wrongful intent, but under circumstances which are clearly not "manifestly appropriate" for their lawful use.

Possession of a fork is manifestly appropriate only at the dinner table, of a bat on the athletic field, of a shovel in the garden.

469 U.S. 1146, 1150 n.3 (1985) (Brennan, J., dissenting) (quoting *State v. Lee*, 457 A.2d 1184, 1187 (N.J. Super. Ct. App. Div. 1982) (Antell, J., dissenting), *aff'd as modified*, 475 A.2d 31 (N.J. 1984)). Note that the scope of the Second Amendment is not limited to firearms. *E.g.*, *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016) (*per curiam* reversal of decision excluding stun gun from the scope of the Second Amendment); *State v. DeCiccio*, 105 A.3d 165, 190 (Conn. 2014) ("[T]he more persuasive authority supports the conclusion that dirk knives constitute 'arms,' as the court in *Heller* explicated that term."). *But cf.* *People v. Buchholz*, 39 N.Y.S.3d 684, 687 (N.Y. Crim. Ct. 2016) (stating a ban on gravity knives does not violate the Second Amendment).

127. It is beyond the scope of this Article to attempt to summarize the full panoply of mundane circumstances that may justify "reasonable suspicion." By way of illustration, Judge Wald provided the following illustrative list of circumstances that might be relied-upon for initiating a *Terry* stop:

Moreover, the reasonable suspicion itself can be based on factors as slight as the suspect fitting aspects of the notorious drug carrier profile, including looking nervous, travelling from a "source city," giving the ticket seller a phone number other than his own, paying cash for the ticket, buying a one-way ticket, making phone calls upon arriving at his destination, not checking luggage, or paradoxically being either first or last off the airplane.

Wald, *supra* note 80, at 103–04 (footnotes omitted). It is also beyond our scope to examine what factors are sufficient to demonstrate the veracity of information received. *See generally* Appellant's Opening Brief at 1, *United States v. Mackie*, No. 17–10060 (9th Cir. Sept. 6, 2017), 2017 WL 4157202, at \*1 (identifying as one of multiple questions presented, "1. Whether the statement by an informant of unknown veracity that a person has a gun is sufficient to justify a stop and frisk in the absence of any evidence the [sic] that the gun possession, if true, was illegal, or that the person represents a present threat?").

128. *See generally* 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, 574 (2003) (discussing this issue of the relationship between investigations without individualized suspicion and whether licensure is a defense, noting, "[O]f the twenty-one states that have considered this issue, twelve place the burden on the defendant, six place the burden on the state, and three have conflicting case law.>").

129. *Id.*

One complication to this approach is that determining whether licensure is an affirmative defense, or whether absence of licensure is an element of the crime, may not merely involve finding a better literal reading the statutory language. It may be based on suppositions concerning what is or is not practicable that are no longer accurate. Technology makes practicable acts that were not a half-century ago.<sup>130</sup>

Of course, some jurisdictions allow permit-free firearms possession, which may be limited to an arm carried in a particular style, e.g., openly-carried, or may not be so restricted.<sup>131</sup> In such a jurisdiction, a court following this approach should conclude that reasonable suspicion a person carrying an arm in the contemplated manner cannot be stopped on that basis alone. As discussed below, where a court follows this approach, the possibility the person cannot lawfully possess a firearm, e.g., is a felon, should not authorize a stop.<sup>132</sup>

Some courts reject focusing on whether the possession requires licensure—licensure that is a defense to a firearms crime (as opposed to absence of licensure being an element).<sup>133</sup> Among those courts, some recent authority asserts reasonable suspicion a person is armed is insufficient to initiate a *Terry* stop, focusing on the nature of the exercise of the right and the implications of reaching an alternative conclusion.<sup>134</sup>

A recent opinion from the Indiana Supreme Court primarily treats the issue as resolved by extant U.S. Supreme Court authority (potentially distinguishable U.S. Supreme Court authority that directly addresses whether an anonymous tip a person is armed by itself justifies a *Terry* stop).<sup>135</sup> The Indiana Supreme Court concludes these circumstances do not justify a *Terry* stop, even though licensure is a defense to a firearms crime in the state.<sup>136</sup>

On the other hand, one can find authority referencing the frequency with which armed persons are found to be possessing firearms illegally as a basis to conclude reasonable suspicion of firearms possession by itself justifies a stop.<sup>137</sup> These alternative approaches are detailed in Part IV.C.

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130. See *infra* note 248 and accompanying text. In brief, a half-century ago, it was impracticable to have a comprehensive, accessible database of firearms licensees and that influenced relevant statutory interpretation. Such databases can be operated modernly.

131. See *supra* notes 48–54 and accompanying text.

132. See *infra* text accompanying notes 199–202 and 215–225 and accompanying text.

133. See Part IV.C, *infra* (discussing, *inter alia*, authority not authorizing a *Terry* stop under the law of Wisconsin (via a federal court), Indiana and Massachusetts; and discussing authority allowing a *Terry* stop in New York).

134. See *infra* notes 167–172 (discussing authority construing Wisconsin law).

135. See *infra* notes 180–202 and accompanying text.

136. See *infra* notes 181 and 202 and accompanying text.

137. See *infra* notes 204–206 and accompanying text.

### B. Determinations Focusing on Whether Licensure Is a Defense

Cases focusing on whether licensure is a defense (as opposed to absence of licensure being an element) often are conclusory. *State v. Timberlake*,<sup>138</sup> from the Supreme Court of Minnesota, followed temporally by *United States v. Cooper*,<sup>139</sup> from U.S. Court of Appeals for the Third Circuit, *GeorgiaCarry.Org, Inc. v. Metropolitan Atlanta Rapid Transit Authority*,<sup>140</sup> from the Northern District of Georgia, and *United States v. Sykes*,<sup>141</sup> from the Northern District of Iowa, are illustrative. Extracts from those courts' conclusory analyses are in the margin. There is other, generally comparable authority that is more oblique in its discussion.<sup>142</sup>

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138. The thrust of the court's discussion as to the propriety of detaining Timberlake, in light of prior authority, *State v. Paige*, 256 N.W.2d 298 (Minn. 1977), holding licensure is a defense, is:

The State argues that consistent with our determination in *Paige* that lack of a permit was not an element of the offense, the police in this case did not need to know whether Timberlake had a permit in order to have a reasonable suspicion that Timberlake was engaged in criminal activity. We agree that our analysis in *Paige* supports the conclusion that the officers had a reasonable basis to suspect that Timberlake was engaged in criminal activity, even without knowing whether he had a permit, based on the caller's report that he saw Timberlake with a gun in the vehicle.

*State v. Timberlake*, 744 N.W.2d 390, 395 (Minn. 2008).

139. The court states:

But 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. Accordingly, Cooper's contention is without merit.

In *Commonwealth v. Bigelow*, the Pennsylvania Supreme Court held that licensure is an affirmative defense to a statutory violation for possession of a firearm—rather than non-licensure constituting an element of the crime that must be proved by the prosecution.

Officer Allen's decision to stop Cooper's vehicle was based on reasonable suspicion, and the motion to suppress evidence was properly denied.

*United States v. Cooper*, 293 F. App'x 117, 119–20 (3d Cir. 2008) (citations and footnote omitted).

140. No. 1:09–CV–594–TWT, 2009 WL 5033444, at \*12 (N.D. Ga. Dec. 14, 2009) (providing the following conclusory discussion, "Because a Georgia firearms license is an affirmative defense to the crime of boarding with a concealed weapon and 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.").

141. The case provides the following conclusory discussion: "The cases cited by Defendant are unpersuasive because they involve jurisdictions where concealed and/or open carry are presumptively lawful. While Defendant's position may or may not have merit in such jurisdictions, it plainly fails in jurisdictions like Iowa, where possessing a permit is an affirmative defense." *United States v. Sykes*, No. 17–CR–2009–LRR, 2017 WL 2514953, at \*8–9 (N.D. Iowa June 5, 2017).

142. *E.g.*, *United States v. Spann*, 649 F. App'x 714, 716 (11th Cir. 2016) (affirming determination there was probable cause to arrest a person who openly carried a rifle for about fifteen seconds from a dwelling to a car, notwithstanding exceptions from the criminal liability for "people going to and from a shooting range," referencing the circumstance as merely a defense); *United States v. Montague*, 437 F. App'x 833, 835–36 (11th Cir. 2011) (stating in part, "The absence of a license is not itself an element of the crime; instead, proof of a license may be raised as an affirmative defense," but ultimately relying on authority from a Florida state court described as "not explicitly addressing the possibility of a concealed weapons permit"); *United States v. Lamb*, No. 16–20077, 2016 WL 4249193, at \*3 (E.D. Mich. July 6, 2016), report and recommendation adopted in No. 16–20077, 2016 WL 4191758, at \*8 (E.D. Mich. Aug. 9, 2016) (holding there was reasonable suspicion to detain a person who exited a vehicle and threw a firearm into it and fled,

*United States v. Rodriguez*<sup>143</sup> follows that general approach. However, idiosyncrasies in the relevant possible crime require the opinion's analysis make an additional leap. The opinion spends five paragraphs to support the conclusion that, under state law, licensure is a defense.<sup>144</sup> Following that, the court summarily rejects the conclusion that the possibility of licensure negates the validity of a stop, subject to one final wrinkle.<sup>145</sup> The crime in New Mexico requires the arm be loaded.<sup>146</sup> To create a basis for finding reasonable suspicion that this element is met, the court oddly relies on firearm safety rules under which individuals handling firearms should treat them as loaded, in addition to a "common sense" conclusion in light of the arm having been sought to be concealed.<sup>147</sup>

The former rationale is inapposite. The safety rule is not premised on a high likelihood that an arm one encounters is loaded. Rather, the safety rule reflects the following reality: Even if there is a small likelihood an arm is loaded, on encountering an arm, one should treat it as if one is encountering a loaded weapon. That is because the magnitude of the impact of this potentially low-risk event is potentially very large. So, for example, if a person consistently unloads a firearm before storing it in a case, these firearm rules contemplate that each time the arm is removed from storage, it be treated as if it were loaded. That is the rule to be applied even if the arm is stored hundreds of times in an unloaded state, by virtue of the extreme consequences that can arise if a mistake is made. So, this procedure to address remote contingencies provides no basis for the assertion one has a reasonable suspicion a particular arm is loaded.

The latter assertion is vacuous. Many people prefer to carry a firearm concealed merely because, in contemporary society, an openly carried firearm can engender unease.<sup>148</sup> An openly carried arm also invites its theft.<sup>149</sup> So, it is not a "common sense" conclusion that the fact that a person sought to conceal a firearm did so in view of its being loaded.

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stating there was "objectively reasonable suspicion that Lamb possessed the firearm illegally, and [the officer] had a right to detain Lamb in order to investigate that suspicion," and noting authority, *People v. Perkins*, 703 N.W.2d 448, 455 (Mich. 2005), stating "the defendant bore the burden of producing evidence regarding licensure, while the prosecution bore the ultimate burden of persuasion.").

143. 739 F.3d 481 (10th Cir. 2013).

144. *Id.* at 486–88.

145. *See id.* at 488.

146. *Id.* at 486–87.

147. *Rodriguez*, 739 F.3d at 488 (10th Cir. 2013) (citation omitted) (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

148. *See supra* note 17; *see also Ayoob, supra* note 5, at 208 ("Open carry makes enemies for the pro-gun movement, instead of friends. The vast majority of the American public does not carry guns openly on city streets and do not see others that they know to be law-abiding private citizens do so. Therefore, says this argument, they are frightened when they observe guns worn openly by people not readily identified as those they are 'socialized' to seeing armed, such as armed guards and police officers, and are therefore frightened when they see ordinary folks with guns on their hips." (emphasis removed)).

149. *See Ayoob, supra* note 5, at 208 ("Open carry invites disarming. Those who prefer to carry their guns concealed point to all the police officers who have been killed with their own weapons. They prefer to keep their guns hidden on their person, where only they know where they are." (emphasis removed)).



This author is not saying that arms carried are not frequently loaded. They are. Rather, the reason this is being referenced is that the occasion allows us to illustrate the following point: Courts cavalierly make simply insupportable assertions as part of concluding that firearms rights can be abridged. This circumstance allows us to provide an illustration, albeit as a detour from the primary thrust of this Article.

The *Rodriguez* court concludes that it needs to address whether the fact of concealment says something about the likelihood a forearm is loaded. For our purposes (to illustrate the fatuous approaches to constrain firearms rights), it is not particularly important what the relevant state says about that. Rather, having identified this legal issue, the court decides to address it, to support the conclusion that the firearms possessor loses, by making rank, specious observations.

One can encounter other examples in the courts, where a judge who proclaims expertise in physics<sup>150</sup> in an appellate makes a manifestly false statement

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150. Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 95 (2017) (“Yes, some judges *are* scholars, but with the exception of Judge Richard Posner none has *universal* expertise. I claim none outside of economics and physics.”).

applying rudimentary principles physics revisited, at least in this author's experience, in a basic university freshman physics class.<sup>151</sup> And one can similarly encounter vacuous observations about firearm functionality from legislators.<sup>152</sup>

151. Easterbrook wrote, "We also know that assault weapons generally are chambered for small rounds (compared with a large-caliber handgun or rifle), which emerge from the barrel with less momentum and are lethal only at (relatively) short range." *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015). Putting aside the dubious conclusions Easterbrook draws concerning what would be the import of the relative momentums and the relationships between cartridge and range of lethality, this statement is patently incorrect.

The momentum of an object is its mass multiplied by its velocity. ROBERT RESNICK & DAVID HALLIDAY, *PHYSICS FOR STUDENTS OF SCIENCE AND ENGINEERING* 161 (1960). Its kinetic energy is one-half its mass times its velocity squared. *Id.* at 122. One can find reported muzzle velocities and energies for various rounds. So, one can ascertain a round's momentum by dividing twice its energy by its velocity. The computation for some common handgun rounds and the rifle rounds Easterbrook is discussing in *Friedman* (AR-15s and semi-automatic AK-47s) are:

	Velocity <u>(ft/sec)</u>	Energy <u>(ft-lbs)</u>	Momentum <u>(lbs-sec)</u>
<b>Pistol</b>			
<i>Practice</i>			
Winchester White Box 9mm	1190	362	0.61
Winchester White Box .45	910	340	0.75
<i>Self-Defense</i>			
Federal Hydra-Shock .40	1140	447	0.78
Federal Personal Defense 9mm	1060	337	0.64
Federal Premium .45 ACP Hydra-Shock	900	414	0.92
<b>Rifle</b>			
Winchester White Box 7.62 x 39	2355	1515	1.29
Winchester White Box .223	3270	1282	0.78

See Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/winchester-9mm-luger-ammunition-200-rounds-fmj-115-grain-020892221819.do> (last visited Jan. 31, 2018) (re 9mm Winchester White Box); Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/winchester-usa-45-acp-full-metal-jacket-185-grains-910-fps-50-round-box-020892212374.do?sortBy=ourPicks&refType=&from=Search&ecList=6&ecCategory=> (last visited Jan. 31, 2018) (re Winchester White Box .45); Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/federal-premium-personal-defense-40-s-and-w-hydra-shok-jacketed-hollow-point-155-grain-1140-fps-20-round-box-p40hs2-029465089146.do?sortBy=ourPicks&refType=&from=Search> (last visited Jan. 31, 2018) (re Federal Hydra-Shock .40); Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/federal-personal-defense-9mm-luger-ammunition-20-rounds-hydra-shock-jhp-135-grain-029465091484.do?sortBy=ourPicks&refType=&from=Search> (last visited Jan. 31, 2018) (re Federal Hydra-Shock 9mm); Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/federal-premium-personal-defense-45-auto-hydra-shok-jacketed-hollow-point-230-grain-900-fps-20-round-box-029465085414.do?sortBy=ourPicks&refType=&from=Search> (last visited Jan. 31, 2018) (re Federal Hydra-Shock .45); Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/win-usa3131w-223-55-fmj-180-5-02089222311.do?sortBy=ourPicks&refType=&from=Search&ecList=6&ecCategory=>

For reasons that will become apparent later,<sup>153</sup> it is significant that in a number of the above jurisdictions, what gives rise to authorization for a *Terry* stop is that a firearms possessor merely has a burden of production on the issue of licensure—the ultimate burden of persuasion as to non-licensure is on the state if the initial burden of production is met.<sup>154</sup>

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(last visited Jan. 31, 2018) (re. Winchester White Box .223); Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/ammo-762x39-winchester-usa-123-grain-fmj-bullet-2355-fps-20-round-box-q3174-020892201903.do> (last visited Jan. 31, 2018) (re. Winchester White Box 7.62x39).

The Winchester White Box .223 rifle round has more muzzle momentum than the Winchester White Box 9mm round. Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/win-usa3131w-223-55-fmj-180-5-020892222311.do?sortBy=ourPicks&refType=&from=Search&eList=6&ecCategory=> (last visited Jan. 31, 2018) (re. Winchester White Box .223). The Winchester White Box 7.63x39 round has more muzzle momentum than a .45 round (and more than any of the listed Federal Hydra-Shock pistol rounds—higher-momentum self-defense rounds). Cheaper Than Dirt!, <https://www.cheaperthandirt.com/product/ammo-762x39-winchester-usa-123-grain-fmj-bullet-2355-fps-20-round-box-q3174-020892201903.do> (last visited Jan. 31, 2018) (re. Winchester White Box 7.62x39).

Judge Easterbrook claims “expertise” in physics. The assertion that the rifle rounds he is discussing have lower muzzle momentum than pistol rounds is manifestly fallacious. Understanding he does not claim expertise in use of firearms, we shall elide the errors in his discussion of the other aspects of the above quote.

152. The functionality of firearm magazines was found puzzling by this United States Representative from Colorado, identified as “lead sponsor in House on gun legislation”:

Asked how a ban on magazines holding more than 15 rounds would be effective in reducing gun violence, DeGette said:

“I will tell you these are ammunition, they’re bullets, so the people who have those know they’re going to shoot them, so if you ban them in the future, the number of these high capacity magazines is going to decrease dramatically over time because the bullets will have been shot and there won’t be any more available.”

What she didn’t appear to understand is that a magazine can be reloaded with more bullets.

Allison Sherry, *As Lead Sponsor in House on Gun Legislation, Rep. Diana DeGette Appears to not Understand How They Work*, DEN. POST (Apr. 3, 2013), <http://blogs.denverpost.com/thespot/2013/04/03/as-lead-sponsor-in-house-on-gun-legislation-rep-diana-degette-appears-to-not-understand-how-they-work/93506/>.

153. See *infra* notes 257–262 and accompanying text.

154. *State v. Timberlake*, 744 N.W.2d 390, 394–95 (Minn. 2008), concludes that licensure is a defense relying on *State v. Paige*, 256 N.W.2d 298 (Minn. 1977). *Paige* states that “[o]nce the defendant has come forward initially with evidence of the permit,” the burden of persuasion is on the state, i.e., the defendant only bears a burden of production, not an ultimate burden of persuasion. *Id.* at 304.

