

POLICING IN THE AGE OF THE GUN

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This Article examines how the rapid deregulation and rampant possession of firearms is likely going to impact policing, and the constitutional law that governs it. For the longest time, lawful gun carry, concealed or open, was exceedingly rare. For a police officer to see a gun was both to see danger, and a crime in progress. This link among guns, danger, and unlawful possession has shaped much of the law of policing. But now, this understanding of the world is in its last stages of unraveling.

In nearly all states, guns are no longer unlawful to own and carry by default. In many, they are barely regulated. Recent Supreme Court Second Amendment decisions like New York State Rifle & Pistol Association v. Bruen serve only to hasten where state laws already were headed. For police, however, the harm guns can do exists irrespective of what the law has to say about the legality of carrying them. As a result, the nation's gun laws are on a collision course with the practice and law of policing. This Article explores how the constitutional law governing policing is changing and will change in the face of gun legalization.

Part I of this Article explains the ubiquitous role guns play in the life of a police officer, and what actions guns lead police to take. Part II is about the legal doctrine of policing, both before and after firearm legalization. It details how the law shaped what police could do in order to protect themselves and others, and how that law is changing to accommodate legalization. Police now must operate in a terrain that increasingly is uncertain as to their lawful authority, and that in many instances may put them or others in jeopardy. Part III examines how the shifting laws of guns and policing might impact police behavior, likely resulting in ad hoc carve-outs for police authority that—if history is any guide—overwhelmingly will be imposed on Black and Brown communities.

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INTRODUCTION

In the old Frank Sinatra tune, love and marriage go together like a horse and carriage. “This I’ll tell ya, brother, you can’t have one without the other.”¹ Here in America, the same seems to be true of police and their guns. American police are exceptional in many ways, but one is that all of ours carry guns, are taught to resort to them quickly as both a coercive and persuasive tool, and as such their work leads to an extraordinary number of mortal encounters.² It is a commonly recited fact that

¹ FRANK SINATRA, *Love and Marriage, on A MAN AND HIS MUSIC* (Reprise Records 1965).

² See Brandon del Pozo, *I’m a Police Chief. We Need to Change How Officers View Their Guns*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/13/opinion/police-shootings-guns.html> [<https://perma.cc/Z9DP-7EQX>] (noting that police officers are taught to “lead with the gun” and arguing that officers should be trained to view their weapons as insurance policies rather than persuasive devices). There are about nineteen countries in which municipal police are routinely unarmed, and dozens of others where police are divided into armed and unarmed contingents (for example, New Delhi and

police kill roughly one thousand people each year, wound countless more, and most of those deaths and injuries occur when police shoot people.³

But there is another, deeper connection between guns and the police, one that drives that data point about deadly force and much else around policing. Guns are ubiquitous in American culture, and with that ubiquity comes danger. For the police officer, the threat from guns is around every corner. For a long time, there was yet one more absolutely crucial datapoint that tied this story together: The public possession of guns by people other than the police was almost always unlawful.⁴ Lawful carry, concealed or open, was exceedingly rare.⁵ To see a gun was to see danger. But it was also to see a crime in progress.

London), but it is hard to find another country in which the gun is such a singular, defining aspect of policing. See Kara Fox, *How US Gun Culture Compares with the World*, CNN (July 19, 2017, 6:58 PM), <https://edition.cnn.com/2017/07/19/world/us-gun-crime-police-shooting-statistics/index.html> [<https://perma.cc/X5Z2-D7AD>] (“The United States arms some 800,000 law enforcement officers . . .”); *National Police Week: 14-20, 2023*, U.S. CENSUS BUREAU (May 14, 2023), <https://www.census.gov/newsroom/stories/police-week.html> [<https://perma.cc/QN8U-ES6B>] (reporting that there were 784,029 full time police officers in the United States in 2021).

³ Federal government data on police shootings is inordinately and inexcusably poor, and so others have begun doing their own tracking. See Andrew Ba Tran, Marisa Lati & Claire Healy, *As Fatal Police Shootings Increase, More Go Unreported*, WASH. POST (Dec. 6, 2022, 6:30 AM), <https://www.washingtonpost.com/investigations/interactive/2022/fatal-police-shootings-unreported> [<https://perma.cc/L35E-6RC9>]. Records are kept by the Washington Post, *Fatal Force*, WASH. POST (July 13, 2023), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> [<https://perma.cc/FW9Z-AHE8>] (documenting fatal force data), and Campaign Zero, *MAPPING POLICE VIOLENCE* (May 31, 2023), <https://mappingpoliceviolence.org> [<https://perma.cc/L5TK-ZLK8>] (same). For non-fatal force, see Justin Nix & John A. Shjarback, *Factors Associated with Police Shooting Morality: A Focus on Race and a Plea for More Comprehensive Data*, PLOS ONE, at 3 (Nov. 10, 2021), <https://doi.org/10.1371/journal.pone.0259024> [<https://perma.cc/FH5A-MHPM>] (“Across the four states [studied], 44.5% of those shot by police were injured . . . while 55.5% were killed.”); see also Brian Howey, Wesley Lowery & Steven Rich, *The Unseen Toll of Nonfatal Police Shootings*, WASH. POST (Oct. 21, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-shootings-non-fatal/?utm_source=substack&utm_medium=email [<https://perma.cc/2ENB-FJZV>] (providing anecdotal and empirical data on the prevalence of nonfatal police shootings).

⁴ See Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 8–9 n.36 (2015) (discussing the history of carry restrictions); Alexander Butwin, Note, “*Armed and Dangerous*” A Half Century Later: Today’s Gun Rights Should Impact Terry’s Framework, 88 FORDHAM L. REV. 1033, 1054 (2019) (discussing the resulting presumption of danger); John J. Donohue, Samuel V. Cai, Matthew V. Bondy & Philip J. Cook, *More Guns, More Unintended Consequences: The Effects of Right-to-Carry on Criminal Behavior and Policing in US Cities* 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30190, 2022).

⁵ See Butwin, *supra* note 4 (describing the legal presumption that anyone carrying a gun does so illegally); Donohue et al., *supra* note 4 (noting that there were few exceptions to Texas’s carrying ban); Bellin, *supra* note 4 (documenting wide-ranging restrictions on lawful carry).

The link between guns, danger, and unlawful possession construct much of the law of policing as it exists today. At least until recently, police could conduct a forcible stop of people at the sight of a gun, or even based on a tip that a gun was present somewhere.⁶ Police can frisk people on reasonable suspicion that they are armed and dangerous.⁷ Police can search people they arrest—and the grab area around them—without a warrant because a lurking firearm could pose a threat.⁸ In *New York v. Quarles*, the Supreme Court held that police could dispense with reading *Miranda* rights to a suspect if that suspect was believed to have hidden a gun somewhere in a supermarket, because with a gun on the loose, there was an imminent threat to public safety.⁹ Guns in plain view (certainly in public, and sometimes not) could be seized as contraband because possession was almost certainly unlawful.¹⁰ And so on.

In other words, guns—in the doctrine of policing—have served as permission slips. The presence of a gun, the possibility of the presence of a gun, the threat of a gun—all these, in the case law, allow police to do a variety of things we otherwise would prohibit: for example, to invade people's privacy,¹¹ put the public at risk,¹² and act in ways that have deeply racialized effects.¹³

This law developed, notably, in a world in which the courts overwhelmingly loved cops and consistently disliked guns.¹⁴ Which, again, was easy to do. Because guns were unlawful, guns were dangerous, and police were the heroic figures that dispossessed criminals of their guns at great personal risk.

The problem is that this state of the world, one that constructed policing, is in its last stages of unraveling. In nearly all states, guns are no longer unlawful to own and carry by default.¹⁵ In many, they are barely

⁶ See *Terry v. Ohio*, 392 U.S. 1, 6, 8 (1968) (permitting a stop-and-frisk because officers “feared ‘they may have a gun’”); *infra* notes 76–164 and accompanying text.

⁷ *Terry*, 392 U.S. at 27.

⁸ *Chimel v. California*, 395 U.S. 752, 763 (1969) (“[I]t is entirely reasonable . . . to search for and seize any evidence on the arrestee’s person . . . [a]nd the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.”).

⁹ 467 U.S. 649, 651–53 (1984).

¹⁰ See *Horton v. California*, 496 U.S. 128, 135–37 (1990) (upholding firearm seizure under the plain view exception because (a) the officer was lawfully in a place where he could lawfully gain control over the weapon, and (b) the incriminating nature of the firearm was immediately apparent).

¹¹ See *infra* Section II.A (documenting stop-and-frisk cases).

¹² See *infra* notes 165–79 and accompanying text (discussing the role of firearm presence in authorizing no-knock warrants).

¹³ See *infra* note 192.

¹⁴ See *infra* Part II.

¹⁵ Twenty-four states and the District of Columbia require a permit of some form for the concealed carry of a firearm. Twenty-six states do not require a permit. See *Guns in*

regulated.¹⁶ Much-controverted Supreme Court Second Amendment decisions like *District of Columbia v. Heller* and *New York State Rifle & Pistol Association v. Bruen* served only to affirm and hasten where state laws were already headed.¹⁷ At the time *Bruen* was decided, the vast majority of states in the country either allowed people to carry guns at will, or mandated that authorities “shall issue” permits to carry them.¹⁸

Today, the United States is awash in guns, with a national supply of firearms unrivaled anywhere else in the world. There are an estimated 393 million guns in the United States, a nation with a population of 330 million people.¹⁹ Unlike smartphones and computers, they are not built

Public: Concealed Carry, GIFFORDS LAW CENTER (2023) [hereinafter GIFFORDS LAW CENTER, *Concealed Carry*], <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry> [https://perma.cc/25AV-GKPZ]. Fifteen states and the District of Columbia require a permit for the open carry of a firearm or have otherwise limited it. Another thirty-five states do not require a permit for the practice. See *Guns in Public: Open Carry*, GIFFORDS LAW CENTER (2022) [hereinafter GIFFORDS LAW CENTER, *Open Carry*], <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry> [https://perma.cc/GN3R-QTJB]. When the Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*, it noted that forty-three states—including those that offer, but do not require, firearm licenses—were “‘shall issue’ jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.” 142 S. Ct. 2111, 2123 (2022). Meanwhile, six states plus the District of Columbia had “‘may issue’ laws, which granted licensing officials “discretion to deny concealed carry licenses even when the applicant satisfies the statutory criteria.” *Id.* at 2123–24. In response to *Bruen*, two “‘may issue’ states have changed their laws to “‘shall issue’ regimes. Two other states that previously were “‘may issue’ states have changed their laws to “‘shall issue’ in response to *Bruen*. H.R. 5163, 192d Gen. Ct., 2021–2022 Sess. (Mass. 2022); N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2023) (effective Sept. 1, 2022). In many states, the possession of a valid permit is an affirmative defense to an unlawful gun possession charge. See generally 50 STATE STATUTORY SURVEYS: CRIMINAL LAWS: WEAPONS: RIGHT TO CARRY A CONCEALED WEAPON, Westlaw (database updated Oct. 2021) (collecting statutes). In others, though, the prosecution must prove that the defendant did not have a license. See, e.g., *State v. Neary*, 409 A.2d 551 (R.I. 1979) (discussing the evidentiary presumptions allowing a finding of unlicensed carry).

¹⁶ See GIFFORDS LAW CENTER, *Concealed Carry*, *supra* note 15; GIFFORDS LAW CENTER, *Open Carry*, *supra* note 15.

¹⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Bruen*, 142 S. Ct. 2111.

¹⁸ See *Bruen*, 142 S. Ct. at 2123–24 (assessing that forty-three states are “‘shall issue’ jurisdictions and only six have “‘may issue’ regimes).

¹⁹ Thomas Black, *Americans Have More Guns Than Anywhere Else in the World and They Keep Buying More*, BLOOMBERG (May 25, 2022), <https://www.bloomberg.com/news/articles/2022-05-25/how-many-guns-in-the-us-buying-spree-bolsters-lead-as-most-armed-country#:~:text=US%20gun%20owners%20possess%20393.3,now%20of%20about%20330%20million> [https://perma.cc/XC9P-LK8H]; Deborah Azrael, Lisa Hepburn, David Hemenway & Matthew Miller, *The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey*, 3 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 38, 39 (citing estimates that roughly one in five U.S. adults owns a gun and guns can be found in one of three households). By all accounts, gun sales, especially to first time buyers, have increased significantly since 2015. See, e.g., Jaclyn Diaz, *Ist-Time Gun Buyers Help Push Record U.S. Gun Sales Amid String of Mass Shootings*, NPR (Apr. 26, 2021), <https://www.npr.org/2021/04/26/989699122/1st-time-gun-buyers-help-push-record-u-s-gun-sales-amid-string-of-mass-shootings>

with planned obsolescence in mind, and unlike cars, they are not so complex that at some point they simply will wear out or break. As long as a gun is kept dry and lightly oiled, it almost certainly will work as well decades from now as the day it was made. Lawfully-held guns are every bit as dangerous as when they are contraband. Guns are insentient, and the damage they can do is oblivious to what the law has to say. It may be true that those who possess guns lawfully are less prone to use them criminally.²⁰ But the sheer volume of guns in circulation may lead to more violence. Unlawful gun ownership remains rampant, and lawfully-owned guns are lost or stolen regularly, finding their way into hands of people with criminal intent.²¹ As news stories make clear, even lawful gun owners can use their guns—or have them used—to tragic effect.²²

As a result, the law of guns is on a collision course with the law of policing, the growing ripples of which are being felt all over the country. The question we take up in this Article is how the rapid deregulation and rampant possession of firearms is going to affect policing. What will the legalization of guns do to the law of policing? How will that, in turn, affect what cops can do, or in fact do? And what—because judicial review is in a feedback loop with society, its priorities, and its shifting sentiments—will then happen to the law of policing?

Part I is about guns and policing. It discusses the ubiquity and role of the gun in the life of a police officer: what role guns play in their lives, and what actions guns lead police to take. It illustrates how the gun is one of the central, defining objects and ideas of American policing. The need for police to be both safe from guns and keep them off the street has been at the core of who police are and what they do. These realities have shaped modern police practice, yielding what seem to be inexorably disparate and often tragic results.

Part II is about the legal doctrine of policing, in the before and after times of gun legalization. In the beforetimes, guns were a clearly-written permission slip for officers, facilitating invasive police conduct of many sorts. But the legalization of guns is causing that to change in some ways (though not in others). The law is shifting, and often in ways

[<https://perma.cc/A6RQ-VLXU>] (attributing the recent increase in gun sales to the COVID-19 pandemic, civil unrest, and the perceived threat of new federal gun control legislation).

²⁰ Bellin, *supra* note 4, at 6 (“[L]icensed gun possessors commit only a tiny fraction of violent street crime.”).

²¹ Donohue et al., *supra* note 4, at 25 (positing that right-to-carry laws lead to crime increases in part because of the number of stolen guns).

²² See, e.g., Michael Hall, *You Can Stand Your Ground in Texas. Even When You Kill a Cop*, TEX. MONTHLY (Dec. 10, 2021), <https://www.texasmonthly.com/news-politics/you-can-stand-your-ground-in-texas-even-when-you-kill-a-cop> [<https://perma.cc/9TGA-CFFL>] (describing a deadly Texas shooting of a police officer by a legal gun owner).

that would seem to disadvantage police. If nothing else, police now must operate in a terrain that increasingly is uncertain as to their lawful authority. Once, courts seemed to love police and dislike guns; now, they prefer guns, often to the disadvantage of police.

Finally, in Part III, we ask how the shifting law of guns and of policing will impact police behavior and then how that in turn will affect the law as courts evaluate police actions. We predict—with some evidence from case law—that police will continue to do what they have always done to “get guns off the streets” and to protect themselves from physical danger. We also suspect that courts will bless much of it. Even if the law no longer permits police to do things at “wholesale” because a gun may be lurking during an encounter, courts will allow it at “retail” if police merely articulate fear and suspicion. Indeed, pretextual justifications are likely to become the order of the day. We will go one step further and suggest that just as the law and the police came together to visit disproportionate harms on Black and Brown communities in the bygone times, evolving circumstances will allow these practices to persist if not worsen during Policing in the Age of the Gun.

I

POLICE AND GUNS

A. *Cops and Guns: A Relationship in Three Parts*

Guns are central to the communal culture of the American police officer. Guns figure into their lives in three ways: police carry guns, others’ guns are a danger to police (and third parties), and it is the job of police to keep illegal guns off the street. In this piece, we focus on the latter two, although in Part III we discuss the danger police can pose to others as armed law enforcement, and how the law is likely to respond to that danger in an era of widely-legalized gun possession.

Carrying the gun is the most concrete and practical manifestation of the police officer’s lawful powers; it is the final backstop to every lesser means of persuasion and coercion available to police.²³ Police officers’ service firearms are central to their professional identities, which in police culture invariably comes to form the basis for their personal ones as well.²⁴

²³ Cf. del Pozo, *supra* note 2 (noting that “we teach our police officers to lead with the gun” in situations involving so-called “lethal threat[s],” like knives or shards of glass).

