UC Law Journal

Volume 75 | Issue 6 Article 13

8-2024

The Impact of Bruen and Its Expansion of the "Right to Carry" on Terry as a Law Enforcement Tool

Kshitij Mehta

The Impact of *Bruen* and Its Expansion of the "Right to Carry" on *Terry* as a Law Enforcement Tool

KSHITIJ MEHTA[†]

In New York State Rifle & Pistol Association, Inc. v. Bruen, *the Supreme Court expanded the right to carry firearms, specifically handguns, outside the home. Due to the Court's conservative rulings, combined with lax and open firearm regulatory regimes in several jurisdictions, gun violence continues to create catastrophic consequences in communities across the country. At the same time, law enforcement agencies already struggle to maintain public safety and public trust under current policing systems. With the rise of firearms in the streets, law enforcement will likely resort to, and double down on, their current use of stop and frisk under* Terry v. Ohio. *But questions linger. When the right to carry is a fundamental right, what can truly be done when an officer deems a civilian with a firearm poses a security risk? Can carrying a firearm truly be considered "probable cause" under the Fourth Amendment? This Note surveys firearm regulations and Second Amendment jurisprudence to paint a clear picture as to what public firearm possession now looks like. This Note then addresses where courts have stood when Fourth Amendment searches have collided with Second Amendment possession principles. Finally, this Note discusses the case law solutions that can be expected, and whether those solutions may ameliorate, or increase, public mistrust in law enforcement.*

[†] J.D., Class of 2024, University of California, College of the Law, San Francisco; Executive Production Editor, *UC Law Journal*, Volume 75; B.S., 2019, California Polytechnic State University, San Luis Obispo. I thank Professors Zachary Price and Matthew Coles for their encouragement and gracious mentorship as I wrote this Note. I extend my gratitude to my peers at the *UC Law Journal* for their diligent work, editorial efforts, and invaluable feedback.

TABLE OF CONTENTS

INTRODUCTION

Firearms irreparably damage communities.[1] The vast majority of the public are opposed to weapons.[2] Despite this, gun rights in the United States have expanded over the past two decades. The Supreme Court's recent landmark decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."[3] In striking down much of New York's gun regulations, the Court made it clear "that the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[4] *Bruen* builds on the currently highly conservative Court's view that the clause in the Second Amendment, "the right of the people to keep and bear arms," protects one's right to own, carry, and use firearms for lawful purposes—expanding the scope of prior interpretations of the Second Amendment.[5]

The effect of this ruling is simple—there will be more guns on the street.[6] Without question, carrying a gun in public is dangerous, and can create apprehension and fear among those that observe such conduct.[7] But is handgun possession now *legally* suspicious activity if carrying a firearm in public is a fundamental right and a core American value?[8] *Bruen* leaves open the question of the effect on policing and law enforcement efforts to curb gun violence.

A civilian's possession of a firearm often, and understandably, raises an officer's reasonable suspicion that the civilian is engaged in dangerous and potentially criminal activity.[9] An officer's suspicion of criminal activity and the

---

1. Sanjay Gupta, *Dr. Sanjay Gupta: The Damage to the Human Body Caused by Firearms*, CNN (Mar. 28, 2023, 2:00 PM EDT), https://www.cnn.com/2022/06/08/health/gun-violence-human-body-damage-gupta/index.html ("The gun deaths are only a small fraction of those affected. The lives of people who are injured, the victims' families, friends and the community at large are forever ripped apart.").

2. Sara Burnett, *AP-NORC Poll: Most in US Say They Want Stricter Gun Laws*, ASSOCIATED PRESS (Aug 23, 2022, 6:20 AM PDT), https://apnews.com/article/gun-violence-covid-health-chicago-c912ecc5619e925c5ea7447d36808715 ("71% of Americans say gun laws should be stricter, including about half of Republicans, the vast majority of Democrats and a majority of those in gun-owning households.").

3. 597 U.S. 1, 8 (2022).

4. *Id.* at 17.

5. U.S. CONST. amend. II. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

6. *See* State v. Wilson, 543 P.3d 440, 459 (Haw. 2024) (describing the current state of gun regulation as a "federally-mandated lifestyle that lets citizens walk around with deadly weapons during day-to-day activities."). *See also* Greg Stohr, *Supreme Court Opens Path to More Guns in Public in Big US Cities*, BLOOMBERG L. (June 23, 2022, 10:52 AM PDT), https://news.bloomberglaw.com/us-law-week/supreme-court-voids-n-y-gun-limits-establishes-right-to-carry; Andrew Willinger, *Bruen's Practical Impact: What We Know and Where We are Going*, DUKE CTR. FIREARMS L. (Oct. 12, 2022), https://firearmslaw.duke.edu/2022/10/bruens-practical-impact-what-we-know-and-where-we-are-going.

7. Rupinder Johal, Steven Lippmann, William Smock & Cynthia Gosney, *Guns: Dangerous, Especially for Suicide, and Costly for America*, 7 PSYCHIATRY 14, 14 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2848468/pdf/PE_7_2_14.pdf. *See also infra* Part I.D.

8. *See* United States v. Homer, No. 23-CR-00086 (NGG), 2024 WL 417103, at *4–5 (E.D.N.Y Feb. 5, 2024) ("The question before the court in this case is whether, after the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, . . . the arresting officer had probable cause when he saw a person with a firearm in public but did not know the person's identity.").

9. *See infra* Part III.

following police response have often led to instances invoking the voluminous and controversial jurisprudence of the Fourth Amendment. The Fourth Amendment protects people from "unreasonable searches and seizures" but this clause has been stretched to account for police action in numerous settings.[10] This Note focuses on *Terry v. Ohio*, in which the Court created a standard for investigative stops and protective frisks by police officers, directing them to do so only when they have reasonable suspicion of criminal activity.[11] Since the Court's ruling in *Terry*, the use of "stop and frisk" by law enforcement has been controversial, with particularly negative effects on minorities.[12]

Even before *Bruen*, there was growing tension between the "right to carry" and law enforcement's ability to conduct *Terry* stops. An increase in public possession of firearms implicates both prongs of the *Terry* analysis: Whether possession of a firearm alone is enough to raise reasonable suspicion both that criminal activity is taking place and that the possessor is armed *and dangerous*. Prior to *Bruen*, the question of whether the act of carrying a gun is enough to raise reasonable suspicion to warrant a *Terry* stop was split among the federal circuit courts of appeals,[13] and the Supreme Court had not yet taken up a case directly on the issue.[14]

Bruen, unlike *District of Columbia v. Heller* and *McDonald v. Chicago*, brings tension between two fundamental rights: the right to carry a weapon under the Second Amendment and the right to be free from unreasonable searches and seizures under the Fourth Amendment. This Note argues that under *Bruen*, police officers today may be unable to justify many of the investigative actions that have, in the past, often led to evidence and arrests related to unlawful-possession violations. Questions linger as to whether firearm possession can even be a factor for officers to justify a *Terry* stop, let alone the only factor.[15] Can police automatically question an individual carrying a weapon regarding an individual's license to carry? Should police be able to question? In a time of increased firearm possession, evaluation of policing measures and clarity of "generally accepted practices" are necessary when law enforcement "failures" and "deficiencies" cause "unimaginable loss."[16]

10. U.S. CONST. amend. IV.

11. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

12. *See generally* Floyd v. City of New York, 959 F. Supp. 2d 540 (2013).

13. *See infra* Part III.

14. People v. Gomez, 105 N.E.3d 901 (Ill. 2018), *cert. denied*, 139 S. Ct. 1210 (2019).

15. *See generally* ROBERT VERBRUGGEN, MANHATTAN INST., "GETTING GUNS OFF THE STREET"—WHEN IT'S LEGAL TO CARRY GUNS ON THE STREET (Jan. 2023), https://static1.squarespace.com/static/5b7ea2794cde7a79e7c00582/t/64324c389ae6ab6d6fe40c2f/1681017912828/when-its-legal-to-carry-guns-on-street.pdf.

16. U.S. DEP'T OF JUST., EXECUTIVE SUMMARY: CRITICAL INCIDENT REVIEW, ACTIVE SHOOTER AT ROBB ELEMENTARY SCHOOL 1 (2024), https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-r1143-pub.pdf [hereinafter UVALDE REPORT].

Scholars expected that the U.S. Supreme Court would eventually address the question of public carry.[17] Now that the Court has done so, cementing the right to carry a handgun in public, there is a change to "the calculus of an officer [in] deciding whether to stop and frisk a public gun carrier."[18]

Following *Bruen*, the Court clarified its history and tradition test in *United States v. Rahimi* by stressing that courts must look for the "historical analogue" to justify modern firearm regulatory enforcement.[19] While *Rahimi* made clear that the right to bear arms under the Second Amendment isn't as absolute as what was presented in *Bruen*, the question remains whether possession of a firearm, notwithstanding some sort of "judicial determination" of a clear danger to others,[20] permits law enforcement to take limited precautions in the name of public safety.

This Note explores the question of whether "firearms possession is by itself sufficient for an officer to initiate a *Terry* stop"[21] and the different interpretations a court may take on the issue. If firearms possession on its own is not sufficient, what can officers do to be able to counteract the ongoing concerns over public firearms possession and to ensure possessors are truly lawful possessors? If possession alone is sufficient to initiate a *Terry* stop, does the resulting expansion on the permissive use of *Terry* further perpetuate the concerns of ineffective and unjust policing as found in *Floyd v. City of New York*?[22] Is there a better legal standard that can apply in such situations?

In Part I, this Note explores the evolution of Second Amendment jurisprudence, the Court's holding in *Bruen*, and firearm regulatory schemes across the country. This will demonstrate the current reality of firearms in our country and how open firearm possession affects public safety. Part II focuses on the Fourth Amendment, the controversial history and use of *Terry* by law enforcement, and what constitutes "articulable reasonable suspicion." Part III dives into the central question: whether and how firearm possession can be legally suspicious after *Bruen*. Part III also discusses the circuit split and case law surrounding whether possession of a gun alone, or in combination with other circumstances, raises reasonable suspicion for law enforcement to take investigative action such as a *Terry* stop. Part IV provides two possible theories as to how law enforcement may be able to use *Terry* post-*Bruen* to further its government interests of preventing crime and ensuring public safety: (1) a presumption of legal possession with a requirement for officers to articulate other factors that may arouse suspicion or (2) automatic authorization to conduct a *Terry* stop when firearm possession is suspected or known by the officer.

17. Royce de R. Barondes, *Automatic Authorization of Frisks in* Terry *Stops for Suspicion of Firearms Possession*, 43 S. ILL. U. L.J. 1, 2 (2018); Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1678 (2019).

18. *See* Fields, *supra* note 17, at 1693.

19. United States v. Rahimi, 144 S. Ct. 1889, 1902 (2024).

20. *See generally id*.

21. Barondes, *supra* note 17, at 3.

22. *See generally* 959 F. Supp. 2d 540 (S.D.N.Y 2013).

I. THE HISTORY OF THE RIGHT TO "BEAR ARMS"

A. GUN REGULATION PRE-*BRUEN*

Many forms of firearm regulation existed in the colonies prior to and during the ratification of the Second Amendment in 1791.[23] Some regulations prohibited certain individuals (unsurprisingly, slaves, free Blacks, and Native Americans) from possessing firearms.[24] Other, affirmative regulations required "heads of households" to own guns[25] and carry them "to church or other public meetings."[26] Federal law even required every man eligible to serve in the militia to submit their weapons for frequent inspection and to register their firearm and declare ownership.[27]

After ratification of the Second Amendment and until the 1930s, gun regulation at the state level was prevalent throughout the country and covered a wide range of issues.[28] Congress did not legislate on the issue until the 1930s. In response to mafia crimes and mass shootings, Congress passed the National Firearms Act (NFA) in 1934, which regulated the manufacture, sale, and possession of certain types of weapons, particularly semi-automatic weapons.[29] Between 1938 and 1993, Congress passed several firearms-related provisions which further regulated the sale of weapons,[30] restricted felons and individuals with disabilities from purchasing firearms,[31] expanded the definition of firearms and destruction devices,[32] and required dealer verification and sale tracking.[33]

In 1993, Congress passed the Brady Handgun Violence Prevention Act (the "Brady Act") which created a background check system and instituted waiting day periods for gun purchases.[34] However, the Brady Act exempted individuals who have federal or state permits from the waiting period.[35] Since the Brady Act, Congress passed several firearm-related pieces of legislation such

23. *History of Gun Control*, BRITANNICA PROCON, https://gun-control.procon.org/history-of-gun-control (Mar. 4, 2024).

24. Stephan P. Halbrook, *The Second Amendment was Adopted to Protect Liberty, Not Slavery: A Reply to Professors Bogus and Anderson*, 20 GEO. J.L. & PUB. POL'Y 575, 581–82 (2022).