*United States v. Sykes*, No. 17–CR–2009–LRR, 2017 WL 2514953, at \*3 (N.D. Iowa June 6, 2017), in construing Iowa law, states: “Rather, ‘statutory exceptions are affirmative defenses.’” *Sykes*, 2017 WL 2514953, at \*3 (quoting *State v. Leisinger*, 364 N.W.2d 200, 202 (Iowa 1985)). *Leisinger* appears to indicate it is only a burden of production that is placed on the charged person: “The State need not negate the exception unless substantial evidence is produced from some source that the exception applies.” *Leisinger*, 364 N.W.2d at 202. That is confirmed where one reviews authority on which *Leisinger* relies, *State v. Bowdry*, 337 N.W.2d 216, 218–19 (Iowa 1983), which states:

We conclude that in a case such as this one where no demand for a permit is made at the scene and no permit is produced there or at trial, the issue of a permit is not in the case unless substantial evidence appears in the record from some quarter—whether from the State or the defense—that the person had a valid permit at the time. In that event the State has the burden of persuasion that the person did not have a valid permit, or that a permit which exists was not issued to him, or that his conduct was not within the permit.

We can review a collection of cases from the Third Circuit that, at least according to the more recent entry, purports to distinguish among jurisdictions' approaches to *Terry* stops of armed persons depending on whether licensure is a defense. The first case is *United States v. Ubiles*.<sup>155</sup> There, the court concludes that assuming officers received a reliable tip<sup>156</sup> a person possessed a firearm at a crowded street festival,<sup>157</sup> that information by itself was insufficient to initiate a *Terry* stop.<sup>158</sup>

The *Ubiles* court does not frame the issue as depending on whether absence of licensure is an element of a crime. In fact, it appears neither the word "element" nor the word "defense" is in the opinion. Rather, the court asserts firearms possession is not inherently illegal,<sup>159</sup> and cites to authority with the parenthetical explanation, "rejecting an 'automatic firearm exception' to the rule in *Terry*," without referencing whether absence of licensure is a defense (or non-licensure is an element).<sup>160</sup>

The *Ubiles* opinion later notes that the government did not introduce evidence concerning the frequency with which persons found to be possessing firearms have been identified as doing so unlawfully.<sup>161</sup> In sum, the *Ubiles* analysis focuses on factors other than whether licensure is a defense.

But the *Ubiles* opinion is later recharacterized by the Third Circuit as being based on non-licensure being an element of the crime in the jurisdiction (the Virgin Islands).<sup>162</sup> Thus, that circuit's opinion in *United States v. Gatlin* concludes reasonable suspicion someone is armed in Delaware is sufficient to authorize a *Terry* stop,

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Other authority referenced in *Sykes*, 2017 WL 2514953, at \*3, *State v. Nelson*, 828 N.W.2d 325 (Iowa Ct. App. 2013), is to a similar effect. See also *United States v. Lamb*, No. 16–20077, 2016 WL 4249193, at \*3 (E.D. Mich. July 6, 2016), discussed *supra* note 142.

155. 224 F.3d 213 (3d Cir. 2000).

156. *Id.* at 214 n.1.

157. *Id.* at 214.

158. *Id.* at 217.

159. *Id.* at 217–18.

160. The opinion states:

It is not necessarily a crime to possess a firearm in the Virgin Islands; nor does a mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry*.

*Id.* at 217–18 (citation omitted) (citing V.I. CODE ANN. tit. 23, § 470 (n.d.)); parenthetically citing *Florida v. J.L.*, 529 U.S. 266, 272 (2000), as "rejecting an 'automatic firearm exception' to the rule in *Terry*").

161. *Id.* at 218 ("Moreover, they did not testify that it is common for people who carry guns in crowds—or crowds of drunken people—to either alter or fail to register their guns, or to use them to commit further crimes—all of which would be additional evidence giving rise to the inference that Ubiles may have illegally possessed his gun or that criminal activity was afoot.").

162. A review of jury instructions reveals that non-licensure is, in fact, treated by the courts in the Virgin Islands as an element. *E.g.*, *Jury Charge*, *United States v. Gerard*, No. 09CR00013, 2010 WL 6509824 (D.V.I. Apr. 14, 2010).

because in Delaware licensure is merely a defense to the crime of carrying a concealed firearm.<sup>163</sup> The language providing the analysis is reproduced in the margin.<sup>164</sup> The Third Circuit later extends the reach of the stop to others in the company of one who is armed.<sup>165</sup>

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163. 613 F.3d 374, 379 (3d Cir. 2010). *United States v. Cooper*, 293 F. App'x 1171 (3d Cir. 2008) (discussed *supra* note 139), an unpublished Third Circuit opinion issued after *Ubiles* and before *Gatlin*, does not mention *Ubiles*. Nor did the government's briefing in the case at the trial court. See Government's Response to Defendant's Motion to Suppress at 5, *United States v. Cooper*, No. CRIM.A.05-27, 2005 WL 1941316 (E.D. Pa. Aug. 11, 2005), *aff'd*, 293 F. App'x 117 (3d Cir. 2008) (not referencing, in its discussion of *Terry* principles, licensure or possession of a permit in connection with the legality of the stop itself, noting, "defendant had a just pulled up his shirt to display a gun in his waistband to the two males with whom he was speaking. This information certainly provided reasonable suspicion that criminal activity was afoot—i.e., that defendant was violating of Pennsylvania's firearms laws—and that defendant was armed and dangerous. Thus, the officers properly stopped defendant.").

164. The opinion states as to defendant Gatlin's claim:

This presumption under Delaware law distinguishes *Gatlin's* case from our decision in *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir.2000), in which we held that a stop-and-frisk based solely on a tip that an individual had a firearm violated *Terry*. While *Ubiles* presented similar facts (in that the only evidence was a tip of firearm possession), the case arose in the U.S. Virgin Islands, which, unlike Delaware, does not apply a presumption of illegality. Instead, there it is the Government's burden to prove the absence of a license. Thus, the tip did not supply reasonable suspicion that criminal activity was afoot because it provided evidence of what is presumptively a legal activity—possession of a handgun. In other words, this tip was no different than "if [the informant] had told the officers that *Ubiles* possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason."

In contrast, it is presumed in Delaware that concealed handgun bearers are violating the law. When (i) a reliable tip is received that a person is carrying a concealed firearm, and (ii) that conduct is presumed to be a crime (as it is in Delaware), an investigatory stop is within the bounds of *Terry*. That the suspect might later offer a license as an affirmative defense does not affect this analysis.

Here, the officers had reasonable suspicion that criminal activity was afoot based on the tip that someone matching *Gatlin's* description was at that very moment committing a crime—carrying a concealed firearm. Therefore, the investigatory stop of *Gatlin* was justified.

613 F.3d at 378–79 (citations omitted) (quoting *Ubiles*, 224 F.3d at 218).

165. In *United States v. Lewis*, 674 F.3d 1298 (11th Cir. 2012) (citation and parallel citations omitted), the court states:

But, as the Supreme Court has also made crystal clear, individualized suspicion is not an absolute prerequisite for every constitutional search or seizure. "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." Thus, in *Samson* the Court specifically observed that "while this Court's jurisprudence has often recognized that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, we have also recognized that the Fourth Amendment imposes no irreducible requirement of such suspicion."

We begin with this observation: under controlling law the officers could lawfully detain *McRae* in order to inquire further into a possible concealed-weapons violation. The central question then boils down to whether it was also reasonable under the circumstances for the officers to briefly detain all four individuals for reasons of safety, having been told by *McRae* and *Evans* that each of them was armed (*McRae* carrying a weapon on his person, and *Evans* having ready access to one in a nearby open trunk), but absent any particularized reasonable suspicion concerning *Lewis*.

We answer that question in the affirmative.

We shall see below that one infirmity of these cases is that the underlying premise—statutory interpretation treating a license as creating a defense—often stands on an infirm ground.<sup>166</sup>

### C. Determinations Focusing on Other Factors

Although, as noted, much of the authority addressing whether reasonable suspicion a person possesses a firearm is sufficient to initiate a *Terry* stop focuses on whether licensure is a defense, some authority does not. Either conclusion may be reached following this alternative approach.

A recent addition to the authority finding those circumstances are insufficient to authorize a *Terry* stop is *United States v. Winters*.<sup>167</sup> The court rejects the argument that because licensure is a defense to the crime in the state, the possibility a person is unlicensed is sufficient to allow a *Terry* stop,<sup>168</sup> citing assorted authority.<sup>169</sup> The court in part provides the following discussion referencing both the frequency of firearms licensure and concerns with allowing a jurisdiction to opt to burden exercise of a fundamental right, in concluding suspicion of firearms possession is insufficient to initiate a *Terry* stop:

Both the United States and Wisconsin constitutions secure the rights of Wisconsin citizens to carry firearms. While Wisconsin is permitted to enact appropriate restrictions on gun ownership and possession, those are exceptions to that fundamental right. More importantly, the government's position reverses *Terry* and the Fourth Amendment's reasonableness requirement. Even if Wisconsin wanted to establish the duties and burdens described by the government, it could not contradict the right against unreasonable seizures guaranteed by the United States Constitution.<sup>170</sup>

Additionally, the court references as analogous the possibility of stopping all motorists simply because driving requires licensure:

Likewise, Defendant points to a common instance of licensed conduct—driving. Driving without a license is unlawful, but this fact does not permit police to stop any and all vehicles on the road simply to check for valid

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*Id.* at 1305–06 (citation and parallel citations omitted) (quoting *Samson v. California*, 547 U.S. 843, 855 n.4 (2006) (parenthetically quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989) as follows, “[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, [and therefore] its proper application requires careful attention to the facts and circumstances of each particular case . . . .” (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979))). *See also supra* note 66.

166. *See infra* notes 239–251 and accompanying text.

167. *United States v. Winters*, No. 16–CR–146–JPS, 2017 WL 2703527 (E.D. Wis. June 22, 2017), *appeal dismissed*, 2017 WL 6946245 (7th Cir. Sept. 19, 2017).

168. *Id.* at \*3 (noting pattern jury instructions identifying licensure as a defense).

169. *Id.* at \*4.

170. *Id.* at \*3. *See generally id.* at \*2 (citing story noting issuance of 300,000th permit and stating, “Numerous Wisconsin citizens have concealed carry permits.”). Wisconsin does require licensure, i.e., it does not authorize permit-free concealed carrying of a firearm. WIS. STAT. ANN. § 941.23(2) (Westlaw through 2017 Act 58).

licenses. As Defendant puts it, “observing licensable conduct without reasonable suspicion of non-licensure does not create reasonable suspicion of crime.”<sup>171</sup>

From the discussion, one cannot determine whether the court concludes it is dispositive that it is a fundamental right whose exercise is being impeded. That fact is apparently significant; but that is all one can with confidence conclude as to its role in the analysis. And it also remains unclear how the frequency of lawful firearms possession is incorporated in reaching this conclusion.<sup>172</sup> In sum, the opinion references factors supporting its conclusion, but it does not detail a rigorous analytical framework.

A similar viewpoint is reflected in a concurrence in *United States v. Jones*,<sup>173</sup> and in a Pennsylvania Supreme Court case focusing on state constitutional principles.<sup>174</sup>

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171. *Winters*, 2017 WL 2703527, at \*5 (citations omitted).

172. The opinion recites the following in summarizing a magistrate’s opinion that reaches a conclusion with which the court agrees:

Numerous Wisconsin citizens have concealed carry permits. In light of Wisconsin’s approach to gun ownership, Beland and the other officers could not take Defendant’s concealed gun possession as establishing reasonable suspicion of criminal activity. Beland thus had no general basis to believe that Defendant’s mere act of carrying a concealed firearm was criminal.

Second, Beland had no particularized suspicion that Defendant was not permitted to have a concealed weapon. The fact that his companion dropped a gun supplied no suspicion of criminal activity as to Defendant.

*Id.* at \*2–3 (citations omitted) (citing a news report referencing in its title a three hundred thousandth license being issued). However, one cannot ascertain from this discussion the extent to which the court agrees with the details. Additionally, one cannot ascertain from the discussion the impact of this factor on the conclusion.

173. The concurrence states:

But giving police officers unfettered discretion to stop and frisk anyone suspected of carrying a concealed weapon without some particularized suspicion of unlawful carrying conflicts with the spirit of the amendment. It is also contrary to a basic purpose of the Fourth Amendment’s reasonableness standard—to protect citizens from “the unconstrained exercise of discretion.”

606 F.3d 964, 969 (8th Cir. 2010) (Loken, C.J., concurring) (quoting *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

174. The court in *Commonwealth v. Hawkins*, 692 A.2d 1068, 1071 (Pa. 1997) (footnote omitted), states:

The Commonwealth takes the radical position that police have a duty to stop and frisk when they receive information from any source that a suspect has a gun. Since it is not illegal to carry a licensed gun in Pennsylvania, it is difficult to see where this shocking idea originates, notwithstanding the Commonwealth’s fanciful and histrionic references to maniacs who may spray schoolyards with gunfire and assassins of public figures who may otherwise go undetected. Even if the Constitution of Pennsylvania would permit such invasive police activity as the Commonwealth proposes—which it does not—such activity seems more likely to endanger than to protect the public. Unnecessary police intervention, by definition, produces the possibility of conflict where none need exist.

See also *Commonwealth v. Govens*, No. 1673 EDA 2016, 2017 WL 2229845, at \*4 (Pa. Super. Ct. May 22, 2017) (parenthetically summarizing *Commonwealth v. Gray*, 784 A.2d 137, 143 (Pa. Super. Ct. 2001), which

The Commonwealth of Massachusetts is among the most restrictive American jurisdictions as to firearm rights.<sup>175</sup> And it was that jurisdiction's Supreme Judicial Court that so deeply erred in restrictively interpreting *Heller* that it was the subject of a *per curiam* reversal in the sole U.S. Supreme Court intervention into lower court developments of Second Amendment jurisprudence following *McDonald*.<sup>176</sup> Yet that state's highest court, in *Commonwealth v. Couture*,<sup>177</sup> concludes knowledge a person is armed is not, by itself, sufficient to initiate a *Terry* stop.<sup>178</sup> And it reaches that conclusion notwithstanding the fact that, in the jurisdiction, licensure is a defense to a firearms crime.<sup>179</sup> Because the court's full discussion is relatively conclusory, little can be said about the underlying analysis.

The Indiana Supreme Court also recently failed to follow the approach that reasonable suspicion one is armed is sufficient to initiate a *Terry* stop merely because the jurisdiction treats licensure as a defense to a firearms crime.<sup>180</sup> Indiana requires a license to carry a concealed handgun.<sup>181</sup> Licensure is a defense to the crime of carrying a handgun without being licensed; a charged licensee has a burden of proof as to licensure.<sup>182</sup> Nevertheless, in *Pinner v. State*, the Indiana Supreme

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applies the Pennsylvania constitution, to the following effect, "stating that although the police officers' observation of defendant with a gun 'substantiate[d] the information provided in the anonymous tip, it [was] not, in itself, indicative of criminal activity.'" On the other hand, there is authority from Pennsylvania that summarily authorizes a *Terry* stop merely on account of public firearms possession. See *infra* note 206 and accompanying text.

175. *E.g.*, MASS. GEN. LAWS ANN. ch. 140, § 131M (Westlaw through Chapter 74 of the 2018 2d Annual Session) (banning magazines with a capacity of more than ten rounds not possessed on Sept. 13, 1994); *id.* § 121 (defining "large capacity feeding device"); *Commonwealth v. McGowan*, 982 N.E.2d 495, 503 (Mass. 2013) (validating statute requiring stored firearms be locked); STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK, App. A (Westlaw through Sept. 2017) ("The firearms laws of the various states, not to mention localities, vary greatly. Generally speaking, the more urbanized states, particularly states such as New Jersey, Massachusetts, and California, have stringent prohibitions, such as license or permit requirements for mere possession of a firearm."); Megan Ruebsamen, Note, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 56 (2013) ("Massachusetts has some of the toughest gun laws in the country . . ."); Leslie Shapiro et al., *How Strictly Are Guns Regulated Where You Live?*, WASH. POST. (June 15, 2017), [https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/?utm\\_term=.aa922e15be54](https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/?utm_term=.aa922e15be54) ("California, along with New York, Massachusetts, New Jersey, Connecticut, Maryland and the District of Columbia, has the strictest firearm laws in the nation.").

176. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam* reversal of decision excluding stun gun from the scope of the Second Amendment, applying *McDonald v. City of Chicago*, 561 U.S. 742 (2010)).

177. 552 N.E.2d 538 (Mass. 1990).

178. *Id.* at 541.

179. *Id.* at 540–41 (stating, "The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles.").

180. *Pinner v. State*, 74 N.E.3d 226 (Ind. 2017).

181. IND. CODE ANN. § 35–47–2–1 (Westlaw through 2018 Second Regular Session of the 120th General Assembly).

182. *Coker v. State*, No. 02A03–1506–CR–744, 2016 WL 705141, at \*7 (Ind. Ct. App. Feb. 23, 2016); *Wilson v. State*, 39 N.E.3d 705, 717 (Ind. Ct. App. 2015).



Court holds that reliable information that a person possesses a firearm is not by itself sufficient to initiate a *Terry* stop.<sup>183</sup>

The words “defense” and “element” do not appear in the *Pinner* opinion, other than in a single quotation of the state constitutional right to bear arms (in the phrase “for defense of themselves and the State”).<sup>184</sup> The court, construing the Fourth Amendment,<sup>185</sup> primarily treats the issue as having been resolved by the U.S. Supreme Court in *Florida v. J.L.*<sup>186</sup> The Indiana Supreme Court quotes a few paragraphs from *J.L.*,<sup>187</sup> including one where the Supreme Court begins, “Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions.”<sup>188</sup> But later, the Indiana Supreme Court notes, “But an automatic firearm exception to our established reliability analysis would rove too far.”<sup>189</sup>

A court that wanted to distinguish *J.L.* could have done so. *J.L.* explicitly rejects setting a lower standard for the *reliability* requirement of information justifying a *Terry* stop merely because firearms are involved.<sup>190</sup> However, to reach its holding, it does not incontrovertibly need to reject application of a lower standard as to other aspects of the *Terry* analysis.

It is submitted that *J.L.*’s meaning is illuminated by referencing the briefing, in particular an amicus brief of The Justice Coalition.<sup>191</sup> Although the Supreme Court has stated, “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,”<sup>192</sup> Posner framed the search and seizure doctrine in that type of construct, in a fashion The Justice Coalition’s briefing illuminates. As the brief notes,<sup>193</sup> one might conceptualize the inquiry as:

[A] search is reasonable (and thereby permissible) if the value of B is less than the value of P multiplied by L (i.e.,  $B < P \times L$ ).

In this construct, *B* is the burden of the impaired privacy; *P* is the probability that, without the search, the individual cannot be convicted; and *L* is the social loss of a lack of a conviction.

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183. *Pinner*, 74 N.E.3d at 232 (applying the Fourth Amendment). The court also notes, “We are equally unpersuaded by the State’s contention that reasonable suspicion was present to suggest the weapon ‘may not have been possessed legally’ because Pinner ‘failed to properly secure the firearm [.]’ The State cites no authority in support of this proposition and we find none.” *Id.* at 233 n.7 (citation omitted).

184. *Id.* at 230 n.3.

185. *See id.* at 229 n.1.

186. 529 U.S. 266 (2000).

187. *Pinner*, 74 N.E.3d at 231–32.

188. *Id.*

189. *Pinner*, 74 N.E.3d at 231 (quoting *J.L.*, 529 U.S. at 272).

190. Another such statement in *J.L.* is:

A second major argument advanced by Florida and the United States as *amicus* is, in essence, that the standard *Terry* analysis should be modified to license a ‘firearm exception.’ Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

*J.L.*, 529 U.S. at 272.