²⁴ The gun figures prominently in the lives of NYPD officers, both on and off duty. See N.Y.C. POLICE DEP’T, PATROL GUIDE PROCEDURE 204–08: FIREARMS, GENERAL REGULATIONS (2018) (specifying, with limited exception, all NYPD officers are required to “[b]e armed at all times in New York City, unless otherwise directed . . . with a service revolver/pistol or off duty revolver/pistol”); cf. Megan B. Mavis & Matthew D. Shapiro, *Second Amendment Interpretation and a Critique of the Resistance to Common-Sense Gun Regulation in the Face*

“Every run you go on is a ‘gun run,’” NYPD recruits are told, “because *you* are bringing a gun.”²⁵

But it is the danger of other people’s guns that truly makes American policing distinct. Guns allow any person who can exert a few pounds of pressure with their index finger to match the proximate, situational power of a police officer. If an armed person gets “the drop” on an officer, it is not merely a match, but an ambush in which the officer-victim is all but helpless. To the extent someone views U.S. police work as dangerous, heroic, and requiring courage—conceptions that police internalize and highly value—it is because of the objective danger that guns create. Guns could be anywhere and can appear without warning.

Finally, there is the belief that it is *the mission of the police to achieve public safety by eradicating the presence of dangerous guns in public*.²⁶ The danger of the gun is present in any encounter between armed people. But it is the police who shoulder the affirmative responsibility of dealing with the threat of others’ guns.²⁷ On the eve of the 2022 West Indian American Day Parade, Brooklyn’s Labor Day celebration, which has been marred by violence in the past, New York City Police Commissioner Keechant Sewell tweeted out that “[o]n #LaborDayWeekend and every day in between, NY’s Finest are dedicated to taking illegal guns and those willing to pull the trigger off the streets of NYC.”²⁸

B. *What Cops Did About Guns*

For the longest time, all three of these factors came together to form the everyday fabric of policing. It generally was a safe assumption for police in most states and certainly in nearly all large cities that a

of Gun Violence: This Is America, 46 W. STATE L. REV. 85, 85–86 (2019) (noting that firearms are a key part of many peoples’ personal and family identities).

²⁵ Some of the content here, including this statement, is based on the personal experience of del Pozo. See del Pozo, *supra* note 2 (detailing del Pozo’s policing experience). This particular statement, for example, was taught to him at the Police Academy, and he would subsequently repeat it to his students as an instructor.

²⁶ See Bellin, *supra* note 4, at 4 (emphasizing the centrality of policing in the implementation of restrictive gun policy).

²⁷ Uvalde is the exception that proves the rule. See *Far More Could Have Been Done to Save Uvalde Massacre Victims, a New Report Says*, NPR (July 6, 2022), <https://www.npr.org/2022/07/06/1110142336/ualde-school-shooting-report> [<https://perma.cc/HL23-PXZY>] (critiquing officers’ failure “to act on opportunities that might have saved lives” in their response to the Uvalde shooting as a departure from what “a reasonable officer” would have done).

²⁸ Alan Feuer & Sean Piccoli, *6-Year-Old and 4 Others Are Shot at J’Ouvert Celebration in Brooklyn*, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/2020/09/07/nyregion/Brooklyn-shooting-jouvert-six-year-old.html> [<https://perma.cc/U2SM-G56D>]; Commissioner Sewell (@NYPDPC), TWITTER (Sep. 4, 2022, 5:19 PM), <https://twitter.com/NYPDPC/status/1566536572937404419> [<https://perma.cc/9VQG-TS9P>].

person carrying a firearm in public—concealed or openly—was a criminal by virtue of doing so.²⁹ As of 1980, twenty-one states had laws that almost completely banned the public concealed carry of firearms.³⁰ Of the remainder, twenty-four states had laws giving the government the discretion to issue permits to people it felt needed them, while denying applicants who couldn't demonstrate such a necessity.³¹ Only four states had “shall issue” laws, which limited the discretion of those charged to issue permits.³² Vermont was the only state in the nation that allowed people to carry a concealed handgun without a permit.³³ The idea that a gun seen in public was criminally carried was a reasonable assumption in nearly every state.

In America's metropolitan areas, especially the ones with the strongest gun control laws, three beliefs—beyond the fact that guns are an omnipresent danger—came to define police conduct: (1) Guns lawfully carried by responsible citizens are the exception, and illegal guns carried by criminals are the rule; (2) The fewer guns there are on the street, the safer a city is; and (3) It is the job of police officers to find these illegal guns and the people carrying them and to remove both from circulation.³⁴ This task, in and of itself, puts police in peril.

Police tactics and behaviors have been shaped by these realities in powerful ways.

1. *Staying Safe*

The work life of the officer on patrol centers around the possibility that hostile people with guns can materialize at any time.³⁵ In some cases, the precautions against attack are general ones, and the gun is the worst case scenario. In others, police take actions specifically to protect against firearms.

²⁹ Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1679–80 (2018) (describing the import of the *Terry* decision's endorsement of stop-and-frisk based on reasonable suspicion because “in a post-*Heller* world . . . courts can no longer assume that public handgun possession is unlawful”). *But see* J. Richard Broughton, *Danger at the Intersection of Second and Fourth*, 54 IDAHO L. REV. 379 (2018) (discussing the challenges courts face with the *Terry* stop and frisk doctrine now that public carry is not ordinarily criminal).

³⁰ *See Carrying Firearms in Public and Stand Your Ground Laws*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, <https://publichealth.jhu.edu/departments/health-policy-and-management/research-and-practice/center-for-gun-violence-solutions/solutions/public-carry-of-firearms> [<https://perma.cc/JG53-BCEH>].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *See* Bellin, *supra* note 4, at 4–5.

³⁵ *See supra* note 25.

This isn't simply paranoia; police officers are in the business of dealing with the nation's armed criminals, and they are not invulnerable. Sometimes, police are targeted by virtue of their professional identity. Two Las Vegas officers were shot and killed in 2014 by right-wing radicals as they ate lunch in a pizzeria in Las Vegas.³⁶ The same year, two New York City police officers were murdered by a gunman without warning as they sat in their patrol car.³⁷ In response, the City retrofitted its fleet of thousands of police cars with bullet resistant doors and unmistakable side windows as thick as a bank teller's.³⁸ Of course, the actuarial probability of a police officer being shot and killed is comparatively small, but it is fair to wonder if it is low in part because police take constant tactical precautions.³⁹

³⁶ See Ken Ritter, *Officials: Vegas Patrol Officer Fatally Shot; Suspect Held*, AP NEWS (Oct. 13, 2022), <https://apnews.com/article/shootings-arrests-las-vegas-nevada-mass-shooting-ce7f6ae2e5321900e96a9553604d401e> [<https://perma.cc/2XKB-GYYH>] (describing various violent acts against Las Vegas officers); Joyce Lupiani, *ANNIVERSARY: 2 Las Vegas Police Officers, 1 Citizen Killed 7 Years Ago at CiCi's Pizza, Walmart*, KTNV LAS VEGAS (June 8, 2021, 11:31 AM), <https://www.ktnv.com/news/anniversary-2-las-vegas-police-officers-1-citizen-killed-7-years-ago-at-cicis-pizza-walmart> [<https://perma.cc/KU3Q-PT4P>] (“The couple was believed to have been involved in right-wing anti-government groups.”).

³⁷ Benjamin Mueller & Al Baker, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide*, N.Y. TIMES (Dec. 20, 2014), <https://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html> [<https://perma.cc/4YK9-FP28>].

³⁸ Marc Santia, Chris Glorioso & Adam Warner, *NYPD to Retrofit More Police Vehicles with Bullet-Resistant Glass After Deadly Officer Shooting*, NBC N.Y. (May 14, 2018, 4:59 PM), <https://www.nbcnewyork.com/news/local/nypd-officer-shot-familia-bullet-resistant-glass-mobile-command-unit-window/199688> [<https://perma.cc/WH46-WR9M>]; Michael Schwartz, Nikita Stewart & Al Baker, *Police Seek Motive in Bronx Officer's Shooting, as Killer's Sister Offers Perspective*, N.Y. TIMES (July 7, 2017), <https://www.nytimes.com/2017/07/06/nyregion/police-seek-motive-in-bronx-officers-shooting.html> [<https://perma.cc/ZRU5-J4VE>] (discussing how the original plan to retrofit patrol cars after the 2014 shooting expanded to other police vehicles after the shooting of another NYPD officer, Misotis Familia, that occurred in 2017); Matthew Hamilton, *Senate Republicans Tout \$4M for NYPD Vehicle Upgrades*, TIMES UNION (July 10, 2017), <https://www.timesunion.com/allnews/article/Senate-Republicans-tout-4M-for-NYPD-vehicle-11278051.php> [<https://perma.cc/NU6G-4X4W>] (discussing the addition of bullet resistant door panels to NYPD patrol cars).

³⁹ There are approximately 750,000 police officers in the United States, and the number killed in the line of duty from all causes rarely exceeds 200. See *Year-by-Year Breakdown of Law Enforcement Deaths Throughout U.S. History*, NAT'L L. ENF'T MEM'L FUND (Mar. 24, 2023), <https://nleomf.org/memorial/facts-figures/officer-fatality-data/officer-deaths-by-year> [<https://perma.cc/6XP7-UBAY>] (listing the number for each year). It is uncommon for more than 100 known officers a year to die by shooting. See “Find a Fallen Officer” Search, OFFICER DOWN MEM'L PAGE, <https://www.odmp.org/search> (narrow “Cause” to “Gunfire”; then search by year) (last visited June 20, 2023). With 13.4 fatalities per 100,000 full-time workers, being a police officer ranked as the nineteenth most dangerous profession in the United States. *These Are America's Deadliest Jobs for 2022, Ranked*, MONEY WATCH CBS NEWS (June 29, 2022), <https://www.moneywatch.com/these-are-americas-deadliest-jobs-for-2022-ranked> [<https://perma.cc/39HJ-2AYT>] (describing the most recent U.S. Bureau of Labor Statistics annual report on workplace deaths).

The threat of guns influences how police dress. The typical armored vest—which is required wear in most jurisdictions—will stop all but the most powerful pistol rounds.⁴⁰ They are bulky, don't breathe, and become a cauldron in hot weather.⁴¹ They are a literally palpable reminder that police officers must be prepared to face people who may shoot at them. Some officers will wear a smaller metal plate over the vest on top of their heart to add an extra layer of protection for this vital organ and to stop the energy of a bullet's impact from disrupting its rhythm.⁴²

Guns also define many police tactics. New York City police officers, like all police, are steeped in this omnipresent danger of the gun from their first days in the police academy.⁴³ The police academy hallways sport signs reminding trainees that “Good Cops Demand to See Hands,” underscoring the logic that empty hands are safe ones and a hidden hand might be holding a gun.⁴⁴

When police officers knock on the door of a private home, many of them then step to the side, in case someone inside opens fire.⁴⁵ When they stop cars, officers approach from behind, and many pause at the “B-pillar,” the one behind the driver's window.⁴⁶ Many lean forward to talk to the driver—almost as if they intend to whisper in her ear—so that if the driver wants to shoot, she'll have to pivot around and shoot

⁴⁰ See *Levels of Body Armor*, CRIM. JUST. TESTING & EVALUATION CONSORTIUM, <https://www.policearmor.org/basics/levels.html> [<https://perma.cc/64E8-YANG>].

⁴¹ See Rana Faruq Mahbub, Lijing Wang, Lyndon Arnold, Sinnappoo Kaneshlingam & Rajiv Padhye, *Thermal Comfort Properties of Kevlar and Kevlar/Wool Fabrics*, 84 *TEXTILE RSCH. J.* 2094, 2094 (2014) (“A multi-layered ballistic vest can be very heavy and uncomfortable to wear, particularly in hot climatic conditions.”).

⁴² *Trauma Plate Pros & Cons?*, OFFICER.COM (July 2, 2002, 1:21 PM), <https://forum.officer.com/forum/equipment-tactical/duty-gear/12936-trauma-plate-pros-cons> [<https://perma.cc/1B9J-UEMY>]; see also *The Cardiac Box: A Vulnerable Target, and How Body Armor Can Help*, SHOTSTOP (Jan. 20, 2023), <https://www.shotstop.net/blogs/blog/cardiac-box> [<https://perma.cc/EN79-BANA>] (describing the vulnerability of the cardiac box and the function and varieties of body armor); *The Vitals: Body Armor & the Cardiac Box*, PREMIER BODY ARMOR, <https://premierbodyarmor.com/blogs/pba/the-vitals-body-armor-the-cardiac-box> [<https://perma.cc/4SY3-ZYAG>] (describing body armor design).

⁴³ See Allison T. Chappell, Lonn Lanza-Kaduce & Daryl H. Johnston, *Law Enforcement Training: Changes and Challenges*, in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 71, 73 (Roger G. Dunham & Geoffrey P. Alpert eds., 5th ed. 2005) (“Recruits spend 90 percent of their training time on firearms, driving, first aid, self-defense, and other use-of-force tactics even though only 10 percent of their job duties will put them in positions where they need to use these skills.”) (citation omitted).

⁴⁴ Or some other weapon, of course, but guns are identified as the central preoccupation. del Pozo, *supra* note 2.

⁴⁵ *Id.* These tactics are not only formally taught at police academies, but are also less formally taught to trainees by more experienced officers in field training environments. As an auditor for a federal consent decree, del Pozo heard these car stop tactics being taught to field trainees on body camera recordings in New Jersey in 2022.

⁴⁶ *Id.*

from an awkward angle.⁴⁷ When police officers respond to calls for armed, violent crimes in progress, they are trained never to stop directly in front of the address in question, so they can have more time and distance if someone from inside suddenly starts shooting at them.⁴⁸

Search warrant execution is perhaps the police practice most built around the danger of guns. Fear of drug dealers with better firepower than the police led to the advent of the no-knock warrant at the dawn of the ill-fated War on Drugs in the 1970s.⁴⁹ It was driven by the principle that police who knock on a door and announce their presence allow time for their opponents to arm themselves and start shooting.⁵⁰ A no-knock execution intends to establish tactical dominance with speed, surprise, and violence. This is accompanied by a protective sweep of a premises for weapons to be sure no threat goes undetected. In embracing this strategy, the search warrant has become the straightest path toward the profession's militarization, in which everything meant to protect the police from the risk of a gun on the other side of the door was brought to bear. Officers wearing helmets, heavy vests, and ballistic shields, and armed with long rifles, deploy flash-bang grenades and send in the dogs.⁵¹ These teams often arrive in armored cars.⁵² Even warrants where officers knock and announce their presence are likely to be executed by teams with this tactical disposition, to be prepared for assailants with guns.

2. *Getting Guns off the Street*

The quest to recover illegal firearms is considered the paradigmatic urban police activity.⁵³ One of the principal violent crime control

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Brian Dolan, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201, 202, 211 (2019) (citation omitted) (noting that “[t]he origins of no-knock warrants can be traced to the Nixon administration and the early days of the War on Drugs” and thus were “designed primarily for dangerous drug dealers”).

⁵⁰ See John D. Castiglione, *Another Heller Conundrum: Is it a Fourth Amendment “Exigent Circumstance” to Keep a Legal Firearm in Your Home?*, 59 UCLA L. REV. DISCOURSE 230, 235–36 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128801 [<https://perma.cc/JHE9-G5Y3>] (explaining that the knock-and-announce requirement can be dispensed with in order to avoid threats of physical violence, including firearms threats, against officers).

⁵¹ See Dolan, *supra* note 49, at 211–12 & n.57 (noting that War on Drugs policies like no-knocks have “drastically increased the number of state and local police departments with SWAT teams and similar paramilitary-style units” deploying tactics like armored vehicles, percussion grenades, tear gas, and more).

⁵² *Id.* at 212 n.57.

⁵³ See Bellin, *supra* note 4, at 4; see also Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*,

strategies remains arresting people for criminal possession of a weapon, often enhanced by the federal charges that apply to a person in possession of a weapon who has been convicted of a prior felony.⁵⁴ To achieve this goal, many departments resort to small teams of officers “jumping out” on groups of men (most often young, Black men) on street corners, spreading their hands on the hoods of cars or against walls so they can be frisked for weapons. This tactic can be seen on street corners from Baltimore to Philadelphia to Chicago.⁵⁵

Again, the NYPD is instructive on the central mission of police in getting guns off the street. Making an arrest for the criminal possession of a concealed firearm almost always guarantees that an officer will receive the Meritorious Police Duty medal.⁵⁶ The NYPD’s stop, question, and frisk regime—peaking at 685,724 pedestrian encounters in 2011—was the most intensive and relentless hunt for illegal firearms in the history of municipal policing.⁵⁷ Its critics noted that less than two percent of the stops for suspicion of a weapon actually yielded one.⁵⁸ But this critique disguised what others believed was the underlying logic of the frisks: their sheer volume was meant to deter people from carrying guns in the first place, and the fact that so few were found to

105 Nw. U. L. REV. 437, 441 (2011) (noting that the ability to regulate and ferret out illegal firearms was particularly important in urban areas).

⁵⁴ See generally David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011 (2020) (describing various federal law enforcement initiatives aimed at increasing federal gun prosecutions for felons-in-possession apprehended by local police).

