

# LAWFUL GUN CARRIERS (POLICE AND ARMED CITIZENS): LICENSE, ESCALATION, AND RACE

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## I

### INTRODUCTION

We take lawful gun carriers for granted—at least some of them. We are acclimated to armed men and women in uniforms. We accept that those people are charged with enforcing rules that our society has agreed on, including the possibility that state agents might use guns to enforce those rules. In a broad range of circumstances, we validate the drawing, pointing, and firing of guns by men and women in uniform as lawful, even if sometimes regrettable, acts.

A second category of lawful gun carriers is more controversial. It consists of private citizens authorized by a spectrum of state laws to carry guns in public. This class of lawful gun carriers has long been with us, but has garnered increased attention in recent years as the private gun-carry movement has burgeoned and courts have struck down restrictive laws in a handful of holdout jurisdictions.

As private gun carriers and state laws facilitating them proliferated, skeptics offered dire warnings about the consequences. Fortunately, that parade of horrors did not materialize. Indeed, the debate about private gun carriers has centered on contested claims that the increase in private gun carriers has caused a decline in crime—the “more guns, less crime” thesis.<sup>1</sup> That thesis is contestable because it extrapolates from readily measurable things like the number of private gun carriers to the tougher to prove claim that private gun carriers are the principle cause of observed declines in violent crime.

One consequence of the heated debate over whether armed “good guys” are deterring criminals is that it obscures important insights from the uncontested data about lawful private gun carriers—for example, not whether they deter crime, but simply how they behave with guns. This article focuses on that behavior and those insights.

Unlike the claim that private gun carriers deter crime, the basic data about the behavior of private gun carriers (like the rate at which private gun carriers themselves are arrested for gun crime) is uncontroversial. That basic data has

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1. See JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 244–49 (3d ed. 2010).

significant policy implications, especially when we compare the two classes of lawful gun carriers—that is, private carriers and police.

One of the most significant things about the spread of the private carry movement is that laws allowing millions of ordinary Americans to carry guns did not turn them into robbers and murderers. This result undercuts the predictions of carnage that were based on the theory that the simple presence of a firearm would transform parking lot bumps into shootouts. And it also raises a question: if the simple presence of a gun does not drive the behavior of lawful gun carriers, what does?

The answer to that question is “license.” License here means the formal and informal rules, permissions, customs, and incentives that guide and constrain behavior. For private gun carriers this license is defined by the boundaries of the traditional self-defense claim—a narrow excuse for using deadly force where an innocent faces imminent threat of death or serious bodily harm. The license claim becomes stronger and yields additional insights when we integrate an analysis of the governing license and behavior of police, our other class of lawful gun carriers, who by rule and by custom operate under a relatively broad license to draw, point, and fire guns.

This article claims that license best explains the behavior of all lawful gun carriers, both police and private citizens. And that assertion has several policy implications. License explains the generally hyper-law-abiding nature of lawful private gun carriers (who have lower arrest rates than the general population and, on crucial measures, lower arrest rates than the police). Also, comparing the narrow license that governs private citizens with the relatively broad license that governs police provides a better understanding of controversial police shootings as well as a sharper perspective on police escalation of violence. Finally, acknowledging that the danger that mundane altercations will escalate into gun fire is substantially a function of license (rather than just the presence of a gun) reveals some counterintuitive points about training of private gun carriers and cuts against the argument that private gun carriers are a hazard because they are not trained like police. Finally, the license critique illuminates the conversation about gun carrying in minority communities, where broad police license to use guns has generated heated controversy, and where the wisdom of encouraging lawful gun carrying by blacks remains contested.

The discussion proceeds in two parts. Part II frames the license that governs lawful private gun carriers (LPGCs) and police. Part III discusses the insights illuminated by thinking about lawful gun carriers in light of the license that drives their behavior.

## II

### LICENSE

All LPGCs are constrained by the boundaries of lawful self-defense. The self-defense license gives private individuals limited permission to use proportionate force to resist imminent, violent threats. This license places significant limits on

displaying, drawing, pointing, and firing guns. Those limits correspond with ancient and common instincts about the limited circumstances under which deadly force is justified. The requirements distill into innocence (the self-defender cannot be the aggressor), imminence (the threat must be immediate), proportionality (the force used must be proportional to the threat), reasonableness (the self-defender must reasonably perceive and respond to the threat), and, in a minority of jurisdictions, avoidance (the use of force must have been unavoidable, for instance, there was no option to retreat).<sup>2</sup> Although LPGCs can be authorized under different regimes, the license that governs their use of firearms remains the same.<sup>3</sup>

Police license to carry, draw, point, and shoot firearms is broader and more complicated than the license granted to LPGCs. James Q. Wilson's 1978 multi-jurisdictional study of policing evokes a spectrum of license to use violence with the observation that the level of discretion granted to individual officers "increases as one moves down the hierarchy."<sup>4</sup> Wilson concluded that it is impossible for administrators or other government officials to "prescribe in

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2. See, e.g., CONN. JUDICIAL BRANCH, CRIMINAL JURY INSTRUCTIONS, pt. 2.8-1, <https://www.jud.ct.gov/JI/Criminal/Criminal.pdf> [<https://perma.cc/UXS4-R96F>]; Jeffrey F. Ghent, Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R. 3d 221 (1972); Kenneth W. Simons, *Self-Defense: Reasonable Beliefs Or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51 (2008); John F. Wagner, Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, that Physical Force is Necessary—Modern Cases*, 73 A.L.R. 4th 993 (1989); see also Nicholas J. Johnson, *Self-defense?*, 2 J.L. ECON. & POL'Y 187 (2006) (showing the deep foundation upon which self-defense rests, and how it is broad enough on which to rest a variety of claims); Cynthia V. Ward, "Stand Your Ground" and Self-Defense, 42 AM. J. CRIM. L. 89, 90 (noting that only a minority of jurisdictions impose the requirement that the victim of a violent attack examine the option of retreat before using force in self-defense).