191. Brief of Amicus Curiae The Justice Coalition in Support of Reversal, *Florida v. J.L.*, 529 U.S. 266 (2000) (No. 98–1993), 1999 WL 1259974.

192. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

193. Brief of Amicus Curiae The Justice Coalition in Support of Reversal, *supra* note 191, at 5–7 (referencing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998)).

For our purposes, it seems more helpful to focus on searches that are designed to prevent ongoing crime. In such a case, one might indicate that the benefit from the seizure (which would be balanced from the burden of the seizure) depends on:

- (1) the probability the individual is engaged in crime<sub>1</sub> that would be interdicted by the stop and the impact of that crime if committed;
- (2) the probability the individual is engaged in crime<sub>2</sub> that would be interdicted by the stop and the impact of that crime if committed;
- ...
- (n) the probability the individual is engaged in crime<sub>n</sub> that would be interdicted by the stop and the impact of that crime if committed.

The probability a particular crime involving a firearm by an unlawful firearm possessor is afoot depends on:

The probability a person has a firearm  $\times$  [the probability the firearm possession is unlawful | the person has a firearm]  $\times$  [the probability a particular crime is afoot | the person unlawfully possess a firearm]

The vertical line means “given.”<sup>194</sup>

We are not going to endeavor to quantify this investigation. But, rather, the point is that the reliability of a tip is simply a component of an inquiry. The relevant inquiry involves assessing the relevant probability that a particular crime is afoot, based on the consideration of suitable evidence. (The latter caveat (the reference to “suitable”) is included because statistical conclusions based on certain, gross factors (abstract categories) won’t be considered suitable.<sup>195</sup>) And the probability that a person is a felon whose firearms possession would be unlawful is also a factor in this same inquiry.<sup>196</sup>

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194. This is because the probability of *A* and *B* is the probability of *A*  $\times$  the probability of *B* given *A*. See, e.g., SUNG C. CHOI, *INTRODUCTORY APPLIED STATISTICS IN SCIENCE* 10 (1978).

So, the probability a person unlawfully possesses a firearm (meaning the probability a person possesses a firearm and that person’s possessing a firearm is unlawful) is:

The probability a person has a firearm  $\times$  the probability the firearm possession is unlawful | the person has a firearm (I)

The probability crime is afoot involving a person unlawfully possessing a firearm is:

The probability the person is unlawfully possessing a firearm  $\times$  the probability a particular crime is afoot | the probability the person is unlawfully possessing a firearm (II)

Substituting (I) for the first multiplicand in (II) yields the statement in body text.

195. See *infra* notes 347–355 and accompanying text.

196. At the moment, it does not seem profitable to endeavor to extend the analysis of this statistical insight further. One could say this means that:

So, it is artificial to cabin *J.L.* to issues of reliability of the person who provided a tip. The absence of a firearms exceptions means that the other factors in the balancing (the potential harm) do not overwhelm ordinary assessment, based on all factors, of the likelihood crime is afoot.

Moreover, there certainly is language in *J.L.* that would support the Indiana Supreme Court's extension of *J.L.*'s principles. The Indiana Supreme Court, for example, in justifying its holding quotes the Supreme Court to the following effect: "Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun."<sup>197</sup> Obviously, because millions carry firearms daily, and that information may be known to hostile acquaintances (e.g., through any of social media, bumper stickers and apparel logos), allowing reasonable suspicion a person is armed to justify a *Terry* stop could subject firearms possessors to a similar level of unjustified harassment.<sup>198</sup>

In *Pinner*, following a discussion of *J.L.*, the Indiana Supreme Court notes in part:

Even taking his tip as true . . . , the officers had no reason to suspect that Pinner[, the armed person,] did not have a valid license to carry the handgun, an illegal act in this jurisdiction. . . . [A] "bare-boned tip[ ] about guns" is insufficient.<sup>199</sup>

As noted, the opinion in *Pinner* does not address the issue of whether the fact that licensure is a defense to a firearms crime authorizes a *Terry* stop of an armed

If an unreliable tip a person is armed is insufficient to authorize stopping someone in a jurisdiction where firearms possession is generally unlawful, *then*

A reliable tip a person is armed is insufficient in a jurisdiction where a firearms possession is generally lawful.

The two cases have comparable probabilities of unlawful firearms possession of the identified individual. One supposes the relevant question is whether a reliable tip a person is armed is insufficient in a jurisdiction where firearms possession is generally unlawful. If this were a matter subject to arithmetic deduction, one might be inclined to assess the ranges of probabilities of the various components and say something like the following:

We do not have a collection of outcomes that allow otherwise unreliable anonymous tips in some states but not others. Yet one supposes there is a variation in the reliability of these types of tips.

One supposes that were one inclined to undertake some quantitative assessment, one might attempt to get a sense of the precision with which the courts have made conclusions (the variations that they ignore), and then compare the magnitude of the change occasioned by the circumstances at hand.

As an aside, one might note that the District Court of Appeal for the Third District of Florida allowed a search based on an anonymous tip of a student's book bag. *K.P. v. State*, 129 So. 3d 1121, 1133 (Fla. Dist. Ct. App. 2013). It is the context that alters the result, not merely that it involves claims of a firearm. *Id.*

197. *Pinner*, 74 N.E.3d at 231–32 (quoting *J.L.*, 529 U.S. at 272).

198. See *supra* note 68 and accompanying text (referencing *Reid v. Georgia*, 448 U.S. 438, 441 (1980), rejecting circumstances authorizing a *Terry* stop that would "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures").

199. *Pinner*, 74 N.E.3d at 232. The court further notes, "In essence, other than the taxi driver's claims of being fearful because he had seen an individual matching Pinner's description 'drop a handgun' there is no evidence in the record from which an inference of *criminal* activity can be drawn." *Id.*

person.<sup>200</sup> The court states the following concerning licensure: “The United States Supreme Court has previously declared that law enforcement may not arbitrarily detain an individual to ensure compliance with licensing and registration laws without particularized facts supporting an inference of illegal conduct.”<sup>201</sup> The opinion continues:

In like fashion, we decline to endorse such behavior to ensure compliance with Indiana’s gun licensing laws. This is precisely the type of “weapons or firearm exception” that other jurisdictions refuse to employ and the United States Supreme Court expressly disapproved of in *J.L.* “Were the individual subject to unfettered governmental intrusion every time he [exercised his right to bear arms], the security guaranteed by the Fourth Amendment would be seriously circumscribed.” “This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”<sup>202</sup>

In addition to the cases discussed above, one can find a number of other supporting cases.<sup>203</sup> In sum, a number of cases hold that reasonable suspicion a person

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200. See *supra* note 184 and accompanying text.

201. *Pinner*, 74 N.E.3d at 233.

202. *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979); and *Prouse*, 440 U.S. at 661 (citations omitted)) (parenthetically citing *Prouse*, 440 U.S. at 663, as follows, “hold[ing] that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver’s license and the registration of the automobile are unreasonable under the Fourth Amendment”).

203. See *generally infra* note 225 (discussing *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132–33 (6th Cir. 2015) (noting prohibited person status is not the default status)); see also *Duffie v. City of Lincoln*, 834 F.3d 877, 883 (8th Cir. 2016) (stating, as to a jurisdiction that “permits individuals who are at least 18 years old to open carry handguns in public,” in a high-risk traffic stop of a double amputee who was suspected of being someone who had displayed a firearm and acted as if he were blowing smoke from its barrel, “[T]he mere report of a person with a handgun is insufficient to create reasonable suspicion.”); *United States v. Roch*, 5 F.3d 894, 899 (5th Cir. 1993) (conclusory analysis focusing on lack of evidence concerning prohibited person status); *United States v. Wali*, 811 F. Supp. 2d 1276 (N.D. Tex. 2011) (raising also issues of reliability of the information); *People v. Granados*, 773 N.E.2d 1272, 1276 (Ill. App. Ct. 2002) (“We find that the mere presence of cased shotguns in the bed of a pickup truck does not constitute a reasonable or articulable suspicion of illegal activity.”); *Pulley v. Commonwealth*, 481 S.W.3d 520, 526–27 (Ky. Ct. App. 2016) (stating, as to a traffic stop delayed to check a firearm serial number, “In states in which possession of an unconcealed firearm is legal, the mere observation or report of an unconcealed firearm cannot, without more, generate reasonable suspicion for a *Terry* stop and the temporary seizure of that firearm. A firearm when combined with other innocent circumstances cannot generate reasonable suspicion because “it [is] impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.” (citations omitted) (quoting *United States v. Smith*, 263 F.3d 571, 594 (6th Cir. 2001) (quoting *Karnes v. Skrutski*, 62 F.3d 485, 496 (3d Cir. 1995) (abrogated on other grounds)); *State v. Williamson*, 368 S.W.3d 468, 482 (Tenn. 2012) (citing *Ubiles* in examining a face-to-face tip of firearms possession).

In *Mackey v. State*, 124 So. 3d 176 (Fla. 2013), the Florida Supreme Court issued an opinion vaguely supporting this type of approach. The intermediate appellate court had certified a conflict between its holding and authority in a different appellate district to the effect that one cannot stop a person simply for being armed. *Id.* at 179. The Florida Supreme Court affirmed a determination that one known to be possessing a

possesses a firearm is an insufficient basis for initiating a *Terry* stop following analyses that do not depend on absence of firearms licensure being an element of a crime (as distinguished from circumstances where licensure is a defense).

However, this approach is not universal in contemporary authority that does not focus on licensure. A few courts of those courts hold a *Terry* stop authorized by mere firearms possession.

A case out of New York, predating *Heller*, holds reasonable suspicion an individual is armed provides a sufficient basis to initiate a *Terry* stop,<sup>204</sup> in an analysis that does not rely firearms licensure merely being a defense. The court's conclusory discussion relies on experience that armed persons typically do not have licenses. It does not make reference to the fact that this is a constitutionally protected civil right that is being stifled (perhaps explained by the fact that the opinion predates

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firearm in a high-crime area, who falsely denied being armed, could be stopped. *Id.* In doing so, the court expressly "approve[d] the holding—but not the reasoning—of" the lower court. *Mackey*, 124 So. 3d at 185. The court's language appears to support the approach of the prior authority, *Regalado v. State*, 25 So. 3d 600 (Fla. Dist. Ct. App. 2009), that holds mere suspicion a person is armed is not, by itself, sufficient to initiate a *Terry* stop. The lower court focuses on the fact that licensure is an affirmative defense. *E.g.*, *Mackey v. State*, 83 So. 3d 942, 946 (Fla. Dist. Ct. App. 2012), *aff'd on other grounds*, 124 So. 3d 176 (Fla. 2013). The Florida Supreme Court, however, states:

Based on the prior analysis, we conclude that the decision in *Regalado* is factually distinguishable from the decision below. Here, Officer May initially approached Mackey in a non-threatening manner and participated in a consensual encounter. It was Mackey's response to a question asked by Officer May during the consensual encounter that led Officer May to reasonably and articulably suspect that Mackey might be engaged in illegal activity. On the other hand, in *Regalado*, the officer stopped the defendant at gunpoint and ordered him to the ground solely on the basis that the officer believed the defendant was carrying a firearm in the waistband of his pants. The officer did not ask the defendant any questions, and the Fourth District Court of Appeal specifically noted that "no information of suspicious criminal activity was provided to the officer other than appellant's possession of a gun." Given the differing factual circumstances that preceded the two different stops at issue, we conclude that even though the decisions appear to be in conflict, the cases can be reconciled, and no actual conflict exists.

*Mackey v. State*, 124 So. 3d 176, 185 (Fla. 2013) (citations omitted) (quoting *Regalado*, 25 So.3d at 601). The *Mackey* court does, however, reiterate the view that, in Florida, licensure is an affirmative defense. *Id.* at 185.

204. *United States v. Lucas*, 68 F. App'x 265, 267 (2d Cir. 2003). *See also* *Bsharah v. United States*, 646 A.2d 993, 996 (D.C. 1994) (stating, as to firearms possession in the District of Columbia by a person who alleged he was exempt by virtue a federal firearms license, "We have held on several occasions that a police officer who has reliable knowledge that a person is in possession of a handgun has probable cause to arrest that person for the crime of carrying a pistol without a license (CPWL)."). Of course, it was the very stinginess in licensure of members that doomed the District's licensure regime in *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

*Heller*).<sup>205</sup> There is also, *inter alia*, conclusory authority out of Pennsylvania, ultimately relying on authority predating *Heller*, authorizing stops on the basis that one is armed.<sup>206</sup>

#### V. TERRY STOPS IN JURISDICTIONS ALLOWING PERMIT-FREE PUBLIC FIREARMS POSSESSION

##### A. Gun-Free School Zones Act Putatively Creates Federal Prohibition Applicable to Persons Exercising Permit-Free Carry

We may start our assessment of the extant authority by focusing on jurisdictions that authorize permit-free public firearms possession. As an initial matter, it is not entirely clear that one can classify firearms possession in any state as truly permit-free (constitutional carry). The federal Gun-Free School Zones Act, as

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205. The opinion states:

The circumstances described by Officer Gulian are those in which a “Terry stop” is appropriate. The officer’s personal observation of an object that appeared to be a gun created adequate “reasonable suspicion” to believe that appellant was unlawfully possessing a firearm, and justified conducting a limited weapons search to protect the safety of officers and others. That New York state permits certain licensed individuals to carry concealed weapons does not negate the officer’s reasonable suspicion that unlawful activity was afoot, since the officers were entitled to draw on their experience that far more individuals who carry concealed handguns do not have licenses than do. *Cf.* *United States v. Forero-Rincon*, 626 F.2d 218, 222 (2d Cir. 1980) (holding that the fact that a suspect’s conduct may be as consistent with innocent activity as with nefarious activity does not preclude that conduct from supporting reasonable suspicion).

*Lucas*, 68 F. App’x at 267. *See generally* *United States v. Presley*, 645 F. App’x 934, 937 (11th Cir. 2016) (validating detention of individual in his own driveway, found to have a visible firearm in his vehicle, on the basis the officer did not know it was the detained individual’s home (firearms possession at one’s home being legal in the jurisdiction); referencing the possibility the individual might have just violated or been about to violate law governing traveling with a visible firearm), *cert. denied*, 136 S. Ct. 2042 (2016); *United States v. King*, 990 F.2d 1552, 1561 (10th Cir. 1993) (authorizing on a community caretaking intervention of a motorist honking a car horn, stating, an officer “could have briefly detained Defendants in order to inform [a defendant] of the hazardous conditions and to advise him to cease honking, regardless of whether [a defendant’s] actions violated any traffic laws;” *State v. Newell*, No. 14–CA–00031, 2015 WL 3993156 (Ohio Ct. App. June 29, 2015) (not discussing the defense/element dichotomy and stating, “Although, the facts presented may not withstand a motion for acquittal at trial or the ‘beyond a reasonable doubt’ standard, the facts in this case support a more likely than not belief that when only one-half to one inch of a firearm is exposed, it is a concealed weapon or appellant was involved in criminal activity. There was a probability that a crime had been committed based upon the prior observations of appellant, his nervous and suspicious movements when approached, and his reaching to his back where the firearm was located.”).

206. *See, e.g.*, *United States v. McMillan*, 227 F. Supp. 3d 432, 437 (W.D. Pa. 2017) (providing the conclusory discussion, “[P]ossession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed.” (quoting *Commonwealth v. Robinson*, 600 A.2d 957, 959 (Pa. Super. Ct. 1991)); *see also* *Commonwealth v. Hicks*, No. 510 EDA 2016, 2017 WL 1176412, at \*4 (Pa. Super. Ct. Mar. 29, 2017), *appeal granted*, 172 A.3d 583 (Pa. 2017). This authority is somewhat difficult to harmonize with the discussion in *Commonwealth v. Hawkins*, 692 A.2d 1068, 1071 (Pa. 1997), *discussed supra* note 174.

amended,<sup>207</sup> prohibits unlicensed firearms possession within 1000 feet of a school. Interpretation of the statute limited to a tedious literal parsing would suggest that a state's authorization of permit-free firearms possession does not satisfy the licensure requirements. The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) apparently hews to this plodding approach.<sup>208</sup>

These 1000-foot zones are ubiquitous in non-rural areas. It is often impracticable to enter or transit a city without passing through one of these zones.<sup>209</sup> The federal act does have some exceptions, e.g., for firearms that are unloaded in locked cases<sup>210</sup>—obviously not the manner in which one carries a firearm for self-defense.

Although this licensure requirement is federal, it may nevertheless provide a basis for local law enforcement officials in a “constitutional carry” jurisdiction to initiate a *Terry* stop as if the jurisdiction required physical permit issuance. There is not a general prohibition on state law enforcement officials arresting individuals for violation of federal criminal law.<sup>211</sup> No definitive authority has been located that concludes federal law prohibits state arrests for violation of the Gun-Free School Zones Act. Thus, it would appear that in large parts of non-rural areas, a local law enforcement officer could treat a jurisdiction as requiring a physical permit to possess a firearm in determining whether a *Terry* stop may be initiated.<sup>212</sup>

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207. 18 U.S.C. § 922(q)(2)(B) (Westlaw through Pub. L. No. 115–140).

208. See generally Barondes, *supra* note 46, at 144–45 n.18 (discussing an ATF interpretation under which general statutory authorization by a state, without that state taking action specific to a person, is not being “licensed to do so by the State”). Pending legislation passed by the House of Representatives would, if enacted, apparently reverse this interpretation. Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. § 2 (as passed by House, Dec. 6, 2017).

209. See generally Barondes, *supra* note 46, at 190–91.

210. 18 U.S.C. § 922(q) (Westlaw through Pub. L. No. 115–140).

211. E.g., *Arizona v. United States*, 567 U.S. 387, 414 (2012) (citing *United States v. Di Re*, 332 U.S. 581, 589 (1948), for the following proposition: “authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law”); *Commonwealth v. Craan*, 13 N.E.3d 569, 577–79 (Mass. 2014) (stating, “although the ‘general rule is that local police are not precluded from enforcing federal statutes,’ . . . their authority to do so derives from State law.” (quoting *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by* *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999)), but holding decriminalization of small amounts of marijuana operated to preclude state officer arrests for a corresponding federal crime); *State v. Towne*, 615 A.2d 484, 496 (Vt. 1992) (holding a state officer may lawfully arrest a person for violation of a federal prohibition of firearms possession by a felon, noting authority allowing state arrests for federal felonies in New York and Illinois); see generally *United States v. Argueta-Mejia*, 615 F. App’x 485, 488 (10th Cir. 2015) (“The federal constitution allows a state law enforcement officer to make an arrest for any crime, including federal immigration offenses.”). *But cf. Arizona*, 567 U.S. at 407, 410 (invalidating state law allowing arrest where there is probable cause to believe a person has committed a public offense that makes him removable, stating, “As a general rule, it is not a crime for a removable alien to remain in the United States.”); Jason Moon, *N.H. Schools Grapple with Concerns about Guns, Student Safety on Election Day*, N.H. PUB. RADIO (Aug. 26, 2016), <http://nhpr.org/post/nh-schools-grapple-concerns-about-guns-student-safety-election-day> (reproducing an option from the Attorney General of New Hampshire stating, “The State of New Hampshire has no authority to enforce the federal Gun Free School Zones Act.”).

212. See generally *infra* note 251 (discussing *Virginia v. Moore*, 553 U.S. 164 (2008), which presents the circumstance in which state limits on arrest powers do not produce a commensurate restriction on the validity of a stop under *Terry*).