⁵⁵ Anyone who has watched *The Wire* is well-familiar with this phenomenon. See, e.g., Justin Fenton, *Baltimore Police Plainclothes Units Now in Uniform, Marked Cars*, BALT. SUN (Sept. 18, 2020, 11:13 AM), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-police-plainclothes-ordered-into-uniform-20200918-7wj5nyxqefcv3cciompireneeq-story.html> [<https://perma.cc/Z5Z4-SRTX>] (noting that the Baltimore Police Department is taking steps to break with its “jump out” practices of the past); Ali Watkins, *N.Y.P.D. Disbands Plainclothes Units Involved in Many Shootings*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/nyregion/nypd-plainclothes-cops.html> [<https://perma.cc/D3SJ-TEZ7>] (describing the NYPD’s past use of anti-crime units composed of plainclothes officers tasked with preventing gun violence by conducting regular searches).

⁵⁶ del Pozo, *supra* note 2. As the commander of the NYPD’s 6th and 50th Precincts, del Pozo was in charge of evaluating the determinations of the precincts’ medal committees, and this level of commendation was citywide precedent.

⁵⁷ See Jeffery Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1498, 1512 (2014) (describing New York’s stop-and-frisk program as “singularly aggressive,” peaking at 685,724 civilian encounters); see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (noting the uncontested fact that the number of stops per year reached “a high of 686,000 in 2011”).

⁵⁸ *Floyd*, 959 F. Supp. 2d at 558 (“A weapon was found after 1.5% of [weapons] frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.”).

do so was, to them, evidence that the strategy was working.⁵⁹ This logic was suppressed in the public discussions because it was facially unconstitutional; each stop had to be based on its own elements of reasonable suspicion, and the idea that the police were noticing more and more genuinely suspicious activity as reports of violent crime went down year after year did not seem plausible.⁶⁰ (In 2013, Judge Shira Scheindlin ruled that the NYPD's practices were indeed unconstitutional on Fourth Amendment and Equal Protection grounds, and the department was placed under a federal monitorship.⁶¹ By 2015, stops had declined by ninety-seven percent, while the violent crime rate remained steady and in some categories continued to decrease.⁶²)

C. *The Legalization of Guns*

What we have seen since the turn of the century, however, is a subversion of the fundamental assumptions about the legality of guns on which policing is based. The 2022 *Bruen* decision, which allows nearly anyone to carry a gun concealed in public, is only the latest event in a decades-long national trend that steadily is turning the police profession's relationship to guns on its head. So-called "Constitutional Carry" regimes now prevail not only in Vermont, but in twenty-five additional states, providing citizens with the right to carry a handgun (concealed or

⁵⁹ See, e.g., Aaron Blake, *An Audio Clip Lays Bare Bloomberg's Major Stop-and-Frisk Problem*, WASH. POST (Feb. 11, 2020), <https://www.washingtonpost.com/politics/2020/02/11/an-audio-clip-lays-bare-michael-bloombergs-major-stop-and-frisk-problem> [<https://perma.cc/BP46-DNS8>] (quoting then-Mayor Bloomberg's statement that "the way you get the guns out of the kids' hands is to throw 'em against the wall and frisk 'em," because "then they start [saying] 'I don't want to get caught,' so they don't bring the gun. They still have a gun, but they leave it at home"); Ryan Devereaux, *NYPD Commissioner Ray Kelly 'Wanted to Instil Fear' in Black and Latino Men*, THE GUARDIAN (Apr. 1, 2013), <https://www.theguardian.com/world/2013/apr/01/nypd-ray-kelly-instil-fear> [<https://perma.cc/5AUE-JLZM>] (quoting now-Mayor Adams, who claims that Bloomberg's Commissioner Ray Kelly told him the only way to "get rid of guns" was "to instil[] fear in [minority men] that every time that they left their homes they could be targeted by police").

⁶⁰ See generally Bellin, *supra* note 57, at 1535–37 (discussing how the *Floyd* court accepted that the NYPD's *Terry* stop practices "could be scaled indefinitely" as long as the stops were based on individualized suspicion, but ultimately concluded that too many stops were insufficiently justified by individualized suspicion for the program survive constitutional muster).

⁶¹ *Floyd*, 959 F. Supp. 2d at 563.

⁶² *Stop and Frisk Data*, N.Y. C.L. UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/3YGP-QK9S>] (explaining that from its peak in 2011 to 2015, stops had dropped from 685,724 to 22,565); James Cullen & Ames Grawert, *Fact Sheet: Stop and Frisk's Effect on Crime in New York City*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/fact-sheet-stop-and-frisks-effect-crime-new-york-city> [<https://perma.cc/U93B-C9LJ>] (showing that murder, violent crime, and property crime all decreased despite stop-and-frisk decreasing).

openly) without a registration or permit.⁶³ An additional eighteen states utilize a “shall issue” system, in which the permit-issuing agency—most typically the police—has no discretion to set standards beyond whether or not the person meets the basic requirements of the law.⁶⁴ The remaining six states, among them California and New Jersey, retain the right to withhold concealed carry permits for a wide range of reasons broadly related to a lack of necessity.⁶⁵ It is the subjective nature of their standards that *Bruen* attacked in an attempt to push these remaining states into the “shall issue” category.⁶⁶

This shift toward a nation of citizens who could freely arm themselves with guns in public suggests *Bruen*—however much alarm it caused in gun-control quarters—was actually a decision of limited practical impact: It only affected the laws in the (then) eight remaining states that had retained the means to make subjective value judgments when deciding to issue concealed carry permits.⁶⁷ In that sense, *Bruen* was a mopping-up operation of what can be considered a long and steady victory march for the gun industry and proponents of an unregulated right to bear arms. State by state, legislative efforts and targeted lobbying yielded a string of successes that gradually transformed the nation

⁶³ See GIFFORDS LAW CENTER, *Concealed Carry*, *supra* note 15.

⁶⁴ See *supra* note 15 and accompanying text.

⁶⁵ See *supra* note 15 and accompanying text.

⁶⁶ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2123 (2022); *accord* Brief of the Black Attorneys of Legal Aid et al. as Amici Curiae in Support of Petitioners at 12, *N.Y. State Rifle & Pistol Ass’n v. Corlett*, 142 S. Ct. 2111 (2022) (No. 20-843) (arguing that the discretionary regime led to racial and class-based disparities concerning the issuance of firearms licenses).

⁶⁷ See *Bruen*, 142 S. Ct. at 2123–24 (describing that six other states and the District of Columbia have “may issue” and “proper cause” standards like the invalidated New York law); *cf.* Chris Burrell, *Police Say Gun-Permitting Process in Massachusetts Mostly Unchanged After Supreme Court Ruling*, GBH NEWS (July 5, 2022), <https://www.wgbh.org/news/local-news/2022/07/05/police-say-gun-permitting-process-in-massachusetts-mostly-unchanged-after-supreme-court-ruling> [<https://perma.cc/3NEE-SNEQ>] (quoting law enforcement leaders, who feel that their gun evaluation process will be largely unchanged despite the state’s proper cause standard being struck down). That said, some lower courts are interpreting *Bruen* in ways that may well exceed what the Supreme Court intended to countenance, invalidating restrictions on gun possession such as felon-in-possession laws, and possession by those who had engaged in domestic violence. See, e.g., *United States v. Perez-Gallan*, PE:22-CR-00427-DC, 2022 WL 16858516, at *15 (W.D. Tex. Nov. 10, 2022) (holding unconstitutional a federal statute prohibiting firearm possession by those subject to domestic violence related restraining orders); *United States v. Price*, No. 2:22-cr-00097, 2022 WL 6968457, at *8–9 (S.D. W. Va. Oct. 12, 2022) (holding unconstitutional a federal statute prohibiting the knowing possession of a defaced firearm, while upholding the constitutionality of the general felon-in-possession law); *United States v. Quiroz*, PE:22-CR-00104-DC, 2022 WL 4352482, at *16 (W.D. Tex. Sept. 19, 2022) (holding unconstitutional a federal statute prohibiting those under felony indictments from receiving firearms). This inconsistency between some lower court decisions and *Bruen* is all the more acute in light of Justice Kavanaugh’s pivotal concurrence. See *infra* note 123 and accompanying text.

with an effectiveness that should be the envy of special interest groups everywhere.⁶⁸

In other words, the taxonomy that police used to organize their relationship with guns and the citizens who carry them—and that influenced their overall sense of policing in critical ways—has been upended. The idea that carrying a concealed weapon is the prerogative of nearly all the residents of forty-two states assails the idea that keeping guns off the street is one of the keys to public safety. The nation's legislators have voiced consistent disagreement and written their laws accordingly, despite emerging evidence that shows the opposite—that deregulating firearm carrying increases violence and homicide rates.⁶⁹ A police culture that is still shaped by the gun laws of the 1980s has failed to keep up with the normalization of a heavily-armed populace, and it has left police in the lurch. The instinct to get guns off the street persists, and the idea that guns can be anywhere and are a grave threat to officer safety still dominates police work. But the people of nearly every state now can carry concealed handguns lawfully. As the fallout from *Bruen* runs its course, this right will continue to expand. We now must understand the terms of Policing in the Age of the (Legal) Gun.

II

GUNS, POLICE, AND THE LAW

For a long while, when it came to guns, the courts were aligned with the police. Supreme Court decisions generally approved at wholesale the sorts of actions police could take, both to protect themselves and to get guns off the streets.⁷⁰ Those decisions effectively provided “scripts” to officers, so they could articulate the right things to get courts to sign off on their actions in individual cases.⁷¹

⁶⁸ See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 207–12 (2008) (surveying the evolution of NRA lobbying efforts).

⁶⁹ See Rosanna Smart, *Effects of Concealed-Carry Laws on Violent Crime*, RAND CORP. (Jan. 10, 2023), <https://www.rand.org/research/gun-policy/analysis/concealed-carry/violent-crime.html> [<https://perma.cc/RKG3-85PX>].

⁷⁰ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (allowing police officers to frisk a subject on reasonable suspicion that the suspect is armed and dangerous); *New York v. Quarles*, 467 U.S. 649, 657–58 (1984) (creating a public safety exception to *Miranda* warnings because of the unknown whereabouts of a firearm); *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (allowing police officers to remove a suspect from the car and frisk at sight of a “bulge”).

⁷¹ Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 79–80 (2015) (noting, in light of NYPD's widespread stop-and-frisk program, that a widely held script was emerging in police justification for stops).

As state legislatures have moved in the direction of legalizing guns in public, courts are being forced to confront the changing landscape.⁷² The permission slips that guns once provided to policing are being rescinded, or altered in significant ways.⁷³ In some areas, the new judicial doctrine is relatively clear; in others it is shifting and deeply uncertain. What those decisions manifest — as this Part and the following one make clear — is a growing tension between the Supreme Court’s love of police and their former (but now shifting) dislike of guns.

When the movement to legalize guns began to bear fruit, it is not clear that anyone—including legislators or judges—was thinking through how it would affect policing. As the developing body of doctrine makes clear, though, it plainly is making its mark.

One of the most stunning developments in the doctrine has been to pry apart the dual nature of guns, separating unlawfulness from danger.⁷⁴ Guns could be either, or both. But the two do not necessarily travel together anymore. Nowhere is the impact of that simple but significant fact more evident than in the emerging doctrine of *Terry v. Ohio*, or stop and frisk, often seen as one of the principal tools in the police arsenal.⁷⁵ We focus there, then summarize other doctrines that have involved the gun’s role as a permission slip.

A. *Beforetimes: Stop and Frisk*

Just as guns and police go together like a horse and carriage, in the befores times so too did the danger and unlawfulness of guns themselves. To see a gun was to have a reasonable fear for one’s safety and that of others.⁷⁶ Given state laws at the time, to see a gun was also to almost certainly see a crime in progress.

Nowhere was the dual nature of guns more evident than in the Supreme Court’s early cases on stop and frisk. In *Terry v. Ohio*, the Court famously held that police could detain an individual, using force if necessary, on reasonable suspicion of criminality—the “stop”—in order

⁷² As recently as 1988, forty states prohibited or heavily restricted the public possession of firearms, but by 2015 every state at least allowed some individuals to publicly possess firearms—thirteen of which required no licensing at all. *See* Fields, *supra* note 29, at 1688–90; *supra* note 15 and accompanying text (describing the current state of gun regulation).

⁷³ *See infra* Sections II.B–C and accompanying text.

⁷⁴ *See, e.g.*, *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1133 (6th Cir. 2015) (rejecting officers’ claimed need to disarm because carrying firearms was legal); *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2015) (noting that courts must resist the suggestion that the possible presence of weapons inevitably poses a threat justifying search).

⁷⁵ *Terry*, 392 U.S. 1 (1968).

⁷⁶ *See Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (finding that a bulge in a jacket justified the conclusion that the suspect was armed and dangerous).

to investigate further.⁷⁷ And it also held that—on reasonable suspicion that the suspect was “armed and dangerous” and thus posed a threat to an officer—a “frisk” of the person’s outer garments was permissible to look for weapons.⁷⁸

Although in *Terry* itself, the basis for the stop was not the gun, but a separate crime, in many cases both the criminality and the threat of danger were embodied in the gun. In *Terry*, the suspected crime was casing a business for a stick up, and the frisk for the weapon was incidental to that.⁷⁹ But in countless subsequent cases, the only crime of which the target was suspected was carrying a gun.⁸⁰ The gun, then, justified both the stop and the frisk. *Adams v. Williams*, the Supreme Court’s first post-*Terry* case, was indicative.⁸¹ A police officer got a tip that Williams had a gun at his waist and heroin in the car. The cop went up to the car, and when the driver rolled the window down, the officer simply reached in and pulled out the gun.⁸² Having found the gun, the driver was arrested; the car search incident to the arrest yielded heroin.⁸³ All this was fine, the Supreme Court majority held.⁸⁴

Over time, a rubric developed in which it wasn’t necessary to actually glimpse a gun. Seeing a gun-like bulge, or getting a tip about a gun, was enough to justify both the stop and the frisk as well.⁸⁵ The only question in these early cases was whether the facts the officer had articulated added up to actionable reasonable suspicion that there was a gun, such that a stop was permissible. *Florida v. J.L.* was the rare case in which the Supreme Court held that it wasn’t.⁸⁶ The Justices disapproved of a stop based on an anonymous tip that a Black boy in a plaid shirt at a bus stop had a gun, even though a gun indeed turned up when the boy was frisked.⁸⁷ It was clear in *J.L.* that the majority was skeptical that

⁷⁷ *Terry*, 392 U.S. at 22–23.

⁷⁸ *Id.* at 27–28.

⁷⁹ *Id.* at 5–7.

⁸⁰ See *United States v. Cooper*, 293 F. App’x 117, 119 (3d Cir. 2008) (ruling that observed possession of a weapon justifies stop); *Commonwealth v. Robinson*, 600 A.2d 957, 959–60 (1991) (same); *United States v. Horne*, 386 F. App’x 313, 315 n.1 (3d Cir. 2010) (accepting presumption that firearm creates reasonable suspicion unless there is reason to believe the suspect has a permit).

⁸¹ 407 U.S. 143 (1972).

⁸² *Id.* at 145–46.

⁸³ *Id.* at 145.

⁸⁴ *Id.* at 145–46.

⁸⁵ See, e.g., *United States v. DeBerry*, 76 F.3d 884, 886 (7th Cir. 1996) (finding an unreliable tip justified the stop because of a firearm); *United States v. McClinnhan*, 660 F.2d 500, 503 (D.C. Cir. 1981) (finding a lower reliability standard for a tip if a firearm is involved); *United States v. Bontemps*, 977 F.3d 909, 915 (9th Cir. 2020) (finding a bulge can form the basis of a *Terry* stop).

⁸⁶ 529 U.S. 266 (2000).

⁸⁷ *Id.* at 268.

there even had been a tip.⁸⁸ That skepticism was revealing, though, of how relentless the mission to hunt for guns had become, and how the Justices struggled even to find a toehold in addressing wayward police conduct. In many other cases, mostly in the lower courts, but also from the Supreme Court, tips, bulges, and glimpses were enough to allow all manner of police intrusions.⁸⁹

B. *Now Times: Stop and Frisk*

1. *The Stop*

In retrospect, the stunning fact that stands out about the 1972 decision in *Adams v. Williams* is that carrying a gun was legal in Connecticut, so long as the person with the gun had a permit to carry it.⁹⁰ Although the lower court had admitted the gun and drugs, Chief Judge Henry Friendly—a legend in the law—dissented, pointing out that “Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided only they have a permit . . . and gives its police officers no special authority to stop for the purpose of determining whether the citizen has one.”⁹¹ When the Supreme Court majority in *Williams* also upheld the search and seizure, it rankled three of the liberal Justices, who dissented.⁹² Justice Douglas grumbled: “Can it be said that a man in possession of narcotics will not have a permit for his gun? Is that why the arrest for possession of a gun in the free-and-easy State of Connecticut becomes constitutional?” (Presciently, he also took a swipe at “[a] powerful lobby” that “dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment”)⁹³

Undoubtedly, part of what could justify the *Williams* Court’s decision in 1972 was the rarity of lawful gun possession itself.⁹⁴ As late as 2018, the Ninth Circuit upheld a stop based on a gun tip, on the ground that “California law ‘generally prohibits carrying concealed firearms

⁸⁸ *Id.* (noting that there was “no audio recording of the tip” even though it presumably came through 911—implying there may not have been a 911 call at all).