3. In recent decades, the vast majority of American states have adopted nondiscretionary or "shall issue" concealed carry laws, where lawful gun owners are granted permits to carry guns in public without any special showing of need. These "shall issue" regimes stand in contrast to discretionary permitting schemes where the license is contingent on the decision of some government official. Today more than 12 million Americans are licensed to carry concealed guns in public. See CRIME PREVENTION RES. CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES 7-8 (July 9, 2014) <http://crime-research.org/wp-content/uploads/2014/07/Concealed-Carry-Permit-Holders-Across-the-United-States.pdf> [<https://perma.cc/TUD3-VGTX>]; *Concealed Carry State Statistics*, LEGALLY ARMED, [http://legallyarmed.com/cw\\_statistics.htm](http://legallyarmed.com/cw_statistics.htm) [<https://perma.cc/HDY4-N2AA>] (last visited Feb. 6, 2017); *New Report From Crime Research Center Shows 11.1 Million Americans Hold Concealed Carry Permits*, CRIME PREVENTION RES. CTR. (July 9, 2014), <http://crimeresearch.org/2014/07/new-report-from-crime-prevention-research-center-shows-11-1-million-americans-hold-concealed-carry-permits/> [<https://perma.cc/JQZ8-2K2K>]. A few states still license concealed carry under discretionary regimes that require applicants to "show good cause" why they should be granted permission to carry a firearm. Ten states have "constitutional carry," which allows citizens who are lawful owners of firearms to carry them concealed in public without going through additional steps to obtain permits. Some states have both constitutional carry as well as a "shall issue" licensing scheme. This is mainly to allow citizens to obtain formal permits that might be needed to gain reciprocal recognition of their license to carry by other states. In several jurisdictions, anyone who may lawfully own a firearm may also carry that gun openly in public. Open carry has deep historical roots. In the nineteenth century, open carry was the norm in many places, and concealed carry was considered a hazard. These three categories will often overlap. For example, Arizona is a shall-issue, a constitutional carry, and an open carry state.

4. JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 7 (1978) (emphasis omitted).

advance the correct course of action” in the many different situations officers face.<sup>5</sup> Although Wilson did not use the term “license,” he recognized the effect in the critique that “the principle limit on managing the discretionary powers of patrolmen arises . . . from the organizational and legal definition of the patrolman’s task.”<sup>6</sup> Other researchers have evoked the theme of license with reference to a general “right” of police “to use coercive force when they believe the situation calls for it.”<sup>7</sup> Barbara Armacost’s classic study similarly concludes that street-level police “operate under more ambiguous and less precise rules than other low-level employees.”<sup>8</sup> She found that “day-to-day decisions that police officers make . . . are determined more by the informal norms of street-level police culture than by formal administrative rules.”<sup>9</sup> This sort of observation about police culture is commonplace in the literature.

Police license can be understood along a spectrum from *express license*, in the form of formal rules, to *tacit license*, drawn by implication from the implementation and enforcement of formal rules, to perceived license—meaning the permission that officers fairly discern from the surrounding culture, including the consequences for alleged violations of formal rules and tacit standards. There might be fair disagreement about the precise boundaries of express, tacit, and perceived police license, and about what sorts of behavior fall where. But ultimately this spectrum captures most lawful police violence.<sup>10</sup> The following discussion elaborates police license, starting with the ends of the spectrum—express license and perceived license. The middle and perhaps the largest part of the spectrum, tacit license, is discussed last.

Express police license is well distilled by Police Executive Research Forum (PERF)<sup>11</sup> Executive Director Chuck Wexler. Discussing the realities of the explicit license to use violence, Wexler commented:

Over the past year, the nation has seen, with their own eyes, video recordings of a number of incidents that simply do not look right to them. In many of these cases, the officers’ use of force has already been deemed “justified,” and prosecutors have declined to press criminal charges. But that does not mean that the uses of force are considered justified by many people in the community.

One reason for this “disconnect” is that under the legal standard for judging a police action, the U.S. Supreme Court’s 1989 precedent in *Graham v. Connor*, an officer’s use of force is considered constitutional if it would be considered “reasonable,” considering the facts and circumstances of the case, “from the perspective of a reasonable officer on the scene.” And the Court added that “the calculus of reasonableness must embody

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5. *Id.* at 279.

6. *Id.* at 11.

7. Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 1, 2 (William A. Geller & Hans Toch eds., 1996).

8. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *GEO. WASH. L. REV.* 453, 510 (2004).

9. *Id.* at 512.

10. *See id.* (comparing two scholars’ views on the structure of police leadership).

11. *POLICE EXEC. RES. FORUM, RE-ENGINEERING TRAINING ON POLICE USE OF FORCE* (2015) (hereinafter “PERF REPORT”).

allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”

*Thus, it is a rare case in which the courts will find an officer's use of force unconstitutional, or a prosecutor will bring charges against an officer.*<sup>12</sup>

Similar examples of explicit license appear in state laws that authorize police use of force and grant police exemptions from certain state criminal laws.<sup>13</sup> Other formal rules also suggest express license—such as provisions for civil sanctions for civil rights violations—but the manner in which they are administered better frames a permission that is broader than anything formally articulated.<sup>14</sup> Some of those are presented later as examples of tacit license.

At the other end of the spectrum from explicit license is perceived license. The sources of perceived license are difficult to fully catalogue. A multitude of variables affect officers' discernments of the actual boundaries on their permission to use violence. The inputs include the practical demands of the patrolman's task and the culture that grows out of those demands.<sup>15</sup>

One example of perceived license and its amorphous roots is the “twenty-one-foot rule.” Discussion of the rule by police executives demonstrates how nebulous the evolution of perceived license can be. The origin of the “rule” is loosely attributed to a 1983 article in *SWAT Magazine* by Salt Lake City Police Officer Dennis Tueller.<sup>16</sup> Tueller performed a series of loose experiments and concluded that an attacker could cover twenty-one feet in the time it took most officers to draw and fire their weapon. So even a contact weapon could be a deadly threat to police at a distance of twenty-one feet.<sup>17</sup> Tueller's assessment was translated into a 1988 training video and soon became an article of faith among police officers.<sup>18</sup>

At the 2015 PERF conference, Tom Manger, Montgomery County, Maryland police chief critiqued the twenty-one-foot rule in this way: “When training officers first started talking about the ‘21-foot rule,’ it may have put the idea in police officers' minds that if you had someone with an edged weapon within that distance, you had a ‘green light to shoot.’”<sup>19</sup> John Timoney, former Chief of

12. *Id.* at 3 (emphasis added) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)); *see also Graham*, 490 U.S. at 398–99 (sanctioning use of force that is reasonable under the circumstances, holding that an officer is not culpable for a reasonable, though erroneous, decision); Armacost, *supra* note 8, at 471 (noting that officers have “no legal incentive” to try to prevent a violent situation).