25. David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEV. STATE L. REV. 315, 320 (2011).

26. Robert J. Spitzer, *Gun History and Second Amendment Rights*, 2 L. & CONTEMPORARY PROBLEMS 55, 75 (2017).

27. Militia Act of 1792, ch. 33, § 1, 1 Stat. 271 (repealed 1903). *See generally* Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323 (2011).

28. Spitzer, *supra* note 26, at 58 ("Carry restriction laws were widely enacted, spanning the entire historical period . . . .").

29. *See* National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236.

30. *See* Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250.

31. *Id.*

32. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 921, 82 Stat. 1213, 1214–15.

33. *See* Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, § 101, 100 Stat. 449.

34. *See* Brady Handgun Violence Prevention Act of 1994, Pub. L. No. 103-159, 107 Stat. 1536.

35. *Id.*

as a ban on assault weapons,[36] granting of immunity to firearm manufacturers from tort liability related to criminal or unlawful use by individuals or third parties,[37] and incentives for states to provide information to the federal government as to whether a person is prohibited from purchasing a firearm.[38] In 2022, three days after the Court decided *Bruen*, President Biden signed the Bipartisan Safer Communities Act, which expanded the background check process for individuals between the ages of 18 and 21, further restricted perpetrators of domestic violence from obtaining weapons, increased funding for gun violence crisis centers, and expanded licensing requirements for sellers.[39]

B. STATE FIREARM REGULATORY SCHEMES

In addition to federal requirements described in the prior Subpart, individuals seeking to carry a weapon, either concealed or open carry, must follow state law. Concealed-carry regulatory schemes at the state level can be classified as one the following: (1) "unrestricted;" (2) "shall-issue;" (3) "may issue;" or (4) "no issue."

An "unrestricted" state allows individuals to carry a concealed firearm without a permit.[40] In these states, individuals can purchase and carry handguns in public without any permit, training, or background checks.[41]

A "shall-issue" state will issue a concealed carry permit to individuals who meet the statutory requirements.[42] A shall-issue regulatory scheme does not allow for discretionary decisions to be made by law enforcement or other state officials for the issuance of a permit.[43]

A "may-issue" state will issue a concealed carry permit to an individual who meets the statutory requirements such as submitting to a background check, training, fingerprinting, and proof of appropriate age, in addition to demonstrating a "justifiable need,"[44] "good cause,"[45] or "proper cause" for the permit to a designated law enforcement officer or government official.[46] Often the justification had to be a "special need for protection distinguishable from

36. *See* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (expired in 2004).

37. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–03).

38. *See* National Instant Criminal System (NICS) Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559.

39. Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

40. *Guns in Public: Concealed Carry*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry (last visited May 24, 2024) [hereinafter *Giffords State Law Summary*].

41. *Id.*

42. Fields, *supra* note 17, at 1688.

43. *Id.*

44. N.J. STAT. ANN. § 2C:58-4(c) (West Cum. Supp. 2021).

45. CAL. PENAL CODE § 26150 (West 2024).

46. N.Y. PENAL LAW § 400.00(2) (McKinney 2023); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 12 (2022) (citing Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 257 (1980)). *See also Bruen*, 597 U.S., at 15 n.2.

that of the general community or of persons engaged in the same profession."[47] Prior to the Court's decision in *Bruen*, six states and the District of Columbia had may-issue statutory regimes that covered more than 25 percent of the country's population.[48]

A "no-issue" state does not allow any individual to carry a firearm, with only a few statutorily listed exceptions.[49] No-issue regulatory schemes ceased to exist by 2015.[50]

The change in state regulatory schemes across the country did not happen overnight and began before the Court's decisions in *Heller* and *Bruen*.[51] Between 1990 and 2018, there was an increase in states that adopted "unrestricted" regulatory schemes as well as "shall-issue" schemes.[52] In 1990, only sixteen states had the more permissive "unrestricted" or "shall-issue" regulatory schemes, and thirty-four states were either "may-issue" or no issue.[53] By 2005 (before *Heller* was decided), thirty-seven states were either "unrestricted" or "shall-issue," and just thirteen states were "may-issue" or "no issue."[54]

Through *Heller* and *Bruen*, the Second Amendment has been interpreted to mean that individuals have the right to carry firearms in their homes and in the public for lawful purposes.[55] As a result, states must allow for some form of "constitutional carry" and grant permits on a non-discretionary basis.[56] In May 2023, there were twenty-five states and the District of Columbia that had a "shall-issue" concealed carry scheme and twenty-five states that had "unrestricted" regulatory schemes.[57] By July 2024, twenty-nine states will have "unrestricted" regulatory schemes.[58] It can be expected that the number of states implementing "unrestricted" regulatory schemes will continue to rise.

C. *HELLER*, *MCDONALD*, AND *BRUEN* – A RETURN TO 1791

In 2008, the Supreme Court for the first time interpreted the "bear arms" clause of the Second Amendment.[59] In *Heller*, the Court specifically looked at a

47. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 87 (2d Cir. 2012).
48. *Bruen*, 597 U.S. at 99–100 (Breyer, J., dissenting).
49. Fields, *supra* note 17, at 1688.
50. *Id.* at 1689.
51. *Id.* at 1689.
52. *Id.*
53. *Id.*
54. *Id.*
55. *See infra* Part I.C.
56. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70–71 (2022).
57. *Giffords State Law Summary*, *supra* note 40.
58. Aliza Chasen, *DeSantis Signs Bill Allowing Florida Residents to Carry Concealed Guns Without a Permit*, CBS NEWS (Apr. 3, 2023, 7:39 PM EDT), https://www.cbsnews.com/news/florida-concealed-carry-no-permit-ron-desantis. *See also Giffords State Law Summary*, *supra* note 40; *Constitutional Carry/Unrestricted/Permitless Carry*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensurepermitting-policies/unrestricted (last visited May 24, 2024).
59. District of Columbia v. Heller, 554 U.S. 570, 577 (2008).

Washington, D.C. regulation prohibiting handgun possession in a home without a license.[60] The Court held that the Second Amendment includes an individual's right to possess a firearm for traditionally lawful purposes.[61] Writing for a narrow 5–4 majority, Justice Scalia based the Court's holding on historical analysis and the ordinary meaning of the Second Amendment.[62] Justice Scalia rejected the view that the Second Amendment is a military and militia-preserving amendment, and thus inapplicable to individuals outside of that context.[63] The Court in *Heller* struck down D.C.'s restrictive handgun regulatory regime in order to allow individuals to buy, register, and use handguns for lawful purposes such as "self-defense in the home."[64]

While finding the individual's right to possess a firearm within the ordinary meaning of the Second Amendment, the Court noted some limits to this right.[65] The Court made certain not to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[66] The Court also distinguished its decision in *Heller* from *United States v. Miller*, which granted the government the right to regulate and prohibit the carrying of weapons that are not "in common use" and are "dangerous and unusual," such as assault rifles.[67]

Two years after *Heller*, the Court in *McDonald* incorporated the Second Amendment into the Due Process Clause of the Fourteenth Amendment and made the "right to keep and bear arms" applicable to the states.[68] Justice Alito extended Justice Scalia's view that the right to bear arms is a right that is "fundamental to our scheme of ordered liberty" and "deeply rooted in our Nation's history and tradition."[69] Similar to *Heller*, the Court in *McDonald* struck down a state law that made it unlawful to possess a firearm, including handguns, and held that the "Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense . . . [and] applies equally to the Federal Government and the State."[70]

Both *Heller* and *McDonald* discussed regulations surrounding handgun possession in one's home. However, the Court did not determine whether the Second Amendment applies to handgun possession in public until over a decade later, when it decided *Bruen.*

60. *Id.* at 576.
61. *Id.* at 619.
62. *See generally id.*
63. *Id.* at 582.
64. *Id.* at 636.
65. *Id.* at 626–27.
66. *Id.*
67. *Id.* at 627. *See generally* United States v. Miller, 307 U.S. 174 (1939).
68. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).
69. *Id.* at 745 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
70. *Id.* at 791.

In *Bruen*, the Court reviewed a challenge to New York's firearm regulatory scheme, and held that the Second and Fourteenth Amendments protect an individual's right to carry a handgun outside of one's home for lawful purposes such as self-defense.[71] The New York law made it a crime to possess a firearm, anywhere, without a permit, and at the time, New York's firearm regulatory scheme was a "may issue" regime.[72] To be eligible for a permit to possess or carry a firearm outside of their home, the individual was required to show "proper cause."[73] Proper cause, under New York law, was satisfied only when the individual "demonstrated a special need for self-protection distinguishable from that of the general community."[74] The adequacy of a proper cause showing was up to the discretion of the designated licensing officer.[75] When an applicant did not satisfy proper cause, they could apply for a restricted permit which allowed the individual to carry for limited purposes such as "hunting, target shooting, or employment."[76] New York had additional regulations that declared the entire island of Manhattan as a "sensitive place" where heightened gun regulations were needed.[77]

The plaintiffs, Koch and Nash, applied for the unrestricted carry permit based on a generalized interest in self-defense but were denied because they did not demonstrate proper cause.[78] The plaintiffs sued, claiming that New York's licensing scheme violated the Second and Fourteenth Amendments by infringing on their right to keep and bear arms in public for self-defense.[79] The Court, in an extension of *Heller*, ruled that individuals have a right to keep and bear arms outside their homes.[80] The Court reasoned that:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.[81]

As a result, the Court held that the New York licensing regime was not consistent with the historical tradition of the Second Amendment and struck it down as a violation of the Constitution.[82]

---

71. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8 (2022).
72. *Id.* at 12–15.
73. *Id.*
74. *Id.* at 12 (citing Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 257 (1980)).
75. *Id.*
76. *Id.*
77. *Id.* at 31.
78. *Id.* at 14–17.
79. *Id.*
80. *Id.* at 17.
81. *Id.*
82. *Id.* Interestingly, state courts interpreting state constitutional provisions that are "nearly identical" to the Second Amendment in Federal Constitution have not agreed with the Court's ruling in *Bruen*. *See* State v. Wilson, 543 P.3d 440, 442 (Haw. 2024) ("[T]he United States Supreme Court does not strip states of all sovereignty to pass traditional police power law designed to protect people."). The Hawaii Supreme Court in

D. POST-*BRUEN* GUN REGULATION AND CONSEQUENCES

Justice Kavanaugh's concurring opinion in *Bruen* shows the likely consequences that decision will have on state firearm possession regulations.[83] Justice Kavanaugh notes that the majority opinion specifically strikes down "may-issue" regulations, but permits states to implement "shall-issue" permitting regimes.[84] According to the majority, may-issue regimes are inconsistent with the Second Amendment because they deny the right to carry handguns for self-defense to many "ordinary, law-abiding citizens."[85] States are allowed to "require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements."[86] Furthermore, Justice Kavanaugh notes that the Second Amendment allows for gun regulations relating to "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[87]

1. *Criticisms of Bruen*

There are several criticisms of the Court's ruling in *Bruen*. First, the Court implements the history and tradition standard with the assumption that societal values are not malleable. The Court requires that for regulations to be valid today, they must have been valid in 1791 and without regard to how our society or country has changed since 1791.[88] Justice Breyer, dissenting in *Bruen*, calls the majority's "near-exclusive reliance on" historical analysis as "too far" and "rigid," "which no Court of Appeals [had] adopted."[89] For example, the Framers

early 2024 ruled that the Hawaii State Constitution did not provide for the right to carry firearms in public. *Id.* The court based its ruling on notion that the "spirit of Aloha clashes with a federally mandated lifestyle that lets citizens walk around with deadly weapons during day-to-day activities." *Id.* at 459. The Hawaii Supreme Court in *Wilson* also held that Wilson lacked standing to sue under the Second Amendment of the United States because *Bruen* can be read to allow for states to require handgun licenses for individuals to carry weapons. *Id.* Conflicts between state regulations, state constitutional rights, and federal constitutional rights regarding public firearm possession will likely arise in the coming years. *E.g.*, Jennifer Sinco Kelleher, *Hawaii's High Court Cites 'The Wire' in Rebuke of US Supreme Court Decision that Expanded Gun Rights*, ASSOCIATED PRESS (Feb. 8, 2024, 2:03 PM PDT), https://apnews.com/article/hawaii-gun-ruling-supreme-court-f060282d4641f65fa7c97ce74a5c0e15 (noting a pending challenge to Hawaii's firearm regulations in the Ninth Circuit).