⁸⁹ See *supra* note 85; Fields, *supra* note 29, at 1686 (“[C]ourts routinely upheld *Terry* stops based on nothing more than suspected gun possession.”).

⁹⁰ *Adams v. Williams*, 407 U.S. 143, 149 (1972) (Douglas, J., dissenting).

⁹¹ *Williams v. Adams*, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly, J., dissenting).

⁹² Justice Douglas wrote a dissenting opinion which Justice Marshall joined. *Id.* at 149 (1972) (Douglas & Marshall, JJ., dissenting). Justice Brennan wrote a separate dissenting opinion. *Id.* at 151 (Brennan, J., dissenting).

⁹³ *Id.* at 150 (Douglas, J., dissenting).

⁹⁴ See Fields, *supra* note 29, at 1689 (noting that as recently as 1988, forty states either prohibited the public possession of firearms or tightly regulated possession).

in public, whether loaded or unloaded.”⁹⁵ At that time, California “[s]trictly limit[ed] the issuance of concealed carry permits” such that only .2% of its adult population had one.⁹⁶ “Given the insignificant number of concealed carry permits issued in California, a reasonable officer could conclude that there is a high probability that a person identified in a 911 call as carrying a concealed handgun is violating California’s gun laws.”⁹⁷

But as *Bruen* stressed, California was an outlier in the regulation of guns, and state legalization of gun possession would bring with it a dramatic shift in how courts would look at police stops.⁹⁸ This was evident in another Ninth Circuit case, *United States v. Brown*.⁹⁹ It involved another tip that a person “had a gun.”¹⁰⁰ This time, though, the tip was in Washington State, where—as the Ninth Circuit explained—carrying a firearm is “presumptively lawful,” and failure to have a license for it was only a civil infraction.¹⁰¹ For that reason, “[t]he anonymous tip that Brown had a gun thus created at most a very weak inference that he was unlawfully carrying the gun without a license, and certainly not enough to alone support a *Terry* stop.”¹⁰²

In quite a turn of events, it has become fashionable for some judges to be indignant about police stopping people and interfering with their liberty simply because they were armed with a firearm. This shift in sentiment—and law—was on display in *United States v. Ubiles*.¹⁰³ In that case, an anonymous individual told an off-duty officer at Carnival in St. Thomas that a man, Kahli Ubiles, had a gun. Officers approached Ubiles, patted him down, and recovered a machete and firearm. The firearm turned out to be unregistered and the serial number defaced.¹⁰⁴ The District Court refused to suppress the firearm as unlawfully-seized, but the Third Circuit reversed, explaining that “[i]t is not necessarily

⁹⁵ *Foster v. City of Indio*, 908 F.3d 1204, 1216 (9th Cir. 2018) (quoting *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016)).

⁹⁶ *Id.* The case itself is tragic: the individual fled, the officer pursued and fatally shot him. The case was set for trial on whether the officer had qualified immunity for the shooting itself, and the Court of Appeals ruling was only on whether there was qualified immunity for the initial stop. *Id.* at 1207–08.

⁹⁷ *Id.* at 1216.

⁹⁸ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2123–24 (2022) (noting that at the time of the decision only six states and the District of Columbia had “may issue” licensing laws).

⁹⁹ 925 F.3d 1150 (9th Cir. 2019).

¹⁰⁰ *Id.* at 1153.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1154.

¹⁰³ 224 F.3d 213 (3d Cir. 2000).

¹⁰⁴ *Id.* at 214–15.

a crime to possess a firearm in the Virgin Islands.”¹⁰⁵ For that reason, “[f]or all the officers knew . . . Ubiles was another celebrant lawfully exercising his right under Virgin Islands law to possess a gun in public.”¹⁰⁶ Criticizing the trial court for suppressing evidence based on after-discovered facts, the Third Circuit explained:

The situation is no different than if [the tipster] had told the officers that Ubiles possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills—the possession of which is a crime under United States law . . . the officers would have had no justification to stop Ubiles based merely on the information that he possessed a wallet, and the seized bills would have to be suppressed.¹⁰⁷

In short: If possession of guns is lawful in a state, then stops are not. A growing body of cases recognizes this new reality. This alone will necessitate a sea change in policing.

2. *The Licensure Conundrum*

Things are not quite that simple, though, even with regard to stops. Differences in state laws raise the question of whether officers can conduct a stop in order to ask whether the person with the gun is licensed to own and carry it. In “constitutional carry” states, no permit is required at all to carry a gun, concealed or otherwise. Things are more complicated elsewhere, however, and courts are struggling to figure out what to do.¹⁰⁸

The rules are fairly straightforward in states where the legislature has flat out barred police from stopping people to ask for permits. “A person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license,” says § 16-11-137 of the Georgia Code.¹⁰⁹ And so, presumably, they will not be. (Though note the phrase “sole purpose,” which might

¹⁰⁵ *Id.* at 217.

¹⁰⁶ *Id.* at 218.

¹⁰⁷ *Id.*

¹⁰⁸ Some jurisdictions and commentators refer to permitless carry as “constitutional carry” based on an interpretation that the Second Amendment guarantees the right to carry firearms without any state regulation. See Amy Sherman, *More States Remove Permit Requirement to Carry a Concealed Gun*, POLITIFACT (Apr. 12, 2022), <https://www.politifact.com/article/2022/apr/12/more-states-remove-permit-requirement-carry-concea> [https://perma.cc/DR2J-WS5X].

¹⁰⁹ GA. CODE ANN. § 16-11-137 (2015).

give the sort of fact-based permission slip to which we will return in Part III.)¹¹⁰

But other states, like New Jersey, see it differently, apparently enabling officers to ask to see the permit. New Jersey law provides that “[w]hen the legality of a person’s conduct . . . depends on his possession of a license or permit . . . it shall be presumed that he does not possess such a license or permit . . . until he establishes to the contrary.”¹¹¹ In other words, gun possession is presumptively unlawful until proven otherwise, which can give rise to a stop, enabling the officer to inquire as to whether there is indeed a permit or license.¹¹²

As is evident in the competing opinions in the Pennsylvania Supreme Court’s decision in *Commonwealth v. Hicks*, however, courts are sundered on what to do when state legislation is less clear.¹¹³ In Pennsylvania—outside of Philadelphia—one can carry a gun openly without a license, but a license is required to carry a concealed weapon.¹¹⁴ In 1991, Pennsylvania courts had interpreted state law to mean officers could stop an individual to ensure a person concealing a weapon was licensed to do so.¹¹⁵ But in 2010, in *Commonwealth v. Hicks*, the Pennsylvania Supreme Court reversed the rule, over a stricken concurrence, concluding that such stops were inconsistent with the spirit of *Terry* and Fourth Amendment rights more generally.¹¹⁶

Hicks elaborated upon the interpretive move—resting in the structure of state law—that many courts are making to determine whether police may (or may not) conduct licensure stops. Courts draw a distinction between statutes in which “nonlicensure is an *element* of the crime

¹¹⁰ See, e.g., *United States v. Hunter*, 798 F. App’x 511, 519 (11th Cir. 2020) (allowing a Georgia officer to stop based on the “totality of the circumstances” because the “sole purpose” was not checking the gun license).

¹¹¹ N.J. STAT. ANN. § 2C:39-2(b) (2014).

¹¹² See *United States v. Horne*, 386 F. App’x 313, 315 n.1 (3d Cir. 2010) (interpreting the statute to provide officers with reasonable suspicion of a crime when an individual has a firearm, and thus allowing officer to conduct a *Terry* stop).

¹¹³ *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019).

¹¹⁴ *Id.* at 925–26.

¹¹⁵ See, e.g., *Commonwealth v. Robinson*, 600 A.2d 957, 959 (Pa. Super. Ct. 1991) (describing the circumstances in which an officer may approach and briefly detain an individual to check for a firearms license).

¹¹⁶ *Hicks*, 208 A.3d at 933–34 (“The *Robinson* rule purports to deem constitutional the seizure of persons upon a basis manifestly inconsistent with the Fourth Amendment jurisprudence that has governed interactions between citizens and law enforcement for five decades.”). See also *id.* at 933 (“The Superior Court’s holding in *Robinson* clearly subverts th[e] fundamental principle [of *Terry*].”). The reason why it was a concurrence and not a dissent rests on an agreement that a remand was necessary. However, the concurring opinion rejected the court’s conclusion that a categorical rule should be established without consideration of the “legislature’s power to define crimes and affirmative defenses.” *Id.* at 959 (Dougherty, J., concurring).

of carrying a firearm without a license” and statutes in which “licensure serves as an *affirmative defense* to the criminal charge”¹¹⁷ Apparently, the theory is that when licensure is an element of the offense, the officer cannot know *ex ante* if someone with a gun has violated the law, so there is no reasonable suspicion for the stop. On the other hand, if possession is presumptively unlawful, and “the permit holder has the obligation to provide evidence of his permit as a way to avoid criminal responsibility[,]” then a *Terry* stop to verify licensure is permitted.¹¹⁸ The *Hicks* majority dismissed this distinction, concluding that focusing only on possession as justification for the stop leads to “categorical treatment of a rather large class—all persons carrying concealed firearms, whether they are licensed to do so or not.”¹¹⁹ But the concurrence would have relied upon the distinction, fretting that the majority’s ruling limited the ability of police to investigate what was unlawful only in Philadelphia: the open carry of firearms in a city—according to the concurrence—beset by gun violence.¹²⁰

At the least then, police face uncertainty until the courts in their jurisdiction resolve what the structure of any particular state’s law means for *Terry* stops. Uncertainty is part of life, but in this case, it is particularly problematic. Not only are state laws themselves in flux, but convictions obtained based on searches that later are proven to have been unlawful will be in jeopardy.

Then there’s the problem that all this is up for grabs after *Bruen*, with nary a clue, frankly, about how it will play out. In terms of predicting how the *Bruen* Court will rule in future Second Amendment cases, one actually can put to one side the extraordinarily long and historically very odd “majority” opinion in *Bruen*.¹²¹ All the important action is in Justice Kavanaugh’s concurrence, for himself and Chief Justice Roberts.¹²²

¹¹⁷ *Id.* at 935.

¹¹⁸ *Id.* at 935 (quoting *State v. Timberlake*, 744 N.W.2d 390, 396 (Minn. 2008)).

¹¹⁹ *Id.* at 939.

¹²⁰ *Id.* at 957–59 (Dougherty, J., concurring).

¹²¹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122–57 (2022). The Court itself has said prediction is inappropriate, and lower courts should simply follow precedential rulings, but legally and empirically pivotal concurrences, such as those in *Bruen*, complicate matters. See generally Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018) (discussing the importance of pivotal concurrences, which occur when one or more of a court majority decides to write separately).

¹²² *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J. & Roberts, C.J., concurring). Justice Thomas wrote the majority opinion in *Bruen*, which all members of the Court joined, except Justices Breyer, Kagan, and Sotomayor. See *id.* at 2163 (Breyer, Kagan & Sotomayor, JJ., dissenting). However, even though Justice Kavanaugh and Chief Justice Roberts joined the majority opinion, both signed on to Justice Kavanaugh’s concurrence. See *id.* at 2161 (Kavanaugh, J. & Roberts, C.J., concurring).

The vote in *Bruen* was 6-3, meaning the Kavanaugh concurrence was pivotal to the outcome—the majority needed those two votes.¹²³ Justice Kavanaugh’s opinion joined the majority and nodded to its historical approach, but he wrote “separately to underscore two important points about the limits of the Court’s decision.”¹²⁴ The first was that states still are entitled to impose “licensing regimes” for “carrying a handgun for self-defense.”¹²⁵ The second was to stress the “‘variety’ of gun regulations” that remain permissible, including on who may carry a gun—such as limits on “felons and the mentally ill.”¹²⁶ Justice Kavanaugh’s *Bruen* concurrence certainly points to a degree of regulatory permissiveness beyond the majority¹²⁷ and even gestures toward the lawfulness of “stop and inquire” regimes.¹²⁸ After all, how is the state to enforce its licensure regime absent the ability of police to check? On the other hand, as the *Hicks* court said, that sort of regime opens up a lot of people to police stops, and it is not certain a Supreme Court majority—when forced to confront the issue as it almost certainly will—will tolerate it.

There’s yet one more Fourth Amendment wrinkle here, which courts have struggled with by analogizing to automobiles. In *Delaware v. Prouse*, the Supreme Court held that police may not stop an automobile, absent other suspect facts, simply to check license and registration.¹²⁹ Roadblocks to check the documents of all motorists were fine; discretionary, individualized stops were out.¹³⁰ Some courts—including Pennsylvania Supreme Court’s decision in *Hicks*—have relied on that logic to argue that license checks of individual gun owners are impermissible, absent other individualized suspicion that possession is unlawful.¹³¹ One would think guns would be treated like automobiles, although one cannot be certain.

In short, in some places, the law of policing is clear around gun stops, but in many, it is not. In constitutional carry states, it stands to reason that no stops for guns will be allowed. In states in which the legislature has barred stops, no stops also will be allowed—though in *Virginia v. Moore* the Supreme Court held that courts still may admit

¹²³ See *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J. & Roberts, C.J., concurring).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 2162 (first quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008); then quoting *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (opinion of Alito, J.)).

¹²⁷ See *id.* at 2161 (noting that States may continue to impose licensing requirements and that existing “shall-issue” licensing regimes are not affected by the Court’s decision).

¹²⁸ See *supra* note 111 and accompanying text.

¹²⁹ *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

¹³⁰ *Id.* at 655–56 (distinguishing between roving-patrol stops and checkpoint stops).

¹³¹ *Commonwealth v. Hicks*, 208 A.3d 916, 941–42 (Pa. 2019).

evidence discovered in the course of stops that violate state law.¹³² In states in which courts have held that failing to have a license is an element of the offense, stops probably are not allowed. In states in which courts conclude licensure is an affirmative defense, or where the legislature has required production of a license, it's entirely up for grabs. Clarity may not shake out for some time. Police do their work in specific jurisdictions, and clarity also may be a function of geography.

3. *The Frisk*

If the state of the law about what is permissible policing in the Age of the Gun is muddy with regard to stops, it's downright opaque on the question of the frisk. The root of the problem is *Terry's* "armed and dangerous" formulation.¹³³ Police can stop a person to investigate only with reasonable suspicion of criminality.¹³⁴ But once the stop occurs, a police officer can frisk immediately if there is "reason to believe" that the target of the stop is "armed and dangerous."¹³⁵

The question courts have debated is whether being "armed" with a firearm is inherently dangerous, or if police must in each instance identify specific facts of dangerousness. The courts are split on this issue.

Courts that permit the very fact of a firearm to justify a frisk rely heavily on the inherently dangerous nature of firearms, as well as what seems to be pretty clear support from the Supreme Court itself. In *Pennsylvania v. Mimms*, for example, the Supreme Court held that as a safety precaution officers can demand occupants of a vehicle get out during a traffic stop.¹³⁶ But it went further on the facts and approved the frisk of *Mimms*, in telling language: "The bulge in the jacket permitted the officer to conclude that *Mimms* was armed *and thus posed* a serious and present danger to the safety of the officer."¹³⁷ (We've added italics to make the point that danger flowed simply from the presence of the gun.) In *McLaughlin v. United States*, the Court devoted only a few paragraphs to holding that an unloaded handgun was a "dangerous weapon" within the meaning of the federal bankruptcy statute.¹³⁸

¹³² *Virginia v. Moore*, 553 U.S. 164, 177 (2008) (noting that lawful arrest is a shorthand for compliance with constitutional constraints, not state law).

¹³³ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹³⁴ *Id.*

¹³⁵ *Id.* The *Terry* Court uses various formulations of both "justified in believing" and "armed and presently dangerous." *Id.* at 24.

¹³⁶ 434 U.S. 106, 111 (1977); *see also* *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (expanding *Mimms'* scope to passengers).

¹³⁷ *Mimms*, 434 U.S. at 112 (emphasis added).

¹³⁸ 476 U.S. 16, 17–18 (1986).

In that short space the Court rattled off reasons that support the “armed equals dangerous” approach. Guns are “typically and characteristically dangerous.”¹³⁹ Indeed, “the use for which [the gun] is manufactured and sold is a dangerous one”¹⁴⁰

And guns are inherently dangerous, are they not? Justice Alito’s concurrence in *Bruen* took pains to tell the tales of gun-wielding individuals frightening off assailants, and the underlying logic of the Court was that armed criminals are a terrifying prospect, requiring more guns in the hands of citizens to stave them off.¹⁴¹ As the *McLaughlin* Court said, even the “display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue.”¹⁴²

From the perspective of the police officer, any concealed firearm poses a danger, regardless of its legal status. Although the legal phrase is “armed and dangerous,” the police ethos can more accurately be summed up as “armed *is* dangerous.” In 2020, Bill Bratton, the former chief of the Los Angeles Police Department and two-time commissioner of the NYPD, was asked why U.S. police officers couldn’t be expected to de-escalate situations as well as their counterparts in places such as England and Scotland.¹⁴³ He was quick to dismiss the notion by arguing that the threat of the gun in the United States put police officers in an acute and incommensurate type of danger. He explained that “the issue is guns, a country that has more guns than people, which increases significantly the apprehension level of an officer in every encounter because he never knows if he’s going to be dealing with somebody with a gun.”¹⁴⁴ Thinking along those same lines, when the Police Executive Research Forum developed its rigorous de-escalation training for U.S. police officers, the nation’s most oft-cited and noteworthy police de-escalation curriculum, it advised that the training is designed specifically for situations involving persons who are “either unarmed or [have] a weapon other than a firearm.”¹⁴⁵ In other words, guns still loom

¹³⁹ *Id.* at 17.