13. *See, e.g.,* Klockars, *supra* note 7, at 2 (referencing general state law disclaimers that deployment of lethal weapons and other lesser violence “none of these laws ‘shall apply to any law enforcement officer or his agent while acting in the lawful performance of his duty’”) (quoting DEL. CODE ANN. tit. 11, § 542 (1994)); *see also* DEL. CODE ANN. tit. 11, § 542 (2016) (regarding exemption of law-enforcement officers).

14. *See infra* text accompanying notes 27–31.

15. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 120 (1993).

16. Dennis Tueller, *How Close is Too Close?*, SWAT MAGAZINE, March 1983, at 3.

17. *See id.*

18. *See* PERF REPORT, *supra* note 11, at 16.

19. *Id.* at 15.

Police in Philadelphia and Miami, was even more candid: “[S]omehow that idea got corrupted, and at conferences I started hearing about a ‘kill zone.’ Somehow, the idea became that if you’re less than 21 feet away, you can shoot. How the hell did it become a kill zone?”<sup>20</sup> The PERF report describes the general evolution of the twenty-one-foot rule as a sense of license that was never explicitly authorized. “Many police officers in the United States have heard about the 21-foot rule in their training . . . . *Many officers have said the 21-foot rule is part of police culture, handed down informally from one officer to another, or mentioned in training, over the generations.*”<sup>21</sup>

Perceived license is reflected in a variety of other phenomena. Various examples show how perceived license can emerge where practice, history, culture, and necessity lead to the fair expectation by police that their judgments will be upheld except in cases of egregious abuse.<sup>22</sup> Witness the investigation of the Prince George’s County Police Department following a *Washington Post* exposé describing a pattern of wrongful shootings and other uses of excessive force.<sup>23</sup> Many of the 122 investigated shootings involved unarmed suspects and officers claiming they believed the suspect was armed. All of those officers were exonerated by the Department, and many were subsequently promoted.

Police scholars cite instances like these as examples of organizational breakdown, criticizing that “accountability systems” are flawed.<sup>24</sup> But, for the officer in the field who is attempting to discern the boundaries of his license, the fairly perceived message is that his judgments about using violence will, for the

20. *Id.* at 16.

21. *Id.* at 5 (emphasis added); see also Taylor Wofford, *New Video Emerges of Police Shooting Kajieme Powell in St. Louis*, NEWSWEEK (Aug. 20, 2014, 11:47 PM), <http://www.newsweek.com/new-video-police-shooting-2nd-man-st-louis-emerges-266041> [<https://perma.cc/G58B-QJDT>] (including the videotaped shooting by police of Kajieme Powell in St. Louis, which seems to be an example of the twenty-one foot rule in operation).

22. Police culture may be the most well studied force here.

The idea of police culture developed early in police research. . . . [Numerous early treatments] have documented the power of a police culture to shape police behavior. . . . [P]olice culture overwhelms rules, regulations, guidelines, and instructions, as well the authority of chiefs and mayors, in shaping how police officers use their discretion. . . . . . . [Police culture presents] policing as a craft learned from other officers on the job, not from education or training.

George L. Kelling & Robert B. Kliesmet, *Police Unions and Police Culture*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE, *supra* note 7, at 191, 203 (citations omitted).

23. See Armacost, *supra* note 8, at 503–04 (discussing the Prince George’s County Police Department and the critique of the Office of Police Reform (“OPR”). The events investigated by the OPR were brought to public attention by a series of articles published in the *Washington Post*. The reporters described a pattern of allegations of excessive force (including shootings) by police officers. Between 1990 and 2001, the PGCPD shot 122 people, killing 47 of them. The facts surrounding many of these shootings were similar—for instance, an officer shooting an unarmed suspect and then being exonerated. The department also promoted many of the same officers who had been involved in multiple incidents of shootings or uses of excessive force.).

24. See *id.* at 504 (characterizing this dynamic as a problem of organizational culture; Armacost’s description of the problem is also a description of license).

most part, be backed up by his immediate superiors, by his union, by the broader bureaucracy, and ultimately, by the justice system.<sup>25</sup>

Tacit license fills the space between express and perceived license. Tacit license is multifaceted. The Supreme Court implicitly recognized the phenomenon in *St. Louis v. Praprotnik*, which discussed the requirements for proving entity liability in officer misconduct cases.<sup>26</sup> There, a plurality of the Court held that “official policy,” requisite to finding entity liability, includes not only written laws and other legal materials, but in certain cases can also “be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government’s business.”<sup>27</sup>

Examples of tacit license can be drawn from liability standards that are not framed as license at all. Indeed, these rules are nominally configured as sanctions; however, the manner in which they are administered communicates license. Consider the civil sanctions that nominally constrain police behavior. Commentators lament the difficulty of winning § 1983 actions against police.<sup>28</sup> The standard is difficult to satisfy. Police conduct is gauged “from the perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight” and, considering the seriousness of the alleged crime, whether the suspect was perceived as a threat and whether the suspect was resisting or attempting to evade arrest.<sup>29</sup> Add to this that the plaintiffs in these cases are often suspects—or survivors of suspects—who are poor, racial minorities, and who may have criminal records. Police have a natural advantage of credibility against these sorts of plaintiffs, which