83. *Bruen*, 597 U.S. at 79 (2022) (Kavanaugh, J., concurring).
84. *Id.*
85. *Id.*
86. *Id.* at 80.
87. *Id.* (quoting McDonald v. City of Chicago, 561 U.S. 742, 786 (2010)).
88. *Id.* at 114 (Breyer, J., dissenting).
89. *Id.* at 103.

certainly could not have envisioned "ghost guns," which are three-dimensionally printed guns or smart guns which can only be fired by authorized individuals.[90]

Second, the Court deeply misconstrues the forty-three nominally "shall-issue" jurisdictions as truly "shall-issue" in practice. While it was correct that six states and the District of Columbia were "may-issue" jurisdictions,[91] many of the forty-three of what the Court calls "shall-issue" jurisdictions were not in fact "shall-issue" jurisdictions with schemes that ran afoul of the Court's Second Amendment interpretation. The Court failed to distinguish between "shall-issue" schemes which allow for concealed carry of a firearm once an individual meets the statutory requirements to obtain a permit and "unrestricted" schemes which allow for "individuals to carry a concealed handgun without a government-issued permit."[92] Even the National Rifle Association ("NRA") acknowledges the difference between "shall-issue" and "unrestricted" schemes, as "unrestricted" schemes "eliminate[] the need for government permission before law-abiding gun owners can carry concealed firearms."[93] The NRA believes that changing state schemes to "unrestricted" should be the "natural next step after the success of 'shall issue' legislation."[94] In July and September 2023, Florida and Nebraska became, respectively, the twenty-sixth and twenty-seventh states to allow public handgun possession without a permit, meaning that after *Bruen*, a majority of states do not require an individual possessing a gun to have passed

90. Justice Breyer noted the inconsistencies created by the majority holding in comparing historical forms of weaponry with modern day guns:

> I fear that it will often prove difficult to identify analogous technological and social problems from Medieval England, the founding era, or the time period in which the Fourteenth Amendment was ratified. Laws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern problems. And as technological progress pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at "analogical reasoning" will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable.

Id. at 115.

Separately, ghost gun regulations promulgated by the ATF are undergoing particularly interesting legal challenges. In the Fifth Circuit, ATF regulations banning ghost gun kits and parts are being challenged as inconsistent with federal statutes and beyond the ATF's authority. *See* VanDerStok v. Garland, No. 4:22-CV-00691, 2023 WL 4539591, at *5 (N.D. Tex. June 30, 2023), *aff'd in part, vacated in part, remanded by* 86 F.4th 179 (5th Cir. 2023). The Supreme Court has left the regulations in place while litigation continues. *See* Garland v. VanDersStok, 144 S. Ct. 44 (2023). In the U.S. District Court in the Northern District of California, the State of California and the Giffords Law Center have challenged the same ATF regulations as not going far enough. *See* California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 20-cv-06761-EMC, 2024 WL 779604, at *4 (N.D. Cal. Feb. 26, 2024).

91. The Court noted that California, New York, Hawaii, Maryland, Massachusetts, New Jersey, and the District of Columbia were the only "may-issue" states prior to the Court's decision in *Bruen*. *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring).

92. *NRA Achieves Historical Milestone as 25 States Recognize Constitutional Carry*, NRA INST. FOR LEGIS. ACTION (Apr. 1, 2022), https://www.nraila.org/articles/20220401/nra-achieves-historical-milestone-as-25-states-recognize-constitutional-carry.

93. *Id.*

94. *Id.*

a background check or be trained on the proper use and handling of these deadly weapons.[95]

Third, the Court in *Heller* and *Bruen* asserts that its rulings favor firearm possession because "individual self-defense is the central component of the Second Amendment right."[96] Even if that's the case, the Second Amendment is not achieving its purported purpose. Studies have shown that using firearms for self-defense is successful in just 2 percent of nonfatal violent crime and 1 percent of property crime.[97] In 2018, offensive firearm use outnumbered defensive use by more than six to one.[98]

Fourth, the most obvious criticism of *Bruen* is that the expansion of gun rights and public possession is coming at a time when gun violence is at "an all-time high."[99] Justice Breyer's dissenting opinions in *Bruen* and *Heller* provide much of the story on the gun violence epidemic taking place in the United States.[100] The following is a non-exhaustive list of the effects of gun violence:

- In 2020, an average of 124 people died every day from gun violence.[101]
- Gun violence is now the leading cause of death in children and adolescents, surpassing car crashes, which had been the leading cause of death of children and adolescents for over 60 years.[102]
- 64.4% of firearm homicides and 91.8% of nonfatal firearm assaults were committed with a handgun. [103]
- Handguns are the most commonly stolen type of firearm.[104]
- A woman is five times more likely to be killed by an abusive partner if that partner has access to a gun.[105]

---

95. Chasen, *supra* note 58; Eric Bamer, *Nebraska Permitless Concealed Carry Law Takes Effect Saturday*, OMAHA-WORLD HERALD, https://omaha.com/news/state-regional/government-politics/nebraska-permitless-concealed-carry-law-takes-effect-saturday/article_05efa690-48d2-11ee-bddc-0f4e43960b7b.html (Jan. 19, 2024).

96. *Bruen*, 597 U.S. at 29 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

97. GRACE KENA & JENNIFER L. TRUMAN, DEP'T OF JUST., SPECIAL REPORT: TRENDS AND PATTERNS IN FIREARM VIOLENCE, 1993-2018 12 (2022), https://bjs.ojp.gov/content/pub/pdf/tpfv9318.pdf.

98. Jennifer Mascia, *How Often Are Guns Used for Self-Defense?*, TRACE (June 3, 2022), https://www.thetrace.org/2022/06/defensive-gun-use-data-good-guys-with-guns.

99. Jennifer Mascia, *Gun Deaths Hit an All-Time High (Again) in 2021*, TRACE (July 11, 2023), https://www.thetrace.org/2022/09/gun-deaths-cdc-2021-record.

100. *Bruen*, 597 U.S. at 83–91 (Breyer, J., dissenting); District of Columbia v. Heller, 554 U.S. 570, 681 (2008) (Breyer, J., dissenting).

101. Caitlin Hoffman, *Report: CDC Records Highest-Ever Number of Gun-Related Deaths in 2020*, JOHN HOPKINS HUB (May 2, 2022), https://hub.jhu.edu/2022/05/02/highest-number-of-gun-related-deaths-in-2020-report.

102. Annette Choi, *Children and Teens Are More Likely to Die by Guns Than Anything Else*, CNN (Mar. 29, 2023, 8:41 AM EDT), https://www.cnn.com/2023/03/29/health/us-children-gun-deaths-dg/index.html.

103. KENA & TRUMAN, *supra* note 97.

104. *Id.*

105. *Guns and Violence Against Women*, EVERYTOWN RSCH. & POL'Y (Apr. 10, 2023), https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem. In a narrow decision, the Supreme Court held that some forms of firearm possession restrictions on individuals under restraining orders as a result of domestic violence are permitted under the

- States with the highest rates of gun ownership report four times as many fatal shootings of civilians by police officers compared to states with the lowest rates of gun ownership.[106]

The number of mass shootings[107] per year has increased substantially over the past few decades.[108] In 2014, there were 272 mass shootings and 12,348 total deaths related to gun violence. Those figures rose to about 415 mass shootings and 39,500 deaths in 2019, and 650 mass shootings and 47,500 deaths in 2022.[109] The increase in gun violence is most readily attributable to the expansion of firearm possession and continued destruction of firearm regulations.[110]

2. *The Normalization of Guns*

In recent years, the number of guns purchased and the number of permits issued has dramatically increased. While *Heller* and *Bruen* have directly led to greater gun access, gun ownership was already becoming normalized even before the Court decided *Heller*. As seen in the figure below, the number of concealed handgun permits increased ten-fold within twenty-three years.

Second Amendment. *See* United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024) (holding that 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, is a valid under the Second Amendment).

106. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 89 (2022) (Breyer, J., dissenting).

107. *See Explainer*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/explainer ("Mass shootings . . . have a minimum of four victims shot, either injured or killed, not including any shooter who may also have been killed or injured in the incident.") (last visited May 24, 2024).

108. Ana Faguy, *Mass Shootings Steadily Increased Over Last 50 Years—And Big States Like California And Texas Face Highest Risk, Study Finds*, FORBES (Aug. 22, 2023, 12:50 PM EDT), https://www.forbes.com/sites/anafaguy/2023/08/22/mass-shootings-steadily-increased-over-last-50-years-and-big-states-like-california-and-texas-face-highest-risk-study-finds/?sh=2ed7ab73488c.

109. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/past-tolls (last visited May 24, 2024).

110. Nadine Yousif, *Why Number of US Mass Shootings Has Risen Sharply*, BBC NEWS (Mar. 28, 2023, 3:15 AM), https://www.bbc.com/news/world-us-canada-64377360; Daniel Semenza, *More Guns, More Death: The Fundamental Fact that Supports a Comprehensive Approach to Reducing Gun Violence in America*, ROCKEFELLER INST. OF GOV'T (June 21, 2022), https://rockinst.org/blog/more-guns-more-death-the-fundamental-fact-that-supports-a-comprehensive-approach-to-reducing-gun-violence-in-america; Emma Tucker & Priya Krishnakumar, *States with Weaker Gun Laws Have Higher Rates of Firearm Related Homicides and Suicides, Study Finds*, CNN (May 27, 2022, 10:09 AM EDT), https://www.cnn.com/2022/01/20/us/everytown-weak-gun-laws-high-gun-deaths-study/index.html.

Year	Estimated Number of Concealed Handgun Permit Holders (in millions)
1999	2.7
2007	4.6
2011	8
2014	11.11
2018	17.3
2022	22.01

Figure 1: Concealed Carry Permits Across the United States[111]

During the COVID-19 pandemic, gun ownership increased.[112] Some hypothesized reasons are: waves of protests occurring throughout 2020; fear that the Biden Administration would restrict access to firearms; and fear of lawlessness occurring during the pandemic.[113]

As a result of *Bruen*, all states must now operate as either an "unrestricted" or "shall-issue" state. After the Court's decision in *Bruen*, individuals who were previously rejected from receiving a permit because they failed to meet proper cause requirements began to reapply, knowing that there was no longer a proper cause requirement to be met.[114] Individuals will be able to buy and own weapons that they previously could not.

111. JOHN R. LOTT, JR., CRIME PREVENTION RSCH. CTR., REPORT FROM THE CRIME PREVENTION RESEARCH CENTER CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES: 2022 8–9 (Oct. 31, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4279137.

112. Matthew Miller, Wilson Zhang & Deborah Azrael, *Firearm Purchasing During the COVID-19 Pandemic: Results From the 2021 National Firearms Survey*, NAT'L LIBRARY OF MED. (Dec. 21, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8697522; Joe Walsh, *U.S. Bought Almost 20 Million Guns Last Year—Second-Highest Year On Record*, FORBES (Jan. 5, 2022, 3:46 PM EST), https://www.forbes.com/sites/joewalsh/2022/01/05/us-bought-almost-20-million-guns-last-year---second-highest-year-on-record/?sh=658179f13bbb.

113. David Chipman, *Panic Buying Guns Won't Keep You Safe During the COVID-19 Pandemic*, GIFFORDS L. CTR. (Mar. 25, 2020), https://giffords.org/blog/2020/03/panic-buying-guns-wont-keep-you-safe-during-the-covid-19-pandemic-blog.

114. Alene Tchekmedyian, *With Restrictions Lifted, Sheriff Villanueva Says Gun Permits Will Rise in L.A. County*, L.A. TIMES (June 30, 2022, 12:52 PM PST), https://www.latimes.com/california/story/2022-06-30/sheriff-villanueva-gun-permits (Los Angeles); Dwight A. Weingarten, *With Gun Law Gone, Permit Applications Increased Nearly 7 Times in Maryland in 2022*, HERALD-MAIL (Feb. 6, 2023, 5:05 AM EST), https://www.heraldmailmedia.com/story/news/state/2023/02/06/conceal-carry-permit-applications-rose-in-md-after-us-supreme-court-gun-law-ruling/69864157007 (Maryland); Alexandra Tremayne-Pengelly, *Interest in Owning Guns Soars in New York Following the Supreme Court Decision on Concealed Weapons*, OBSERVER (June 27, 2022, 4:51 PM), https://observer.com/2022/06/interest-in-owning-guns-soars-in-new-york-following-the-supreme-court-decision-on-concealed-weapons (New York); Benjamin Schneider & Sydney Johnson, *Concealed Carry Gun Applications Surged in San Francisco After* Bruen *Decision*, S.F. EXAM'R (Oct. 23, 2023), https://www.sfexaminer.com/news/concealed-carry-gun-applications-surged-in-san-francisco-after-bruen-decision/article_309342e4-33bb-11ed-a85b-cf0db8ae5aed.html (San Francisco). *See also* Erik Eva, *Gun-Carry Applications Flood Blue States Following* Bruen *Decision*, RELOAD (July 22, 2022, 5:01 AM), https://thereload.com/gun-carry-applications-flood-blue-states-following-bruen-decision.