The extent to which local officers currently do that is not relevant. We are investigating the contours of the constitutional protection. These rights do not exist at the pleasure of law enforcement, and we should not assess the scope of the constitutional right on the premise that the government will not capitalize on some extant authority.<sup>213</sup>

Of course, initiation of a *Terry* stop involves a threshold below probable cause. Thus, one supposes the threshold for initiation of a *Terry* stop might be met even if a person is encountered outside 1000 feet of a school zone if the officer has reasonable suspicion the individual has recently transited,<sup>214</sup> or is going to be transiting, such a zone.

#### B. Mere Suspicion the Possession is Unlawful; Prohibited Person Status

Further parsing the potential implications of this vague statute would take us too far afield. There are many locations outside school zones where firearms possession is generally lawful without a license. In examining *Terry* stops, it is easiest to first examine the principles applicable in those locations; and we can put aside attempts to gain certainty as to precisely where those locations are.

Federal law generally prohibits firearms possession by persons who have been convicted of a felony<sup>215</sup> or a misdemeanor crime of domestic violence.<sup>216</sup> In addition, federal law prohibits firearms possession by persons who have been involuntarily committed for mental health reasons<sup>217</sup> and illegal users of controlled substances.<sup>218</sup> State law may add to the list of circumstances that prohibit firearms possession.<sup>219</sup> Or it may prohibit firearms possession by persons who have committed crimes in other states that, although not felonies where committed (or that do not give rise to firearm disabilities where committed), are felonies in the jurisdictions

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213. See *infra* note 227 and accompanying text.

214. See *infra* note 254 (concerning completed offenses).

215. 18 U.S.C. § 922(g)(1). The prohibition relating to felonies excludes “any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . .” 18 U.S.C. § 921(a)(20)(A) (Westlaw through Pub. L. No. 115–140).

216. 18 U.S.C. § 922(g)(9). *But see* United States v. Pauler, 857 F.3d 1073, 1078 (10th Cir. 2017) (“We interpret ‘State’ to have the same meaning in § 921(a)(33) that it has throughout the rest of §§ 921 and 922 and therefore conclude that ‘a misdemeanor under Federal, State, or Tribal law’ does not include a violation of a municipal ordinance.”); United States v. Enick, No. 2:17–CR–00013–BLW, 2017 WL 2531943, at \*2 (D. Idaho June 9, 2017) (same).

217. 18 U.S.C. § 922(g)(4).

218. *Id.* § 922(g)(3).

219. *E.g.*, MO. ANN. STAT. § 571.070.1(2) (Westlaw through 2017 First Regular Session and First and Second Extraordinary Sessions of the 99th General Assembly) (habitual intoxication); OHIO REV. CODE ANN. § 2923.13(A)(4) (Westlaw 2017 File 25 of the 132nd General Assembly (2017–2018) and 2017 State Issue 1) (chronic alcoholic).



where the firearms are then possessed.<sup>220</sup> Thus, there always is some possible possessor-specific factor that cannot be excluded merely by observing a person and that might make unlawful that firearms possession.<sup>221</sup>

*Northrup v. City of Toledo Police Department* addresses whether a person's openly carrying a firearm, where lawful (evidently without any further permit),<sup>222</sup> in combination with having received a 911 call indicating it was occurring, is sufficient to initiate a *Terry* stop.<sup>223</sup> The court holds not.<sup>224</sup> Of course, only after further investigation could an officer conclude the possessor was not a felon whose firearms possession would be unlawful. As to that, the court states, "Where it is lawful to possess a firearm, unlawful possession 'is not the default status.' There is no 'automatic firearm exception' to the *Terry* rule."<sup>225</sup>

Outside the context of firearms possession, one would think one could summarily reject the assertion that for engaging in an innocent, otherwise unregulated activity that is prohibited of those who have committed felonies, one may be detained for questioning. A person who has committed a felony may not be allowed

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220. *Hamilton v. Pallozzi*, 848 F.3d 614, 618 & n.2 (4th Cir. 2017) (stating, in a case involving an out-of-state conviction for which the jurisdiction of conviction had reinstated the individual's firearms rights, "A crime committed out of state is a disqualifying crime if the Maryland equivalent is a disqualifying crime."); *Hamilton v. Pallozzi*, 165 F. Supp. 3d 315, 319 (D. Md. 2016), *aff'd*, 848 F.3d 614 (4th Cir. 2017) (out-of-state crime where firearms rights were reinstated in the jurisdiction of the offense nevertheless prohibited firearms possession); *State v. Howard*, 339 P.3d 809, 814, 816 (Kan. Ct. App. 2014) (holding a Missouri suspended imposition of sentence, which the court states under Missouri law, "doesn't count it as a conviction," nevertheless constitutes a conviction for purposes of Kansas prohibition on firearms possession by those with previous convictions); *aff'd*, 389 P.3d 1280 (Kan. 2017); MO. ANN. STAT. § 571.070.1(1) (Westlaw through 2017 Second Extraordinary Session of the 99th General Assembly) (referencing "crime under the laws of any state or of the United States which, if committed within this state, would be a felony").

221. Age prohibitions also exist. 18 U.S.C. § 922(x) (concerning handgun possession). Of course, they might be excludable in particular circumstances.

222. The opinion is not as clear as one would like concerning the court's understanding of whether the legality of the possession requires a license. The relevant discussion is:

Ohio law permits the open carry of firearms and thus permitted Northrup to do exactly what he was doing. While the dispatcher and motorcyclist may not have known the details of Ohio's open-carry firearm law, the police officer had no basis for such uncertainty. If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers—at least with regard to unambiguous statutes.

*Northrup*, 785 F.3d at 1131–32 (citation omitted). The cited statute provides for preemption.

223. 785 F.3d at 1131. As to the legality of the open carrying of firearms, the court cites a statutory provision that generally preempts non-statutory firearms prohibitions on the possession, etc., of a firearm, indicating the possession, etc., may occur "without further license, permission, restriction, delay, or process . . ." OHIO REV. CODE ANN. § 9.68 (Westlaw through 2017 File 20 of the 132nd General Assembly (2017–2018)).

224. 785 F.3d at 1133. *See generally* *Berry*, *supra* note 3, at 153 (reaching that conclusion under Arkansas law).

225. *Northrup*, 785 F.3d at 1132 (quoting *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013), where the court states, "Being a felon in possession of a firearm is not the default status."). *See also* *St. John v. McColley*, 653 F. Supp. 2d 1155, 1161 (D.N.M. 2009) (noting that where the possession is generally allowed, the fact that a person possesses a firearm does not, "by itself, create a reasonable suspicion sufficient to justify an investigatory detention."). *Cf.* *United States v. Ubiles*, 224 F.3d 213, 217–18 (3d Cir. 2000) (discussed *supra* notes 155–164 and accompanying text and *infra* note 245).

to vote, and doing so may be criminalized.<sup>226</sup> However, one would expect vehement reaction to police officers randomly detaining individuals merely for exiting polling places. One would think the outrage would be enhanced by the fact that it is a basic civil right that would be triggering the ability to initiate a stop. But of course, firearms possession is also, in contemporary jurisprudence, treated a basic civil right.

It is not a satisfactory response to assert that currently officers are not known to stop persons for voting and, therefore, one can disregard that possibility, and simultaneously assert the possibility one is a felon (or has some other prohibited factor) will authorize a *Terry* stop. To assert the freedom from unreasonable searches does not prohibit *Terry* stops of voters stops at governmental whim, but the public is merely relegated to relying on this discretion not being poorly exercised, is to assert there is not a right implicated.<sup>227</sup>

Authority has not been found justifying such a total abrogation of freedom from seizure at any time for vast segments of the American population.

### C. Conclusion

In sum, putting aside the federal Gun-Free School Zones Act, it would appear there is not a cogent basis to allow suspicion a person is armed to be the basis for a *Terry* stop of someone where permit-free firearms possession is generally authorized. To allow the possibility the individual's possession might be unlawful, by one with a prohibiting conviction or other circumstance, is not supported by authority and would allow a vast increase in scope of those subject to *Terry* stops.

## VI. ANALYSIS OF EXTANT AUTHORITY

### A. Introduction

Part IV has identified a number of different approaches to whether reasonable suspicion one is possessing a firearm can, by itself, authorize a *Terry* stop. This Part endeavors to present a coherent assessment of the assorted views. The analysis in this Part is sufficiently nuanced that it is helpful to begin with a summary.

Wide-ranging, suspicionless searches at the whim of inferior governmental officers are unsatisfactory—sufficiently so that such an arrangement put the Colonies

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226. *E.g.*, KY. REV. STAT. ANN. § 116.065 (Westlaw through 2018 regular session) (“Each application for registration, change of affiliation, transfer of registration or absentee ballot, as absentee ballots are provided for by KRS 117.075, shall be verified by a written declaration by the applicant that it is made under the penalties of perjury.”); STATE BD. OF ELECTIONS, COMMONWEALTH OF KY., FORM SBE 01 (08/03) (voter registration form requiring affirmation under penalty of perjury by the applicant of the following: “I am not a convicted felon, or if I have been convicted of a felony, my civil rights must have been restored by executive pardon”), <https://elect.ky.gov/SiteCollectionDocuments/Register%20to%20Vote/Kentucky%20Voter%20Registration%20Card.pdf> (last visited Jan. 31, 2018).

227. *Cf. Scope, Inc. v. Pataki*, 386 F. Supp. 2d 184, 192, 194–95 (W.D.N.Y. 2005) (granting plaintiff's motion for judgment on the pleadings that state statute is overbroad in that it “essentially declares any assembly of gun owners for any purpose a ‘gun show,’” rejecting the state's efforts to validate the statute by arguing, “Because we are not going to prosecute (seek) civil actions or enforcement under that situation.”).

on the path to the Revolutionary War.<sup>228</sup> As developed above,<sup>229</sup> some courts have concluded that where firearms licensure is an affirmative defense to a base firearms possession crime (as opposed to non-licensure being an element), reasonable suspicion a person is armed is sufficient to initiate a *Terry* stop. As Part VI.B shows, this approach is ultimately untenable, because it would allow a manifestly unacceptable range of ordinary activity to, by itself, justify *Terry* stops. One such illustration involves the crime of trespass, where one can encounter law in which license from a tenant to enter premises is merely a defense to trespass at a posted apartment complex.

Moreover, treating licensure as a defense to a firearms possession crime, and thereby authorizing at-whim *Terry* stops, for our purposes gives rise to significant constitutional issues—concerning whether the government has the authority to allow mere firearms possession to authorize a *Terry* stop. In such a context, principles of constitutional avoidance should command that statutory schemes that do not unambiguously treat licensure as a defense to firearms possession, and thereby purport to authorize *Terry* stops of armed persons, should not be so construed.

The substantial concern with allowing a legislature to authorize *Terry* stops of one who merely possesses a firearm is illuminated by *Delaware v. Prouse*,<sup>230</sup> which is discussed in Part VI.C. The annual number of firearm murders in the United States is dwarfed by traffic fatalities.<sup>231</sup> Nevertheless, in *Prouse* the Court holds that suspicionless, ad hoc stopping of motorists is not constitutional, notwithstanding “that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles . . . and hence that licensing, registration, and vehicle inspection requirements are being observed.”<sup>232</sup> Persistent, innocent quotidian activity by itself is simply insufficient to authorize a *Terry* stop. And firearms possession for self-defense, as a precautionary measure for an event that might occur at any time, is in that category.

Even if the triggering event were not exercise of a basic civil right, the doctrine of unconstitutional conditions would present a substantial obstacle to concluding that because an activity is licensed (here, firearms possession), the license can be conditioned on consent to a *Terry* stop. But we are discussing the licensure of the core manner for exercising what contemporary courts typically treat as an enumerated right.<sup>233</sup> Part VI.E shows that, in contrast, authority involving the First Amendment indicates allowing a more modest, non-core exercise of a fundamental right to be a factor in authorizing a *Terry* stop is at best suspect. Lower court authority is highly suspicious of allowing First Amendment exercise, comprising the display of religious items or stickers reflecting religious viewpoints, to authorize a *Terry* stop.

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228. See *supra* note 55 and accompanying text.

229. See *supra* notes 138–166 and accompanying text.

230. 440 U.S. 648 (1979).

231. The National Highway Traffic Safety Administration reports 35,092 Motor traffic fatalities in 2015. *Traffic Fatalities up Sharply in 2015*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Aug. 29, 2016), <https://www.nhtsa.gov/press-releases/traffic-fatalities-sharply-2015>. That is 354 percent of the 9,916 murders with firearms in the United States in 2015. See *supra* note 104.

232. *Prouse*, 440 U.S. at 658, 663.

233. See *supra* notes 10–11 and accompanying text.

So, treating core exercise of the right to bear arms as authorizing a *Terry* stop is, a fortiori, prohibited.

Nevertheless, one might assert that in jurisdictions where firearms possession is infrequently authorized, a *Terry* stop is authorized merely by a relatively high likelihood that one possessing a firearm is doing so illegally. However, as discussed in Part VI.F, there are concerns with use of statistics for some large group of persons alone—a grouping unrelated to prior criminal convictions of the persons to be seized<sup>234</sup>—to authorize ad hoc *Terry* stop of individual group members.

#### B. Licensure as an Affirmative Defense

We have above noted that some courts have focused on whether licensure is a defense, as opposed to non-licensure being an element, of an ordinary firearms crime.<sup>235</sup> Some courts take the position that where firearms licensure is a defense, an officer having reasonable suspicion of firearms possession that would be unlawful absent licensure, and knowing nothing about the individual's licensure status, could freely initiate a *Terry* stop of an armed person. One can reject that view for two independent reasons.<sup>236</sup>

The first is that this approach would in fact allow a vast expansion of the ability to initiate a *Terry* stop, because ubiquitous innocent activity unrelated to firearms possession can be lawful only by virtue of circumstances that can be, and sometimes are, styled as an affirmative defense.

The scope of that activity that could give rise to a *Terry* stop under this approach may be juxtaposed by noting the initial conceptualization of the scope of *Terry* stops. It was not initially clear that stops authorized in *Terry* were not cabined to a limited set of crimes being afoot. Justice Brennan, dissenting in *Adams v. Williams*, quotes the dissenting opinion below of Judge Friendly, where Judge Friendly writes, "To begin, I have the gravest hesitancy in extending *Terry* to crimes like the possession of narcotics."<sup>237</sup> The field of play has transitioned from considering whether reasonable suspicion of narcotics possession would authorize a *Terry* stop to considering whether the fact one is present in a posted apartment complex can authorize a *Terry* stop.<sup>238</sup>

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234. Of course, probationers and parolees have diminished rights. See *infra* notes 284–290 and accompanying text.

235. See *supra* notes 138–166 and accompanying text.

236. Leider also rejects this approach in an article that has quite a bit of discussion of cases involving firearms possession. He instead approvingly references, *inter alia*, consideration of mere statistical likelihood of an offense being afoot, without regard to whether licensure (for example) is an affirmative defense (as opposed to non-licensure being an element). Leider, *supra* note 3, at 439–41 (discussing low firearms licensure); see also *id.* at 442 ("As I argued above, reasonable suspicion means suspicion both that a person has satisfied the elements of the offense and that the person has no relevant defense. Statistical generalities are often sufficient to have reasonable suspicion that most defenses do not apply, so the burden on law enforcement should not be unmanageable using this view.").

237. *Williams v. Adams*, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly, J., dissenting), *rev'd on reh'g*, 441 F.2d 394 (2d Cir. 1971), *rev'd*, 407 U.S. 143 (1972) (citation omitted) (quoted in *Adams v. Williams*, 407 U.S. 143, 151 (1972) (Brennan, J., dissenting)).

238. See *infra* notes 255–262 and accompanying text.

The second is that allowing firearms possession alone to authorize *Terry* stops contemplates vesting in a legislature an insupportable ability to condition the exercise of a civil right. That issue is discussed in Part VI.C.

i. Avoiding the Issue—Constitutional Avoidance

As noted above, statutes often are not clear whether licensure is a defense or whether non-licensure is an element. A seminal statement of *constitutional avoidance* is:

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.<sup>239</sup>

Katyal and Schmidt state, “The avoidance canon requires only that a judge advert to some theoretical ‘doubt’ about a law’s constitutionality, which naturally leads to vague and imprecise constitutional analysis.”<sup>240</sup> They continue, “In the end, there is no magic formula that captures how far a judge can swerve from the best reading of a statute in the name of avoidance. The current doctrinal standard—that a reading must be ‘fairly possible’—is probably the best that can be done, even if it is rather tautological.”<sup>241</sup>

Statutes often are not explicit in whether they intend to make licensure an affirmative defense to a base firearms possession crime, or whether non-licensure is an element. Rather, trivial textual differences can be determinative. For example,

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239. *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407–08 (1909) (citation omitted). See generally *Arizona v. United States*, 567 U.S. 387, 415 (2012) (applying avoidance in the context of possible state infringement of federal regulation of immigration, stating, “There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [the state statutory provision] will be construed in a way that creates a conflict with federal law.”); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (“[T]he so-called ‘avoidance’ canon now camouflages acts of judicial aggression in both the constitutional and statutory spheres. . . . First, the Court has used avoidance cases to announce new rules of constitutional law and major departures from settled doctrine. . . . Second, the Court seems indifferent to whether the resulting statutory interpretations are at all plausible.”); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (concluding, “The basic difference between classical and modern avoidance is that the former requires the court to determine that one plausible interpretation of the statute would be unconstitutional, while the latter requires only a determination that one plausible reading might be unconstitutional.”).

240. Katyal & Schmidt, *supra* note 239, at 2112.

241. *Id.* at 2163.

in *Commonwealth v. Bigelow*, the Pennsylvania Supreme Court discusses two statutory provisions. One provides, “No person shall carry a firearm . . . without a license therefor . . .;”<sup>242</sup> the second provides, “No person shall carry a firearm . . . unless . . . such person is licensed; or . . . such person is exempt from licensing . . . .”<sup>243</sup> The court holds the second treats licensure as an affirmative defense, although the first treats non-licensure as an element.<sup>244</sup> It is submitted that the variation between these two statutes does not clearly manifest an intended distinction concerning whether licensure is a defense or non-licensure is an element. Moreover, reflecting the unpredictability of how this type of language is interpreted, there is authority construing textual constructs comparable to each to reach the opposite conclusions.<sup>245</sup>

The standard *Katyal* and *Schmidt* identify as sufficient to trigger avoidance would seem to be met rather easily in construing the language at issue in *Bigelow*. Our discussion below would indicate there is more than mere theoretical doubt that the resulting burden on exercise of Second Amendment rights is unlawful. So, the

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242. A more complete extract is:

No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as provided in this subchapter.

*Commonwealth v. Bigelow*, 399 A.2d 392, 393 n.1 (Pa. 1979) (quoting 18 PA. CONS. STAT. § 6106 (1973)).

243. A more complete extract is:

No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:

(1) such person is licensed to carry a firearm; or

(2) such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license).

*Commonwealth v. Bigelow*, 399 A.2d 392, 393 n.2 (Pa. 1979) (quoting 18 PA. CONS. STAT. § 6108 (1973)).

244. Compare *Bigelow*, 399 A.2d at 396, with *State v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977) (holding the phrase “without a permit” does not create an element of a crime, relying on *People v. Henderson*, 218 N.W.2d 2 (Mich. 1974) (reaching a similar result as to the phrase “without a license”). See generally *State v. Burg*, 648 N.W.2d 673, 678–79 (Minn. 2002) (noting the approach of *Paige*, treating “without” introducing an exception, being inconsistent with the court’s recent cases, that have “consistently treated such language as creating an element of an offense”).