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25. Given the nature of the work, it is easy to understand how the people charged with motivating and nurturing line officers would sympathize with their need to make snap judgments about the use of force in ways that can never be captured by the expression or tacit implications of formal rules. That reality fuels perceived license. Barbara Armacost implicitly acknowledges how the perception of license can develop in these cases. Her critique of police abuse characterizes this dynamic as a problem of organizational culture but her description of the problem is also a description of license:

[A] law enforcement organization that tolerates repeated, notorious instances of the worst kinds of brutality—even by a minority of police officers—effectively signals to its employees that a certain level of violence is acceptable despite formal policies to the contrary. The culture of an organization is made up of “shared meaning” or “shared understanding” . . . . These shared understandings are created not only by values and norms that are formally expressed but also by the kinds of conduct that are encouraged, rewarded, or tolerated by the organization. . . .  
 . . . [R]epeated failure by higher-ups to address patterns of misconduct is viewed as a signal—by subordinates and the outside world—that such conduct is permissible. It creates a cultural climate that appears—even if by default—to actually condone the deviant behavior.

*Id.* at 506–07 (footnote omitted) (quoting GARETH MORGAN, *IMAGES OF ORGANIZATION* 128 (1986)).

26. 485 U.S. 112, 121, 123 (1988).

27. *Id.* at 123.

28. See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786–90 (1970) (describing the barriers to succeeding in suits against police); David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 467 (1992) (discussing the courts’ failure to police to internal policies of law enforcement); Allison Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 753–54 (1993) (noting three weaknesses to § 1983 suits: they are difficult and expensive to pursue, the Supreme Court has limited ability to enjoin a particular police technique, and juries are more likely to believe the officer than the plaintiff).

29. Armacost, *supra* note 8, at 467–68 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

diminishes the risk of being sanctioned. That advantage is amplified by judicial approval of release-dismissal agreements (where charges of resisting may be used as a bargaining chip in securing dismissal of § 1983 actions) and the fact that § 1983 defendants are not typically held personally liable, but are instead indemnified.<sup>30</sup>

All things considered, the risk of losing is so slim and the ultimate consequences so meager that even officers who lose § 1983 lawsuits might fairly walk away thinking that they behaved properly. One prominent critic notes that even successful civil suits generally do not signal bad behavior. A report by Human Rights Watch of fourteen different police departments found a lack of a “collective official will” to stigmatize officers found guilty of civil-rights violations.<sup>31</sup> In many departments, even large damages awards did not trigger internal review and the episodes were not entered into the officers’ personnel files.<sup>32</sup>

Tacit license is also evidenced by the phenomenon of the bureaucratic double message, which has been widely recognized as a cultural feature of police organizations. One commentator observes that

[P]olice culture is defined not so much by officially-proclaimed goals and rules, but by the sometimes very different messages that circulate at the operational level. Police socialization involves a whole range of complex and conflicting messages. For example, there is the “hard-nosed” organizational message that emphasizes crime-fighting and proactivity, the message that says, “Let’s go get ‘em.” . . . [T]he official organizational messages are selectively affirmed or undermined by informal messages about what kinds of conduct are actually tolerated or rewarded. It is these informal expectations—that officers learn from fellow officers on the street and in the locker rooms—that determine the institutional culture that ultimately governs and shapes the discretionary decisions of street level cops.<sup>33</sup>

On the specific point of gun use, tacit license reflects the reality that police are authorized to draw guns, point guns, and fire guns in a wide range of circumstances that far exceed the boundaries of traditional self-defense. It also reflects the reality that police judgments about the use of deadly force are given broad deference. And that deference, which drives how formal rules and policies are implemented, sends a strong signal about what sort of behavior with guns is permitted.<sup>34</sup>

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30. See e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 392–93 (1987) (holding release-dismissal agreements in § 1983 cases constitutional).

31. *Armacost*, *supra* note 8, at 504–05 (quoting HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* 6 (1998)).

32. See *id.* (“[I]n many departments, civil rights suits did not necessarily trigger an internal review, even when those suits gave rise to large damages awards.”).

33. *Id.* at 516–17 (footnotes omitted).

34. See *Klockars*, *supra* note 7, at 3 (discussing the rarity of prosecutions of police officers for use of excessive force); see also *SKOLNICK & FYFE*, *supra* note 15, at 193–216 (1993) (discussing beliefs and motives that lead to ineffective regulation of police); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1317–40 (1999) (discussing assumptions that can influence judges); *Rudovsky*, *supra* note 28, at 480–88 (discussing the courts’ failure to police to internal policies of law enforcement); see generally *Patton*, *supra* note 28 (discussing why § 1983 fails as a deterrent to police brutality). These sources demonstrate how formal barriers do not reflect the perceived or actual boundaries on state violence. This is especially evident when we consider those amorphous boundaries against the bright line of self-defense that governs LPGCs. An example of tacit license to draw a firearm



It is common to argue that unsettling episodes of police violence are mistakes and evidence of dysfunction. But the mixture of legal permissions, practical concessions to the exigencies of police work, police culture, and the persistence of aggressive policing demonstrates how Americans countenance the drawing, pointing, and firing of guns by state agents within a very broad range that far exceeds the boundaries of self-defense. One need not disparage police in order to acknowledge this basic point. It is simply the nature of policing and administration of state prerogatives that generates this broad license.<sup>35</sup>

### III

#### LICENSE AND POLICY

Thinking about the behavior of lawful gun carriers as a function of license yields several insights about firearms policy and policing. This part discusses those insights in four subparts. Subpart A discusses the variables of license and the simple presence of a gun as predictors of the behavior of lawful gun carriers. Subpart B examines license as a driver of lawful gun carriers' escalation of violence. Subpart C applies the license insight to questions of LPGC training. Subpart D applies the license insight to issues of escalation and gun carrying in the context of race.