Simply put, guns are more prevalent than ever.[115] The Court's decisions in *Heller* and *Bruen* have led to more guns being bought by everyday citizens and carried in public, and have done so at a time where the data does not show that the need for firearms for self-defense outweighs the damage more ready access to firearms causes to communities.[116]

E. THE COURT DOUBLE DOWNS IN *RAHIMI*

2. *The Normalization of Guns*

In its first Second Amendment challenge following Bruen, the Supreme Court upheld a federal statute that permitted the disarming of individual who was under a domestic violence restraining order.[117] The defendant, Zackey Rahimi, was subject to a domestic violence restraining order after a domestic violence incident that included the discharge of a weapon by Rahimi.[118] The domestic violence restraining order restricted Rahimi from being able to possess a firearm.[119] After the institution of the order, Rahimi was involved in several other criminal incidents that involved firearms and he was subsequently arrested and charged with "one count of possessing a firearm while subject to a domestic violence restraining order."[120] Rahimi challenged the indictment on Second Amendment grounds, asserting that statute violated his "right to bear arms."[121] After some back and forth in the lower courts, the Fifth Circuit agreed with Rahimi.[122]

---

115. Chris DiLella & Andrea Day, *TSA Sees 'Concerning' Rise in Number of Firearms at Security Checkpoints—And Most are Loaded*, CNBC (Nov. 23, 2022, 2:04 PM EST), https://www.cnbc.com/2022/11/23/tsa-sees-rise-in-number-of-firearms-at-security-checkpoints.html.

116. Separately, questions also linger as to just how far the Court will expand firearm possession rights. *Compare* Nat'l Ass'n for Gun Rts. v. City of Naperville, 144 S. Ct. 538 (2023) (denying hearing whether the government can "ban the sale, purchase, and possession of certain semi-automatic firearms and firearm magazines tens of millions of which are possessed by law-abiding Americans for lawful purposes when there is no analogous historical ban as required by" *Heller* and *Bruen*) *and* United States v. Rahimi, 144 S. Ct. 1889 (2024) (holding that 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, is valid under the Second Amendment), *with Cargill v. Garland*, 602 U.S. 406 (2024).

In June 2024, the Court held six to three in *Cargill v. Garland* that "bump stocks" are not machine guns and cannot be banned under the ATF's regulatory authority. 602 U.S. at 410. The focus of the case is not the Second Amendment, as neither the Second Amendment nor *Bruen* are cited in any of the opinions, but rather agency and statutory interpretation law. *See generally id.* Notably Justice Alito in a concurring opinion acknowledged the horrific 2017 Las Vegas shooting that involved bump stocks and recommended that the "simple remedy for the disparate treatment of bump stocks and machineguns" was for Congress to "act" and "amend the law." *Id.* at 429 (Alito, J., concurring). Maybe this is a signal from a leading conservative justice that Congress can make reasonable restrictions on firearms. It remains to be seen what new issues will arise in the Second Amendment context, how the current Supreme Court will rule on them, and what actions Congress will take.

117. Rahimi, 144 S. Ct. at 1894.

118. *Id.* at 1895.

119. *Id.*

120. *Id.*

121. *Id.* at 1896.

122. *Id.*

In a slight change of pace from Bruen, the Supreme Court held against Rahimi in an 8-1 decision.[123] The Court held that:

> When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.[124]

Writing for the majority, Chief Justice Roberts conducted a significant historical analysis and focused on several historical practices dating back to Civil War, Colonial, and Anglo-Saxon English eras.[125] But Chief Justice Roberts stated that the Second Amendment's focus on history and tradition was not absolute.[126] He recognized that a focus on history would limit the Amendment's scope "only to muskets and sabers."[127] As a result, the Court explicitly disavowed Fifth Circuit's "historical twin" requirement and made it clear that lower courts must instead look for "historical analogies" and "'seek harmony" rather than "manufactur[ing] conflict.'"[128] However, Chief Justice Roberts's opinion expressly affirms *Bruen*'s "history and tradition" test as the law of the Second Amendment.[129]

Chief Justice Roberts's relatively short and narrow opinion gave way for five concurrences and one dissent, all providing a different take as to how to apply the history and tradition test.[130] The sole dissent came from Justice Thomas, the author of *Bruen.*[131] In short, Justice Thomas's lengthy dissent states that *Bruen* demands a strict comparison to history, that the government did not meet its burden on the heavier test, and that the government has an alternative mechanism to protect public safety: criminal prosecution.[132]

Justices Sotomayor, Kagan, and Jackson all believed that *Bruen* was decided wrong.[133] Justice Sotomayor sided with the majority to the extent that Chief Justice Roberts's opinion was the "right" interpretation of *Bruen.*[134] However, Justice Sotomayor expressed in her concurrence that she "remain[ed] troubled by *Bruen*'s myopic focus on history and tradition, which fails to give

123. *Id.* at 1903.
124. *Id.* at 1896.
125. *Id.* at 1898–903.
126. *Id.* at 1898.
127. *Id.*
128. *Id.* at 1903.
129. *Id.* at 1898 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022)) ("[W]hen a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'")
130. *See generally id.*
131. *Id.* at 1930–47 (Thomas, J., dissenting)
132. *See generally id.*
133. *Id.* at 1904 (Sotomayor, J., concurring); *Id.* at 1926 (Jackson, J., concurring)
134. *Id.* at 1904 (Sotomayor, J., concurring).

full consideration to the real and present stakes of the problems facing our society today."[135] She also highlighted a key theme throughout the concurrences: that lower courts struggled with how to apply *Bruen*[136] and Justices Sotomayor,[137] Gorsuch,[138] Kavanaugh,[139] Barret,[140] and Jackson[141] all provide their own variety as how to use text, history, and tradition.

Justice Jackson noted that "the Court should also be mindful of how its legal standards are actually playing out in real life."[142] She quips that the Court's decision in *Bruen* created "madness" in the lower court.[143] In a footnote, she stated "that *Bruen*'s history-and-tradition test is not only limiting legislative solutions, it also appears to be creating chaos."[144] And in her view, the "blame" for the chaos "may lie with us."[145]

1. *Rahimi*'s Impact on Public Safety

While *Rahimi* is a victory for gun control and domestic violence prevention advocates, as made clear by the concurrences in *Rahimi*, *Bruen*'s historical test is here to stay.[146] *Rahimi* provides some guidelines regarding the disarming of an individual but only in the situation where a "judicial determination" has been made that "a particular defendant likely would threaten or had threatened another with a weapon."[147] But that doesn't account for the majority of gun possession enforcement.[148] A substantial portion of gun regulation takes place outside the context of judicial determinations.[149] Considering that there is an increased level of gun possession in communities across the nation,[150] *Rahimi* doesn't provide clarity as to what an officer can do if they have any concern that a given firearm possession in any given context requires some sort of action.

Perhaps *Rahimi* is an indication that the Court will be more lenient to honest and legitimate (perhaps reasonable suspicion or probable cause) determinations by law enforcement. Maybe the Court won't buy the idea that the general societal concern of gun safety can't justify specific regulations. What *Rahimi* truly does is that it "helps" lower courts understand how to apply the

135. *Id.* at 1906.
136. *Id.* at 1904.
137. *See id.* at 1905.
138. *See id.* at 1908–09 (Gorsuch, J., concurring).
139. *See id.* at 1913–24 (Kavanaugh, J., concurring).
140. *See id.* at 1924–26 (Barrett, J., concurring).
141. *See id.* at 1926–30 (Jackson, J., concurring).
142. *Id.* at 1926.
143. *Id.* at 1927.
144. *Id.* at 1929 n.3.
145. The "[U]s" in Justice Jackson's statement refers to the Supreme Court of course. *Id.* at 1926.
146. *Id.* at 1898 (Majority Decision of Roberts, C.J.)
147. *Id.* at 1902.
148. *See supra* Part I.D.1.
149. *Id.*
150. *See supra* Part I.D.2.

Bruen historical test. But it doesn't fix the root of the problem–that *Bruen* opened the door to massive and uncharted issues related to the firearm safety and gun possession. Any clarity that *Rahimi* provides does not lessen the uncertainty to public safety and law enforcement tools that *Bruen* has plagued to society.

F. THE SUPREME COURT'S VIEWS ON FIREARMS OUTSIDE THE SECOND AMENDMENT

In a few instances, the Court has held that firearms are so uniquely dangerous and threatening that special exceptions and regulations are permissible and necessary for public safety. In *New York v. Quarles*, the Court created an exception to administering an arrestee's *Miranda* rights before questioning them because the location of suspect's firearm was unknown and the firearm was likely readily accessible to the public.[151] The Court justified its holding, creating an exception to *Miranda*, by reasoning that a firearm in public "pose[s] more than one danger to the public safety . . . ."[152] The Court has perhaps made no clearer statement than the following regarding the danger of handguns:

> [A] gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place.[153]

While the Court has expanded the right to carry a weapon in public, its views are clear regarding firearms and public safety: The prioritization of public safety is of such importance that constitutional and fundamental rights can be limited.[154] But what remains an open question is how the resulting violence and suffering from increased firearm possession can be curbed. Law enforcement present one such opportunity.

II. *TERRY* AND REASONABLE SUSPICION

A. THE *TERRY* STANDARD

The Fourth Amendment provides the right "against unreasonable searches and seizures."[155] Police officers routinely patrol areas, often areas of high crime.[156] Police are trained and experienced in the detection of unusual conduct

151. 467 U.S. 649, 657 (1984).

152. *Id.*

153. McLaughlin v. United States, 476 U.S. 16, 17 (1986).

154. *Id.*; *Quarles*, 467 U.S. at 657. *See* District of Columbia v. Heller, 554 U.S. 570, 689 (Breyer, J., dissenting) ("[T]he Court has in a wide variety of constitutional contexts found such public safety concerns sufficiently forceful to justify restrictions on individual liberties.").

155. U.S. CONST. amend. IV.

156. *See, e.g.*, United States v. Sokolow, 490 U.S. 1 (1989).

that may lead to the conclusion that "criminal activity may be afoot."[157] Police want to be able investigate in order to confirm such suspicions. This may include the need for police officers to briefly question, detain, and frisk individuals to investigate such suspicions for the "protection of himself and others in the areas."[158] Generally, individuals are free to not engage with an approaching police officer.[159] However, an individual is seized when a law enforcement officer "restrains their freedom to walk away," thus implicating the Fourth Amendment.[160]

Terry established a two-prong test for determining when officers are justified in conducting an investigatory stop, in which case such stop a is not a violation of the Fourth Amendment.[161] First, to initiate a stop, the officer must have "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'"[162] Second, during the stop, the officer may frisk the individual for weapons only if the officer has "reasonable grounds to believe that [the individual is] armed and dangerous."[163] The officer's ability to stop, investigate, and frisk an individual is seen as a limited and permissible "intrusion upon the sanctity of the person."[164]

The first prong of *Terry* allows officers "to act on suspicion amounting to less than probable cause."[165] The officer may approach an individual and investigate with the goal of preventing crime and catching an individual in the act before harm occurs. The Court embraced the law enforcement view that "in dealing with the rapidly unfolding and often dangerous situations on city streets[,] the police are in need of an escalating set of flexible responses . . . ."[166]

The second prong of *Terry*, "armed and dangerous," has been regarded as an ambiguous term but one that recognizes the relationship between "danger and crime."[167] In follow-up cases to *Terry*, the Court has justified an officer's ability to frisk an individual during an investigation because of the special danger to officers exercising reasonable caution posed by weapons, particularly firearms.[168] The Court extended this rationale in *Michigan v. Long*, where the

157. Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

158. *Id.* at 30.

159. Florida v. Royer, 460 U.S. 491, 497–98 (1983) (plurality opinion) ("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.").

160. *Terry*, 392 U.S. at 16.

161. *See generally id.*

162. United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30).

163. *Terry*, 392 U.S. at 31.

164. *Id.* at 26.

165. Renée M. Hutchins, *Stop* Terry*: Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 895 (2013).

166. *Terry*, 392 U.S. at 10.

167. Robert Weisberg, *The Eternal Task of Understanding* Terry v. Ohio, 51 U. PAC. L. REV. 887, 904 (2020).

168. Pennsylvania v. Mimms, 434 U.S. 106, 111–13 (1977).

Court found it legitimate for an officer to conduct a frisk due to the fear that "the suspect may gain immediate control of weapons."[169]

Reasonable suspicion sufficient to initiate a *Terry* stop requires "more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity."[170] The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the investigative stop and frisk.[171] When determining whether an officer had reasonable suspicion, courts must look at the totality of the circumstances to see if the officer had a particularized and objective basis for suspecting that criminal activity was taking place.[172] In *Illinois v. Wardlow*, the Court held that an individual's presence in a high-crime area, plus the individual's flight upon sight of the officers, was sufficient to raise a reasonable suspicion that criminal activity was taking place.[173] In *United States v. Sokolow*, the Court held that officers could conduct a *Terry* stop when a suspected individual fits multiple factors of a drug courier profile.[174]

A common criticism of *Terry* has been the fact that it creates a search-and-seizure standard based on the Fourth Amendment, and yet uses a lower suspicion standard than the one written in the Constitution.[175] Justice Douglas, the sole dissenter in *Terry v. Ohio,* opined that, because of the Court's ruling, "police [would] have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action."[176] According to Justice Douglas, the Constitution provides for protection against searches and seizures without "probable cause."[177] However, in recent years, the Court, even with its recent deep ideological divisions, has continued to reaffirm and expand *Terry* in cases such as *Heien v. North Carolina*[178] and *Arizona v. Johnson*.[179]

B. *TERRY* IN PRACTICE AND ITS EFFECT ON COMMUNITIES OF COLOR

A true discussion of *Terry* requires a review of the effects it has had on Black, African American, and Latinx communities. The landmark case of *Floyd v. City of New York* provides a glimpse into the realities of *Terry* and its use as a law enforcement tool.[180] The plaintiffs in *Floyd* alleged that the New York City Police Department had been conducting *Terry* Stops in a racially

169. 463 U.S. 1032, 1049 (1983).