¹⁴⁰ *Id.*

¹⁴¹ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2159 (2022) (Alito, J., concurring).

¹⁴² *McLaughlin*, 476 U.S. at 17–18.

¹⁴³ *American Cops Are Under Pressure to Rely Less on Guns and Take More Personal Risk*, NPR (May 19, 2021, 11:17 AM), <https://www.npr.org/transcripts/994818478> [<https://perma.cc/BP4E-4L2N>].

¹⁴⁴ *Id.*

¹⁴⁵ POLICE EXEC. RSCH. F., *INTEGRATING COMMUNICATIONS, ASSESSMENT, AND TACTICS: A TRAINING GUIDE FOR DEFUSING CRITICAL INCIDENTS* 16 (Oct. 2016), <https://www.policeforum.org/assets/icattrainingguide.pdf> [<https://perma.cc/5EMA-Z768>].

large in the minds of police, and their dangers are beyond the pale of de-escalation tactics.

Yet, despite this on-the-ground reality, some courts have held that guns are not *per se* dangerous and that police must be able to point to specific facts about the situation that justify their perception of danger.¹⁴⁶ The New Mexico Supreme Court typifies this view, holding in *State v. Vandenberg* that “[t]o justify a frisk for weapons, an officer must have a sufficient degree of articulable suspicion that the person being frisked is both armed *and* presently dangerous. Any indication in previous cases that an officer need only suspect that a party is either armed *or* dangerous is expressly disavowed.”¹⁴⁷

Most peculiar in all this is the role the legality of gun possession under state law plays as a special fact in determining whether a person who is armed is also dangerous.¹⁴⁸ As a matter of logic, the idea that guns are inherently dangerous remains objectively true no matter the status of state law, given that their purpose and capabilities as machines haven’t changed. The majority in *Adams v. Williams* didn’t even feel the need to acknowledge what the dissent emphasized: that Connecticut made gun possession lawful.¹⁴⁹ But many judges do not see it that way. This dispute over the role of state law in defining dangerousness played out in a hotly-debated *en banc* decision of the Fourth Circuit in *United States v. Robinson*.¹⁵⁰ Based on a tip about a gun, police conducted a traffic stop (using the pretext of a seatbelt violation), frisked Robinson, and indeed found a gun.¹⁵¹ He was convicted (as so many of the defendants in these cases are) of being a felon in possession of a firearm.¹⁵² Robinson challenged the conviction by arguing that if the police action was valid, “in any state where carrying a firearm is a perfectly legal activity, every citizen could be [considered] dangerous, and subject to a *Terry* frisk and pat down.”¹⁵³

¹⁴⁶ See, e.g., *State v. Serna*, 331 P.3d 405, 410 (Ariz. 2014) (concluding that “the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous”); *State v. Bishop*, 203 P.3d 1203, 1218 (Idaho 2009) (noting that weapon possession does not necessarily establish dangerousness).

¹⁴⁷ 81 P.3d 19, 25 (N.M. 2003) (internal citation omitted).

¹⁴⁸ See, e.g., *United States v. Robinson*, 846 F.3d 694, 707 (4th Cir. 2017) (Harris, J., dissenting) (pointing out that in states like West Virginia where carrying firearm is legal, there is no reason to believe that suspect with firearm is dangerous); *Pulley v. Commonwealth*, 481 S.W.3d 520, 527 (Ky. Ct. App. 2016) (noting that lawful possession of a firearm is insufficient to establish dangerousness).

¹⁴⁹ 407 U.S. 143, 149 (1972) (Douglas, J., dissenting).

¹⁵⁰ 846 F.3d 694 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (2017).

¹⁵¹ *Id.* at 695.

¹⁵² *Id.*

¹⁵³ *Id.* at 696.

The Fourth Circuit majority basically said that Robinson was right: “[A]n 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.”¹⁵⁴ Be clear about what you just read. The only basis for criminality in the *Robinson* case was a seatbelt violation. In the view of the Fourth Circuit, any similar basis for a stop will do to permit a frisk. In reaching its conclusion the Fourth Circuit leaned heavily on the danger police face in making traffic stops.¹⁵⁵ “The concern—*i.e.*, the danger—[is] found in *the presence of a weapon during a forced police encounter*.”¹⁵⁶

Writing in dissent for herself and three others, Judge Pamela Harris presciently confronted the “collision course” between the law of policing and the law of guns.¹⁵⁷ Quoting her colleague Daniel Hamilton on the Seventh Circuit, she said, “as public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt.”¹⁵⁸ As Judge Harris saw it, the fact that “states have elected to trust their citizens to carry guns safely” changes the “facts on the ground to which Fourth Amendment standards apply.”¹⁵⁹ That already was the case with the stop, and “the same reasoning compels the conclusion” that in a state that allows possession of firearms, “reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person also is dangerous, so as to justify a *Terry* frisk.”¹⁶⁰ In short, there is no longer a reason to believe that a person carrying a gun during a traffic stop is anything but a law-abiding citizen.

Given the dangerousness that some see in the gun, courts have been remarkably blasé about where this leaves police, when they have addressed it at all. Judge Sutton exemplifies this view in *Northrup v. City of Toledo*.¹⁶¹ Northrup was on a walk one “midsummer evening” with his wife, daughter, grandson, and dog, wearing a “This Is The Shirt

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 700 (emphasizing that the frisk is justified in order to protect the officer).

¹⁵⁶ *Id.* There’s one bizarre twist in *Robinson*, which is that the majority talks generally of weapons, and sidesteps the specific gun issue to some degree. In his concurrence, Judge Wynn makes clear that he views only *firearms* as inherently dangerous. *Id.* at 703–05 (Wynn, J., concurring).

¹⁵⁷ *Id.* at 707 (Harris, J., dissenting).

¹⁵⁸ *Id.* at 707–08 (quoting *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013)).

¹⁵⁹ *Id.* at 708.

¹⁶⁰ *Id.*

¹⁶¹ *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128 (6th Cir. 2015) (finding that the police officer lacked reasonable suspicion to frisk Northrup based on the fact that he was openly carrying a handgun where state law permits such carry).

I Wear When I Don't Care" T-shirt and carrying "a cell phone, which he holstered on his hip—next to a black semiautomatic handgun."¹⁶² (Welcome to America, circa early 21st century.) Acting on a 911 call from someone alarmed about the gun, Officer Bright stopped Northrup, and when Northrup protested (precisely what happened is in dispute), Bright grabbed Northrup's gun. Northrup sued, and the Sixth Circuit denied Bright qualified immunity.¹⁶³

What is an officer like Bright supposed to do when called upon to confront someone with a gun? Absent reasonable suspicion of danger, Judge Sutton wrote, just try to talk to the guy. "While open-carry laws may place police officers . . . in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets."¹⁶⁴ "Awkward" may not quite capture how many cops view their obligation to address these situations. Put sharply, it is now impossible to love guns and cops equally, and so courts are choosing.

C. *Now Times: Other Doctrines*

In the *Robinson* decision, the concurrence and dissent pointed to other doctrines that might have to give way if armed automatically means dangerous.¹⁶⁵ For example, are no-knock warrants now automatically appropriate if the very existence of a gun poses danger?¹⁶⁶ Can First Amendment rights be restricted now to those without firearms, given the inherent danger of carrying a gun?¹⁶⁷ Judge Harris went so far as to question whether the very presence of a gun would then justify the use of deadly force.¹⁶⁸ In truth, as this very brief canvas of some relevant doctrine suggests, there's great uncertainty in the law, and precious little guidance for the police. Judge Harris was right about the collision course between the law of policing and the law of guns, but how that collision will play out with many doctrines is still anyone's guess.

¹⁶² *Id.* at 1129–30.

¹⁶³ *Id.* at 1130–31, 1134.

¹⁶⁴ *Id.* at 1133.

¹⁶⁵ See *United States v. Robinson*, 846 F.3d 694, 706 (4th Cir. 2017) (Wynn, J., concurring) ("I see no basis . . . for limiting our conclusion . . . to the *Terry* frisk inquiry.").

¹⁶⁶ See *id.* (noting that a finding of dangerousness may allow the police to bypass knocking).

¹⁶⁷ See *id.* (arguing that individuals who choose to carry firearms necessarily face greater restriction on their exercise of First Amendment rights).

¹⁶⁸ *Id.* at 711 (Harris, J., dissenting). In her comments to us, Christy Lopez also suggested that the law of force is likely to become more permissive in the face of the pervasiveness of guns. If so, there is the risk this is going to fall more heavily on Black and Brown people. See *infra* note 192.

Take no-knock warrants. Police began to rely on these heavily during the War on Drugs. They were concerned about approaching homes with less firepower than those inside might have, and they feared that suspects might flush critical drug evidence down the toilet before they could seize it.¹⁶⁹ Yet, the no-knock warrant has—rightfully—become a symbol of all that is wrong with both policing and its judicial governance. Today, judges hand out no-knocks like candy on Halloween.¹⁷⁰ The carnage from such warrants, and indeed, the entire militarized “dynamic” entry of police into homes, has been documented by many.¹⁷¹ A no-knock was in part responsible for the tragic death of Breonna Taylor, who was fatally shot by police officers who forced entry into her apartment.¹⁷²

So what does gun legalization spell for no-knock warrants? Despite the fact that many courts say armed equals dangerous when it comes to *Terry* stops and frisks, that is not the case with no-knock warrants.¹⁷³ Police must have some other facts besides the presence of a gun to justify entering without knocking and announcing their presence.¹⁷⁴ This general rule preceded both legalization and *Bruen* and

¹⁶⁹ Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html> [<https://perma.cc/6DK9-KTEG>] (“[F]orcible-entry methods have become common practice over the last quarter century through a confluence of the war on drugs, the rise of special weapons and tactics squads, and Supreme Court rulings that have eroded Fourth Amendment protections . . .”).

¹⁷⁰ See Nino Marchese, *Examining the Risks of No-Knock Raids*, AM. LEGIS. EXCH. COUNCIL (Apr. 14, 2022), <https://alec.org/article/examining-the-risks-of-no-knock-raids> [<https://perma.cc/88W5-64G3>] (“There are an estimated 20,000 no-knock raids executed in the U.S. each year.”).

¹⁷¹ See, e.g., ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 16 (2014) (arguing that “[p]olice militarization can result in tragedy for both civilians and police officers,” particularly people of color); Radley Balko, *Too Many Cops Are Told They’re Soldiers Fighting a War. How Did We Get Here?*, ACLU (July 9, 2013), <https://www.aclu.org/news/national-security/too-many-cops-are-told-theyre-soldiers-fighting-war> [<https://perma.cc/S37Q-R6SW>] (“Too many police departments today are infused with a more general militaristic culture.”); Sack, *supra* note 169 (telling the stories of numerous individuals impacted by no-knocks gone wrong).

¹⁷² Josiah Bates, *Breonna Taylor’s Killing Sparked Restrictions on No-Knock Warrants. But Experts Say Those Rules Don’t Actually Change Much*, TIME (Mar. 11, 2022, 1:25 PM), <https://time.com/6156590/breonna-taylor-no-knock-warrants> [<https://perma.cc/4GCJ-JRFQ>].

¹⁷³ See, e.g., *United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996) (“Evidence that firearms are within a residence, by itself, is not sufficient to create an exigency to officers when executing a warrant.”); *United States v. Marts*, 986 F.2d 1216, 1218 (8th Cir. 1993) (“The reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient.”); *United States v. Moore*, 91 F.3d 96, 98 (10th Cir. 1996) (“The mere statement that firearms are present, standing alone, is insufficient.”).

¹⁷⁴ Compare *Bates*, 84 F.3d at 795, 797 (invalidating a no-knock when officers had no indicia besides a gun that the suspect posed a threat), *Marts*, 986 F.2d at 1218 (invalidating a no-knock when officers based their entry on mere presence of a gun and a five-second

perhaps represents special solicitude for the home.¹⁷⁵ Still, a gun plus any additional articulation of danger will justify a no-knock warrant, at least in the many places no-knock warrants still are lawful.¹⁷⁶ In some places, evidence of drug dealing plus guns is enough.¹⁷⁷ In others, prior conduct of the target—such as prior convictions or threats—will do the trick.¹⁷⁸ Or it could be the sort of gun: While ordinary handguns won't justify dispensing with knocking, less ordinary weapons will.¹⁷⁹

Then there is the *Quarles* doctrine, discussed in the introduction, which allows officers to eschew giving *Miranda* warnings if there is a public safety threat and critical questions remain unanswered.¹⁸⁰ In

delay in opening the door), *United States v. Nielson*, 415 F.3d 1195, 1201 (10th Cir. 2005) (invalidating a no-knock when the only indicia of danger was a gun stored in the suspect's garage), and *Moore*, 91 F.3d at 98 (invalidating a no-knock that was based on officer policy to execute a no-knock for all narcotics and firearms cases), with *United States v. Bynum*, 362 F.3d 574, 581–82 (9th Cir. 2004) (upholding a no-knock when a suspect was armed and had exhibited threatening behavior with his gun), and *United States v. Brown*, 69 F. Supp. 2d 518, 519–20 (S.D.N.Y. 1999) (upholding a no-knock when the suspect possessed multiple illegal and unusually dangerous weapons).

¹⁷⁵ See E. Martin Estrada, *A Toothless Tiger in the Constitutional Jungle: The "Knock and Announce Rule" and the Sacred Castle Door*, 16 U. FLA. J.L. PUB. POL'Y 77, 81 (2005) ("The 'knock and announce' rule logically extends from this entrenched legal reverence for the home.").

¹⁷⁶ See, e.g., *Bynum*, 362 F.3d at 581 (noting that their decision that a no-knock entry was lawful "primarily hinges on the officers' knowledge that Bynum was armed" while reiterating that "[t]o lawfully dispense with the knock and announce requirement, the government must demonstrate that the presence of firearms raised a legitimate concern for officer safety").

¹⁷⁷ See, e.g., *United States v. Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (noting that since "drug dealing is a crime infused with violence" the presence of drugs and guns together "distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers").

¹⁷⁸ See, e.g., *United States v. Musa*, 401 F.3d 1208, 1214, 1216 (10th Cir. 2005) (permitting a no-knock due to the suspect's past threats and aggression towards police officers, and illegal possession of a firearm despite prior convictions); *United States v. Nabors*, 901 F.2d 1351, 1354 (6th Cir. 1990) (permitting a no-knock due to the suspect's past felony convictions and known habits of carrying many illegal firearms and wearing a bullet-proof vest); *Stowe*, 100 F.3d at 499 (permitting a no-knock where a convicted felon operating under an alias had secured an apartment using a steel door and had been observed with multiple loaded firearms and large amounts of cocaine); *United States v. Peterson*, 353 F.3d 1045, 1049 (9th Cir. 2003) (permitting a no-knock due to the suspect's possession of explosives and the threat that he was ready "to blow some shit up . . . at any time").

¹⁷⁹ See, e.g., *Brown*, 69 F. Supp. 2d at 518 (noting that the possession of "particularly dangerous weapons raises a special threat to the officers' safety that warrants a 'no-knock' entry"); *State v. Wasson*, 615 N.W.2d 316, 326–27 (Minn. 2000) (Gilbert, J., dissenting) (distinguishing hunting rifles from less ordinary, and more dangerous and easily concealed weapons such as TEC-9 machine pistols and sawed-off pistols); *State v. Attaway*, 870 P.2d 103, 115–16 (N.M. 1994) (noting the suspect's possession of "a large arsenal of weapons including an automatic weapon" and "two sawed-off shotguns" as a factor supporting that "[t]he method of entry was reasonable").

¹⁸⁰ *New York v. Quarles*, 467 U.S. 649, 658–59 (1984).

some jurisdictions, the possibility of the presence of a gun is enough.¹⁸¹ But those are the minority. In others, additional factors are required before questioning without reading *Miranda* warnings is permitted.¹⁸² As the Fourth Circuit has remarked, “[a]bsent other information, a suspicion that weapons are present in a particular setting is not enough, as a general matter, to demonstrate an objectively reasonable concern for immediate danger to police or public.”¹⁸³ Those factors include the presence of other individuals, the nature of the offense or dangerousness of the suspect, and the ubiquitous reliance on “furtive movement.”¹⁸⁴ Interestingly, no federal court, at least, has held that the legality of gun possession affects any of this, a state of affairs that might in the future give way in courts that treat the possibility of a gun as sufficient.