245. For example, statutory language that begins as follows is discussed as not providing merely a defense, but, rather, creating an element of the crime: “Whoever, unless otherwise authorized by law, has, possesses, [etc.,] any firearm . . . .” 14 V.I. CODE ANN. tit. § 2253 (Westlaw Virgin Islands Statutes Annotated–1999) (statutory language in effect at the time of the events at-issue in *Ubiles*, 224 F.3d 213, construed in *United States v. Gatlin*, 613 F.3d 374 (3d Cir. 2010), as creating an element; see *supra* note 164). This style of language is difficult to distinguish from the language *Bigelow* holds creates an affirmative defense.

On the other hand, *Lively v. State* states the following language treats firearms licensure as an affirmative defense: “A person is guilty of carrying a concealed deadly weapon when he carries concealed a deadly weapon upon or about his person without a license to do so as provided by s 1441 of this title.” *Lively v. State*, 427 A.2d 882, 882 (Del. 1981) (citing DEL. CODE tit. 11, § 1442 (Westlaw through 81 Laws 2017, chs. 1–199, as amended 1989, 1995, 2010) (cited and quoted by *United States v. Gatlin*, 613 F.3d 374, 378 (3d Cir. 2010), as amended (Oct. 22, 2010) (“While it is possible to have a concealed handgun license, “[t]he burden is upon the defendant to establish that he had a license to carry [the] concealed . . . weapon.”)). This language seems like that *Bigelow* treats as creating an element. See also *supra* note 244.

principle of constitutional avoidance would require both statutory schemes be interpreted so as not to authorize *Terry* stops for mere firearms possession.

One will often see reference to non-textual principles in construing this type of language—reference to the consequences of one reading being undesirable. In particular, where proof is particularly within the control of the charged party, that circumstance often outweighs a textual focus. That is, it is not the statutory text that often directs these interpretations. Rather, it is a concern for the consequences of it being read in a particular way that results in an interpretation that licensure is an affirmative defense.<sup>246</sup>

So, for example, one court states, “It is a well settled rule of law that where the negative of an issue does not permit of direct proof, or where the facts more immediately lay within the knowledge of the defendant, the Onus probandi rests upon him.”<sup>247</sup> That is a non-textual approach to interpretation—which, when one interpretation raises substantial constitutional questions, admits the circumstance is one that should trigger the canon of constitutional avoidance. To boot, it is based on a factual premise that is no longer operative. A half-century ago, there were administrative burdens in creating usable, comprehensive databases of firearms possessors that are not present today.<sup>248</sup>

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246. There are other principles on which courts rely. For example, *United States v. Rodriguez*, 739 F.3d 481, 487–88 (10th Cir. 2013), focuses on an untethered principle. It references a free-standing principle of statutory construction involving what are categorized as “exceptions” to penal statutes: The general rule—which we have no reason to think the New Mexico Supreme Court would decline to recognize—is a defendant must establish “that he is within an exception to a penal statute in order to take advantage of it.” *Rodriguez*, 739 F.3d 481, 487 (10th Cir. 2013) (quoting *State v. Roybal*, 667 P.2d 462, 464 (N.M. Ct. App. 1983)). The court states, “Nor is it a matter of importance whether the excepting clause is in parenthesis, or set off by commas, at the beginning of the sentence, or follows a proviso at the end.” *Id.* at 487–88 (quoting *Nicoli v. Briggs*, 83 F.2d 375, 379 (10th Cir. 1936)). This type of exercise in rudimentary taxonomy, on which one begins with an unsupported conclusion that some circumstance is an “exception,” is not compelling. The court provides this hand-waiving justification:

The Supreme Court has told us a statutory exception to a crime constitutes an element of that crime only where the exception “is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted.” Accordingly, “where one can omit the exception from [a] statute without doing violence to the definition of the offense,” that exception is not an element of the offense absent a discernible legislative intent to the contrary.

*Rodriguez*, 739 F.3d at 488 (quoting *United States v. Cook*, 84 U.S. (17 Wall.) 168, 173 (1872); and *United States v. McArthur*, 108 F.3d 1350, 1353 (11th Cir.1997)).

247. *State v. Rabatin*, 95 A.2d 431, 435 (N.J. App. Div. 1953) (holding the state need not prove the defendant did not have a permit to carry a firearm). *Lively v. State*, 427 A.2d 882 (Del. 1981), relies on, *inter alia*, *State v. Blanca*, 241 A.2d 647, 650 (N.J. App. Div. 1968), which relies on *Rabatin*.

There is an annotation on the subject of whether a license is a defense or an absence of a license is an element of the crime. Dag E. Ytreberg, Annotation, *Burden of Proof as to Lack of License in Criminal Prosecution for Carrying or Possession of Weapon without License*, 69 A.L.R.3d 1054 (1976 & Supp. n.d.).

248. Whether an exigency exists allowing warrantless search or arrest requires assessment of the current technology, so the timely availability of a telephonic warrant may mandate getting such a warrant, even though such a warrant could not have been obtained in similar circumstances before development of the relevant technology. *Cf. United States v. Cuaron*, 700 F.2d 582, 589 (10th Cir. 1983) (“In accordance with the congressional intent embodied in Fed. R. Crim. P. 41(c)(2), we conclude that trial courts must consider the availability of a telephone warrant in determining whether exigent circumstances existed, unless the critical nature of the circumstances clearly prevented the effective use of *any* warrant procedure.”); *United*

In sum, conclusions that firearms statutes treat licensure an affirmative defense often are not clearly required by the statutory language. Rather, it often is “fairly possible” the statutory language treats non-licensure as an element. Prior interpretative decisions have been reached before applicability of avoidance principle came in-focus—before *Heller*. And some of those interpretations reflected not a textual interpretation but, rather, a desire to avoid problems that technology of half a century ago presented that modern technology obviates. Neither amorphous, conclusory interpretative approaches nor technological limitations of a half-century ago provide a basis for avoiding a “cardinal” principle of statutory construction.<sup>249</sup>

The authority authorizing a *Terry* stop is varied; it may arise from statute or by case law.<sup>250</sup> It is beyond the scope of this Article to attempt to detail that authority. For our purposes, one may merely note that this principle of constitutional avoidance may be applied to whatever authority collectively, in the particular jurisdiction,<sup>251</sup> purports to authorize a *Terry* stop. So, in a particular case, a court need not be applying this principle of constitutional avoidance to address burdens imposed by the underlying criminal statute in a trial on the substantive offense.

#### ii. The Frequency of Terry Stops Authorized by a Defense-Focused Approach Is Insupportable

There are restrictions on the extent to which a legislature may make a circumstance a defense to a crime, as opposed to its non-existence being an element.<sup>252</sup>

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States v. Cattouse, 666 F. Supp. 480, 484 (S.D.N.Y. 1987), *aff'd*, 846 F.2d 144 (2d Cir. 1988) (“Therefore, although the Second Circuit does not appear to have expressly considered the issue, I believe that in the case at bar this Court must evaluate the availability of a telephonic warrant in determining the existence *vel non* of exigent circumstances.”).

249. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (referencing the “cardinal principle”).

250. See generally George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 861–63 (1985) (summarizing the law in various jurisdictions and concluding, “a complete catalogue of relevant legislative enactments is difficult, if not impossible, to compile.”); Berry, *supra* note 3, at 149–57 (discussing the interaction between the Arkansas statute and stopping persons carrying firearms openly).

251. That is, insofar as that jurisdiction’s law is relevant under *Virginia v. Moore*, 553 U.S. 164, 176 (2008); see also *supra* note 212 and accompanying text.

252. A discussion of those issues is beyond the scope of this Article. See generally Patterson v. New York, 432 U.S. 197, 210 (1977) (“This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.”); Davis v. Allsbrooks, 778 F.2d 168, 172 (4th Cir. 1985) (“We reject this contention, and hold that a state may legitimately shift a burden of production on an element of the crime to the defendant, as North Carolina has done, so long as the presumed fact is rationally connected to a proven fact.”); People v. Watts, 692 N.E.2d 315, 322–23 (Ill. 1998) (“We agree that in the area of criminal law, mandatory rebuttable presumptions which shift the burden of production to the defendant are unconstitutional.”); CHRISTOPHER B. MUELLERA & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 3:19 (4th ed., Westlaw updated June 2017) (“Interestingly, the Court has not quite said that criminal presumptions cannot shift the burden of production to the defendant on an element in the offense. Nevertheless, this conclusion seems to follow from the bar against directing a finding against the accused, because failing to meet this burden would logically generate such an instruction.”).



But within those limits, as developed below, there are profound implications to giving full deference to that choice in determining whether a *Terry* stop may be initiated.

The *Terry* construct is a *sui generis* implementation, in a particular type of context, of the right to be free from unreasonable searches and seizures. For example, eighteen years after *Terry* was decided, the Supreme Court recognized as theretofore unresolved whether *Terry* stops could be initiated for completed offenses: “We do not agree with the Court of Appeals that our prior opinions contemplate an inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest.”<sup>253</sup> Even then, the Court would not provide a comprehensive conclusion:

We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion.<sup>254</sup>

So, general language announced in other circumstances in developing this *sui generis* application of Fourth Amendment principles should not be parsed to treat as settled, or deterministic of the settlement of, the principles governing stopping persons exercising atypical, but secured civil rights that were conclusively recognized by the Supreme Court only a decade ago.

With that perspective, consider the crime of trespass in the context of a large housing complex that is posted for trespassing. Although LaFave, for example, criticizes allowing a *Terry* stop to investigate minor crimes,<sup>255</sup> numerous courts have not so limited the scope of crimes suspicion of which may authorize a *Terry* stop.<sup>256</sup> *People v. Washington* describes invitation—in that case, alleged authorization from a tenant—as a circumstance for which “[a] defendant must present sufficient evidence to raise an affirmative defense.”<sup>257</sup> It would be shocking were everyone visiting such a posted apartment complex subject to a pretextual *Terry* stop. But that would be the result of a formulaic analysis in which pretextual *Terry* stops are authorized and, in determining whether a *Terry* stop is authorized, the possibility of licensure can be disregarded.<sup>258</sup>

253. United States v. Hensley, 469 U.S. 221, 227 (1985).

254. *Id.* at 229.

255. 4 LAFAVE, *supra* note 66, at § 9.2(c) (“The *Terry* rule should be expressly limited to investigation of serious offenses.”).

256. *Id.* (“[O]n occasion a stop has been given judicial approval even though nothing more than possible disorderly conduct, a possible curfew violation, a possible noncriminal truancy, a civil forfeiture offense of littering, smoking of a marijuana cigarette, or a minor traffic violation was involved. With rare exception, cases declaring that the stop was improper because of the nature of the offense under investigation have been decided upon limitations set out in a state statute or rule of court or found to be required under the state constitution.”); *see, e.g.*, United States v. Young, 707 F.3d 598, 605 (6th Cir. 2012) (stating, “[S]uspicion of trespassing is alone sufficient to support a *Terry* stop.”).

257. *People v. Washington*, 762 N.E.2d 698, 699–701 (Ill. App. Ct. 2002). The defendant alleged he was visiting a cousin, a child of the named tenant.

258. Leider also rejects focus on the licensure/defense dichotomy, concluding:

In *Washington*, the ultimate burden of persuasion as to the affirmative defense was on the government.<sup>259</sup> As noted above, a number of the cases treating licensure as a defense, as a basis for allowing a *Terry* stop of an armed person, are in jurisdictions where, similarly, the firearms possessor merely has a burden of production.<sup>260</sup> So, the analogy holds. If firearms possession may authorize a *Terry* stop because licensure is a defense (imposing on the individual a burden of production), all those visiting a posted apartment complex may be stopped where the jurisdiction's law is like that involved in *Washington*—and stopped pretextually if *Whren v. United States*<sup>261</sup> is so extended.<sup>262</sup>

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[R]easonable suspicion means suspicion both that a person has satisfied the elements of the offense and that the person has no relevant defense. Statistical generalities are often sufficient to have reasonable suspicion that most defenses do not apply, so the burden on law enforcement should not be unmanageable using this view.

Leider, *supra* note 3, at 442.

259. *Washington*, 762 N.E.2d at 700.

260. See *supra* notes 153–154 and accompanying text.

261. *Whren v. United States*, 517 U.S. 806, 814 (1996).

262. See *supra* notes 72–74 and accompanying text.

One cannot conclude that a jurisdiction that follows this approach to burdens of proof in trespass would necessarily prohibit initiating a *Terry* stop for a mere criminal trespass. It would appear Illinois does not prohibit a *Terry* stop for criminal trespass. *E.g.*, *People v. Little*, 50 N.E.3d 655, 660 (Ill. App. Ct. 2016), *reh'g denied* (Mar. 16, 2016), *appeal denied*, 50 N.E.3d 1141 (Ill. 2016) (“[W]e find that Deputy Pilat had reasonable suspicion to make an investigatory stop of defendant’s vehicle for a possible criminal trespass to real property.”); *People v. Dancy*, 387 N.E.2d 889, 892 (Ill. App. Ct. 1979) (“Conducting a search in the instant case was also justifiable, since here defendant’s probable access to the platform by trespass, the nature of the temporary, investigative stop, and the information that the suspect was known to be armed with a knife permitted a limited search of defendant’s outer clothing for weapons.”).

Although it seems reasonably clear that rote deference to a legislature’s choice to make licensure a defense, and for that alone to allow a *Terry* stop of an armed person, excessively expands the ability to stop individuals, that leaves unresolved broader questions. *Virginia v. Moore* holds, “We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.” 553 U.S. 164, 176 (2008). The principles of *Virginia v. Moore* have been extended to detentions short of arrests. *E.g.*, *State v. Slayton*, 223 P.3d 337, 346 (2009); 1 LAFAVE, *supra* note 66, § 1.5(a) (“*Moore* is applicable to statutes limiting which state agents may make a *Terry* stop . . .”).

Leider notes, “In fact, [*Adams v. Williams*] expressly disclaimed an element-by-element breakdown.” Leider, *supra* note 3, at 423–24. So, for example, one will encounter a court concluding a *Terry* stop for criminal trespass not invalidated because it is alleged the officer had evidence the detained individual had notice his presence was unlawful (by direct communication or posting). *People v. Little*, 50 N.E.3d 655, 661 (Ill. App. Ct. 2016), *reh'g denied* (Mar. 16, 2016), *appeal denied*, 50 N.E.3d 1141 (Ill. 2016) (“Deputy Pilat was not required to have evidence that the notice element of criminal trespass to real property was satisfied before he could make an investigatory stop on defendant’s vehicle to investigate a possible commission of that offense. While evidence of notice may be required for a person to be found guilty of committing some forms of criminal trespass to real property, it is not required for a police officer to have reasonable suspicion to investigate whether a criminal trespass to real property has been committed.”).

Nevertheless, state law is necessarily relevant. See generally 1 LAFAVE, *supra* note 66, § 1.5(a) (noting, “[S]ometimes how one comes out under the applicable Fourth Amendment standard will of necessity depend upon the contours of state or local law.”). Even if one does not do an “element-by-element” breakdown to assess whether a *Terry* stop is authorized, that does not mean one can simply disregard the elements. For there to be concerns whether crime is afoot arising from firearm possession, one typically would

C. Delaware v. Prouse and Quotidian Activity Authorizing Stops Without Particularized Suspicion; Unconstitutional Conditions

Part VI.B would indicate that it goes too far to assert cavalierly that because firearms licensure is, in a particular jurisdiction, a defense to a base firearms crime, one carrying a firearm can, for that alone, be stopped. Focus on whether a statute treats licensure as a defense or non-licensure as an element produces a manifestly unsupportable scope of *Terry* stops in other contexts. Yet a more fundamental question is whether a legislature may properly condition the specific civil right to bear a firearm in public—may condition that act alone—on consent to a *Terry* stop at any time.

Mere suspicion that a person has the power to inflict injury is insufficient to initiate a *Terry* stop. LaFave notes, “[A] degree of suspicion that the person is armed which would suffice to justify a frisk if there were that basis will not alone justify such a search.”<sup>263</sup> *Speten v. State* notes, “[T]here is neither a ‘freestanding’ right to search based solely upon officer safety concerns, nor is there a ‘freestanding’ right to search based solely upon reasonable suspicion of the presence of weapons or contraband. The right to search or ‘frisk’ for weapons arises out of the need for

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need to reference the state law, which (absent some concern about felon, etc., status) is going to be what provides what is in fact a crime for failure to license one’s firearms possession—there not being a general federal statute requiring licensure of handguns. Of course, possession of fully automatic firearms and so-called *any other weapons*, such as pistols with foregrips, does require federal licensure. 26 U.S.C. § 5841 (Westlaw through Pub. L. No. 115–140) (requiring registration of “firearms”); *id.* § 5845 (providing anomalous, restrictive definition of “firearm” for the chapter). However, our Article is not focused on those arms. We elsewhere discuss that felon status makes firearms possession by itself unlawful under federal law. See *supra* note 225 and accompanying text.

Leider ultimately rejects a focus on whether non-licensure is an element (as opposed to licensure being an affirmative defense), primarily on the following two grounds:

The practical problem, in licensing cases, is that legislative drafting can authorize police to conduct a *Terry* stop based solely on reasonable suspicion that the person is engaging in the activity. The theoretical problem is that such formalism misunderstands the definition of a crime. The element/defense distinction has no relevance in determining what constitutes “criminal activity.” A person is engaged in criminal activity only if the person has satisfied the elements and no defense makes the action permissible.

Leider, *supra* note 3, at 428. It is submitted a more refined analysis would be that *Virginia v. Moore* allows a jurisdiction to treat a particular seizure as violation of a state equivalent of the Fourth Amendment. There is not an inherent reason why a legislature should not be able to make the choice by requiring reasonable suspicion be based on some more complete set of elements, by making a circumstance an element of a crime as opposed to the converse of the circumstance being a defense. And, one supposes, that because legislation often does not get into these details of what ought to authorize a seizure for less than probable cause, there is not an obvious reason to reject the affirmative choice to heighten the bar for suspicionless searches as evidenced by selection of something as an element (as opposed to the converse state being an affirmative defense).

On the other hand, there are some circumstances where the choice to allow *Terry* stops ought not to be respected, because it too heavily trenches on the freedom from unreasonable searches, even if the legislature wishes to do so and attempts to achieve the result by making a circumstance a defense. This Article does not endeavor to provide a comprehensive treatment of those circumstances where that attempt ought not to be respected. Rather, it addresses the issue in the particular context of firearms possession for self-defense.

263. 4 LAFAVE, *supra* note 66, § 9.6(a) (citing *Speten v. State*, 185 P.3d 25 (Wyo. 2008)).

officer safety during an arrest, which arrest, whether by warrant or not, is supported by probable cause, or it arises out of the need for officer safety during an investigative detention, the latter by its required nature being based upon reasonable suspicion of criminal activity.”<sup>264</sup> *United States v. King* observes, “[I]f a police officer’s safety could justify the detention of an otherwise lawfully armed person, the detention could last indefinitely because a lawfully armed person would perpetually present a threat to the safety of the officer.”<sup>265</sup>

Of course, recent events illustrate that vehicles can be used to create mass casualties.<sup>266</sup> So, were that power to inflict injury alone sufficient to initiate a *Terry* stop, those driving vehicles could be stopped for that alone. But as we shall see shortly, such stops are not constitutional. If there is not a basis to stop someone merely because he has the power to inflict injury, that ought to mean there is not a basis to stop someone because (x) he has the power to inflict injury and (y) it is possession of a firearm that gives rise to that power.