170. United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 27).

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

172. United States v. Arvizu, 534 U.S. 266, 273 (2023).

173. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (citing Brown v. Texas, 443 U.S. 47, 61 (1979)).

174. 490 U.S. 1, 10–11 (1989).

175. *See Terry*, 392 U.S. at 35 (Douglas, J., dissenting).

176. *Id.* at 36.

177. U.S. CONST. amend. IV.

178. 574 U.S. 54 (2014) (8–1 decision expanding the reasonable suspicion element of *Terry* to cover an officer's reasonable mistake in law).

179. 555 U.S. 323 (2009) (unanimous decision expanding the ability for an officer to frisk an individual stopped in a vehicle).

180. *See generally* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

motivated pattern.[181] They alleged that the officers would stop, question, and frisk individuals based on their race and without reasonable suspicion.[182] Judge Scheindlin's opinion, more than one hundred pages in length, described the New York City Police Department's practice of "conducting stops," concluding that it did so "in a racially discriminatory manner."[183] The court looked at several data points to come to that conclusion.[184]

The court noted that "[b]etween January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops."[185] The number of stops per year increased from 314,000 to 686,000 between 2004 and 2011.[186] Fifty-two percent of all stops were followed by a frisk, and in only 1.5 percent of frisks was a weapon actually discovered.[187] Only 12 percent of stops led to an arrest or summons.[188] Within the data, there was a clear racial disparity in the application of *Terry*. Of the 4.4 million *Terry* stops conducted during the given period, 52 percent of stops involved a Black individual, and 31 percent involved a Hispanic individual, while only 10 percent involved a White individual.[189] This was glaringly disproportionate considering that during the same period, 33 percent of New York City's population was White, while 23 percent was Black and 24 percent was Hispanic.[190] A Black or Hispanic individual was also more likely than a White individual to have force used during the investigative stop, while data showed that contraband and weapons were more often seized when the individual was White than Black or Hispanic.[191]

The racial disparity at issue in New York City's policy was not only enough to demonstrate issues with *Terry*, but the court also remarked that between 2004 and 2009, the failure of an officer to "state a specific suspected crime rose from 1% to 36%."[192] The Court noted that:

> One NYPD official has even suggested that it is permissible to stop racially defined groups just to instill fear in them that they are subject to being stopped at any time for any reason — in the hope that this fear will deter them from carrying guns in the streets. The goal of deterring crime is laudable, but this method of doing so is unconstitutional.[193]

Many recent applications of *Terry* have "excerbat[ed] distrust and antagonism between police and communities police depend on in gathering

181. *See generally id.*
182. *See generally id.*
183. *Id.* at 562.
184. *See generally id.*
185. *Id.* at 558–59.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 562.

evidence and fighting crime."[194] The consequences have gone beyond the physical exposure of individuals of color to law enforcement action and into to the psychological health of minority individuals and communities.[195] Mental health professionals have found that:

> [I]ncreased interaction with the police is associated with trauma, distress, anxiety, and depression. . . . [Those who] experience police mistreatment are at increased risk of a range of negative psychological effects, including higher levels of suicidal ideation, paranoia, anxiety disorders, and posttraumatic stress, as well as negative physiological effects including premature aging and cardiovascular disease.[196]

While the data and studies have often dealt with stop-and-frisk practices in New York City, similar conclusions regarding the disproportionate racial impact of *Terry* have been reached across the country.[197] As discussed in Part IV, allowing officers to have a broader authority to conduct an investigative stop, regardless of public safety reasons, requires a component of checked power on law enforcement and reforms to policing.[198]

III. GUNS AND *TERRY*

Firearms and *Terry* stops go hand in hand. An officer is trained to "recognize the inherent dangerousness of her own firearm [as well as] the inherent dangerousness of a firearm in the hands of a potentially untrained civilian."[199] Law enforcement routinely recognize that an individual may be carrying a weapon by looking at circumstances such as: "a characteristic bulge in the suspect's clothing; . . . awkward movements manifesting an apparent attempt to conceal something under [the suspect's] jacket; . . . awareness that the suspect had previously been armed; . . . [or] discovery of a weapon in the

194. Fields, *supra* note 17, at 1716; Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689, 732 (2016) ("There is a large cost to current policing methods. Current policing creates distrust of law enforcement among the individuals targeted and in the community at large. Although stop-and-frisk is supposed to be a method of reducing crime, ironically, the distrust generated by stop-and-frisk makes it harder for police to solve or prevent crimes."); Jeffery Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL. F. 43, 89–90 (2016).

195. Chan T. McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 365–66 (2019).

196. *Id.* at 366–67.

197. Barondes, *supra* note 17, at 6–8 (Philadelphia); David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO STATE L.J. 501, 531–37 (2018) (New York, New Jersey, and Philadelphia); Commonwealth v. Warren, 475 Mass. 530, 539–40 (Mass. 2016) (Boston); Dustin Gardiner & Susie Neilson, *'Are The Police Capable of Changing?': Data On Racial Profiling in California Shows the Problem is Only Getting Worse*, S.F. CHRON. (July 14, 2022, 4:00 AM PST), https://www.sfchronicle.com/projects/2022/california-racial-profiling-police-stops ("In San Francisco and Los Angeles . . . Black people were nearly 6 times more likely to be stopped by police than white residents in 2020, when factoring in the relative city populations of the racial groups. In Oakland, Black people were 5.3 times more likely to be stopped. In Sacramento, Black people were 3.7 times more likely to be stopped.").

198. *See infra* Part IV.C.

199. *See* Fields, *supra* note 17, at 1708.

suspect's possession."[200] Before *Heller*, there was "a blanket assumption of dangerousness" such that when an officer encountered an individual carrying a firearm, the officer could immediately conduct an investigative stop for the suspected criminal activity (*e.g.*, felon-in-possession) and a frisk for the contraband (*e.g.*, the handgun).[201] This assumption arose for primarily two reasons. First, in most places across the country, possession of a firearm in public was extremely rare and often automatically unlawful in "may-issue" and "no-issue" jurisdictions. [202] Second, there was and is broad sociological agreement that being armed means being dangerous.[203]

The Court's decisions in *Heller* and *McDonald* applied only to firearm possession within one's home,[204] but the "overwhelming majority of stop and frisk cases involve encounters between police officers and individuals in public," making *Heller* and *McDonald* inapplicable to the analysis of whether a *Terry* stop and frisk of a firearm possessor is justified.[205] Scholars predicted that after *Heller* and *McDonald*, a reconsideration of the nexus between the right to carry in public and an officer's suspicion of an individual's public firearm possession was coming in the near future.[206] That prediction became a reality with *Bruen.*

Firearm possession as a basis for conducting a *Terry* stop implicates both parts of the *Terry* standard. First, whether an individual's possession of a firearm, absent any other facts, raises reasonable suspicion that criminal activity is taking place. In other words, whether gun possession alone triggers suspicion on the part of law enforcement that justifies investigation and questioning of the possessor. Second, whether carrying a weapon makes the possessor *per se* dangerous. No one denies that carrying a weapon makes the individual armed, but *Terry* requires that an individual be armed *and* dangerous before the officer is permitted to conduct a protective frisk of the individual. Many lawful possessors of weapons will assert that possession of a weapon does not make them dangerous because their justification for firearm possession is self-defense without active intent to harm.[207] However, the continuing increase in mass shootings and firearm-related deaths suggests that firearm possession does more harm than good.[208]

Lower courts are divided on the question of whether a law enforcement officer, where she suspects merely firearm possession, has reasonable suspicion of criminal activity sufficient to justify a stop and frisk. Often, a court's decision

200. *Id.* (citing 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.6(a) (5th ed. 2016)).

201. Matthew J. Wilkins, Note, *Armed and Not Dangerous? A Mistaken Treatment of Firearms in* Terry *Analyses*, 95 TEX. L. REV. 1165, 1170–71 (2017).

202. *See supra* Part I.

203. Wilkins, *supra* note 201, at 1170.

204. *See supra* Part I.C.

205. *See* Fields *supra* note 17, at 1693.

206. Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 21 (2015).

207. *See supra* Part I.C.

208. *See supra* Part I.D.

is based on the state's firearm regulatory scheme.[209] Multiple circuits and state supreme courts have held that because firearms are *per se* dangerous and a threat to officer safety, officers have reasonable suspicion for the purposes of *Terry* whenever a firearm is spotted.[210] Regarding the role of state law, these courts have primarily invoked *Adams v. Williams*. There, the Supreme Court, in a case involving the possession of a knife, ruled that "the validity of a *Terry* search [does not] depend[] on whether the weapon is possessed in accordance with state law."[211] Other courts have focused more on the danger that firearms posed to officer safety, usually citing *Florida v. J.L.*, *Terry v. Ohio*, and *Pennsylvania v. Mimms*.

Going the other way, multiple other circuits and state supreme courts have found that exercising the right to carry a firearm, without anything more, cannot justify police intervention.[212] This interplay between the Second Amendment and the *Terry* has been litigated in nearly every circuit and state across the country. The cases discussed in the Subparts that follow are just a few such examples.

A. *FLORIDA V. J.L.*

No Supreme Court case better discusses firearm possession within the *Terry* context than *Florida v. J.L.*[213] In *J.L.*, the officers had received an anonymous and unverified tip that a Black male wearing a plaid shirt near a bus stop was carrying a weapon.[214] However, the tipster did not provide any information as to whether the individual was illegally carrying the weapon, threatening individuals, or otherwise breaking the law.[215] The officers responding to the call spotted the individual in question and frisked him, finding a concealed weapon for which he did not have a license to carry.[216]

At trial, the defendant moved to suppress the weapon as evidence, arguing that the officers performed an unlawful search.[217] The Supreme Court unanimously held that the anonymous tip did not meet the minimum requirements to perform a warrantless search.[218] While the Court did suppress the weapon, they did so on the grounds that the tip was unreliable rather than

209. Wilkins, *supra* note 201, at 1180 (noting that courts frequently rely on underlying state firearm regulations as a central feature of their determinations as to whether "firearm possession is . . . per se dangerous for purposes of a *Terry* analysis").

210. *See, e.g.*, United States v. Robinson, 846 F.3d 694 (4th Cir. 2017); United States v. Orman, 486 F.3d 1170 (9th Cir. 2007); United States v. Rodriguez, 739 F.3d 481 (10th Cir. 2013).

211. Michigan v. Long, 463 U.S. 1032, 1052 (1983) (citing Adams v. Williams, 407 U.S. 143, 146 (1972)).

212. *See, e.g.*, Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015); United States v. Ubiles, 224 F.3d 213, 214 (3d Cir. 2000); Commonwealth v. Hicks, 208 A.3d 916, 951 (Pa. 2019).

213. 529 U.S. 266 (2000).

214. *Id.* at 268–69.

215. *Id.*

216. *Id.*

217. *Id.* at 269.

218. *Id.* at 274.

deciding the question of whether the officers had reasonable suspicion of illegal activity based on the presence of the firearm.[219]

While *J.L.* provides insights into how the Court views the reliability of tips, it is of limited help regarding weapons and reasonable suspicion in the context of *Terry*. The Court explicitly denied creating an exception to *Terry* for when an officer investigates a claim of firearm possession based on suspicion grounded in the potential harm of firearms.[220] At the same time, the facts of *J.L.* limit the holding specifically to instances where an officer is made aware of firearm possession from a tip, which requires verification of reliability.[221] The question, then, is what can an officer do when she spots an individual possessing a weapon in the open street? As Barondes points out, the holding in *J.L.* neither requires nor forecloses extension of its logic to all other aspects of an analysis under *Terry*, but "a court that wanted to distinguish *J.L.* could [do] so."[222] Lower federal courts and state supreme courts have done exactly that—extended or distinguished *J.L.*

B. WHEN POSSESSION OF A FIREARM DOES RAISE REASONABLE SUSPICION UNDER *TERRY*

Several federal circuit courts of appeals and state courts have found that an individual's possession of a firearm does raise the reasonable suspicion that satisfies both prongs of *Terry*. These Courts have relied on two main principles to allow for an officer to find reasonable suspicion based solely on firearm possession: (1) firearm possession was unlawful in the jurisdiction at the time of the incident; or (2) firearms are especially hazardous to public safety.