As a final example, it is hard to see how the legalization of firearms will do anything but wreak havoc on the “plain view” doctrine. The doctrine allows police to seize anything in plain view from a place where the police have a legal right to be, without a warrant, so long as there is probable cause to believe the thing they want to take is unlawful to

¹⁸¹ See, e.g., *United States v. Liddell*, 573 F.3d 1007, 1008 (8th Cir. 2008) (noting that the “risk of police officers being injured by the mishandling of unknown firearms . . . provides a sufficient public safety basis to ask a suspect . . . whether there are weapons”); *United States v. Williams*, 181 F.3d 945, 953–54 (8th Cir. 1999) (holding that the public safety exception applied to questions to a handcuffed defendant in part because officers could happen “upon [unknown firearms] unexpectedly” inside the apartment); *United States v. Simpkins*, 978 F.3d 1, 10–11 (1st Cir. 2020) (allowing officers’ questions about weapons in part because officers knew the “defendant owned firearms” from a previous interaction).

¹⁸² See, e.g., *United States v. Williams*, 483 F.3d 425, 428 (6th Cir. 2007) (finding that an officer must “at minimum . . . have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it”); *United States v. DeJear*, 552 F.3d 1196, 1201–02 (10th Cir. 2009) (adopting the Sixth Circuit test); *State v. Stephenson*, 796 A.2d 274, 279–80 (N.J. Super. Ct. App. Div. 2002) (“To sanction unwarned questioning about . . . a gun in every case where a gun is suspected would result in the exception swallowing the rule.”). In some places, like the First Circuit, the law is simply muddled. Compare *United States v. Fox*, 393 F.3d 52, 57, 60 (1st Cir. 2004) (finding that even though the gun was in the possession of officers, the officers were justified in asking Fox unmirandized questions on the nature of the firearm), *vacated on other grounds*, 545 U.S. 1125 (2005), with *United States v. Jackson*, 544 F.3d 351, 360 n.9 (1st Cir. 2008) (“The mere fact that a gun was involved is not sufficient [to justify applying the public safety exception].”).

¹⁸³ *United States v. Mobley*, 40 F.3d 688, 693 n.2 (4th Cir. 1994).

¹⁸⁴ See, e.g., *United States v. Newsome*, 475 F.3d 1221, 1225 (11th Cir. 2007) (holding that when officers suspected that a room had more than one person present, questioning under the public safety exception was justified); *United States v. Johnson*, 95 F. App’x 448, 449, 452 (3d Cir. 2004) (applying the public safety exception to an incident of road rage which involved the suspect pointing a gun at another driver); *Williams*, 181 F.3d at 954 n.14 (noting the suspect’s past weapons charges in applying the public safety exception); *United States v. Duncan*, 308 F. App’x 601, 606 (3d Cir. 2009) (relying in part on the suspect’s movements in applying the public safety exception).

possess.¹⁸⁵ In many cases, the plain view doctrine has followed the path of other doctrines. In some states in which possession of a gun was presumptively unlawful, courts allowed a plain view seizure on the mere sight of a gun.¹⁸⁶ In general, though—and increasingly—courts recognize gun possession might be entirely lawful and bar plain view seizure absent other giveaway indicia of unlawful possession.¹⁸⁷ These indicia include possession of a gun by a convicted felon, at the site of a violent crime, or in proximity to drug dealing.¹⁸⁸ The caution around seizing guns is highlighted by a recent federal case from Kentucky, in which the court (in dicta) perplexingly distinguished a gun from a baggie containing a white substance, concluding: “Clearly, as a general matter, seeing a firearm in plain view is different from seeing, *e.g.*, a baggie of cocaine; the latter is intrinsically incriminating, while the former is not necessarily so, in every circumstance.”¹⁸⁹ But guns, after all, are recognizable as guns—and absent a great deal of other context, cocaine is just a white powder in a plastic bag.

¹⁸⁵ See *Arizona v. Hicks*, 480 U.S. 321, 326 (1987) (holding that probable cause is required to justify a plain view seizure); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 468–69 (1971) (discussing the common traits and limitations of plain view cases, including that officers had prior justification to be in the place of the seizure and that “discovery of evidence in plain view must be inadvertent”); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (“The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity.”).

¹⁸⁶ See, *e.g.*, *United States v. Sanchez Villar*, 99 F. App’x 256, 258 (2d Cir. 2004) (ruling that firearm’s incriminating character was immediately apparent because “[u]nder New York law, it is a crime to possess a firearm”); *United States v. Scopo*, 19 F.3d 777, 782 (2d Cir. 1994) (“[T]he mere presence of a partially concealed firearm is highly and immediately incriminating.”); *People v. Bryon*, 2004 WL 2093358, at *7 (N.Y. Sup. Ct. 2004) (“[T]he incriminating characteristics of a firearm is [sic] readily identifiable.”); *State v. Wyckoff*, 2022 WL 350276, at *3 (N.J. Super. Ct. App. Div. Feb. 7, 2022) (upholding a plain view seizure where the officer saw the butt of a gun in a backpack), *cert. denied*, 277 A.3d 459 (N.J. 2022).

¹⁸⁷ See, *e.g.*, *State v. Folds*, 216 A.2d 58, 65 (N.H. 2019) (“[N]ot every firearm the police may come across is inherently incriminating.”); *United States v. Van Dreel*, 155 F.3d 902, 905 (7th Cir. 1998) (finding that firearms “may be lawfully possessed” absent indicia of lawlessness, for instance, that they were used in a “bank robbery” or for “hunting out of season”); *United States v. Lewis*, 864 F.3d 937, 944 (8th Cir. 2017) (“[The] plain-view argument falters because when [the officer] grabbed the handgun off the shelf, its incriminating character was not immediately apparent.”).

¹⁸⁸ See, *e.g.*, *United States v. Folk*, 754 F.3d 905, 912 (11th Cir. 2014) (“A firearm that reasonably appears to be in the possession of a convicted felon qualifies as contraband—and is therefore subject to seizure under the plain view doctrine.”); *United States v. Hastings*, 685 F.3d 724, 729–30 (8th Cir. 2012) (upholding the seizure of a firearm seized in connection with a bank robbery); *State v. Garza*, 952 N.W.2d 734, 746 (Neb. Ct. App. 2020) (“Seizing the weapons as relevant evidence of illegal drug activity was not unreasonable.”), *review denied* (Mar. 25, 2021), *cert. denied*, 142 S. Ct. 449 (2021).

¹⁸⁹ *United States v. Salto-Garcia*, 2018 WL 3064279, at *5 n.5 (E.D. Ky. June 21, 2018) (citing *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132–33 (6th Cir. 2015)).

The short of it is, the law of guns is colliding with the law of policing. There is a lot police once could do that they ostensibly can do no longer. And in many instances, they face uncertainty about which tactics—to protect themselves or others, or get guns off the street—are lawful. One might think this uncertainty would limit the capacity of police, and to some degree it might. But, as the next Part indicates, if history is any guide, police will find ways to take the actions they consider appropriate. This will increase their use of discretion, with unfortunately predictable results.

III

LAW AND POLICING IN THE AGE OF THE GUN

Law and policing are iterative processes, in dialogue with one another. Courts learn what police do, or want to do, from cases that come before them, and respond in written opinions. Police learn of court decisions and alter conduct. They comply.¹⁹⁰ Or they engage in structured defiance, which is to say they find ways to achieve what they wish or feel they must within the bounds of what they are told.¹⁹¹ And then courts decide whether these new approaches are acceptable.

The questions we take up here are how police are likely to respond to the changing law of guns, and how courts will respond to shifting police tactics. It is our instinct, based on mutual learning and experience, that the police are going to do what they need to do to protect themselves from danger, and also to remove unlawful or dangerous guns from the street. In response, courts are going to find a way to sign off on what police do.

And perhaps reflecting some cynicism, for this has been an unending pattern in American policing, we believe that as police adapt their tactics, and courts sign off, it is—as always seems to be the case—Black and Brown men who are going to bear outsized scrutiny and pay a disproportionate price in the new world of gun policing.¹⁹²

¹⁹⁰ See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 631 (1996) (“[P]olice complied with the letter, but not the spirit, of the required fourfold warnings.”).

¹⁹¹ *Id.* at 633 (“[D]etectives often intoned the warnings in a mechanical, bureaucratic manner so as to trivialize their potential significance and minimize their effectiveness.”).

¹⁹² For examples of these disparities, see, for example, Kevin E. Jason, *Dismantling the Pillars of White Supremacy*, 23 CUNY L. REV. 139, 173–74 (2020) (discussing racial disparities in New York City’s stop-and-frisk program); Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 L. & CONTEMP. PROBS. 199, 208 (2016) (“[T]he 2014 report of Missouri vehicle stops statewide indicated that African Americans . . . were

A. *Cops Are Going to Cop . . . Often with Tragic Results*

It is commonly held that proactive policing—of guns and much else—took a steep decline in the past few years, owing first to COVID-19 and then to the political and social fallout that followed the murder of George Floyd.¹⁹³ Yet, rather than defunding the police, as activists demanded, the opposite has occurred. Historic increases in homicides and shootings in several U.S. cities have put pressure on police to respond to gun violence and pressure on politicians to fund them to do so.¹⁹⁴ A prime example? The President set aside \$13 billion in grants to hire 100,000 more officers nationwide.¹⁹⁵

Police departments are entrenched and resilient bureaucracies with immense forward momentum, led by officials who respond to political pressure. The steady deregulation of concealed carry and the *coup de grace* of *Bruen* has made policing guns more difficult and uncertain by revoking some of the permission slips of gun enforcement.¹⁹⁶ But there

1.7 times more likely to be searched than were whites.”); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk As A Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2471 (2017) (“[The] study demonstrated that in the Capitol Hill neighborhood of Seattle, three percent of those purchasing narcotics were African American, while 20.5% of those arrested were African American.”).

¹⁹³ See Kyler R. Nielson, Yan Zhang & Jason R. Ingram, *The Impact of COVID-19 on Police Officer Activities*, 82 J. CRIM. JUST., Sept.-Oct. 2022, at 2 (“By March 23, 2020 . . . 61% [of responding agencies] implemented policies to reduce proactive stops.”); Brad Heath, *After Floyd’s Killing, Minneapolis Police Retreated, Data Shows*, REUTERS (Sept. 13, 2021), <https://www.reuters.com/investigates/special-report/usa-policing-minneapolis> [<https://perma.cc/A36D-VPQ6>] (showing a precipitous drop in police initiated stops after George Floyd’s killing).

¹⁹⁴ See Nicole Sganga, *Homicides in Major American Cities Increased in 2021, New Study Finds*, CBS NEWS (Jan. 26, 2022), <https://www.cbsnews.com/news/homicides-2021-increase-council-on-criminal-justice> [<https://perma.cc/M652-ZFMX>] (citing RICHARD ROSENFELD & ERNESTO LOPEZ, COUNCIL ON CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: 2021 YEAR END UPDATE 6 (2022), <https://secure.counciloncj.org/np/viewDocument?orGId=counciloncj&id=4028888b7e8af38e017e935f8822013a> [<https://perma.cc/24EU-KE2H>]) (finding that of twenty-two American cities surveyed, sixteen saw increases in the homicide rate in 2021); see also John Gramlich, *What We Know About the Increase in U.S. Murders in 2020*, PEW RSCH. CTR. (Oct. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/10/27/what-we-know-about-the-increase-in-u-s-murders-in-2020> [<https://perma.cc/BJ6R-GJ5S>] (“The U.S. murder rate rose 30% between 2019 and 2020.”).

¹⁹⁵ *Fact Sheet: President Biden’s Safer America Plan*, WHITE HOUSE (July 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/21/fact-sheet-president-bidens-safer-america-plan> [<https://perma.cc/BJ6R-GJ5S>].

¹⁹⁶ See, e.g., *United States v. Winters*, 2017 WL 2703527, at *2 (E.D. Wis. June 22, 2017) (rejecting a concealed firearm as indicative of criminality to justify a *Terry* stop “[i]n light of Wisconsin’s approach to gun ownership”), *appeal dismissed*, 2017 WL 6946245 (7th Cir. 2017); *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1133 (6th Cir. 2015) (finding that police departments cannot disregard the decision of the legislature to permit open carry “by detaining every ‘gunman’ who lawfully possesses a firearm”); *Brumley v. Commonwealth*, 413 S.W.3d 280, 286 (Ky. 2013) (noting the lax gun regime in Kentucky in a decision not to uphold a protective sweep).

can be little doubt that the police will continue to police. The hunt for illegal guns will continue.¹⁹⁷

As we have seen, some tactics police long have relied upon will have to change—and yet they probably will continue to look oddly familiar. If the “suspicion” of a handgun no longer is available to justify a stop or frisk, police are going to rely more on “consent”—to ask about guns, to search for them, to check permits and run serial numbers.¹⁹⁸ Much of what the police need to do to act can be justified in terms of an officer’s need for personal safety, regardless of whether guns are much more likely to be lawful as time goes on.¹⁹⁹ If existence of the gun alone is insufficient, police are going to imbue a wide range of other acts and circumstances with criminal suspicion. If armed doesn’t automatically equal dangerous, a host of other factors will emerge that made the gun holder seem threatening. “Drug prone” locations, high crime areas, and active violent crime patterns, combined with vague suspect descriptions or “furtive movements” all can provide the ingredients to view a lawfully-carried gun as a possible threat that warrants seizure at the outset of a stop and that provides the cause for further investigation.²⁰⁰

¹⁹⁷ See, e.g., Gennady Sheyner, *Police: Woman Arrested After Car Search Nets Gun, Suspected Drugs*, PALO ALTO ONLINE (Sept. 17, 2022), <https://paloaltoonline.com/news/2022/09/17/police-woman-arrested-after-car-search-nets-gun-suspected-drugs> [<https://perma.cc/RC7P-KFSX>]; *Toledo Police Operation B.L.A.S.E.R. Nets 27 Guns, 169 Arrests*, WTOL 11 (Sept. 28, 2022), <https://www.wtol.com/article/news/crime/toledo-police-operation-blaser-27-guns-169-arrests/512-ea674527-dbb4-450c-b54c-7e45cb8b489a> [<https://perma.cc/RNP7-BLRS>]; Tim Balk & Denis Slattery, *Gov. Hochul Says New York Cops Have Seized Twice as Many Guns This Year Than 2021*, N.Y. DAILY NEWS (Aug. 4, 2022), <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-hochul-guns-interstate-police-task-force-firearms-20220804-pos73zd6vrgw7d6wn3iuv2o3x4-story.html> [<https://perma.cc/2ENY-WPGL>] (noting that eight months into 2022, New York state cops “have snatched some 800 guns, a 104% year-over-year increase”).

¹⁹⁸ For an example of this phenomenon, see SCOTT H. DECKER & RICHARD ROSENFELD, NAT’L INST. OF JUST., *REDUCING GUN VIOLENCE: THE ST. LOUIS CONSENT TO SEARCH PROGRAM 1* (2004) (discussing a St. Louis program to get illegal guns off the street using consent searches).

¹⁹⁹ See, e.g., *United States v. Robinson*, 846 F.3d 694, 700 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 379 (2017) (“[T]he risk of danger is created simply because the person . . . is armed.”); *United States v. Orman*, 486 F.3d 1170, 1176–77 (9th Cir. 2007) (upholding the *Terry* seizure of a firearm based on the danger presented by the firearm to the officer and public safety); *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013) (finding that the officer “was entitled to remove [Defendant’s] handgun to permit him . . . to pursue investigation without fear of violence”).

²⁰⁰ See, e.g., *United States v. McCallister*, 39 F.4th 368, 376 (6th Cir. 2022) (upholding the *Terry* frisk and seizure of a firearm based on suspect movements and location in a high crime park); *State v. Bishop*, 203 P.3d 1203, 1218 (Idaho 2009) (noting the suspect’s reputation for dangerousness or being under the influence of illegal narcotics may be sufficient to constitute dangerousness); *Chase v. State*, 121 A.3d 257, 266 (Md. Ct. Spec. App. 2015), *aff’d*, 144 A.3d 630 (Md. 2016) (upholding a protective frisk for weapons in part based upon “reasonable

In other words, we will see more officers articulate their fear of the gun in the specific context they encounter to justify stops and seizures they characterize as protective actions. We also are likely to see dusted off and put back to use the same sort of minimally-sufficient, often-flimsy, and sometimes completely inadequate articulations that officers used to justify a multitude of forcible stops at the height of stop, question, and frisk in New York City.²⁰¹ Together, these two approaches can serve as counterbalances to the evolving gun law and the handicaps of *Bruen*, whatever those prove to be. The question will become to what extent courts accept such articulations, and how disparately they are invoked along the lines of race and class.