No case comes to mind in which the Supreme Court has modernly allowed quotidian activity alone to be the basis of authorizing *Terry* stops of millions of persons engaged in personal activity at substantially all points in time when they are in public.<sup>267</sup> Perhaps the most apposite Supreme Court authority is *Delaware v. Prouse*.<sup>268</sup> There the Court invalidates a vehicle stop that does not involve either “articulable and reasonable suspicion” of a violation or “spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.”<sup>269</sup> The Court notes, “In those situations in which the balance of interests precludes insistence upon ‘some quantum of individualized suspicion,’ other safeguards are generally relied upon to assure that the individual’s reasonable expectation of privacy is not ‘subject to the discretion of the official in the field.’”<sup>270</sup>

The continuing validity of *Prouse* is suggested by *Arizona v. United States*.<sup>271</sup> In that case, the Court expresses reservations about the legality of suspicionless detention to ascertain “illegal entry or another immigration crime.”<sup>272</sup>

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264. *Speten*, 185 P.3d at 33.

265. 990 F.2d 1552, 1559 (10th Cir. 1993).

266. *E.g.*, Shimon Prokupez et al., *Note Found Near Truck Claims Manhattan Attack Done for ISIS*, *source says*, CNN (Nov. 6, 2017), <http://www.cnn.com/2017/10/31/us/new-york-shots-fired/index.html> (“Eight people were killed and almost a dozen injured when a 29-year-old man in a rented pickup truck drove down a busy bicycle path near the World Trade Center Tuesday in Manhattan, New York City.”); CNN Library, *Terrorist Attacks by Vehicle Fast Facts*, CNN (Nov. 6, 2017), <https://www.cnn.com/2017/05/03/world/terrorist-attacks-by-vehicle-fast-facts/index.html> (collecting events worldwide).

267. Our focus is here on persons not known to have prior criminal convictions. For that circumstance, *see infra* notes 284–290 and accompanying text.

268. 440 U.S. 648 (1979).

269. *Id.* at 663.

270. *Id.* at 654–55 (footnote omitted) (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 532 (1967)).

271. 567 U.S. 387, 413 (2012).

272. *Id.* at 414 (stating “Detaining individuals solely to verify their immigration status would raise constitutional concerns.”).

As is often the case, one who has already arrived at a conclusion can pick snippets from the authority to rationalize a preferred application of the decision to other contexts. In support of applying this principle to suspicionless seizures of those possessing firearms, the *Prouse* Court references a “grave danger” that arises from unbridled discretion, citing prior Court language stating, “There also was a grave danger that such unreviewable discretion would be abused by some officers in the field.”<sup>273</sup> And it says the following about a motorist being stopped unexpectedly, for no apparent reason, “We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol.”<sup>274</sup> One supposes the heightened likelihood the stop will involve an officer pointing a loaded weapon at an innocent during the *Terry* stop for firearms possession is substantially more intrusive. The concerns are compounded because a resulting groin grope may be automatic.<sup>275</sup>

On the other hand, in *Prouse* the Court discusses various other ways in which safety concerns can be mitigated other than by these stops.<sup>276</sup> So, one fixed on distinguishing *Prouse* might assert that seizing those with firearms is different—that there are not corresponding ways to limit the safety concerns without this type of search. It is submitted that, if there were a need to check persons, the analogue of a permitted roadblock to check driver sobriety<sup>277</sup>—checking all who possess firearms (or some fraction chosen by lot)—cannot be eliminated as a reasonable substitute.

Moreover, it is not clear that even a checkpoint for firearms, selecting persons by neutral criteria, would pass constitutional muster. In *City of Indianapolis v. Edmond*, the Court states, “We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”<sup>278</sup> In invalidating narcotics checkpoints, the Court continues:

We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.<sup>279</sup>

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273. 440 U.S. at 662 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976)). *But cf.* *Samson v. California*, 547 U.S. 843, 856 (2006) (referencing “California’s prohibition on ‘arbitrary, capricious or harassing’ searches” in stating, “The dissent’s claim that parolees under California law are subject to capricious searches conducted at the unchecked ‘whim’ of law enforcement officers ignores this prohibition.” (citations omitted) (citing, *inter alia*, *People v. Reyes*, 19 Cal. 4th 743, 753–54 (1998), *amended on denial of reh’g* (Dec. 2, 1998); CAL. PENAL CODE § 3067(d) (Westlaw through 2017 Reg. Sess.) (stating, “It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.”) (amended 2011, 2012).

274. *Prouse*, 440 U.S. at 657.

275. See *supra* note 24 and accompanying text.

276. 440 U.S. at 658–61.

277. See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (validating highway sobriety checkpoints); see also *supra* notes 91–92 and accompanying text.

278. 531 U.S. 32, 41 (2000).

279. *Id.* at 44.

So, it would appear that even checkpoints using neutral criteria cannot be adopted merely to ascertain whether someone is criminally possessing what is, for the possessor, contraband.

It is best to consider *Delaware v. Prouse* by placing it in the context of basic principles. We know reasonable suspicion that a person is dangerous is not, by itself, sufficient to authorize seizure of large numbers of persons engaged in otherwise innocent, ordinary activity, in a fashion that would allow wholesale seizures.<sup>280</sup> Those who are suspected of being dangerous merely by virtue of being armed are a subset of the wider group of persons who may be dangerous. The question then arises whether it is permissible for a state to subject to seizure, at any time when in public, some subset of persons who are suspected to be dangerous (in some sense). The way in which the subset is selected matters for these purposes.

We can consider, by way of illustration, three subsets of persons who are suspected of being dangerous:

(a) a subset consisting of those who also are doing something that makes it appear they have a higher likelihood of manifesting the dangerousness (act violently, etc.) presently;

(b) a random selection (one selected by lot or other neutral criteria) of generally dangerous persons—meaning persons with some heightened means to inflict injury<sup>281</sup> who are not known to have decreased Fourth Amendment protections by criminal convictions<sup>282</sup> producing a large set of individuals (hundreds of thousands or millions of persons) who are subject to seizure at whim whenever they are in public; and

(c) a non-random selection from such generally dangerous persons (as so understood), comprising all carrying firearms, who are to be subject to seizure at whim whenever they are in public.

If we properly define the suspected likelihood of imminent action, persons in the first type of subset would be subject to a *Terry* stop. However, presence in the second type of subset (subset (b)) should not be a basis for authorizing a *Terry* stop at any time one is in public. Where there is substantial discretion in law enforcement to decide whom to stop within this large group of people (subset (b)), the possibility for abusive exercise of the power to seize, identified as problematic in, e.g., *Delaware v. Prouse*,<sup>283</sup> of the type prohibited by the core of the Fourth Amendment, remains.

When we frame the question in this way, the impropriety of allowing firearms possession to be a basis for initiating a *Terry* stop (the impropriety of authorizing a *Terry* stop for mere membership in the third subset (subset (c)) follows a fortiori. Here we do not have a mere random assignment into a large group of generally

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280. See *supra* notes 263–265 and accompanying text.

281. Given the increasing prominence of mass casualties caused by using a vehicle as a weapon, see *supra* note 266 and accompanying text, it is not even clear that this category, as it might have traditionally been understood, remains meaningful, unless *Delaware v. Prouse*, 440 U.S. 648 (1979), is revisited.

282. Again, we are excluding those who are known *ex ante* to have criminal convictions. See *infra* notes 284–290 and accompanying text.

283. See *supra* note 270.

dangerous persons who could be stopped throughout the day while engaging in ordinary activity. This risk is being occasioned on a subset of them because of their exercise of a civil right.

We can provide context by referencing two cases involving searches of probationers and parolees. They involve more intrusive searches than mere *Terry* stops and frisks. But, on the other hand, they involve searches restricted to those who have committed crimes. Insofar as either case is remotely close, it would suggest any balancing test applied to suspicionless searches of persons merely for being armed in public is unreasonable. The latter of the two cases, in the view of the three dissenting justices, is more than just a close question. To add more confirmation, the reasoning in each was rejected by the Iowa Supreme Court addressing a state constitutional analogue.<sup>284</sup>

In validating a search of a probationer's apartment in *United States v. Knights* on mere reasonable suspicion, the Supreme Court took pains to note that it was leaving unanswered whether a search absent individualized suspicion was lawful.<sup>285</sup> And in concluding "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house,"<sup>286</sup> the court expressly relies on the fact that "[t]he recidivism rate of probationers is significantly higher than the general crime rate."<sup>287</sup> That the Court reserves this question—the legality of searches, without reasonable suspicion, of a set of persons with criminal convictions—urges strongly against the suspicionless *Terry* stops of persons in the general public merely for being armed.

*Samson v. California* holds, "[T]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee."<sup>288</sup> In reaching the conclusion, the Court notes, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."<sup>289</sup> Notwithstanding that diminished expectation of privacy, the outcome prompted three justices to dissent.<sup>290</sup> In sum, balancing ad hoc, otherwise suspicionless searches of criminals is proximate to or verging on failing the Fourth Amendment.

*United States v. Cruikshank* states, as to the Second Amendment, "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution."<sup>291</sup> As the Court makes more explicit in its discussion of other rights in the Bill of Rights, the reference to the right not being granted by the Constitution does not connote nonexistence of the right but, rather, references

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284. *State v. Short*, 851 N.W.2d 474, 500, 506 (Iowa 2014). *But cf.* *United States v. Lewis*, 674 F.3d 1298, 1303 (11th Cir. 2012) (relying on *Samson v. California*, 547 U.S. 843 (2006), to conclude that one in the company of an armed person could be the detained).

285. 534 U.S. 112, 120 n.6 (2001) ("We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy (or constituted consent) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." (citation omitted)).

286. *Id.* at 121.

287. *Id.* at 120.

288. 547 U.S. 843, 857 (2006).

289. *Id.* at 850.

290. *Id.* at 857.

291. 92 U.S. 542, 553 (1875).

it as arising independent of the Constitution.<sup>292</sup> If randomly selecting hundreds of thousands or millions of persons alleged generally to have a heightened capability to injure a number of persons who can be subject to seizure at governmental whim while in public is unreasonable under the Fourth Amendment, it is surely unreasonable to create a subgroup by further selecting those who have chosen to exercise a civil right that “[t]he government of the United States when established found . . . in existence.”<sup>293</sup>

One wishing to curtail firearms possession might assert that there are inherently limits to the exercise of constitutional rights. For example, the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* notes:

What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the

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292. The Court states elsewhere:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It “derives its source,” to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, “from those laws whose authority is acknowledged by civilized man throughout the world.” It is found wherever civilization exists. *Id.* It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

92 U.S. at 551–52 (citation omitted) (quoting and citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

293. See *supra* note 292.

Leider, on the other hand, articulates the following justification for giving deference to a state’s choice to treat non-licensure as an element in assessing whether a *Terry* stop is authorized (an approach he elsewhere rejects):

In some cases, there may be some expressivism in choosing whether to make the licensing question an element or a defense. Non-licensure, as an element, may signal the legislature’s focus is on engaging in the activity without a license. In contrast, where having a license is a defense, the legislature may make a judgment that the underlying conduct is *prima facie* wrong, but that society will merely tolerate it when the person has received prior permission to engage in the activity.

Thus, for example, the government might have the burden in driver’s license cases. . . .

But the same is not true of carrying a concealed weapon. The carrying of a concealed weapon facilitates unlawful violence. Society will *tolerate* it when a person goes through a procedure to become properly qualified. Because, however, the regulated conduct creates the social ills, police have a right to intervene and check whether the person possesses the required license.

Leider, *supra* note 3, at 426–27 (footnote omitted). Treating the right to be armed as something society merely will tolerate does not comport with the right being one long recognized as right predating the Constitution, see *supra* notes 291–292 and accompanying text, and expressly identified for governmental recognition as a bulwark against depriving citizens of their other civil rights. See *infra* notes 334–336 and accompanying text.



unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.<sup>294</sup>

So, one might assert some balancing test allows some curtailment of any civil right to bear arms in public. The balancing of ancillary aspects of the exercise of a protected right and the alleged benefits of curtailing that ancillary exercise is a conclusory undertaking. We shall below (in Part VI.D) provide some observations on the relationship of risks and benefits, relative to those in other contexts, which support caution in reliance on a balancing rationale to conclude these firearm rights may be curtailed.

Of course, if particular firearms possession could not be prohibited or restricted, it would be unlawful to attempt to condition that exercise on forfeiture of an otherwise applicable right to be free from an unreasonable seizure.<sup>295</sup> *Heller* suggests this type of balancing cannot justify restriction of firearm rights:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>296</sup>

But, even if a state could ban some public firearms possession by law-abiding citizens following some balancing rationalization, that does not inherently imply it could condition the possession on release of a constitutional right (freedom from an unreasonable seizure). If the balancing rationalizing allows prohibition of firearms possession, one might reframe the issue at hand as follows:

Even if a particular mode of firearms possession could be prohibited, can the government grant a benefit involving firearms possession on the condition that the beneficiary surrender a constitutional right—the right to be free from seizures with significant safety concerns (and possibly as

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294. 505 U.S. 833, 877 (1992) (plurality opinion). Filling the content of the Second Amendment by analogy to authority concerning abortion is contemplated in Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285 (2009).

295. Cf. Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J. F. 369, 372 (2016) ("[G]overnment may not deny a benefit to a person because he exercises a constitutional right"—and a fortiori it may not do so if that benefit is itself a legally protected right." (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983)))).

296. 554 U.S. 570, 634–35 (2008). See also *infra* note 341. Dery criticizes *Heller's* rejection of balancing, claiming the opinion's reference to Fourth Amendment jurisprudence containing balancing is inconsistent. Dery, *supra* note 3, at 36–37. One should think relevant the express reference to something being "unreasonable," U.S. Const. amend. IV, in one but something "shall not be infringed," U.S. Const. amend. II, in the other.

well intrusive searches) otherwise in violation of the Fourth Amendment?<sup>297</sup>

Kathleen Sullivan begins a piece noting, “The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>298</sup> Some older authority takes the position that the “greater power to withhold a benefit included the lesser power to grant it upon condition,”<sup>299</sup> a view Sullivan identifies as rejected by the contemporary doctrine of unconstitutional conditions.<sup>300</sup>

Some contemporary authority allows this type of condition where the arrangement is characterized as conditioning a *subsidy* on surrender of some constitutional right. But the taxonomy is important: A non-de minimis *penalty* for failure to surrender a constitutional right is problematic, while conditioning *receipt of a subsidy* on how one exercises a constitutional right may be allowed. For example, Justice Rehnquist wrote, “We have held in several contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.”<sup>301</sup>

Sullivan notes, “[T]he characterization . . . as a ‘penalty’ or as a ‘nonsubsidy’ depends on the baseline from which one measures.”<sup>302</sup> At times, identifying the “baseline” (or frame of reference) may be contentious.<sup>303</sup> We have no such indeterminacy in the case at hand, however: *Cruikshank* would indicate the right is already in existence<sup>304</sup>—it is not merely by governmental dispensation that one may be armed to protect oneself, so the deprivation is inherently a penalty. So, even if a court were to reject the ordinary lower-court treatment of the Second Amendment as extending to possession outside the home,<sup>305</sup> the default—the baseline—has already been recognized as being allowed to be armed for self-defense.

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297. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1424–25 (1989) (describing regulatory exemptions as occupying a “twilight zone between the forbidden and the compelled”).

298. *Id.*

299. See *id.* at 1459.

300. *Id.* at 1415.

301. *Regan v. Tax’n with Representation of Wash.*, continues:

*Buckley v. Valeo* upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Harris v. McRae* and *Maher v. Roe* considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.

461 U.S. 540, 549 (1983) (citations omitted) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976), *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977)).

302. Sullivan, *supra* note 297, at 1436.

303. See *id.* at 1420.

304. See *supra* notes 291–292 and accompanying text.

305. See *supra* notes 10–11 and accompanying text.

In sum, *Terry* stops are not authorized merely because a person has the capability of killing dozens of persons as might happen with a deranged user of a handgun in public. The magnitude of death that might be caused by driving a vehicle into a crowd is comparable. This level of capacity to inflict injury is not, by itself, sufficient to authorize a *Terry* stop. If that is the case, then it violates the principles of unconstitutional conditions to condition the right to possess a firearm on consent to such searches. And that result does not depend on the Second Amendment extending to possession in public, because the benchmark provided by *Cruikshank* demonstrates that public possession is some form of right—it is not a governmental “subsidy.”

#### D. Balancing the Benefits of Terry Stops of Armed Persons

Although the doctrine on unconstitutional conditions would seem to prohibit an explicit attempt to allow unfettered *Terry* stops of armed persons, a court might seek to apply a *sui generis* balancing test.<sup>306</sup> It is not ventured to be innovative to note that such a “balancing test” is not a “test,” in the sense of a rigorous decision-making algorithm, at all. Rather, it is a rationalization formed by the mere recitation of facts and circumstances followed by conclusory determination. The circumstances vary on multiple dimensions, preventing rigorous deductive analysis.

For example, one cannot ascribe a value to the difference between merely being stopped and being stopped and frisked. And it is impracticable to measure, for purposes of constitutional impact, the difference between a death as opposed to the infinite degrees of serious physical injury. And it is not clear how one “balances” governmental infliction of serious injury on the innocent, or even the substantial emotional distress arising from having an officer point a firearm at an innocent person. Prohibited suspicionless searches of motorists would vary from suspicionless searches of armed persons in terms of, *inter alia*,

(i) the number of deaths that would be prevented;

(ii) the number of serious injuries that would be prevented;

(iii) the heightened likelihood an officer would deploy a loaded firearm during the stop, causing severe emotional impact or serious physical injury on innocents; and

(iv) the indignity, or other constitutionally cognizable injury, to a stop (for motorists) compared to a stop and the more likely accompanying frisk (for weapons possessors).

The last two distinctions are particularly salient. As noted above, stops of persons known to be armed present idiosyncratic risks of governmentally-effected killing or serious injury of the innocent.<sup>307</sup> The risk is sufficiently severe that anecdotal evidence would suggest that, for some, it is sufficient to relinquish exercise of a

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306. Cf. *supra* note 296 and accompanying text (rejecting balancing in the Second Amendment context).

307. See *supra* note 85 and accompanying text.

right<sup>308</sup> (a right that most lower courts hold protected by the Second and Fourteenth Amendments).

One cannot analytically engage an outcome-centric application of a “balancing” rationalization, unless one can find precedent involving a more compelling case for a particular conclusion in which the circumstances at hand can be identified as even more supportive of the conclusion on all possibly relevant dimensions. Moreover, it is not clear how one alters in the balancing the assessment of a death that arises from being unable to defend oneself or from being wrongfully killed by the government, relative to some other death being prevented.

We have above<sup>309</sup> examined the results of balancing in recent Supreme Court authority addressing stops of parolees and probationers, relying on high recidivism rates for the group in authorizing searches: *United States v. Knights*<sup>310</sup> and *Samson v. California*.<sup>311</sup> One view would be that the fact these cases are close or are rejected under a state analogue would militate against allowing *Terry* stops to be authorized against someone merely for being armed.<sup>312</sup>

If it were clear that suspicionless stops without neutral criteria of those who have firearms would produce smaller reductions in deaths and injuries than such suspicionless stops of drivers, one supposes that would end the matter.<sup>313</sup> Be that as it may, for those who would seek refuge in attempting to apply a balancing test in this context to validate the seizure, one can note that the safety concerns of public firearms possession (and thus, the benefits of generally stopping armed persons) are smaller than may be apparent.