In *United States v. Robinson*, the Fourth Circuit held 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."[223] The court rejected the argument that, because carrying a firearm is a perfectly legal activity when permitted by state law, a stop on the basis of suspicion the individual is armed is unjustified.[224] The court noted that it is "inconsequential that the passenger may have had a permit to carry the concealed firearm [because] the danger justifying a protective frisk arises from the combination of a forced police

219. *Id.*

220. *Id.* at 272 ("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.").

221. *See generally id.*

222. Royce de R. Barondes, *Conditioning Exercise of Firearms Rights on Unlimited* Terry *Stops*, 54 IDAHO L. REV. 297, 336 (2018).

223. 846 F.3d 694, 696 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 379 (2017) (citing Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977)). *Robinson* illustrates the controversy of the issue as the en banc decision by the Fourth Circuit was the fourth decision surrounding the case with "each succeeding court overrul[ing] the previous one." *See also* Alexander Butwin, *"Armed and Dangerous" a Half Century Later: Today's Gun Rights Should Impact* Terry*'s Framework*, 88 FORDHAM L. REV. 1033, 1043–46 (2019).

224. *Robinson*, 846 F.3d at 696.

encounter and the presence of a weapon, not from any illegality of the weapon's possession."[225]

In *United States v. Orman*, the Ninth Circuit held that when an officer has reasonable suspicion that an individual is carrying a gun, that is "all that is required to conduct a protective search under *Terry*."[226] In *Orman*, the officer involved testified that the detainee was acting cordial, and that suspicion only arose from a tip that the individual was carrying a weapon.[227] The court noted that the officer was "warranted in retrieving the gun for his safety and the safety of the mall patrons."[228]

In *United States v. Rodriguez*, in the Tenth Circuit, the officer in question had been alerted that a convenience store employee had a concealed weapon.[229] The officer, upon entering and observing the employee, spotted the concealed weapon and seized the individual.[230] As the individual and the officer were leaving the store, the officer disarmed the individual.[231] Upon further questioning, the individual notified the officer that he did not have a permit and was subsequently arrested.[232] The court held that where the officer "has personal knowledge that an individual is carrying a concealed handgun, the officer has reasonable suspicion that a violation of" state law has occurred, "absent a readily apparent exception."[233] Furthermore, the court noted that the fact that the officer could reasonably have suspected that the individual's firearm was loaded was enough to justify frisking the individual.[234]

In *United States v. Lewis*, the Eleventh Circuit held that because one of the detainees admitted that he "was carrying a handgun, the officers had reasonable suspicion to believe that [the detainee] was committing a crime under Florida law—carrying a concealed weapon."[235] In *Lewis*, officers approached four men they had observed.[236] The court noted "that there was no basis to conclude that the men the officers had observed were involved in the commission of" any crime.[237] The officers approached the men, initiated a consensual encounter, and engaged in "casual conversation."[238] The officers then asked the men whether they had weapons, to which two of the men responded affirmatively.[239] The officers drew their own weapons and ordered the men to sit down on the ground,

225. *Id.*
226. 486 F.3d 1170, 1176 (9th Cir. 2007).
227. *Id.*
228. *Id.*
229. 739 F.3d 481, 483–84 (10th Cir. 2013)
230. *Id.*
231. *Id.* at 484.
232. *Id.*
233. *Id.* at 490–91.
234. *Id.* at 491.
235. 674 F.3d 1298, 1304 (11th Cir. 2012).
236. *Id.* at 1300.
237. *Id.*
238. *Id.*
239. *Id.*

turning the encounter into an investigatory stop.[240] The court held that because one of the detainees "possessed [a] firearm at the time of the detention," it was reasonable for the officers to "[inquire] further about whether [the detainee] had an affirmative defense in the form of a valid concealed-weapons permit."[241]

In *United States v. Pope*, the Eight Circuit addressed a challenge to an officer's investigative stop and frisk, and confiscation of a firearm, holding that it did not violate the Fourth Amendment.[242] In *Pope*, the defendant asserted "that the officer lacked a reasonable, articulable suspicion that he was engaging in criminal activity since the officer had no reason to suspect that he lacked a permit to carry the gun."[243] The court rejected the defendant's argument because state law provides an affirmative defense to anyone "who displays to a peace officer on demand a valid permit."[244] The court rejected the defendant's proposition that an individual being armed does not necessarily give law enforcement the belief that they are dangerous "since many law abiding citizens carry guns legally nowadays."[245] Citing *Terry* and *Mimms*, the court held that "being armed with a gun necessarily means that the suspect poses a risk to an officer."[246]

Multiple state supreme courts have also held that conducting an investigatory stop and frisk is lawful when based solely on the individual's possession of a firearm.[247]

Behind each of these cases rest similar themes. Officer safety provides justification to stop an individual suspected of carrying a handgun. An officer is then permitted to conduct a frisk simply based on knowledge of the individual's possession of a firearm.[248] These courts have also noted that once officers begin to question the individual, the individual can provide a valid state permit and end the limited inquiry—absent another legitimate reasonable suspicion the officer may have. The question that then arises is, what about states where a concealed carry permit is not required?

---

240. *Id.*

241. *Id.* at 1304–05.

242. 910 F.3d 413, 414 (8th Cir. 2018).

243. *Id.*

244. *Id.* at 416 (citing IOWA CODE § 724.4(4)(i) (2024)).

245. *Id.*

246. *Id. See* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977). (holding that an officer's suspicion that the suspect has a bulge in their jacket "permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger to the safety of the officer.").

247. *See, e.g.*, State v. Timberlake, 744 N.W.2d 390, 397 (Minn. 2008).

248. *See* United States v. Homer, No. 23-CR-00086, 2024 WL 417103, at *18 (E.D.N.Y Feb. 5, 2024) ("Even after *Bruen*, police officers have reasonable suspicion to justify a *Terry* stop when seeing someone they suspect has a gun."). Interestingly, Judge Garaufis, in *United States v. Homer*, granted the Defendant's motion to suppress, holding the officers did not conduct a *Terry* frisk but instead an "immediate[] arrest[]." *Id.* at *1, *3 ("In the pre-*Bruen* world, the court agrees that a police officer likely would have had probable cause to arrest someone that the officer observed in a high crime area at night with a firearm. . . . The licensing regime was strict enough that a reasonable officer could have disregarded whether someone with a gun had a firearm license because licenses were so difficult to acquire that it was unlikely to be relevant for determining whether someone in possession of a gun was committing a crime. . . . The licensing exception that police could have reasonably disregarded before *Bruen* was substantially broadened so that police can no longer reasonably assess whether a person was committing a crime without taking the exception into account.").

C. WHEN POSSESSION OF A FIREARM ALONE DOES NOT RAISE REASONABLE SUSPICION UNDER *TERRY*

A number of other federal courts and state supreme courts take an opposing approach to the one discussed in Part III.B. This approach argues that firearm possession does not raise reasonable suspicion of criminal activity taking place or that an individual is *per se* dangerous. In each of the rulings discussed below, courts found that because firearm possession was lawful under the applicable state law, firearm possession alone cannot and does not raise reasonable suspicion to justify a *Terry* stop.

In *United States v. Black*, the Fourth Circuit found that officers had violated the Fourth Amendment when they seized the detainee.[249] In *Black*, one of the reasons the officer had detained the individual was because he was carrying a firearm.[250] The officer testified that he "had never seen anyone in this particular division openly carry a weapon" and that officers could not have known whether the individual "was lawfully in possession of the gun until they performed a records check."[251] The court, in rejecting all of the officers' reasons for detainment, individually and in totality, found that "felon in possession of a firearm is not the default status . . . where a state permits individuals to openly carry firearms [and] exercise[] this right."[252] "Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states."[253] The court further added that the case gave the panel "cause to pause and ponder the slow systematic erosion of Fourth Amendment protections for a certain demographic."[254]

The Third Circuit in *United States v. Ubiles* opined on a case where law enforcement were given an anonymous tip that the defendant was illegally carrying a weapon in public.[255] After initiating a *Terry* stop and frisk, the officers recovered a firearm that was unregistered.[256] The court held that the officers "had no reason to believe that [the defendant] was 'involved in criminal activity'" and a "mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, [does not] justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry*."[257] The Third Circuit case in *Ubiles* is factually similarly to *Florida v. J.L.*, but what makes *Ubiles* interesting is the analogy it draws to counterfeit bills, an activity that differs vastly in the danger

249. There is a Fourth Circuit split on this issue. *Compare* United States v. Black, 707 F.3d 531, 542 (4th Cir. 2013), *with* United States v. Robinson, 846 F.3d 694, 696 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 379 (2017).

250. *Black*, 707 F.3d at 540.

251. *Id.*

252. *Id.* ("More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention.").

253. *Id.*

254. *Id.* at 542.

255. 224 F.3d 213, 214 (3d Cir. 2000).

256. *Id.*

257. *Id.* at 217–18.

it poses to public safety.[258] The Court in *Ubiles* noted that the situation of the defendant, in this case, is no different than if the tipster told the officers that:

> [The defendant] possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills . . . the officers would have had no justification to stop Ubiles based merely on information that he possessed a wallet, and the seized bills would have to be suppressed.[259]

Similarly, in *Northrup v. City of Toledo Police Department*, the Sixth Circuit found that an individual who possesses a firearm in public is not *per se* dangerous.[260] The court reasoned that:

> While open carry laws may put police officers . . . in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. The Toledo Police Department has no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every 'gunman' who lawfully possess a firearm.[261]

In *Commonwealth v. Hicks*, the Supreme Court of Pennsylvania overruled its precedent and held that "the observation of a firearm concealed on [the defendant's] person" did not raise reasonable and articulable suspicion that the individual was taking part in criminal conduct, and that a seizure which occurred "solely due to [that] observation" could not be justified.[262] The court overruled previously established case law that "possession 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."[263]

In *Hicks*, the officers responded to an alert that the defendant had entered a convenience store and was in possession of a weapon.[264] Officers detained and disarmed the defendant.[265] It later emerged that the defendant was licensed to carry a concealed firearm, but he was charged with possession of marijuana, found during a search of his person, and DUI.[266] The defendant moved to suppress on the grounds that state law provides for lawful carrying of firearms and that mere possession of a firearm, concealed or open, is neither criminal conduct nor indicative of criminal activity.[267] In limiting its decision to the first prong of *Terry*, the court held there is "no justification for the notion that a police

258. *Id.*
259. *Id.* at 218.
260. 785 F.3d 1128, 1133 (6th Cir. 2015).
261. *Id.*
262. 208 A.3d 916, 951 (Pa. 2019).
263. *Id.* at 921 (quoting Commonwealth v. Robinson, 600 A.2d 957, 959 (Pa. Super. Ct. 1991)).
264. *Id.* at 922.
265. *Id.*
266. *Id.*
267. *Id.* at 937.

officer may infer criminal activity merely from an individual's possession of a concealed firearm in public."[268] The police officer must have "prior knowledge that a specific individual is not permitted to carry a concealed firearm" or some other "articulable facts supporting reasonable suspicion that a firearm is being used or intended to be used in a criminal manner."[269] The court set a standard that "requires something suggestive of criminal activity before an investigative detention may occur," noting that "[t]he Commonwealth cannot simply point to conduct in which hundreds of thousands of citizens lawfully may engage, then deem that conduct to be presumptively criminal."[270] Many other state supreme courts[271] and federal circuits[272] have arrived at holdings similar to the Pennsylvania Supreme Court.

Across these cases is the theme that simple gun possession is not enough to raise suspicion of criminal activity provided that firearm possession is legally permitted. And today, in every state, gun possession is more permissible than ever.[273] The reality is that in every state, officers may be reticent to simply approach an individual in possession of a firearm and ask questions related to the licensure of the firearm and the conduct the individual is taking part in. Such actions by the officer would give rise to Fourth Amendment concerns. Officers will need more than mere possession to initiate such questioning, such as knowledge of the detainee's felon-in-possession status or that serial numbers have been removed from the firearm. But an officer cannot obtain such information from a distance or without directly investigating the individual and the firearm.

D. DOES FURTHER NORMALIZATION OF GUN POSSESSION AFFECT REASONABLE SUSPICION?

When *Terry* was decided in 1968, gun possession by anyone other than law enforcement was illegal in Ohio.[274] Thus even in *Terry*, once the officer had reasonable suspicion that the suspects were carrying a weapon, the officer had reasonable suspicion that criminal activity was afoot because the possession itself was a violation of Ohio's firearm regulations.[275] Furthermore, because of the rarity of guns, officers could justify more suspicion of criminal conduct or danger because of the presence of a weapon in any given situation. The changes in Second Amendment law and ensuing increase in guns in public, however, changes that calculus.