We also may see an increase in police shootings. Guns are not just a permission slip to stop a person and investigate; they are also a reason to shoot first. In the mind of the police officer, the lawfully-carried gun can kill just as easily as the illegal one; it is never more than a moment away from doing so. In states where legal concealed carry isn't a difficult proposition, there is no reason for police to think people with legal guns are less of a threat. The 2016 police killing of Black motorist Philando Castile in Saint Anthony, Minnesota is a painful example of how this thinking can manifest among police.²⁰² Castile was stopped by an officer for a defective brake light, as he had been many times before.²⁰³ He dutifully informed the officer that he had the handgun he was licensed to carry.²⁰⁴ And then a panicked officer—unable to contain his sudden fear of Castile, an armed Black man pleading to be told what to do so he could safely comply with instructions—shot Castile several times.²⁰⁵ A jury acquitted the officer,²⁰⁶ likely on the basis of the defense's argument that even if he wildly overreacted and

suspicion that a suspect is engaged in drug dealing"). For a description of the interplay of these factors relied upon to indicate criminality, see also Fields, *supra* note 29, at 1695.

²⁰¹ See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 70–71 (2015) (describing the often spurious factors officers relied on to justify *Terry* stops, including the “time of day,” “changed direction,” and a “suspicious bulge”); see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 579 (S.D.N.Y. 2013) (listing other factors which Dr. Fagan found New York City officers relied on in justifying stops).

²⁰² See J. Weston Phippen, *Jury Acquits Officer Who Shot Philando Castile*, ATLANTIC <https://www.theatlantic.com/news/archive/2017/06/jury-acquits-philando-castile/530709> [<https://perma.cc/4M2X-LT5J>].

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See *id.*

²⁰⁶ See Joshua Barajas, *Jury Finds Minnesota Officer Not Guilty in Shooting Death of Philando Castile*, PBS: NEWSHOUR (June 16, 2017), <https://www.pbs.org/newshour/nation/jury-finds-minnesota-officer-not-guilty-death-philando-castile> [<https://perma.cc/H4DD-3Y7A>].

the gun itself was lawful and licensed, the officer's conduct still was not criminal.

All this is going to be exacerbated by the wildly-increasing number of guns in the hands of people in the United States, as well as the likelihood that with more guns out in public—and more people out in public in general as the pandemic lifts—chaos will at times ensue.²⁰⁷ There will be the tactical confusion of incidents in which citizens draw their weapons in self-defense at the sound of gunfire, and nobody has a clear idea of who is an aggressor and who is trying to defend themselves. There also will be more of the confusion and fear that comes to people naturally when they are shopping at the supermarket and a man openly carrying a combat rifle walks in, giving them seconds to decide if they should nervously continue shopping, run for their lives, or prepare to return fire with a gun of their own, further compounding the confusion experienced by responding officers when someone calls the police.²⁰⁸

This is neither a hypothetical nor trivial concern. Police officers have shot and killed their own off-duty or plainclothes colleagues in tragic, confused confrontations of this exact type, and too often those colleagues themselves have been Black and Brown.²⁰⁹ And the same

²⁰⁷ See Cara Murez, *Even Before Uvalde, Gun-Related Deaths to Texas School Children Were Rising*, U.S. NEWS & WORLD REP. (Oct. 13, 2022, 6:24 AM), <https://www.usnews.com/news/health-news/articles/2022-10-13/even-before-uvalde-gun-related-deaths-to-texas-schoolchildren-were-rising> [<https://perma.cc/MJ9H-4PQV>] (noting that, beginning in 2013, firearm deaths of Texan school children “surged”); see also GIFFORDS LAW CENTER, *Concealed Carry*, *supra* note 15 (concluding that “[a] robust body of academic literature shows that when more people carry guns in public, violent crime increases”).

²⁰⁸ For a recounting of such an incident, see Richard Fausset, *A Heavily Armed Man Caused Panic at a Supermarket. But Did He Break the Law?*, N.Y. TIMES (Jan. 2, 2023), <https://www.nytimes.com/2023/01/02/us/atlanta-gun-laws.html> [<https://perma.cc/PG62-PLKU>].

²⁰⁹ Three cases from New York City are illustrative. In the Bronx in 2006, off-duty officer Eric Hernandez was mortally wounded by responding police after fending off attackers at a White Castle. He was shot three times as he held one of his assailants down at gunpoint. See Robert D. McFadden, *Off-Duty Officer Is Shot by Police During a Fight*, N.Y. TIMES (Jan. 29, 2006), <https://www.nytimes.com/2006/01/29/nyregion/offduty-officer-is-shot-by-police-during-a-fight.html> [<https://perma.cc/QA6B-DK46>] (describing the incident and additionally citing debate over whether white officers are too quick to assume plainclothes officers of color are criminals); Manny Fernandez, *Shot in Case of Mistaken Identity, Officer Dies After 11-Day Ordeal*, N.Y. TIMES (Feb. 9, 2006), <https://www.nytimes.com/2006/02/09/nyregion/shot-in-case-of-mistaken-identity-officer-dies-after-11day-ordeal.html> [<https://perma.cc/476T-QRLY>]. In Harlem in 2009, officers killed Omar Edwards, an off-duty colleague chasing a man who'd broken into his car. Edwards was running after him, stopped, pointed his gun at one of the officers, and the officer opened fire. James Barron, *No Charges Against Officer in Death of Colleague*, N.Y. TIMES (Aug. 13, 2009), <https://www.nytimes.com/2009/08/14/nyregion/14edwards.html> [<https://perma.cc/8YQP-3PSE>]. In 1994, New York City plainclothes transit officer Desmond Robinson was shot in the back by a fellow officer following reports of armed suspects on a subway platform. He barely survived. It's worth noting each of these victims was a Black or Brown police officer. In Robinson's

sort of confusion is going to cause the death of other people, often in tragic ways. An exemplar is the 2021 killing in Arvada, Colorado of a man who—carrying a concealed weapon—shot a gunman who had just killed a police officer. The man was then shot and killed by a responding officer.²¹⁰

B. Courts Are Going to Sign Off

The question is, as police keep policing guns and responding to the danger of guns, what courts are going to do with all this.

1. Police Shootings

Our focus here is on the conscious tactics police will adopt in the age of guns, but we pause momentarily to acknowledge one part of that law we have heretofore left untouched—the breadth of immunity given to officers as they fatally wield their guns in precarious situations. All too often, prosecutors don't charge police at all, as in the case of Tamir Rice.²¹¹ And in the rare instances in which they do, or when civil rights actions are filed against police, immunity from punishment, even for clear misdeeds, is too often the rule.²¹²

case, the police commissioner characterized the incident as “a snap judgment that was tragic but understandable,” but the Guardians—a Black officers’ association—took another view: “To shoot [Robinson] three times in the back is out-and-out murder,” said their spokesman, demanding that the on-duty officer who shot Robinson “be prosecuted to the full extent of the law. I don’t think he knew it was a cop. He was just killing another black man, and that is indicative of a sickness right there.” Clifford Krauss, *Subway Chaos: Officer Firing at Officer*, N.Y. TIMES (Aug. 24, 1994), <https://www.nytimes.com/1994/08/24/nyregion/subway-chaos-officer-firing-at-officer.html> [<https://perma.cc/UA63-GNR3>]. An example not from New York City is the 2016 shooting of Prince George’s County, Maryland detective Jacai Colson, who was shot and killed by a fellow officer while Colson, operating in plain clothes, was himself shooting at an individual who had fired upon a police station. At the time he was shot, Colson was allegedly holding his badge and shouting, “Police! Police!” Lynh Bui, *Family of Officer Killed by Friendly Fire During Police Ambush Files Lawsuit in Md.*, WASH. POST (June 12, 2018, 6:45 AM), https://www.washingtonpost.com/local/public-safety/family-of-officer-killed-by-friendly-fire-during-police-ambush-files-lawsuit-in-md/2018/06/11/c4711e38-6d80-11e8-bf86-a2351b5ece99_story.html [<https://perma.cc/5ECC-WEM4>].

²¹⁰ Elise Schmelzer, “*Good Samaritan*” Johnny Hurley Died Because Arvada Police Officers Failed to Confront Olde Town Shooter, Federal Lawsuit Alleges, MERCURY NEWS, <https://www.mercurynews.com/2022/06/22/johnny-hurley-arvada-police-lawsuit> [<https://perma.cc/4J3W-H2AZ>].

²¹¹ See Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<https://perma.cc/HWZ3-2Z74>] (stating that a prosecutor recommended that the grand jury not bring charges in the death of Tamir Rice).

²¹² Examples of this abound. The 2016 killing of Daniel Shaver while crawling towards officers as instructed resulted in a jury acquitting the officer who fatally shot Shaver of criminal charges. Erik Ortiz, *Daniel Shaver Shooting: Ex-Arizona Police Officer Acquitted of Murder*, NBC NEWS (Dec. 8, 2017, 8:09 AM), <https://www.nbcnews.com/news/us-news/>

The Supreme Court has resisted doing anything about the doctrine of qualified immunity, even in the face of truly outrageous police conduct that did not involve responding to threats of gunfire.²¹³ Public criticism seemingly has had little effect on the Justices. It's hard to see that law moving in any direction but favorably to cops when, in the face of omnipresent guns, police are a little too quick to respond to perceived threats with force. Uses of force may increase, and immunity travels right along with them.

2. *Police Tactics*

What about the simply ordinary tactics of stopping, investigating, frisking, seizing, checking papers, and the like? As police ramp up all these tactics, we predict that courts will find ways to sign off on what cops do. To be clear, there are, and will be, hard doctrinal questions, such as with licensure stops. But the emerging doctrine already shows indications that the police will find the permission slips they need, and the courts will approve them.

Police will, with judicial blessing, conduct pretextual traffic stops to seize guns. We saw that in the *Robinson* case, in which police got a tip about a gun but waited to use a seatbelt violation to make the stop itself.²¹⁴ Police will candidly tell you that with all the traffic offenses that exist, if they follow a vehicle for a short time, they will find reason

daniel-shaver-shooting-ex-arizona-police-officer-not-guilty-murder-n827641 [https://perma.cc/GYF2-66MJ]. The 2000 killing of Amadou Diallo by officers who thought his wallet was a gun also resulted in acquittal. Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html [https://perma.cc/C2SU-VUWB]. For an egregious example of this in a civil suit, see N.S. *ex rel.* Lee v. Kan. City Bd. of Police Comm'rs, 35 F.4th 1111, 1114–16 (8th Cir. 2022) (extending qualified immunity to the officer after he shot and killed a suspect who was allegedly trying to surrender).

²¹³ See *City of Tahlequah v. Bond*, 142 S. Ct. 9, 10–11 (2021) (reversing a Tenth Circuit opinion which declined to extend an officer qualified immunity after his fatal shooting of a suspect); see also Nick Sibilla, *Supreme Court Defends Qualified Immunity in Police Shooting, Excessive Force Cases*, FORBES (Oct. 20, 2021, 4:00 PM), https://www.forbes.com/sites/nicksibilla/2021/10/20/supreme-court-defends-qualified-immunity-in-police-shooting-excessive-force-cases/?sh=2d2c2e1629f4 [https://perma.cc/3BND-S3HS] (discussing the Supreme Court's recent reversal of two circuit court opinions declining to extend qualified immunity to officers in excessive force cases).

²¹⁴ *United States v. Robinson*, 846 F.3d 694, 702 (4th Cir. 2017) (Wynn, J., concurring) (“Defendant . . . concedes that the . . . officers lawfully stopped him for [a] . . . pretextual reason. I agree with the majority that these facts . . . allowed the officers to perform a protective frisk of Defendant during the stop.”); cf. *Whren v. United States*, 517 U.S. 806, 813 (1996) (foreclosing “any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved”).

to pull a car over.²¹⁵ And once they have, existing law lets them order people out of the vehicle, and in the case of reasonable suspicion that someone is armed and dangerous, conduct a frisk.²¹⁶

Traffic stops will become the focus of much more activity courts will deem “consensual.” The Idaho Supreme Court’s decision in *State v. Henage* displays this sort of doublespeak of consent. In *Henage*, police stopped a vehicle driven by two brothers they knew.²¹⁷ The ostensible basis for the stop was because a taillight was out, but it quickly emerged that they suspected drug use.²¹⁸ And so once—by both the officers’ and the court’s account—the traffic stop ended, a police sergeant who had shown up started to ask the passenger, Jeremy Henage, some questions, including whether he had a weapon.²¹⁹ He said he had a knife, and during the subsequent frisk, the officers turned up drug paraphernalia.²²⁰ Even though the court ultimately suppressed the evidence, deeming the frisk unwarranted, it noted that the post-stop questioning may have been fine because “a traffic stop may *evolve into* a consensual encounter to which Fourth Amendment protections do not apply.”²²¹ Just think about that. Cops stop a motorist for some small-potatoes traffic violation. And apparently the motorist then “consensually” wants to hang out with the police some more and talk about possible criminal behavior? So a forcible stop “evolves into” a consensual gabfest. Given additional restrictions on deeming any gun suspicious, police are almost certainly going to rely more on supposedly consensual encounters, and courts will grant them leeway.

As *Henage* makes clear, the next thing officers are going to do is ask people they have stopped if they have weapons, and often, that will allow a frisk as well. The *Henage* court thought this practice was fine, too, even if in that particular case it didn’t think Jeremy Henage’s

²¹⁵ See David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 559 (1997) (quoting LAWRENCE P. TIFFANY, DONALD M. MCINTYRE, JR. & DANIEL L. ROTENBERG, *DETECTION OF CRIME* 131 (1967)) (noting that officers stated when wanting to search a person or vehicle that they “will usually follow the vehicle until the driver makes a technical violation of a traffic law”).

²¹⁶ See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (“[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle”); *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (finding the same rule for passengers); *Arizona v. Johnson*, 555 U.S. 323, 327 (2009) (requiring reasonable suspicion that a driver or passenger is armed and dangerous to justify a frisk).

²¹⁷ *State v. Henage*, 152 P.3d 16, 18–19, 22 (Idaho 2007).

²¹⁸ See *id.* at 20.

²¹⁹ *Id.* at 19–20.

²²⁰ *Id.* at 19.

²²¹ *Id.* (emphasis added); see *id.* at 23–24.

answer justified the frisk.²²² But as we have seen, in many jurisdictions armed automatically means dangerous, and the subsequent search is justified on those grounds.²²³ So when compliant individuals are honest with police about weapons they carry—and hasn't *Bruen* said carrying weapons is perfectly understandable?—courts are going to allow the frisk that automatically follows.

Pedestrian stops may prove trickier—beyond jaywalking, police tend not to rely at present on as many pretextual violations to justify them—but here too, things are likely to change. Police are going to make strident claims that stops are consensual, and courts are likely to accept that the consent was freely given. In *United States v. Orman*, police got a tip that someone was walking into a shopping mall with a gun in his boot.²²⁴ So an off-duty officer—John Ferragamo—in uniform, moonlighting as mall security, located Orman, went up to him, and asked, “[E]xcuse me, may I speak to you?”²²⁵ When Orman consented (because he may not have found it easy to say no to a uniformed officer), the officer “motioned Orman away from the foot traffic and toward a store window.”²²⁶ Ferragamo’s and Orman’s versions of what happened next differ wildly. Orman said he was summarily frisked; Ferragamo said that Orman conceded he had a gun when asked, and indicated where it was.²²⁷ The court believed Ferragamo, which is the pattern in these cases.²²⁸ Orman argued it all was unlawful because he had been seized at the time; he “knew [that he] didn’t have any question of walking away at the time from that point.”²²⁹ The Ninth Circuit agreed with the trial court that the encounter was “consensual, polite, and without coercion.”²³⁰ Officer Ferragamo never drew his gun. Another officer, who stationed himself behind Orman, “was not threatening.”²³¹ The understanding of “consent” by the courts in these cases is not how countless people who have been stopped by police view the word.

²²² *Id.* at 23–24 (“The district court based its determination that Sgt. Baker was justified in initiating the weapons search upon a subjective feeling Rather, the court must find . . . specific facts that can be objectively evaluated to support the conclusion that the subject . . . posed a potential risk.”).

²²³ *See supra* note 199.

²²⁴ *United States v. Orman*, 486 F.3d 1170, 1171 (9th Cir. 2007).

²²⁵ *See id.* at 1171–72.

²²⁶ *Id.* at 1172.

²²⁷ *Id.* at 1172 & n.2.

²²⁸ *See id.* at 1172.

²²⁹ *Id.* at 1175.

²³⁰ *Id.*

²³¹ *Id.*

Courts likely will be fine with officers next asking people if they ever have been arrested or imprisoned for a felony. Why do they ask this question? Because, as becomes clear from reading all these cases, one of the primary goals is to find a means to probe for “felon-in-possession” cases.²³² For a felon to possess a firearm is a federal offense with the potential for a great deal of jail time.²³³ Felon-in-possession cases are brought by federal prosecutors, rather than beleaguered and overworked municipal prosecutors.²³⁴ Given the jeopardy of answering yes, it seems a violation of *Miranda* to ask whether someone is a felon without the appropriate warnings.²³⁵ But courts are likely to find that *Miranda* doesn’t apply either because the suspect is not in “custody” at the time²³⁶ or because the public safety exception applies—perhaps on the pretense that a felon in possession of a firearm is a public safety threat, even if guns generally are not.²³⁷

Officers also are going to run the serial numbers of guns to see if they are stolen, and courts may well uphold this too, though it seems a violation of the Fourth Amendment. In *Arizona v. Hicks*, the Supreme Court held that police on the premises to investigate a shooting could not turn over a stereo to locate the serial number and call it in to see if it was stolen—this was another “search” for which “probable cause” was required despite falling under the purview of the plain view doctrine.²³⁸

²³² Cf. David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1012 (2020) (describing federal prosecutors pursuing felon-in-possession prosecutions given the ease of proof and the harshness of the punishments).