First, any justification for stopping those who are armed must be derived from some *a priori* likelihood that the armed person is not lawfully licensed. Statistics show that persons who are lawfully licensed to carry firearms are much more law-abiding than the public as a whole.<sup>314</sup> And there is even a suggestion they are more law abiding than police officers<sup>315</sup>—a group that the federal government has considered so suitable generally to carry firearms that it preempts application to them, while employed or even in retirement, of state and local restrictions on firearms possession on non-governmental property.<sup>316</sup>

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308. See *supra* notes 87–88 and accompanying text.

309. See *supra* notes 284–290 and accompanying text.

310. 534 U.S. 112 (2001).

311. 547 U.S. 843 (2006).

312. *But cf.* *United States v. Lewis*, 674 F.3d 1298, 1305–06 (11th Cir. 2012) (relying on *Samson*, 547 U.S. 843, to conclude that one in the company of an armed person could be the detained).

313. See *generally supra* notes 268–272 and accompanying text (discussing invalidating such stops of drivers).

314. *Moore v. Madigan*, 702 F.3d 933, 937–38 (7th Cir. 2012) (“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.”); *Lott et al., supra* note 64, at 4 (“Concealed handgun permit holders are extremely law-abiding. In Florida and Texas, permit holders are convicted of misdemeanors or felonies at one-sixth the rate that police officers are convicted.”).

315. *Lott et al., supra* note 64, at 13 (“Combining the Florida and Texas data together implies that permit holders are convicted of misdemeanors and felonies at less than a sixth the rate for police officers.”).

316. 18 U.S.C. §§ 926B, 926C (Westlaw through Pub. L. No. 115–140).

Second, firearms are used to commit murder much less frequently than individuals are killed on the roadways<sup>317</sup>—and, by the way, firearm murders are over an order of magnitude below the number of preventable deaths from hospitals each year, estimated in the hundreds of thousands.<sup>318</sup> Now, this information by itself would not get to the heart of the matter, which would require identifying the number of deaths or injuries that could be eliminated by the suspicionless stops in the various contexts. But it would provide some impediment to rationalizing treating firearms possession differently by vague reference to a balancing test.

Third, there is some suggestion that addressing wrongful firearms possession is not understood by the government itself as being as high a priority as one might think, if the government thought it suitable to stop anyone for merely possessing a firearm. Each year, thousands of persons attempt to acquire firearms but have the transaction denied because they fail a record check. The National Instant Criminal Background Check System (“NICS”) is used by dealers to determine whether a prospective transferee is prohibited in possessing firearms.<sup>319</sup> Completing the application for a check requires a person provide government identification.<sup>320</sup> The identification information is required to be recorded on a form,<sup>321</sup> which is kept by the dealer for at least five years.<sup>322</sup>

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State law will often identify some locations where firearms cannot be carried by private persons, evidently reflecting that firearms possession there is particularly problematic. For example, it might be a location where many people are densely congregated. *E.g.*, CAL. PENAL CODE § 17510 (Westlaw through 2017 Reg. Sess.) (criminalizing carrying a concealed firearm while picketing). But, if one is merely a retired out-of-state law enforcement officer with the required credential, one can possess a firearm there. The objective in stopping firearms possessors for that alone cannot plausibly be to ascertain whether a lawful possessor is, at the time, engaged in unlawful activity.

317. See *supra* note 231 and accompanying text.

Those seeking to ban firearms often combine firearms murders with the more frequent use of firearms for suicide. Putting aside the general impropriety of combining those statistics when one speaks of the danger generally associated with firearms, including firearms used in suicide is particularly inapt for this purpose.

The most comparable statistics would involve public firearms possession causing any death—for that is what a *Terry* stop would be designed to address—and highway deaths. As to firearm deaths, one would exclude firearms use by a person in his own home (no transit being required) as well as suicides there.

318. John T. James, *A New, Evidence-based Estimate of Patient Harms Associated with Hospital Care*, 9 J. PAT. SAFETY 122, 122 (Sept. 2013) (“Using a weighted average of the 4 studies, a lower limit of 210,000 deaths per year was associated with preventable harm in hospitals. . . . [T]he true number of premature deaths associated with preventable harm to patients was estimated at more than 400,000 per year. Serious harm seems to be 10– to 20–fold more common than lethal harm.”).

319. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT OF THE HANDLING OF FIREARMS PURCHASE DENIALS THROUGH THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM, at i (Sept. 2016).

320. The instructions state: “The transferee/buyer must provide a valid government-issued photo identification document to the transferor/seller that contains the transferee’s/buyer’s name, residence address, and date of birth.” BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF E-FORM 4473, OMB No. 1140-0020 (Oct. 2016), at 5 (providing instruction to Question 18a).

321. *Id.* at 2 (Question 18a).

322. 27 C.F.R. § 478.129(b) (Westlaw through Mar. 22, 2018). The retention period for completed transactions is longer. *Id.*

The form essentially tracks the prohibitions on firearms possession.<sup>323</sup> Making a misstatement on the form is a criminal offense.<sup>324</sup> Between fiscal years 2008 and 2015, there were 556,496 NICS transactions denied by the FBI.<sup>325</sup> A government concerned about mere unlawful possession of firearms would take advantage of this data, which captures evidence that ought to make identification and location of violators (by attempt) rather straightforward—their identification information is handily on file.

Nevertheless, “[t]he [U.S. Attorneys’ Offices] accepted for consideration of prosecution 254 subjects (or less than 32 subjects per year), declined to prosecute 272 subjects, and decisions for 32 were pending at the time of [the Department of Justice’s 2016] review.”<sup>326</sup> That is a prosecution rate of less than 0.05%.<sup>327</sup> And the prosecution rate has dropped dramatically since 2003.<sup>328</sup>

We don’t know how many of the denials are wrongful.<sup>329</sup> Let us say that the overwhelming majority are wrongful. By way of example, let’s say it is 99%. Even in that case—a check process that is overwhelmingly riddled with inaccuracies—that would mean that only one of twenty of the persons who commit a serious felony involving firearms possession,<sup>330</sup> for which the proof has been captured and retained, are prosecuted by the federal government. One cannot say the need to arrest persons who wrongfully seek to possess firearms is so urgent that

(x) lawful firearms possessors should be subjected to ad hoc gropes and seizures involving heightened risk of wrongful governmental infliction of death or serious bodily injury, and

(y) some segment of society particularly worried about these safety implications will disproportionately entirely forego the exercise of what is normally considered a protected right—

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323. Compare 18 U.S.C. § 922(d), (g) (Westlaw through Pub. L. No. 115–140) with ATF, E-FORM 4473, QUESTIONS 11A–I, 12A–D (Oct. 2016).

324. *E.g.*, 18 U.S.C. § 922(a)(6) (Westlaw through Pub. L. No. 115–140) (containing a materiality limit); § 924(a)(1)(A); *United States v. Sullivan*, 459 F.2d 993, 994 (8th Cir. 1972) (“Appellant contends that an element of materiality should be read into the language concerning false statements made for the dealer’s records. We disagree. While a violation of 18 U.S.C. § 922(a)(6) expressly requires a showing of materiality no such expression is found in § 924(a).”); accord *United States v. Johnson*, 680 F.3d 1140, 1144 (9th Cir. 2012). See generally *Abramski v. United States*, 134 S. Ct. 2259 (2014) (addressing a straw purchase for a permitted purchaser).

325. OFFICE OF THE INSPECTOR GEN., *supra* note 319, at i.

326. *Id.* at iv.

327. The number of subjects is slightly larger than the number of transactions (a transaction may involve more than one subject). See *id.* at 4 (identifying nine percent more subjects referred for prosecution than transactions (558 vs. 509)).

328. *Id.* at iv.

329. But see generally Matt Stroud, *CPRC in the Associated Press on Background Checks*, CRIME PREVENTION RES. CTR. (Dec. 9, 2014), <https://crimeresearch.org/2014/12/cprc-in-the-associated-press-on-background-checks/> (“That implies an initial false positive rate of roughly 94.2%. And it still doesn’t mean that the government hasn’t made a mistake on the remaining cases. In some cases for example, a person’s criminal record was supposed to be expunged, and it had not been.”).

330. The ratio of 0.05% to 1.0% is one-twentieth.

if the more low-hanging fruit is not prosecuted.

One might assert that *Terry* stops are effective and necessary, pointing to, for example, the relationship between *Terry* stops and decreasing crime rates in New York City. Yet one would need to focus on whether the New York City experience involves activity to be emulated.<sup>331</sup> A recording posted on *The Daily Caller* attributes the following to former-Mayor Michael Bloomberg:

. . . controversial but the first thing is all of your [unintelligible] . . . 95% of your murders . . . murderers and murder victims, fit one MO. You can just take the description, Xerox it, pass it out all the time. They are male, minority 15 to 25. It's true in New York. It's true in virtually every city. And that's where the real crime is. You've got to get the guns out of the hands of the people who get killed. . . .

. . . .

And in New York when . . . before Rudy Giuliani got elected, we'd get 2300 murders. When he left office, that was down to 660 murders. When I left office, it was down to 333 murders a year. . . .

. . . .

In other cities where they haven't gone after the [unintelligible] the kids to get guns out of them . . . . A lot of people don't like the fact that's what they do. But that's what stop and frisk is all about. And that's . . . what you have to do is you have to spend money on your police department. New York City is 8–1/2 billion dollars a year.<sup>332</sup>

Because the process in New York was odious, one cannot rely on any beneficial results of an *odious* process as a basis to assert *proper* *Terry* stops will produce desirable results.

Additionally, the estimates of defensive use of firearms dwarf their use in murders. A survey prepared under the auspices of the National Academy of Sciences of research on defensive firearms use states, "Almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million, in the context of about 300,000 violent crimes involving firearms in 2008."<sup>333</sup> So, insofar as one is balancing the safety rationale for *Terry* stops of firearms possessors, one would need to weigh the extent to which these stops may

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331. The circumstances considered in *Ligon v. City of New York*, 925 F. Supp. 2d 478, 521 (S.D.N.Y. 2013), involve a putative policy prohibiting stops merely for entering or exiting a posted building. *But see id.* at 495, 521–22 (noting prior stops for mere presence and concluding that there was inadequate evidence that training "affected the magnitude of unlawful trespass stops").

332. Chuck Ross, *Here's Audio from the Event Michael Bloomberg Is Trying to Block from Being Broadcast*, DAILY CALLER (Feb. 16, 2015), <http://dailycaller.com/2015/02/16/heres-audio-from-the-event-michael-bloomberg-is-trying-to-block-from-being-broadcast-audio/>.

333. COMM. ON L. & JUSTICE, DIV. OF BEHAVIORAL & SOC. SCIS. & EDUC. et al., PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (Alan I. Leshner et al., eds. 2013) (citations omitted) (continuing, "On the other hand, some scholars point to a radically lower estimate of only 108,000 annual defensive uses based on the National Crime Victimization Survey." (citation omitted)).

operate to suppress firearms possession that would otherwise prevent felony victimization, e.g., by those, including the increasing number of female firearm carriers who are unwilling to submit to groin gropes.

If one could assemble this information, one might be able to assess the frequency with which *Terry* stops without individualized suspicion may, in the aggregate, be better in preventing personal injury if applied to those who are driving and those who are suspected of possessing a firearm. If the former is more productive, that, of course, might be sufficient for ending the “balancing.” Because a *Terry* stop of a person suspected of possessing a firearm inherently involves a person suspected of being armed, such a stop has a higher likelihood of also involving a frisk. So, any “balancing,” comparing the circumstances in *Prouse* to those at-issue, would also have to account for the differential likelihood of an intrusive search. There is not a metric by which one can “balance” increasing frequency of intrusive searches with vague safety concerns. They cannot be put on a single scale for purposes of comparison.

The governmental imprimatur for being armed for self-defense was reaffixed at the time the Fourteenth Amendment was adopted. *Heller* notes, “Antislavery advocates routinely invoked the right to bear arms for self-defense.”<sup>334</sup> Clayton Cramer concludes that racially tinged state firearms regulations precipitated the adoption of the Fourteenth Amendment.<sup>335</sup> Nicholas Johnson and co-authors note

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334. *District of Columbia v. Heller*, 554 U.S. 570, 609 (2008) (noting a Senate speech stating, “[T]he Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment.” (quoting *The Crime Against Kansas*, May 19–20, 1856, in *AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR* 553, 606–607 (T. Widmer ed. 2006)). See generally Dery, *supra* note 3, at 9–10 (providing additional detail).

335. Cramer writes:

The end of slavery in 1865 did not eliminate the problems of racist gun control laws. The various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms or bowie knives. These Codes are sufficiently well-known that any reasonably complete history of the Reconstruction period mentions them. These restrictive gun laws played a part in provoking Republican efforts to get the Fourteenth Amendment passed. Republicans in Congress apparently believed that it would be difficult for night riders to provoke terror in freedmen who were returning fire.

It appears that the Fourteenth Amendment’s requirement to treat blacks and whites equally before the law led to the adoption of restrictive firearms laws in the South that were equal in the letter of the law, but unequally enforced.

Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 *KAN. J.L. & PUB. POL’Y* 17, 20 (1995) (footnote omitted).

The context of the adoption of the Fourteenth Amendment may be illuminated by reference to the view it negates, expressed by the Supreme Court to support the conclusion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. The *Dred Scott* opinion supports its conclusion by asserting that the converse outcome would, *inter alia*, allow Black residents “to keep and carry arms wherever they went.” The opinion states:

More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, . . . it would give them the full liberty . . . to keep and carry arms wherever they went. And all of this would be done in the face of the



a repeating pattern in which freedmen would be forcibly disarmed, facilitating subsequent intimidation and violence.<sup>336</sup> To restrict this warrantless rummaging of one's person (and potentially inside luggage that ordinarily would contain documents),<sup>337</sup> and these stops involving heightened risk of the government seriously injuring the innocent, to those who wish to exercise a civil right recognized to prevent deprivation of other civil rights on account of racial animus, would, one supposes, make it all the worse.

In sum, those who would retreat to rote recitation of a balancing test rationalizing a conclusion that all armed persons can be stopped would need to sweep away:

(i) persons lawfully licensed to carry concealed firearms are highly law-abiding, relative to the population as a whole and police officers—persons generally authorized to possess firearms in public, even in high-vulnerability locations;

(ii) firearm murders are much less common than roadway deaths and preventable deaths from hospitals;

(iii) wrongful possession of a firearm is not evidenced as a high governmental priority, by virtue of the minuscule federal prosecution rate for those who make misstatements in firearm background checks in attempts to possess firearms;

(iv) one cannot rely on any alleged efficacy of *Terry* stops implemented in a noxious way;

(v) any suppression of defensive carrying of firearms is problematic, where they are defensively used orders of magnitude more frequently than they are used to murder; and

(vi) these stops of armed persons have heightened risk of the government seriously injuring the innocent.

#### E. First Amendment Analogues

One inclined nevertheless to focus on a *sui generis* balancing test may profit by drawing an analogy to authority addressing the interaction between *Terry* and the First Amendment. To proceed in that way, one would first need to conclude that

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subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

*Dred Scott*, 60 U.S. at 416–17. See generally NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 277–78 (2014) (noting the language); Cramer, *supra*, at 19–20 (same).

336. JOHNSON ET AL., *supra* note 335, at 292.

337. See *Cady v. Sheahan*, 467 F.3d 1057, 1062 (7th Cir. 2006) (validating *Terry* search of a briefcase that allegedly included opening a Bible contained in the briefcase resulting in identifying the seized person's name); *United States v. McClinnhan*, 660 F.2d 500, 503 (D.C. Cir. 1981) (allowing search of a briefcase), *abrogation on other grounds recognized by United States v. Thompson*, 234 F.3d 725, 728 (D.C. Cir. 2000).

the Second Amendment protects a right to bear arms in public (as lower courts typically do).<sup>338</sup>

*Heller* itself, in sketching the contours of the civil right not previously addressed by the Court, makes analogy to First Amendment jurisprudence,<sup>339</sup> among other things noting the Court did not first find a law to violate the First Amendment until 1931.<sup>340</sup> Scalia's opinion rejects an interest-balancing test as the means for assessing compliance with the Second Amendment, concluding the "balancing" has already been done in the adoption of the constitutional provision itself.<sup>341</sup>

Commentators as well have sought to fill the content of the Second Amendment by making that analogy to the First Amendment.<sup>342</sup> A potentially relevant string of authority addresses whether display of religious symbols or texts can be a factor in a *Terry* stop.

A Fifth Circuit case, *Estep v. Dallas County, Texas*, describes a lower court in *United States v. Ramon* as "holding that in the absence of other sufficiently strong factors supporting a stop, reliance upon the vehicular display of religious decals and symbols as indicative of criminal activity likely violates the First and Fourth Amendments."<sup>343</sup> *Estep* itself holds that expression protected by the First Amendment, the display of an N.R.A. sticker on a vehicle, cannot be a basis for concluding a stopped person is dangerous.<sup>344</sup> Other authority is more equivocal in its treatment of

338. See *supra* notes 10–11 and accompanying text.

339. E.g., *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not.").

340. *Id.* at 625–26 (further noting, "[I]t was not until after World War II that we held a law invalid under the Establishment Clause.>").

341. See *supra* note 296 and accompanying text. See generally Volokh, *supra* note 15, at 1487–88 ("But as *Heller* correctly concluded, right to bear arms provisions embody the judgment that the danger posed by private ownership of the normally dangerous weapons is justified by the benefits of gun ownership for, among other things, private self-defense. This is much like the constitutional judgment that the danger posed by First-Amendment-protected speech praising violence, or by criminals who are harder to catch as a result of the Fourth Amendment or harder to prosecute as a result of the Fifth and Sixth Amendments, is justified by the benefits that those constitutional provisions yield.>").

342. E.g., Volokh, *supra* note 15, at 1511 (in discussing age limits, drawing analogy to that issue in First Amendment analysis).

343. 310 F.3d 353, 358 (5th Cir. 2002) (citing *United States v. Ramon*, 86 F. Supp. 2d 665, 677 (W.D. Tex. 2000)); see also *United States v. Magana*, 544 F. Supp. 2d 560, 567 (W.D. Tex. 2008) ("Because displaying a religious symbol on a vehicle constitutes symbolic speech, and is protected by the First Amendment's freedom of expression, it is impermissible for law enforcement to use religious paraphernalia in their reasonable suspicion calculation."). See generally *United States v. Townsend*, 305 F.3d 537, 544 (6th Cir. 2002) ("We agree with the district court that the Bible, in this case, is a very weak indicator of criminal activity."); *United States v. Guerrero*, 472 F.3d 784, 788 (10th Cir. 2007) ("The presence of religious iconography in the vehicle is, similarly, not merely consistent with innocent conduct but so broad as to provide no reasonable indicium of wrongdoing;" summarizing *United States v. Valenzuela*, 365 F.3d 892, 900 (10th Cir. 2004), as follows: "dismissing as 'beyond the pale' the government's argument that the presence of American flag decals on a car contributed to reasonable suspicion"). See generally Bradlee H. Thornton, Comment, *Soccer Mom or Drug Trafficker?: Why the Consideration of Religious Symbols in an Officer's Reasonable Suspicion Calculus Does Not Offend the First Amendment*, 42 TEX. TECH L. REV. 123 (2009) (discussing consideration of religious symbols as a basis to initiate a stop).