---

268. *Id.* at 936.

269. *Id.* at 937.

270. *Id.* at 940.

271. *See, e.g.*, State v. Bishop, 203 P.3d 1203 (Idaho 2009); State v. Vandenberg, 81 P.3d 19 (N.M. 2003); State v. Serna, 331 P.3d 405 (Ariz. 2014) (finding that officers did not have reasonable suspicion that the defendant had committed or was going to commit a crime simply because the officer initiated a *Terry* stop after observing that the defendant had a bulge upon the person).

272. United States v. Leo, 792 F.3d 742 (7th Cir. 2015).

273. *See supra* Part I.

274. Terry v. Ohio, 392 U.S. 1, 4 n.1 (1968).

275. *See generally id.*

The increased normalization of firearms[276] impacts both parts of a *Terry* stop. As legally-carried firearms become more prevalent, it is increasingly the case that the fact that an individual is carrying a weapon will not necessarily give rise to the suspicion that they are taking part in criminal activity. Meaning, the fact that an individual is carrying a weapon is increasingly not a "'specific and articulable fact' [sufficient] to justify a stop or frisk . . . ."[277]

In the first prong of *Terry*, the question becomes is possession of a firearm reasonable suspicion of criminal activity, whether that activity is illegal possession or some other conduct? In the second prong of *Terry*, is possession of firearm reasonable suspicion that the individual armed and dangerous? The question is not whether the individual is armed, which is a given, but rather whether firearm possession makes the individual *per se* dangerous? As to both questions, one can reach divergent conclusions.

Both questions can be summarized into a simpler question for a court to resolve: Does firearm possession in public provides law enforcement the opportunity to investigate further?

With the increased normalization of firearm possession in public, the "assumption that mere possession of a firearm constitutes a crime is crumbling."[278] "[C]oncealed weapons will probably not be considered contraband in so-called 'shall issue' states."[279] Before *Bruen*, scholars believed that in "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."[280] However, in jurisdictions where there has been no broad firearm licensing scheme, such as in California, pre-*Bruen*, "such an argument could be made."[281] Now, all over the country, firearm possession may be considered as commonplace as carrying the Bible or Quran[282]—not a constitutionally "suspicious" activity but a mere exercise of one's fundamental right.

Stated in statistical terms, the relationship between firearm possession and *Terry* stop is inverse. "To authorize *Terry* stops for firearms possession alone means . . . individuals are subjected to *Terry* stops at will [simply] because there is . . . too small a percentage of others in their community who could lawfully exercise this civil right . . . [who] opt to do so."[283] As firearm ownership and public carry increases, the authority to authorize *Terry* stops on firearm

276. See *supra* Parts I.A & D.

277. Bellin, *supra* note 206, at 31.

278. *Id.*

279. Jon S. Vernick, Matthew W. Pierce, Daniel W. Webster, Sara B. Johnson & Shannon Frattaroli, *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Low Enforcement Tool*, 31 J.L. MED. & ETHICS 567, 574 (2003).

280. Barondes, *supra* note 222, at 370.

281. *Id.*

282. A most obvious protection under the First Amendment even though guns and sacred religious books are wholly distinct in the danger their to the community.

283. *Id.*

possession alone decreases. But public safety concerns need to be taken into account because guns are *especially dangerous* and illegal firearm possession is easily verifiable with a simple question: "Can I see your license to carry?"

E. THE ANALOGICAL CONFLICT OF *TERRY* AND THE FIRST AMENDMENT

In similar fashion, we can see how exercising the First Amendment can also raise Fourth Amendment concerns. This occurs when an individual exercises their free speech rights and such exercise and expression gives rise to reasonable suspicion that an individual is involved in criminal activity.[284] For example, we might question whether display of symbol or texts can be the basis of a *Terry* stop.[285] Display of a symbol, such as a marijuana tattoo, or a verbal shouting of "down with the government" could raise concerns among the public, but is not, on its own, illegal.[286]

For example, in *Estep v. Dallas County*, the Fifth Circuit, reviewing a traffic stop based on a NRA sticker, held that the "presence of the NRA sticker in the vehicle should not have raised the inference that [the defendant] was dangerous" because "placing an NRA sticker in one's vehicle is certainly legal and constitutes expression which is protected by the First Amendment."[287] Similarly, the Tenth Circuit in *United States v. Guerrero* held that the "presence of religious iconography in the vehicle is . . . not merely consistent with innocent conduct but so broad as to provide no reasonable indicium of wrongdoing."[288]

Other circuit courts disagree. The Eighth Circuit in *United States v. Frazier* upheld a lower court's finding that the officer did not violate the Fourth Amendment.[289] The District Court noted that "it is not beyond the realm of possibility that the carrying of a Bible on the dashboard of a vehicle can be indicative of drug courier behavior, even if such conduct is often benign."[290] Thornton likewise argues that the display of religious symbols is a basis for initiating a stop that does not implicate the First Amendment.[291]

One may argue that the First and Second Amendments do not raise the same concerns. Protected First Amendment activity generally does not implicate public safety concerns, but protected Second Amendment activity, due to the dangerous nature of firearms, does and thus may require a higher level of attention from law enforcement. Regardless of how the First and Fourth Amendments may interact, constitutionally-protected Second Amendment conduct can come into tension with the Fourth Amendment when an individual

284. *Id.* at 369.
285. *Id.*
286. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).
287. 310 F.3d 353, 360 (5th Cir. 2002).
288. 472 F.3d 784, 788 (10th Cir. 2007).
289. United States v. Frazier, 408 F.3d 1102, 1106 (8th Cir. 2005).
290. Frazier v. Lutter, No. 4:07-CV-3019, 2007 WL 1340932, at *1 (D. Neb. Mar. 7, 2007).
291. *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).

acts in a way that a police officer, both subjectively and reasonably, can believe is suspicious. The question becomes, does constitutionally protected activity under the Second Amendment override the reasonable suspicion standard under *Terry* and the Fourth Amendment?

IV. WHAT WILL *TERRY* STOPS LOOK LIKE GOING FORWARD? PROPOSALS ON THE FUTURE OF *TERRY*

Just like with other controversial issues (abortion, same-sex marriage, religious freedom), the litigation and legislation behind firearm ownership and possession may never end.[292] Each state will continue to have their own response to the constant wave of mass shootings, either further expanding gun possession liberties or further constraining them with new gun control measures. Such legislation will be litigated, and new factual scenarios will continue to emerge. And there is no doubt that law enforcement will continue to rely upon *Terry* as an investigatory tool. The Supreme Court will have to step in eventually to clarify and resolve the conflict between *Terry* and *Bruen*. Among many possibilities, there are two ways the Court may address this conflict. First, it could find that firearm possession liberties are more important than officer and public safety, thereby limiting the presence of firearm possession as a justifying factor under *Terry*, and further elevating the right to bear arms. Alternatively, it could limit public firearm possession liberties by giving law enforcement the automatic authority to investigate if the officer deems an individual has a firearm, regardless of any other contributing factors.

But why must the Court resolve this dilemma? Based on the case law that has emerged post-*Bruen*, the current harmony between *Terry* and *Bruen* requires finding that firearm possession is not inherently reasonably suspicious. As all states now have a "shall-issue" regime, future courts are more likely to rule that a firearm alone does not justify a *Terry* stop. But these courts will be departing from the reality that firearms are uniquely unsafe, a conclusion that the Supreme Court itself has come to, finding exceptions and police actions necessary when firearms are involved.[293]

In 2018, the Court had the opportunity to resolve this issue when the case of *Eduardo Gomez v. Illinois* was petitioned for review, but the Court denied certiorari.[294] And while it is unknown why the court denied cert, the hypothesis is that the conservative Court first wanted to expand the right to gun possession to its optimal level, hence *Bruen*, before it took on the issues surrounding possession of a firearm and the Fourth Amendment. As this issue was already

292. *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889 (2024); Nat'l Ass'n for Gun Rts. v. City of Naperville, 144 S. Ct. 538 (2023) (denying hearing whether the government can "ban the sale, purchase, and possession of certain semi-automatic firearms and firearm magazines tens of millions of which are possessed by law-abiding Americans for lawful purposes when there is no analogous historical ban as required by" *Heller* and *Bruen*).

293. *See supra* Part I.

294. Gomez v. Illinois, 105 N.E.3d 901 (Ill. 2018), *cert. denied*, 139 S. Ct. 1210 (2019) (mem.).

litigated heavily before *Bruen*,[295] the expansion of the public carry right will only lead to more constitutional challenges to instances where police interact with individuals carrying a weapon.

Each proposal discussed in the Subparts below is grounded in concepts raised in the litigation in the federal circuits and state supreme courts. The "Gun Possession Plus" approach arises from court rulings that the possession of a firearm, without other specific and articulable facts of suspicious criminal activity, is not by itself enough to initiate an investigative stop. Following that approach raises concerns of public safety and proper firearm use. The opposite proposal, stemming from court decisions that have given law enforcement significant latitude, provides officers with an *automatic* right to question and even frisk an individual possessing a weapon. That approach raises concerns about the use of *Terry*, particularly in minority communities, and whether this will be a "new" pretext for *Terry* stops.

By contrast, some gun rights advocates theorize that *Bruen* changes nothing because, regardless of the state's firearm regulatory scheme, criminals are already in possession of firearms. This perspective holds that *Bruen* does not change that reality or impact the degree to which it can enter the calculus behind a *Terry* encounter. Part IV.C discusses this viewpoint in more detail.

A. PRESUMPTION OF LEGAL POSSESSION AND THE NEED FOR MORE

Some scholars argue that courts can reconcile the growth of Second Amendment rights and the normalization of guns with law enforcement interests such as officer and public safety by requiring officers to show that the possession of a firearm has given rise to reasonable suspicion of criminal activity in combination with other factors.[296] The requirement of firearm possession in combination with another factor of suspicion has been called the "Gun Possession Plus" standard.[297] This standard relies on the premise that possession of a firearm alone would not enough to raise reasonable suspicion sufficient for an investigative stop. For an officer to initiate a stop, they must use firearm possession as but one factor within the totality of circumstances to demonstrate that the officer had reasonable suspicion to conduct a *Terry* stop.

The idea behind this standard is that possession of a firearm on its own is presumed to be legal, thus the officer cannot initiate questioning or a frisk without other specific and articulable facts. This requires that conduct protected by the Second Amendment be respected by law enforcement where there are no other facts to support suspicion of criminal activity. The Gun Possession Plus standard does not ignore that a firearm can be part of criminal conduct, but the officer must have more on information regarding what specific criminal conduct is being alleged as taking place. This is akin to the notion that an individual's

295. *See supra* Part III.
296. *See generally* Fields, supra note 17.
297. *Id.*

presence in a high-crime neighborhood is not enough to justify a stop, although presence along with other facts can give rise to reasonable suspicion.[298]

In reality, this standard already exists. In a scenario where an officer sees that an individual is present in a high-crime neighborhood, making furtive movements, fitting the profile of a drug carrier, and possessing a weapon, the combination of at least two of those factors in combination raises reasonable suspicion of criminal activity.[299] The Supreme Court has even recognized the common co-occurrence of firearm possession with types of crime, such as drug-related activity.[300] The Gun Possession Plus standard places the weight of reliance on an individual's possession of a firearm on the same footing as other factors: not enough on its own but capable of contributing to an inference of reasonable suspicion in the totality of the circumstances.[301]

It may be argued that a key drawback to the Gun Possession Plus standard is that it ignores a key premise of *Terry*: the unique danger of firearms to officers and the public. By minimizing the real danger posed by firearms and the role guns often play in certain types of crime. As the Court stated in *Quarles*, *McLaughlin*, *Terry*, *Long*, and *Mimms*,[302] protection of Second Amendment liberties cannot come at the expense of public safety and legitimate law enforcement. To withhold from police the full authority to investigate any form of firearm possession would be reckless, even if in all jurisdictions, firearm possession is permitted in some form. But the Gun Possession Plus standard does not take the firearm possession fact off the table, it simply recognizes it as a factor within the totality of the circumstances test as provided by the Court in *Arvizu* and *Wardlow*.[303]

B. AUTOMATIC AUTHORITY TO CONDUCT A *TERRY* STOP UPON SUSPICION OF FIREARM POSSESSION – THE FIREARMS EXCEPTION

Some scholars propose that an officer should have automatic authorization to investigate firearm possession.[304] The reason why is simple and broadly understood: the individual possession of a firearm "poses a *per se* danger to the officer and public."[305] This approach considers that the "consequences are simply too high to prevent officers from taking necessary precautions to protect themselves and the public."[306]

298. *See supra* Part II.A.