##### A. License As a Predictor Of Behavior

A foundational premise of early supply-side gun control theory was that the mere presence of a gun created a substantial risk of gun homicide.<sup>36</sup> In the debates over “shall issue” licensing of private gun carriers, that assumption fueled the prediction that carrying guns would turn ordinary people into murderers and

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is the Rohnert Park incident where absent the badge, the drawing of the gun becomes an illegal act. *See* Laura Anthony, *Rohnert Park Officer Being Sued for Drawing Gun on Man*, ABC 7 NEWS (Aug. 7, 2015), <http://abc7news.com/news/rohnert-park-officer-being-sued-for-drawing-gun-on-man/911687/> [https://perma.cc/Q5JZ-YDG3]; *Rohnert Park “Coffee with a Cop” Canceled After Video Goes Viral*, ABC 7 NEWS (Aug. 6, 2015), <http://abc7news.com/news/rohnert-park-coffee-with-a-cop-canceled-after-video-goes-viral/907660/> [https://perma.cc/LVM5-8BJ5]; *Rohnert Park Officer Caught on Video Pulling Gun on Civilian Cleared of Wrongdoing*, ABC 7 NEWS (Oct. 29, 2015), <http://abc7news.com/news/rohnert-park-officer-accused-of-pulling-gun-on-civilian-cleared/1058185/> [https://perma.cc/4MNT-5FV8].

35. *See* Armacost, *supra* note 8, at 469 (Although it is probably not her intent, Armacost confirms this point with the observation that the nature of police work makes it difficult to reconstruct and regulate police–citizen encounters, “and the question of whether an officer applied reasonable force under the circumstances as he reasonably believed them to be will not be easy to answer.”).

36. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 122–23 (1997) (“Current evidence suggests that a combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict is the most important single contribution to the high U.S. death rate from violence.”).

transform mundane conflicts into shootouts.<sup>37</sup> Experience refutes those early predictions.<sup>38</sup>

The empirical assessments here are clouded by contested claims that increases in concealed carry have generated billions of dollars in net benefits from the avoided costs of crime. That conversation is dominated by John Lott (proponent of the “more guns, less crime” thesis) and his various critics (who argue that declines in violent crime and gun crime cannot be attributed to the rise in concealed carry).<sup>39</sup>

The “more guns, less crime” debate distracts from the more basic and uncontested point central to the argument here—the surge in LPGCs has not caused the feared wave of minor altercations escalating into shootouts. One of the most telling assessments of this point comes from Judge Richard Posner. Posner has harshly criticized the Supreme Court’s decision in *District of Columbia v. Heller*, which affirmed the right to keep and bear arms.<sup>40</sup> But in the recent case of *Moore v. Madigan*, which struck down a ban on concealed carry, Posner quoted with approval, the following summary of the literature:

Whether the net effect of relaxing concealed-carry laws is to increase or reduce the burden of crime, there is good reason to believe that the net is not large. . . . [T]he change in gun carrying appears to be concentrated in rural and suburban areas where crime rates are already relatively low, among people who are at relatively low risk of victimization—white, middle-aged, middle-class males. The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders. Based on available empirical data, therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.<sup>41</sup>

Posner’s assessment reflects the fact that LPGCs have behaved very differently than skeptics feared. The following compilation fills in the landscape that Posner summarized.

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37. See, e.g., Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 747–64 (describing the rise of the concealed carry movement in the United States, including the cycle of speculation about blood in the streets contrasted with the “ho hum” reality).

38. See Steve Walters, *Weapons Laws Not Matching Hype: Concealed Carry Not Altering Crime, States Find*, MILWAUKEE J. SENTINEL, Nov. 3, 2003, at A1 (discussing the lack of change in violent crime following repeal of Wisconsin’s ban on concealed weapons).

39. See generally LOTT, *supra* note 1, at 244–49. Lott conveniently cites and endeavors to answer his various critics. *Id.* at 202–30.

40. See Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [<https://perma.cc/U7D7-Z9B7>]; see also *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

41. 702 F.3d 933, 937–38 (7th Cir. 2012) (alterations in original) (quoting Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009)); see also John J. Donohue, *The Impact of Concealed-Carry Laws*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 287, 314–21 (Jens Ludwig & Philip J. Cook eds., 2003) (providing state-by-state estimates on the effect of Shall-Issue laws on various crimes); H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors*, NAT’L CTR. FOR POL’Y ANALYSIS (June 2, 2010), [www.ncpa.org/pdfs/ba324.pdf](http://www.ncpa.org/pdfs/ba324.pdf) [<https://perma.cc/DW2U-W2PU>] (reviewing the impact of concealed carry laws on violent crime).

ARIZONA. There were 99,370 active permits as of December 1, 2007. During 2007, 33 permits were revoked for any reason—a 0.03 percent rate.<sup>42</sup> There was one case where a permit holder committed murder with a gun in 2002.

FLORIDA. Between, October 1, 1987, and November 30, 2008, Florida issued permits to 1,439,446 people . . . 166 had their permits revoked for any type of firearms related violation—about 0.01 percent.<sup>43</sup> These revocations overwhelmingly involved individuals accidentally carrying concealed handguns into restricted areas.

INDIANA. In 2007, there were approximately 300,000 active permits, and 744 were revoked—just under 0.25 percent. . . .

KENTUCKY. During 2000, 74 of the 66,000 permits were revoked for any reason—about 0.1 percent. No permit holder was convicted of a violent crime. The most common charge against permit holders, accounting for 20 of the 74 revocations, was a lack of vehicle insurance.

MICHIGAN. During 2007, there were over 155,000 licensed permit holders and 163 revocations—about 0.1 percent.<sup>44</sup> Over the period from July 1, 2001, to June 30, 2007, there was one permit holder convicted of manslaughter, though it did not involve the use of a gun.<sup>45</sup> Three other people were also convicted of “intentionally discharging a firearm at a dwelling.” No one was convicted of “intentionally discharging a firearm at or towards another person.”

MISSOURI. Ninety-six of the 50,507 permit holders had their permits revoked in 2008—a 0.19 percent rate.

MONTANA. As of December 12, 2008, Montana had 17,974 active permits, and during 2008 there were 20 revocations—0.1 percent. . . .