344. *Estep*, 310 F.3d at 358. The opinion states:

whether First Amendment activity may be a factor in giving rise to a basis for a *Terry* stop.<sup>345</sup>

If the understanding of *Ramon* referenced in *Estep* is correct, it would provide strong support for rejection of the view that firearms possession justifies a *Terry* stop. *Ramon* involves an ancillary exercise of religion that cannot be relied-upon in initiating a *Terry* stop. We are considering instead the core exercise of a civil right to authorize a *Terry* stop. If a minor manifestation of an analogous civil right cannot justify a *Terry* stop, a stop cannot be authorized by each and every core exercise of the civil right to bear arms.

#### F. Statistics Alone

One might note that, before initiating a *Terry* stop for suspected firearms possession, an officer often would not know whether the firearms possession was lawful (absent some prior personal knowledge of the individual to be detained). The frequency with which firearms possession is licensed varies tremendously among jurisdictions. In some locations that broadly allow or broadly license firearms possession, one cannot make even an argument based on mere statistics that reasonable suspicion a person is possessing a firearm gives rise to reasonable suspicion the individual is doing so unlawfully. But, in some jurisdictions, such an argument could be made.<sup>346</sup> The better view here would appear to be that statistical analysis

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The presence of the NRA sticker in the vehicle should not have raised the inference that *Estep* was dangerous and that he might gain immediate control of a weapon. Regardless of whether there is some correlation between the display of an NRA sticker and gun possession, placing an NRA sticker in one's vehicle is certainly legal and constitutes expression which is protected by the First Amendment. A police officer's inference that danger is afoot because a citizen displays an NRA sticker in his vehicle presents disturbing First and Fourth Amendment implications.

*Estep*, 310 F.3d at 360. The discussion concludes, "The contention that a citizen poses an immediate danger because he possesses a key chain containing mace, camouflage gear, an NRA sticker, and does not answer questions in exactly the manner the officer desires is not suspicious enough behavior to justify a *Long* "frisk" of a vehicle. Thus, the search violated the Fourth Amendment." *Id.* at 360.

345. For example, *United States v. Pena-Gonzalez*, 618 F. App'x 195, 199 (5th Cir. 2015) (citations omitted), states:

We do have concerns that classifying pro-law enforcement and anti-drug stickers or certain religious imagery as indicators of criminal activity risks putting drivers "in a classic 'heads I win, tails you lose' position." But we need not decide whether these items alone, or in combination with one another, amount to reasonable suspicion because we find the more suspicious evidence to be the array of air fresheners and inconsistencies in the driver's responses to the officer's basic questions.

346. *E.g.* *Leider*, *supra* note 3, at 437–39; *see also supra* notes 204–205 and accompanying text (discussing New York authority).

For example, over the period 1987 through 2007, one sees in California only a handful of licenses issued in San Francisco (annual counts ranging between 2 to 11). See *CCW Counts by County*, <http://ag.ca.gov/firearms/forms/pdf/ccwissuances2007.pdf> (last visited July 3, 2016). This cryptic document does not unambiguously state whether it identifies outstanding licenses for a year or issuances in the year. It may well reference outstanding licenses, because there were only three licenses outstanding in 2009 issued by San Francisco law enforcement personnel. See *Pizzo v. City & Cty. of San Francisco*, No. C 09–4493 CW, 2012 WL 6044837, at \*8–10 (N.D. Cal. Dec. 5, 2012) (noting a total of three permits outstanding in 2009, one issued by San Francisco Police Department and two by the San Francisco Sheriff's Department;

in gross, not focused on a particular attribute beyond exercise of a fundamental right, is insufficient to initiate a *Terry* stop.

The New Mexico Supreme Court, for example, noted, “This does not endorse using general statistical probabilities or group characteristics to establish reasonable suspicion for a stop.”<sup>347</sup> The court cites other authority “recognizing that ‘the Fourth Amendment demands more than a generalized probability’ and concluding that ‘the search of a group of students gathering at the “smoker’s corner,” without reason to suspect that any particular student is in possession of contraband, is not constitutionally sound.”<sup>348</sup> The Louisiana Supreme Court in *State v. Saia*, concludes seeing a person exiting from a residence known to be a drug outlet did not give rise to reasonable suspicion crime was afoot.<sup>349</sup> The court relies on *Sibron v. New York*,<sup>350</sup> decided at the same time as *Terry*, which the *Saia* court summarizes as holding, “[T]he officer in the *Sibron* case did not have sufficient evidence to allow an investigatory stop after seeing the suspect confer with various known narcotic addicts for eight hours . . . .”<sup>351</sup>

It was the low rate at which law-abiding members of the public were licensed to carry firearms by the District of Columbia that accounted for invalidating the District’s licensure regime.<sup>352</sup> It would seem a somewhat odd collective state of affairs if there is some middle zone of licensure frequency that can allow *Terry* stops without individualized suspicion beyond firearms possession, but a lower frequency makes the firearms prohibition invalid and a higher frequency makes the *Terry* stop invalid.

There will be a significant variation in the percentage of persons carrying arms at a particular point in time whose possession is lawful. To allow reference to these statistics to authorize *Terry* stops for firearms possession alone means:

(i) individuals are subjected to *Terry* stops at will because there is present some combination of

(a) too small a percentage of others in their community who could lawfully exercise this civil right, one recognized as predating the founding of the country, opt to do so; and

(b) too large a percentage of felons do so; and

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one James F. Harrigan, legal counsel to the sheriff, stated the sheriff has not issued a permit to “any private citizen,” though he himself had been issued one of the two permits, notwithstanding his being only a civilian employee of the Sheriff’s Department.). See generally Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: The New Wave of Concealed Handgun Permit Laws, 62 TENN. L. REV. 679, 712–16 (1995) (discussing the variation within California and its relation to the rates of various crimes).

347. *State v. Yazzie*, 376 P.3d 858, 866 (N.M. 2016).

348. *Id.* (quoting *State v. Gage R.*, 243 P.3d 453 (N.M. 2010)).

349. 302 So. 2d 869, 873 (La. 1974).

350. 392 U.S. 40 (1968).

351. *Saia*, 302 So. 2d at 873 (discussing *Sibron*, 392 U.S. 40).

352. *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

(ii) individuals who endeavor to alter these statistics, which if successful would thereby eliminate the ability to stop them at-will, by engaging in lawful conduct, ironically make themselves targets of these seizures.

Deferring to this type of gross statistical analysis in determining a *Terry* stop is authorized seems inconsistent with typical principles. The following circumstances indicate that, in many cases, a single gross statistic, as one might categorize this, is insufficient on its own to authorize a *Terry* stop. So, one can see that exiting a residence known to be a drug outlet is not sufficient to authorize a stop.<sup>353</sup> There are, of course, individual locations where drug use, for example, is rampant. Yet, presence in a high-crime neighborhood alone is not enough. For example:

The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. . . .

In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.<sup>354</sup>

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353. *State v. Saia*, 302 So. 2d 869, 873 (La. 1974). See *supra* note 349 and accompanying text.

354. *Brown v. Texas*, 443 U.S. 47, 52 (1979). See also, e.g., *United States v. Young*, 707 F.3d 598, 603 (6th Cir. 2012) ("At minimum, an individual being in a high-crime area does not alone give rise to reasonable suspicion."); *United States v. Massenburg*, 654 F.3d 480, 488 (4th Cir. 2011) (stating, notwithstanding that the officers encountered few individuals, "To hold otherwise would be to authorize general searches of persons on the street not unlike those conducted of old by the crown against the colonists. Allowing officers to stop and frisk *any* individuals in the neighborhood after even the most generic of anonymous tips would be tantamount to permitting a regime of general searches of virtually any individual residing in or found in high-crime neighborhoods, where 'complaints' of 'random gunfire' in the night are all too 'usual[.]'. James Otis famously decried general searches as 'instruments of slavery . . . and villainy,' which 'place [ ] the liberty of every man in the hands of every petty officer,' warning against abuses by '[e]very man prompted by revenge, ill humor, or wantonness.' The Fourth Amendment, and the courts' Fourth Amendment jurisprudence, is aimed at this evil. Without reasonable *particularized* suspicion of wrongdoing, such searches and seizures offend the Constitution." (quoting Joint Appendix; and Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 722 (2000) (quoting James Otis, Speech on the Writs of Assistance (1761))); *United States v. Johnson*, 620 F.3d 685, 692 (6th Cir. 2010) ("The first two facts—presence in a high-crime location and the lateness of the hour—'may not, without more, give rise to reasonable suspicion,' but they may be considered in the totality of the circumstances." (quoting *United States v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006)); *United States v. Perrin*, 45 F.3d 869, 873 (4th Cir. 1995) ("Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside of his control.").

This last circumstance seems most analogous. If firearms possession authorizes a *Terry* stop, possessing a firearm in a may-issue regime is the analogue of presence in a high-crime neighborhood.<sup>355</sup> In either case, the gross statistic should not subject the law-abiding to seizures—seizures involving heightened risks of the government seriously injuring the innocent—and groin gropes at the whim of inferior state functionaries.

## VII. CONCLUSION

The primary contemporary approach concerning whether firearms possession alone provides a basis to initiate a *Terry* stop involves focus on whether, in the particular jurisdiction, firearms licensure is an affirmative defense to a base firearms possession crime or whether non-licensure is an element of the crime.<sup>356</sup> In the former case, firearms possession alone is treated as a basis to authorize a *Terry* stop, but not so in the latter.<sup>357</sup> A handful of contemporary courts, however, have taken a different approach. Relying on basic principles governing reasonableness, courts in some jurisdictions, surprisingly including Massachusetts, have concluded firearms possession alone is not an adequate basis to initiate a *Terry* stop.<sup>358</sup> And, relying on the infrequency with which the particular jurisdiction licenses firearms possession, some contemporary courts (primarily predating *McDonald's*<sup>359</sup> application of the Second Amendment to the states) have summarily concluded that firearms possession alone is sufficient to initiate a *Terry* stop, without focusing on whether non-licensure is an element.<sup>360</sup>

This Article concludes it is misguided to conclude a *Terry* stop is authorized by relying on the jurisdiction treating licensure as a defense. There are a number of reasons.

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355. Vernick and co-authors address the application of the Fourth Amendment to scanning technology designed to identify contraband. Vernick et al., *supra* note 128, at 571. Within that framework, they claim, “Two Supreme Court cases suggest that government conduct that has the potential to reveal only whether or not a person is in possession of contraband, and which is not otherwise intrusive, does not constitute a search for Fourth Amendment purposes.” *Id.* Further addressing the issue, they also note a possible bifurcation in treatment depending on whether a jurisdiction is “shall-issue” or “may-issue”:

According to this argument, concealed weapons will probably not be considered contraband in so-called “shall issue” states: states that require government officials to issue concealed weapon licenses to almost anyone who demonstrates firearms proficiency and passes a criminal background check.

There are at least three reasons to believe that courts might adopt this approach. First, it has the support of most commentators who have considered this issue.

*Id.* at 573.

356. See *supra* Part IV.B.

357. See *supra* Part IV.B.

358. See *supra* Part IV.C.

359. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

360. See *supra* notes 204–206 and accompanying text.

First, statutes typically are ambiguous as to whether licensure is an affirmative (as opposed to non-licensure being an element) of a base firearms crime. Comparable language can be construed in opposite ways in different jurisdictions.<sup>361</sup> The interpretation is often guided not by textual norms but, rather, by some other principle putatively designed to fathom the statutory purpose from the context.<sup>362</sup> So, we shall see jurisdictions putting the burden on the firearms possessor because it is claimed it is too difficult for the jurisdiction to prove non-licensure.<sup>363</sup> Contemporary technology is inconsistent with such a claim of impracticability.

The doctrine of constitutional avoidance provides that where a statute is ambiguous, and one possible interpretation raises some doubt as to its constitutionality, it should be interpreted so as to avoid presentation of the constitutional issue.<sup>364</sup> Now, the manner in which jurisdictions authorize *Terry* stop varies. It may be by statute, or it may be by judicial determination. It is submitted that to whatever combination is in effect in a particular jurisdiction, the doctrine of constitutional avoidance should be applied so as not to treat as authorized a stop for mere firearms possession.

Second, even if the statutory scheme were not susceptible to that interpretative approach, a focus on licensure as an affirmative defense should be rejected because it produces manifestly unsatisfactory results. That approach would, for example, authorize *Terry* stops of all persons entering a posted apartment complex in a jurisdiction having a basic trespass statute like that involved in *People v. Washington*.<sup>365</sup> That is precisely the type of excessive stopping of individuals that was at the heart of the discredited New York City policy.<sup>366</sup>

Although a legislature should be authorized to *restrict* searches that otherwise are permissible under *Terry*, it should not have the authority vastly to increase their scope—particularly not so through a casual drafting choice.

Rejecting that approach (one focusing on whether licensure is an affirmative defense or whether non-licensure is an element), we can now turn to an affirmatively satisfactory one. The Supreme Court has not yet determined whether the individual right to bear arms protected by the Second and Fourteenth Amendments extends to firearms possession outside the home. Contemporary lower courts typically hold it does or assume it does.<sup>367</sup>

The vast majority of jurisdictions have shall-issue handgun licensing regimes.<sup>368</sup> In these jurisdictions, one may be required to take proficiency training or testing, and not have a one of a number of relatively limited disqualifying factors, such as being a felon. In contrast, the District of Columbia's very restrictive may-issue policy was recently invalidated by the U.S. Court of Appeals.<sup>369</sup>

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361. See *supra* notes 242–245 and accompanying text.

362. See *supra* notes 246–249 and accompanying text.

363. See *supra* note 247 and accompanying text.

364. See *supra* note 239–241 and accompanying text.

365. 762 N.E.2d 698, 699–700 (Ill. App. Ct. 2002). The defendant alleged he was visiting a cousin, a child of the named tenant. *Id.* at 701.

366. See *supra* note 331 and accompanying text.

367. See *supra* notes 10–11 and accompanying text.

368. See *supra* note 52.

369. *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

Millions of persons carry firearms daily. Carrying a firearm for self-defense is not something that can be satisfactorily done sporadically. It is a precaution for events that may occur at times unknown.

Because firearms possession for self-defense can be essentially continuous, conditioning its exercise on being subject to a *Terry* stop would subject millions of individuals to at-whim seizure by officers. There is substantial support for the view that even checkpoints implementing neutral criteria to ascertain the licensure status of persons possessing self-defense firearms would be unconstitutional. In *City of Indianapolis v. Edmond*, the Court states, in invalidating narcotics checkpoints, “We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”<sup>370</sup> So, it would appear that even checkpoints using neutral criteria cannot be adopted merely to ascertain whether someone is criminally possessing what is, for the possessor, contraband.

The doctrine of unconstitutional conditions in part prohibits conditioning an activity on release of a constitutional right. The contours of the doctrine are not fully settled. But one of the guiding principles is, apparently, to distinguish between subsidies, on the one hand, and non-de minimis penalties, on the other hand. A subsidy may be denied on account of how one exercises a constitutional right, but a non-de minimis penalty may not be imposed.<sup>371</sup>

For these kinds of analyses, identifying the frame of reference is often difficult. What, from one perspective, appears a subsidy, from another perspective appears a penalty. However, we have authority that addresses this issue for firearms possession. *United States v. Cruikshank* describes the right to bear arms for self-defense as “not a right granted by the Constitution,”<sup>372</sup> by which it means one that arises independent of the Constitution.<sup>373</sup> So, its deprivation is necessarily a penalty—it is not a subsidy provided out of the beneficence of a benevolent government. That firearms possession alone may not authorize a *Terry* stop then, it would seem, follows a fortiori from *Delaware v. Prouse*, which invalidated seizures of motorists without particularized suspicion (and without substitute neutral criteria designed to obviate the concerns underling the Fourth Amendment).<sup>374</sup>

We have encountered manifestly vacuous judicial statements, reflecting ignorance of rudiments of firearms functionality and handling, proffered to support the fettering of firearms rights.<sup>375</sup> Of course, the typical move to avoid giving effect to a right is to assert that there is some balancing test, the result of whose application is to allow those acts found in favor by those doing the balancing, and discarding the rest. Without suggesting such a test is rigorous, or anything other than a rationalization, it bears note to those who would retreat to rote recitation of a balancing test, rationalizing a conclusion that all armed persons can be stopped, would need to sweep away:

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370. 531 U.S. 32, 41 (2000).

371. See *supra* notes 301–305 and accompanying text.

372. 92 U.S. 542, 553 (1875).

373. See *supra* notes 291–292 and accompanying text.

374. 440 U.S. 648, 663 (1979).

375. See *supra* notes 147–151 and accompanying text.



(i) persons lawfully licensed to carry concealed firearms are highly law-abiding, relative to the population as a whole and police officers—persons generally authorized to possess firearms in public, and in even the most vulnerable locations not authorized for the general public;

(ii) firearm murders are much less common than roadway death and preventable deaths from hospitals;

(iii) stops of persons merely for being armed inherently involves heightened risk that an innocent person will have a firearm pointed at him or her and be killed or injured, and, thus, the nature of the seizure is inherently more intrusive than seizures in other contexts, as in the ordinary traffic stop;

(iv) wrongful possession of a firearm is not evidenced as a high governmental priority, by virtue of the minuscule federal prosecution rate for those who make misstatements in firearm background checks;

(v) one cannot rely on any alleged efficacy of *Terry* stops implemented in a noxious way;

(vi) any suppression of defensive carrying of firearms is problematic, where they are defensively used orders of magnitude more frequently than they are used to murder; and

(vii) these stops of persons exercising firearms right have a heightened risk of the government seriously injuring the innocent.

One seizing on a balancing regime also would need to distinguish First Amendment analogues. Some authority is suspicious of considering religious items or symbols, such as bumper stickers, in deciding a *Terry* stop is authorized.<sup>376</sup> The impingement of the First Amendment right, by being a factor in authorizing a *Terry* stop, is much more modest than firearms possession authorizing a *Terry* stop. In the First Amendment context, that is an ancillary aspect of the exercise of religion. In the case of firearms possession alone authorizing a *Terry* stop, it is the core of the civil right's exercise that is fettered.

Lastly, one seeking to authorize these *Terry* stops without individualized suspicion might seize on gross statistics, particularly in jurisdictions that have may-issue licensure. Deferring to this type of gross statistical analysis in determining a *Terry* stop is authorized seems inconsistent with typical principles. In many cases, a single gross statistic, as one might categorize this (the relative proportion of persons in may-issue states whose firearms possession is unlawful), is not sufficient on its own to authorize a *Terry* stop. So, one can see authority that exiting a residence known to be a drug outlet is not sufficient to authorize a stop.<sup>377</sup> There are, of course, individual locations where drug use, for example, is rampant. Yet, presence in a high-crime neighborhood alone is not enough.

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376. See *supra* notes 343–345 and accompanying text.

377. See *supra* notes 349–351 and accompanying text.

This last circumstance seems most analogous. For firearms possession authorizing a *Terry* stop, the may-issue regime is the analogue of the high-crime neighborhood. Authorizing *Terry* stops for either presence in a high-crime location or mere firearms possession involves application of a gross statistic, which should consistently be found insufficient.