²³³ *Id.*

²³⁴ See 18 U.S.C. § 922(g); see, e.g., Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, N.Y. TIMES (April 3, 2022), <https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html> [<https://perma.cc/FDV8-92YF>] (noting that many New York City prosecutors are leaving their positions because of burnout, unmanageable work-life balance, and onerous amounts of paperwork due to statutory discovery obligations).

²³⁵ See *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (“[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way *and is subjected to questioning*, the privilege against self-incrimination is jeopardized.” (emphasis added)).

²³⁶ See *id.* at 444 (limiting situations where warning is required to “custodial interrogation,” meaning “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way”).

²³⁷ See, e.g., *United States v. Beasley*, 180 F. Supp. 3d 836, 842–43 (D. Kan. 2016) (rejecting the defendant’s argument that he should have been Mirandized before being questioned about a firearm due to his felon status based on the public safety exception); *United States v. Hickman*, No. 8:12-CR-472-T-17EAJ, 2013 WL 672580, at *4 (M.D. Fla. Jan. 24, 2013) (finding that questions to the defendant about firearms were allowed under the public safety exception though the agent knew he was a convicted felon); *United States v. Powell*, 444 F. App’x 517, 520 (3d Cir. 2011) (applying the public safety exception based in part on the officer’s knowledge of a suspect’s felon record).

²³⁸ 480 U.S. 321, 323, 324–25 (1987).

Yet, in *United States v. Mazon*, the U.S. District Court for the District of New Mexico essentially shrugged off, with little analysis, a *Hicks* claim, holding that the police had “legal possession” because they had taken the gun during a frisk, so checking the serial number was constitutionally valid.²³⁹

3. *Police Narratives*

As must be apparent, making these tactics work requires police offering narrative testimony to justify their actions. These will take the form of accounts about how the encounter was “polite,” or “cordial” and “friendly,” and so not a seizure, but consensual. They will involve stories about what factors created suspicion. And here too, courts and police collaborate in an unchoreographed but notable iterative dance to craft what works and what doesn’t.²⁴⁰

To see how the dance is constructed, return to Idaho, in the aftermath of *Henage*. There, the Idaho Supreme Court found the frisk was unwarranted, because the officer did not genuinely feel threatened. The officer’s concern that his safety was compromised was “not particularized to a particular individual in a specific fact situation.”²⁴¹

Ten years later, in the Idaho Court of Appeals case of *State v. May*, it was clear all the players had learned their lines. May was a passenger in a car stopped for speeding, and “[t]he officer obtained information” (whatever that means) “regarding the driver and May and learned that May was on probation.”²⁴² A subsequent frisk yielded methamphetamine.²⁴³ May argued there was no basis for believing she was armed and dangerous.²⁴⁴ But now the frisk was permissible. Whereas in *Henage*, where “the officer did not connect the defendant’s nervousness with anything tending to demonstrate a risk to his safety” and “did not articulate any furtive movements or behavior from which a person in the officer’s position could reasonably conclude the defendant posed a risk,” here, the officer knew better what

²³⁹ See *United States v. Mazon*, 454 F.Supp.3d 1155, 1168–69 (D.N.M. 2020); see also *United States v. Wallace*, 889 F.2d 580, 583 (5th Cir. 1989) (“[H]aving legally come into possession of the gun the police were entitled . . . to note and to record its serial number . . .”). But see *Pulley v. Commonwealth*, 481 S.W.3d 520, 526–28 (Ky. Ct. App. 2016) (rejecting the argument that the observation of an unconcealed firearm was justification for extending a stop and running the firearm’s serial number).

²⁴⁰ Cf. Fagan & Geller, *supra* note 201, at 77 (describing how the suspicious indicia of “fits description” and “casing” serve “as handy bins of suspicion that judges can easily understand to satisfy constitutional review”).

²⁴¹ *State v. Henage*, 152 P.3d 16, 23 (Idaho 2007).

²⁴² *State v. May*, No. 43045, 2017 WL 1376451, at *1 (Idaho Ct. App. Apr. 17, 2017).

²⁴³ *Id.*

²⁴⁴ *Id.*

the testimony should look like: “May [was] acting incredibly nervous and fidgety, which are signs of stimulant use.”²⁴⁵ May was making furtive movements, such as avoiding eye contact, bouncing her feet, and turning her body away from the officer by shifting her weight to her left hip.²⁴⁶ As the officer explained, and the court accepted, “people under the influence of stimulants behave erratically, which causes [the officer] to be concerned for his safety.”²⁴⁷

So, even if armed does not automatically equal dangerous, courts are incredibly forgiving of officer behavior if any explanation, no matter how tenuous, is given to justify their actions. We’ve seen how in *State v. Vandenberg*, the New Mexico Supreme Court sternly said that the very presence of the gun alone does not justify a frisk.²⁴⁸ But let’s take a closer look at the case and its outcome. Police stopped a vehicle for speeding, although it was clear that this stop was a pretext, and that they were out to get the defendants.²⁴⁹ This was their second stop of the car, because all the first stop yielded was a refusal to permit a canine sniff of the car.²⁵⁰ Officers found this suspicious, as well as the fact that the passengers “looked at each other, refused to make eye contact with” the officer, and “became very nervous when asked about the canine sniff.”²⁵¹ So the officer issued a “be-on-the-lookout” for the car and shortly thereafter another officer—who typically made *fifty traffic stops a night*—stopped the defendants for going ten miles over the speed limit.²⁵² An articulation of suspicious behavior then opened the door to a frisk. Although the driver was “cooperative,” he was “tapping fingers on the hood of the car, glancing back at [the officer] in both the driver’s side view mirror and the rearview mirror, and glancing over his shoulder.”²⁵³ Oh, and rolling his window up and down several times.²⁵⁴ Officers frisked the driver, who (for what it is worth) insisted they had no authority to do so.²⁵⁵ They found marijuana.²⁵⁶

²⁴⁵ *Id.* at *2 (citing *Henage*, 152 P.3d at 22–23).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *State v. Vandenberg*, 81 P.3d 19, 25 (N.M. 2003).

²⁴⁹ *See id.* at 22–23 (noting that the officer stopped the defendants’ car because it fit the description of a car in the be-on-the-lookout issued by another officer who found the defendants’ behavior suspicious).

²⁵⁰ *Id.* at 22.

²⁵¹ *Id.*

²⁵² *Id.* at 22–23.

²⁵³ *Id.* at 22.

²⁵⁴ *Id.* at 22–23.

²⁵⁵ *Id.* at 23.

²⁵⁶ *Id.*

The Supreme Court of New Mexico upheld the frisk in an opinion that makes clear just how low the threshold for officer “danger” can be. Working overtime to deny that “nervousness alone” can be enough to justify a frisk—this is a court that plainly is of two minds all at once—nervousness plus “articulation by the officer of specific reasons why the nervousness displayed by the defendant caused the officer to reasonably believe that his or her safety would be comprised” was enough.²⁵⁷ What reasons were given here? “Officer Roberts felt Swanson was trying to expel nervous energy through his movement, stretching, drumming his fingers on the roof of the car, and being aware at all times of the location of the officer.”²⁵⁸ The defendants’ “nervousness indicated that they might have been in ‘fight or flight’ mode, a concept he learned at the law enforcement academy.”²⁵⁹ That, plus the “be-on-the-lookout”—itself a product of “nervous” behavior—was enough.²⁶⁰

The same willingness to accept thin justification is true in additional areas in which the simple presence of a gun is not enough. This includes, for example, the *Quarles* exception and no-knock warrants.²⁶¹ Courts rely on a variety of factors which are subjective or manipulable, ranging from vague suspicion of dangerousness, or furtive movements, to enable the police.²⁶² The more things change, the more they remain familiarly the same.

C. *Race Is Likely to Yet Again Rear Its Head*

To be sure, these cases are happening out west, where gun laws, after all, have been permissive for much longer than in parts of the east. It’s also impossible to tell the race of the defendants in some of

²⁵⁷ *Id.* at 27.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 22. A common thread in these cases is how a series of acts, each of which clearly offers no suspicion on its own, come together to generate a subjective but apparently legally-defensible account of suspicious behavior. In other words, in the way that the dots of a pointillist painting are meaningless up close but convey a scene at the right distance, suspicion supervenes on a totality of objectively non-suspicious acts. Courts have yet to lay out the rationale of how or why this works, beyond trusting the experience and judgment of police officers. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996) (noting that appellate courts should defer to officer judgment in determining whether reasonable suspicion exists).

²⁶¹ *See supra* Section II.C.

²⁶² *See, e.g.*, *United States v. Duncan*, 308 F. App’x 601, 602, 606 (3d Cir. 2009) (applying the public safety exception partly due to the suspect’s furtive movements); *United States v. Reilly*, 224 F.3d 986, 993 (9th Cir. 2000) (holding that the public safety exception applied when, *inter alia*, the suspect moved his hands to his waistband); *United States v. Bynum*, 362 F.3d 574, 580 (9th Cir. 2004) (finding dangerousness based on, *inter alia*, “strange conduct during the most recent drug transaction”).

the cases (though Hispanic surnames are common, as are some other indications). But it is the formula itself that unavoidably leads one to conclude that race is going to play a big role in policing in the age of the gun. The task now is to tell good guns from bad guns, which is to say, lawful ones from unlawful. Unfortunately, the police will resort to racial markers to do so.

Start with felon-in-possession cases. As we have said, it is impossible to read these cases and miss that officers are conducting stops to find guns, and especially guns held by felons. That's the big federal prosecution payoff, one that is much more likely to yield a conviction and substantial prison time.²⁶³ But after years of targeted enforcement in minority communities, it is Black and Brown individuals who have the notably disproportionate number of felony convictions.²⁶⁴ Police will aggressively be looking for those among them who possess guns and are not supposed to have guns.

Of course, getting in place to ask the question requires some cause, but here too, the formula is all too familiar. In *State v. Bishop*, the Supreme Court of Idaho set out the factors that justify concluding that a person is armed and dangerous:

[W]hether there were any bulges in the suspect's clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous.²⁶⁵

Boil that story down, and what you get is a huge amount of police discretion, particularly in "high crime" areas. And sure enough, we see the cases in which police patrol the block around a "high crime" convenience store, approach or follow people nearby to make pretextual

²⁶³ See Patton, *supra* note 232. For a discussion of federal sentencing of 18 U.S.C. § 922(g) violators, see U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf [<https://perma.cc/AV5E-DMDE>].

²⁶⁴ See generally THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://dataspace.princeton.edu/bitstream/88435/dsp01db78tg10c/1> [<https://perma.cc/J36H-BTNH>] (discussing racial disparities in the likelihood that an individual will have had a prior conviction).

²⁶⁵ *State v. Bishop*, 203 P.3d 1203, 1218 (Idaho 2009).

stops, and ask about weapons.²⁶⁶ There also will be cases, as we have seen, in which police officers “know” the people they are dealing with, whose dangerous reputations will precede them.²⁶⁷

That was precisely the story in *United States v. Robinson*,²⁶⁸ and in it Judge Pamela Harris, dissenting, put her finger on the problem. Reading *Robinson*, one initially might wonder why some of the Fourth Circuit’s most “liberal” judges were so very willing to bar police from concluding that armed equals dangerous.²⁶⁹ The pro-gun (or at least deferential to pro-gun legislatures) language of that opinion seemed oddly placed. But then Judge Harris said out loud what too often is subtext.

The “biggest concern,” Harris wrote, “is that these ‘special burdens’—most relevantly, the *Terry* frisks at issue here—will not be distributed evenly across the population.”²⁷⁰ Allowing frisks during traffic stops whenever someone is armed “giv[es] police officers unbridled discretion.”²⁷¹ How that plays out is well-known. Once again quoting Judge Hamilton, Judge Harris said there is “the potential for intentional or unintentional discrimination based on neighborhood, class, race, or ethnicity.”²⁷²

If you are a person committed to the safety of residents beleaguered by crime, as police often are, there’s a perverse irony in all this. As Justice Alito explained in *Bruen* (and it is worth reading it carefully):

Some of these people [who carry firearms] live in high crime neighborhoods. Some must traverse dark and dangerous streets in order to reach their homes after work or other evening activities. Some are members of groups whose members feel especially vulnerable. And some of these people reasonably believe that unless they can brandish

²⁶⁶ See, e.g., *Lewis v. State*, 705 S.E.2d 693, 694–95, 697 (Ga. Ct. App. 2011) (upholding a *Terry* stop taking place during the officers’ patrol of a high crime area near a frequently-robbed convenience store); *United States v. Turnage*, 222 F. App’x 251, 252 (4th Cir. 2007) (upholding a *Terry* stop based on the suspect’s suspicious behavior in a high-crime area); see also *United States v. Robinson*, 846 F.3d 694, 695 (4th Cir. 2017) (noting that after receiving a tip about a loaded firearm, officers stopped the suspect’s vehicle on the basis of the suspect not wearing a seatbelt, frisked him, and found a weapon).

²⁶⁷ See *Fields*, *supra* note 29, at 1703 n. 173 (“Federal law criminalizes firearm possession by . . . fugitives, felons, [and] domestic violence misdemeanants An officer’s reasonable suspicion that a public gun possessor fits into one of these categories would qualify as the ‘gun possession plus’ necessary to initiate a stop . . .”).

²⁶⁸ See *Robinson*, 846 F.3d at 695 (noting that the parking lot in which *Robinson* was stopped was “well known for drug-trafficking activity”).

²⁶⁹ See *supra* notes 148–52 and accompanying text.

²⁷⁰ *Robinson*, 846 F.3d at 711–12 (Harris, J., dissenting).

²⁷¹ *Id.* at 712 (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009)).

²⁷² *Id.* (quoting *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in judgment)).

or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury.²⁷³

To be clear, we have our serious hesitations with Justice Alito's eagerness to privatize what long had been the state's primary responsibility to use force to secure personal safety.²⁷⁴ But we also read this with some measure of cynicism, well-grounded in experience and history. One of the main factors in the cases justifying frisks based on officer concern for danger is that the stop occurred in a "high crime area." But people without means are forced to live in those areas. They know full well that the areas are "high crime," and sometimes unbearably so.²⁷⁵ That's why, as Justice Alito seemingly understands, some choose to carry weapons of their own. Yet many also cannot obtain licenses because they have prior felony convictions or face other hurdles or disqualifications. So we may be forgiven in thinking that what Judges Harris and Hamilton predict will become all too true. People in high crime areas will want to carry guns, and Black and Brown people will pay a disproportionate price for this.

CONCLUSION

Policing in the Age of the Gun will be different, and yet it will be more of the same. Because legislators have determined that nothing apparently was quite as good as the Wild West, we will be—we already are—awash in guns, legal and otherwise.²⁷⁶ Courts have taken the signal

²⁷³ N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2158 (2022) (Alito, J., concurring); see Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, PHIL. & PUB. AFFS., Spring 2007, at 126, 138–39 (discussing how living in high crime areas forces those living there to be on guard against violent situations and to adopt "deadly violence" if necessary to protect themselves).

²⁷⁴ For an extended argument on why the state never actually had a monopoly on the use of force to protect and rescue people from the threat of violence, but rather took everyone's basic *prerogative* to do so and assumed it as a *duty*, see BRANDON DEL POZO, *THE POLICE AND THE STATE: SECURITY, SOCIAL COOPERATION, AND THE PUBLIC GOOD* 26–46 (2023).

²⁷⁵ In some cities, the risk of violent crime is so acute that it exceeds the risks of combat death in war. This was found to be the case for military-aged males living in the most violent parts of Chicago and Philadelphia, and may hold for many other U.S. cities with similar levels of highly concentrated violence. See Brandon del Pozo, Alex Knorre, Michael J. Mello & Aaron Chalfin, *Comparing Risks of Firearm-Related Death and Injury Among Young Adult Males in Selected US Cities with Wartime Service in Iraq and Afghanistan*, JAMA NETWORK OPEN (Dec. 22, 2022), https://jamanetwork.com/journals/jamanetworkopen/articlepdf/2799859/del_pozo_2022_oi_221360_1671050393.00525.pdf [<https://perma.cc/H2P3-8NAQ>].

²⁷⁶ Or perhaps a myth of the Wild West, where strict gun control actually prevailed in many places. Tombstone had stricter gun control laws in 1881, before Arizona's statehood, than it does today. Matt Jancer, *Gun Control Is as Old as the Old West*, SMITHSONIAN MAG. (Feb. 5, 2018), <https://www.smithsonianmag.com/history/gun-control-old-west-180968013> [<https://perma.cc/TV4K-TKVW>].

and are limiting what police can do with those guns. But guns, lawful or otherwise, pose a threat. To officers, for sure, but equally to others in areas riven by gun violence. Cops will cop, as they have. And though the ritual incantations will become more complex and more likely to strain credulity, courts will instinctively uphold their actions. The price will be borne by all of us, but will especially continue to be borne by Black and Brown communities.