NEW HAMPSHIRE. Local sheriffs handle permits for New Hampshire residents, so systematic statewide information is only available for nonresident permits. As of December 31, 2007, there were 29,609 active permits held by nonresidents. . . . “The number of revocations is in the range of 2 to 5 per year . . . .” That is a revocation rate of between 0.007 and 0.017 percent per year. . . .

NORTH CAROLINA. With 246,243 permits issued and 789 revocations, about 0.3 percent of North Carolina permit holders have had their permits revoked over the twelve years from when permits started being issued . . . .<sup>46</sup>

. . . “One frequent reason [for revocation] is when the police pull someone over for a traffic violation, [permit holders] fail to tell them that they are a CCW holder.” . . .

OHIO. From April 2004 to the beginning of August 2006, 73,530 permits were issued in Ohio. There were 217 revocations, but 69 of these came from the Cuyahoga County Sheriff’s Office after a weapons instructor was accused of not providing the training required by state law.<sup>47</sup> Excluding revocations due to improper training, about 0.2

42. Donna J. Street, Administrative Supervisor, Arizona Department of Public Safety, Concealed Weapons Permit Unit, P.O. Box 6488, Phoenix, AZ 85005.

43. See DIV. OF LICENSING, FLA. DEP’T OF AGRIC. & CONSUMER SERVS., CONCEALED WEAPON/FIREARM SUMMARY REPORT, OCTOBER 1, 1987 – NOVEMBER 30, 2008 (2008) (including statistics regarding licenses issued, licenses revoked, and applications denied).

44. See CRIMINAL JUSTICE INFO. CTR., MICH. STATE POLICE, CONCEALED PISTOL LICENSURE ANNUAL REPORT, JULY 1, 2006 TO JUNE 30, 2007 (2007), [http://www.michigan.gov/documents/msp/ccw\\_annual\\_report\\_2006-2007\\_228850\\_7.pdf](http://www.michigan.gov/documents/msp/ccw_annual_report_2006-2007_228850_7.pdf) [https://perma.cc/V3KM-ZK3S] (including statistics regarding licensed permit holders in Michigan).

45. See *id.*

46. See NORTH CAROLINA CONCEALED HANDGUN PERMIT STATISTICS BY COUNTY, 12/01/1995 THRU 12/31/2008 (2008) (offering statistics on permit applications, valid permits, permit applications denied, and permit applications revoked from 1995–2008).

47. See John Fuddy, *Few Concealed-Carry Permits Revoked, Records Show—Sheriffs Keeping Reasons for Suspensions, Revocations Secret*, COLUMBUS DISPATCH, Aug. 13, 2006, at C6 (including

percent of permit holders had their permits revoked. There were no reported incidents of any permit holder having his permit revoked for committing a violent crime. . . . A major reason for revocations was that a licensee moves out of state or dies.<sup>48</sup> . . .

TEXAS. In 2006, there were 258,162 active permit holders. Out of these, 140 were convicted of either a misdemeanor or a felony, a rate of 0.05 percent. That is about one-seventh the conviction rate in the general adult population, and the convictions among permit holders tend to be for much less serious offenses.<sup>49</sup> The most frequent type of revocation, with 33 cases, involved carrying a weapon without their license with them. The next largest category involved domestic violence, with 23 cases.

Similar numbers have been reported in Texas every year . . . .<sup>50</sup>

UTAH. With 134,398 active concealed-handgun permits as of December 1, 2008, there were 12 revocations for any type of violent crime over the preceding twelve months—a 0.009 percent rate. None of those involved any use of a gun. Thirteen revocations involved any type of firearms-related offense, a revocation rate of less than 0.01 percent. . . .

Since 1994, two permit holders have been convicted of murder, including a police officer who shot his wife. The other murder was not committed with a gun.

WYOMING. Over the four years from 2005 to 2008, 31 permits were revoked. The average yearly revocation rate was 0.06 percent. . . . None of the cases involved a violent crime or the improper use of a gun.<sup>51</sup>

LPGCs also compare favorably to the other class of lawful gun carriers: police. For example, in Florida, which offers a large sample size and long experience with shall issue permitting, LPGCs are not only more law abiding than the general population but they also are sanctioned for firearms crimes at a lower rate than police.<sup>52</sup> Similarly, in Texas, recent data show 584,000 active license

statistics regarding the amount of conceal-carry permits Ohio revoked).

48. See MARC DANN, ATTORNEY GEN. OF THE STATE OF OHIO, OHIO'S CONCEALED HANDGUN LAW: 2008 REPORT TO THE GOVERNOR & GENERAL ASSEMBLY (2008) (including details regarding Ohio's concealed carry law and statistics on licenses issued).

49. See TEX. DEP'T OF PUB. SAFETY, CONVICTION RATES FOR CONCEALED HANDGUN LICENSE HOLDERS, REPORTING PERIOD: 01/01/2006–12/31/2006 (2006) (demonstrating that in 2006, there were 61,539 convictions for misdemeanors and felonies among individuals without a concealed-handgun permit; the adult population was 16,925,604).

50. See *id.*; TEX. DEP'T OF PUB. SAFETY, CONVICTION RATES FOR CONCEALED HANDGUN LICENSE HOLDERS, REPORTING PERIOD: 01/01/2005–12/31/2005 (2005); TEX. DEP'T OF PUB. SAFETY, CONVICTION RATES FOR CONCEALED HANDGUN LICENSE HOLDERS, REPORTING PERIOD: 01/01/2004–12/31/2004 (2004); TEX. DEP'T OF PUB. SAFETY, CONVICTION RATES FOR CONCEALED HANDGUN LICENSE HOLDERS, REPORTING PERIOD: 01/01/2003–12/31/2003 (2003); TEX. DEP'T OF PUB. SAFETY, CONVICTION RATES FOR CONCEALED HANDGUN LICENSE HOLDERS, REPORTING PERIOD: 01/01/2002–12/31/2002 (2002).

51. LOTT, *supra* note 1, at 244–49 (footnotes omitted); see also David B. Kopel, *Pretend "Gun Free" School Zones: A Deadly Fiction*, 42 CONN. L. REV. 515, 569–573 (2009) (showing how vague claims by lobbying organizations like the Brady Center "thousands of people with CCW licenses have committed atrocious acts of gun violence" are unsupported by the state data).