299. *See supra* Part II.A.

300. *See, e.g.*, Smith v. United States, 508 U.S. 223 (1993).

301. United States v. Arvizu, 534 U.S. 266, 273 (2002); United States v. Sokolow, 490 U.S. 1, 6 (1989).

302. New York v. Quarles, 467 U.S. 649, 657 (1984); McLaughlin v. United States, 476 U.S. 16, 17 (1986); Terry v. Ohio, 392 U.S. 1, 30–31 (1968); Michigan v. Long, 463 U.S. 1032, 1049, 1052 (1983); Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977).

303. *See generally Arvizu*, 534 U.S. 266; *Sokolow*, 490 U.S. 1.

304. *See generally* Fields, *supra* note 17; Barondes, *supra* note 17.

305. Shawn E. Fields, Terry, *Handguns, and The Hand Formula: Some Preliminary Thoughts*, 54 IDAHO L. REV. 467, 468 (2018).

306. *Id.* at 475.

Under an automatic authorization standard, when an officer becomes aware or receives a reliable tip that an individual is carrying a firearm, she is allowed to approach the individual and ask for their carry permit, and to conduct a firearm inspection.[307] However, without more specific and articulable suspicion of a *separate* criminal act, such as burglary or dealing drugs, the officer must limit her investigation to the firearm.[308] The officer is given an automatic right to conduct a *limited Terry* stop to determine whether the individual is allowed to carry a firearm, that the firearm is properly concealed, that the weapon is not in a sensitive place, that the firearm's serial number is intact, that the firearm was not used in a crime, and/or that the firearm is not otherwise in violation of the state's regulations. Such automatic authorization operates as an exception to the Second Amendment, a backstop against abuse of such liberties, based on an understanding that firearms are uniquely dangerous.

Similar to the Gun Possession Plus standard, the concept of an automatic authority to inquire about an individual's weapon is already present in many states.[309] Many states have provisions within their licensing scheme that grant law enforcement officers an automatic right to ask an individual carrying a weapon for their carry permit.[310] Once an individual presents their license, the individual has shown an affirmative defense to unlawful carry, and may no longer be detained absent other conduct related to violence or other criminal offense. For an officer to continue her interaction, she must have "specific and articulable reasonable suspicion that criminal activity is afoot" outside of activity related to suspected violations of firearm regulations.[311] This approach of automatic authority follows Court precedent such as *Hiibel v. Sixth Judicial District Court of Nevada*, where the Court held that inquiries by an officer that have "an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop," where the stop was "justified at its inception," do not constitute a Fourth Amendment violation.[312]

Organizations that are anti-gun-control will likely scoff at such a concept, raising claims of Second Amendment violations. They may argue that laws that permit firearm inspections are not part of the history and tradition of the Second Amendment.[313] But firearms are such a uniquely threatening tool that part of the constitutional right to carry one should include law enforcement's ability to ensure an individual's firearm possession is legitimate. Such enforcement tactics are indeed prescribed by the Court in *Bruen*, *Heller*, and *McDonald*.[314]

307. *See generally id.*

308. *Id.* at 475, n.54.

309. *Duty to Inform*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/terminology/general-terms/duty-to-inform (last visited May 24, 2024).

310. *Id.*

311. *See* supra Part II.A.

312. 542 U.S. 177, 188 (2004).

313. *See generally* State v. Wilson, 543 P.3d 440 (Haw. 2024).

314. *See supra* Part I.C.

Similarly, those concerned with the racially unjust effects of *Terry* also may fear that providing more power to the police will allow such effects to go unchecked.[315] Arguably, the continued use of *Terry* stops in any situation can be a hard pill to swallow, but striking the right balance between the racial inequities of *Terry* as applied on the ground and the public safety concerns of *Bruen* is outside the scope of this Note. That said, the question remains: If we concede that law enforcement have an automatic authorization to investigate firearm possession, can we trust the police to patrol streets and conduct such stops in a legitimate, equitable, and non-discriminatory manner?[316] It would be unwise to ignore the possibility that automatic authorization to investigate an individual's firearm possession could be used as a tool for officers to conduct pretextual and discriminatory stops.

The best way for the automatic authorization tool to be implemented in a way that avoids or at least mitigates that possibility is to reform *Terry*. *Terry* reforms include "better selection of police personnel during recruitment, improved training, clearer administrative policies, enhanced supervision of officers with corresponding accountability mechanisms, and external oversight."[317] While passing such reforms is a tall task in a highly polarized political landscape,[318] the reality is that in a society where gun possession is commonplace and normal, there must be a check on gun possessors. Yet that check need not be at the expense of justice for racial minorities. Reforms such as described can significantly reduce the incidence of racially-motivated stops. By reforming and using the investigative tool from *Terry* to ensure all firearm possession is legal and proper, we may be able to continue to keep streets safe and counteract the continued threat of harm posed by firearms. I am cautiously optimistic.

C. IS THE IMPACT OF *BRUEN* AND THE RIGHT TO CARRY IN PUBLIC ON *TERRY* A "MYTH"?

The idea that *Bruen* has little impact on *Terry* comes from multiple fronts. There is some broad agreement that "concealed handgun permit holders are extremely law-abiding"[319] and a "general consensus that licensed gun possessors rarely use their firearms to commit violent street crimes such as robberies or

315. Eric J. Miller, *Reasonably Radical:* Terry*'s Attack on Race-Based Policing*, 54 IDAHO L. REV. 479, 479 (2018).

316. *See supra* Part III.B (discussing the disproportionate initiation of *Terry* stops upon minorities).

317. *See generally* Henry F. Fradella & Michael D. White, *Reforming Stop and Frisk*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 45 (2017).

318. Candice Norwood, *Democrats' Police Reform Bill Faces Opposition in the Senate—But that's Only the First Hurdle*, PBS (Mar. 5, 2021, 5:33 PM EDT), https://www.pbs.org/newshour/politics/democrats-police-reform-bill-faces-opposition-in-the-senate-but-thats-only-the-first-hurdle ("Despite bipartisan agreement on a need for change in policing, there's a notable gap between Republicans' and Democrats' ideas on reform remedies.").

319. *Concealed Carry Facts and Fiction*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/gun-facts-and-fiction/concealed-carry (last visited May 24, 2024).

murders."[320] Many gun-rights advocates assert that "guns do not kill people, people kill people."[321]

Similarly, the fact that *Terry* stops yield a low number of firearm seizures by officers suggests that *Terry* and firearm possession intersect seldomly.[322] Part of the reason for this is that spotting a concealed weapon can be difficult—it is called *concealed* carry for a reason. Training for a firearm license requires not only proper firearm use but also correct firearm care, storage, and safety.[323] In practice, the increase in concealed carry firearms may not actually lead to more guns being spotted by law enforcement.[324] And those who do not properly conceal their weapons are likely not permitted to carry them.

To some, *Bruen* did not dramatically change the law in practice, it just affirmed a trend that was already taking place before *Heller*.[325] Criminals have long-since been acquiring guns and often are not trained in their proper use, safety, and concealment. In such scenarios, law enforcement is simply doing its job by spotting and appropriately investigating such possession. Thus, the theory goes, law-abiding citizens will continue to follow the law, conceal their firearms, and, in the limited circumstances where law enforcement have occasion to ask, show proof of their licensure, while individuals who are not licensed and/or are not appropriately concealing their weapon will be spotted and questioned.

However, this is all just theory. The fact is that as gun possession has increased, deaths and injuries from firearms have increased.[326] And many times over, guns are initially bought legally and then put into the wrong hands.[327] Public safety demands more than just hoping law-abiding citizens can be trusted with such threatening, dangerous, and destructive weapons.

Law enforcement must be able to check a suspected firearm possessor for valid possession without fear that even a limited, above-board, check on the gun in the name of public safety does not raise a constitutional violation. These issues

320. Bellin, *supra* note 206, at 32.

321. Jill Filipovic, *The Conservative Philosophy of Tragedy: Guns Don't Kill People, People Kill People*, GUARDIAN (Dec. 21, 2012, 10:00 AM EST), https://www.theguardian.com/commentisfree/2012/dec/21/guns-conservative-philosophy-tragedy; Graham Allen, *Guns Don't Kill People. Bad People Kill People*, TURNING POINT USA (May 16, 2022), https://www.tpusa.com/live/guns-dont-kill-people-bad-people-kill-people.

322. Barondes, *supra* note 17, at 7 ("[T]hese stops do not seem to have been highly effective in identifying persons who possess firearms.").

323. *Gun Owner Safety Training*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/solutions/safety-training (last visited May 24, 2024). *But see* United States v. Homer, No. 23-CR-00086, 2024 WL 417103, at *17 (E.D.N.Y Feb. 5, 2024) ("[W]hile a lack of firearm discipline is inconsistent with the training that one would have to undergo to acquire a license to carry a firearm, it is too large a leap to conclude that lack of firearm discipline implies that the firearm is unlicensed.").

324. *See Carry a Gun? Here's What You Need to Know About Concealed Carry*, U.S. L. SHIELD (Sept. 28, 2021), https://www.uslawshield.com/concealed-carry ("The primary advantage to concealed carry is that, when done correctly, only the person carrying knows there are firearms present.").

325. *Background Checks – NICS*, NRA-INST. FOR LEGIS. ACTION, https://www.nraila.org/get-the-facts/background-checks-nics (last visited May 24, 2024).

326. *See supra* Part I.D.

327. *Trafficking & Straw Purchasing*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing (last visited May 24, 2024).

have and will continue to rise.[328] The best short-term answer is clarification from the Court as to what an officer can do when they suspect or see a firearm in public. Until then, the tension between *Bruen* and *Terry* remains.[329]

CONCLUSION

The Second Amendment protections expanded by the Court over the past two decades have led to more guns being present in public at the same time as our society has experienced a rising epidemic of gun violence. Often, officers can take guns off the street through investigative stops that lead to the discovery of felon-in-possession, unlicensed firearm, or domestic violence order violations. However, such investigative stops are far from perfect and have drawn calls for police reform stemming from racial profiling and unjust policing. The question, as explored throughout this Note, is what should be done when an officer spots a firearm in public? Should they accept its presence as legitimate and lawful, even though a firearm inherently poses a unique threat to public safety? Can officers approach and question, without any other reason than the firearm possession, or is such authority outweighed by the potential of police abuse? Is there a way to institute an approach that both accepts the perspective that firearm possession is not inherently suspicious and allows law enforcement to pursue investigation to keep themselves and public spaces safe?[330]

Under *Terry*, a significant justification for an officer's frisk of an individual when conducting an investigative stop is that it ensures that the individual the officer is dealing with is "not armed with a weapon that could unexpectedly and fatally be used against" the officer and the public.[331] And yet, through its decision in *Bruen*, the current conservative Court opened the door to further erosions of safety—aside from the well-documented, repetitive, and destructive nature of firearms on innocent civilians (particularly school-age children).[332]

An ideal solution to ensure public safety would be a more limited Second Amendment jurisprudence, such that all jurisdictions take on "may-issue" schemes, and that officers must have "probable cause" that criminal activity is afoot to initiate a *Terry* stop, as stated in Justice Douglas's dissent.[333] But we do not live in such a perfect world. Accepting that the *Bruen* holding will be law for a long time and that firearms will continue to be present in daily public life, we must work with the law as it stands, finding ways to improve upon its

328. *See Homer*, 2024 WL 417103; United States v. Torres, No. 23-CR-395 (JGK), 2024 WL 1251186 (S.D.N.Y. Mar. 22, 2024).

329. *United States v. Rahimi* does not answer this. While *Rahimi* is a follow-up case to *Bruen*, it speaks only to whether domestic-violence perpetrators already in the court system can access firearms. *See supra* Part I.E.

330. *See generally* Fields, *supra* note 17.

331. Terry v. Ohio, 392 U.S. 1, 23 (1968).

332. John Woodrow Cox, Steven Rich, Linda Chong, Lucas Trevor, John Muyskens & Monica Ulmanu, *School Shootings Database*, WASH. POST (Apr. 11, 2023), https://www.washingtonpost.com/education/interactive/school-shootings-database ("More than 352,000 students have experienced gun violence at school since Columbine."). *See also* UVALDE REPORT, *supra* note 16.

333. *Terry*, 392 U.S. at 35 (Douglas, J., dissenting).

application through clarification and resolution of its meaning, which only the courts can provide. While both the "Guns Possession Plus" Standard and the Automatic Authorization Exception to the Second Amendment are not perfect approaches to resolving the tension between the Second and Fourth Amendments, and while both require plenty of reform to law enforcement before they can truly be impactful, they are the best guides on how to operate in a post-*Bruen* world.

Maybe the simple solution for all of this could be to not allow everyday individuals to carry weapons altogether. Maybe *Terry* stops should require a "probable cause" standard as stated by Justice Douglas's dissent. But we are nowhere near that.

***