52. See CRIME PREVENTION RES. CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES, *supra* note 3, at 7–8 ("Over the last 77 months from January 2008 through May 2014, just 4 permits have been revoked for firearms-related violations. With an average of about 875,000 active permit holders per year during those years, the annual revocation rate for firearms related violations is 0.00007 percent – 7 one hundred thousandths of one percentage point." The Florida numbers can easily be compared to data on firearms violations by police officers during the three years from January 1, 2005 through December 31, 2007. During that time period, the annual rate of such violations by police was at least 0.007 percent. That is higher than the rate for permit holders in Florida.).

holders, with 120 of these convicted of any sort of misdemeanor or felony, a rate of 0.021 percent, fewer than one quarter of which reportedly involved firearms.<sup>53</sup> By comparison, the crime rate among Texas police was 0.124 percent.<sup>54</sup>

With lawful gun carrying now the norm in the vast majority of states, it is plain that initial predictions that gun carrying would turn ordinary people into murderers were wrong. Indeed the best predictor of the behavior of LPGCs is not the fact that they are carrying guns, but rather their limited license to use guns in self-defense.

Given the general characteristics of LPGCs, this is no surprise. The regulatory filters used to exclude people from owning and carrying guns make LPGCs more trustworthy (on those measures) than the general population. Though the general population includes people with criminal records that disqualify them from owning firearms, the class of lawful gun carriers excludes them.<sup>55</sup>

A nationwide comparison focusing exclusively on murder convictions underscores this point. Nationally, over the nearly two decades from 1990 through July 2008, there were twenty cases in which a permit holder was convicted of murder with a gun and three other cases where the killers died at the scene, amounting to slightly more than one murder per year.<sup>56</sup> By any measure, this is a lower rate than that for the general population. For example, an analysis focusing on the year 2007, showed that nationally “[p]ermit holders committed murder at 1/182nd the rate of the general public.”<sup>57</sup>

An assessment of serious crimes committed by Texas permittees yields similar results. During the assessment period Texas permittees were convicted of all serious crimes at a lower rate than the general population.<sup>58</sup>

One need not claim too much here. The basic point is that carrying a gun does not appear to be a radically transformative driver of violent behavior; it has not caused LPGCs to act out of character by escalating mundane conflicts into shootouts. As a descriptive matter, without making any claims of causation, the

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53. *Id.* at 7–8.

54. *Id.*

55. Like LPGCs, police also are superior to the general population on common measures of trustworthiness. And like LPGCs there are also outliers. *See, e.g.,* Gina Barton, *Officers' Criminal Records are Tough to Track*, MILWAUKEE J. SENTINEL (Oct. 29, 2011), <http://archive.jsonline.com/watchdog/watchdogreports/officers-criminal-records-are-tough-to-track-132868478.html> [<https://perma.cc/VHK6-3MPY>] (2004 report of active Milwaukee officers known to have criminal records); Christopher N. Osher, *4 of 10 Rocky Ford Police Officers Had Problems in Previous Law-Enforcement Jobs or Criminal Records*, DENVER POST (Aug. 16, 2015, 9:58 AM), <http://www.thedenverchannel.com/news/local-news/4-of-10-rocky-ford-police-officers-had-problems-in-previous-law-enforcement-jobs-or-criminal-records> [<https://perma.cc/FV9C-CD5U>]; Lauren Seabrook, *WPD Hasn't Fired Two Officers Who Were Dishonest or Have Criminal Records*, KWCH (Nov. 3, 2015, 3:48 PM), <http://web.archive.org/web/20160108192514/http://www.kwch.com/news/local-news/wpd-hasnt-fired-two-officers-who-lied-or-have-criminal-records/36212822> [<https://perma.cc/XL8L-39FT>] (detailing Kansas officers with criminal records).

56. LOTT, *supra* note 1, at 251.

57. *Id.*

58. *See* Kopel, *supra* note 51, at 568 (noting that this includes “burglary, violent crimes, sex offenses, weapons offenses and various other serious crimes”).

limited license granted to LPGCs is the prime predictor of their behavior with guns.

### B. License And Escalation

The claim that license is a better predictor of behavior than the mere carrying of a gun squares with what occurs across the two categories of lawful gun carriers. Experience refutes the dire predictions that guns on the hips of LPGCs would transform fender benders and shopping cart bumps into shootouts.

Now compare police, who relative to LPGCs, operate under a far broader license to carry, draw, point, and fire guns. Police may draw guns to secure the scene of an incident or inquiry. Police may establish ad hoc rules at the scene of an investigation or arrest (hands out of pockets, hands up, sit down, on the ground, etcetera), and may enforce those ad hoc rules by drawing, pointing, and firing guns. When these scenarios escalate, after-the-fact evaluations of hot-blooded police judgments are difficult. General reluctance to second-guess these decisions is a major driver of police license.

The broad consequence here is that by training, assignment, and myriad other factors that distill into license, police sometimes draw, point, and fire guns in scenarios that start with relatively trivial things. These scenarios are common enough that mainstream assessments credibly lead off with a list of the citizens who have fallen to seemingly disproportionate violence.<sup>59</sup> Often the police response in these cases is that officers did nothing wrong. This response can be understood as a function of license—a statement of fact that police, by assignment and training, are allowed and can be expected to escalate violence.

This sort of escalation was precisely the thing that skeptics wrongly predicted would be precipitated by LPGCs.<sup>60</sup> But just as the aggressive, preemptive behavior of police is predicted by their license to escalate violence, so too is the behavior of LPGCs predicted by the limited license under which they operate.

Outrage over police shootings generally centers on disproportionality—cases where police have used guns against unarmed people suspected of some relatively trivial infraction. Police managers recognize that police license in these cases departs from community instincts about the legitimate use of force. Reflecting the fact that police license goes beyond traditional self-defense, the 2015 PERF report expresses concerns about escalation in scenarios like a

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59. See PERF REPORT, *supra* note 11, at 3 (The opening sentences read this way: “Over the past year, the policing profession has been shaken by controversies of the deaths of Eric Garner, Michael Brown, Tamir Rice, Walter Scott, Antonio Zambrano-Montes, and many others. I don’t know anyone who would dispute that the reputation of American policing has suffered from these incidents. At times, it has seemed like every time you turn on the TV, you see another story about the police that hits you like a punch to the stomach.”).

60. President Obama captured the worry in his projection that LPGCs would transform minor altercations into shootings and homicides. Paul Helmke, *Barack Obama: “I Am Not In Favor Of Concealed Weapons”*, HUFFINGTON POST (May 25, 2011, 1:57 PM), [http://www.huffingtonpost.com/paul-helmke/barack-obama-i-am-not-in\\_b\\_170033.html](http://www.huffingtonpost.com/paul-helmke/barack-obama-i-am-not-in_b_170033.html) [<https://perma.cc/Q4Y8-CG77>]; see also Johnson, *supra* note 37.

homeless man holding a contact weapon surrounded by armed officers. It is the kind of circumstance where community members wonder: “Why did all those officers have to shoot that homeless man? . . . All those officers were there, they had him surrounded. Why couldn’t they Tase him, or pepper spray him, or just wait him out? They didn’t have to kill him.”<sup>61</sup>

Police scholars have noted that it is easy to understand why police officers, immersed in the culture and training of “command presence,” might earnestly contend that they have done nothing wrong in scenarios where trivial encounters with citizens escalate into violence, including guns drawn and fired.<sup>62</sup>

There are signals within police culture that the license to escalate can morph into a sense of duty, with officers who fail to escalate deemed to have failed on one of their fundamental obligations. Under the discussion heading “Never back down. Move in and take charge,” the 2015 PERF report expresses the concern that

*de-escalating, and disengaging tactically are sometimes seen as antithetical to a traditional police culture.* Some officers, with the best intentions, think that their job is to go into a situation, take charge of it, and resolve it as quickly as you can. Sometimes there is a feeling of competitiveness about it. If an officer slows a situation down and calls for assistance, there is sometimes a feeling that other responding officers will think, “What, you couldn’t handle this yourself?”<sup>63</sup>

Concern about this sort of attitude has prompted calls for re-training police in de-escalation tactics.<sup>64</sup> But those suggestions fail to acknowledge the dynamics of the police assignment and the power of police culture.<sup>65</sup> These dynamics are underscored in comparison to LPGCs.<sup>66</sup>

LPGCs are granted a license to react defensively to deadly threats by an assailant who has made the first move. Police on the other hand are necessarily authorized to act *preemptively*. There is an obvious danger of requiring police in their myriad encounters to give suspects—or citizens—the benefit of the doubt

61. PERF REPORT, *supra* note 11, at 9 (also noting that while this sort of shooting is likely to be deemed legal, “[a] decision by a prosecutor or a jury that an officer’s use of force was not a crime does not address the community trust issue”).

62. See Armacost, *supra* note 8, at 495 (“[LAPD o]fficers were instructed to maintain a ‘command presence,’ which required aggressive identification and investigation of potential suspects and generated a high level of confrontations on the street. The combination of aggressive training, coupled with a heavy emphasis on high citation and arrest statistics as a measure of success, meant that officers were habituated into commanding and confronting, rather than communicating.”).

63. PERF REPORT, *supra* note 11, at 5 (emphasis added).

64. See Klockars, *supra* note 7, at 10–11 (de-escalation hierarchy is standard in police training and criminology).

65. David Lester captures the phenomenon with this summary of the research:

[R]ookies soon learn that what is taught in the police academy is somewhat irrelevant to their work on the street. . . . They . . . learn that their colleagues reward them for aggressive and forceful action and punish them for caution. Cautious police officers are seen as unreliable and as risky partners.

David Lester, *Officer Attitudes Toward Police Use of Force*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE, *supra* note 7, at 180, 186.

66. One commentator observes that in many circumstances “police behavior is both abusive of the rights or dignity of citizens and necessary and appropriate conduct.” Klockars, *supra* note 7, at 7 (emphasis omitted).

and allow them the first move to violence.<sup>67</sup> Consequently, police commonly make the first move to violence (that is, to restrain, to handcuff, and to draw guns, to point guns, to deploy batons, sprays, Tasers, and firearms). This necessary discretion to act preemptively is just another way of describing escalation, which is an inherent part of the police assignment.

Police escalation may be exacerbated by what Jerome Skolnick described as heightened police sensitivity to the possibility of violence.<sup>68</sup> Skolnick argued that the danger of police work makes officers especially attentive to the possibility of disorder, violence, or law breaking.<sup>69</sup> Combined with the discretion and license already discussed, it is easy to see how an acute sensitivity to the possibility that mundane circumstances might spin into deadly encounters might result in police drawing, pointing, and firing guns under circumstances in which LPGCs would be foolish to consider that option.<sup>70</sup>

The license, assignment, and dynamics that prompt police to escalate violence and move quickly to the gun also bolster officers' fair expectations of deference to their decisions about use of force. Contrast this to the calculation of LPGCs, whose license is more limited. High-profile incidents like the Trayvon Martin shooting demonstrate the dire consequences when LPGCs push the boundaries of their license.<sup>71</sup> Unlike police, they have broad exposure to civil claims, even if they avoid criminal conviction. And unlike police, LPGCs will not benefit from the brotherhood of officers and union organizations that will empathize with and support them. The lesson of George Zimmerman is that LPGCs who push the boundaries will become pariahs. The plain incentives to LPGCs are to avoid, rather than escalate, conflict.

All of this prompts re-examination of the conversation about the training of LPGCs, and particularly the about the scope and value of police training for LPGCs.

### C. License, Escalation, And Training

A common policy objection to private citizens carrying guns is that they are not trained like police. Given the hazards introduced by police license, this reflex objection demands closer examination. If police training is intertwined with the preemptive violence and escalation that are embedded in police license, then we should be wary of policies that would train LPGCs like police. The proper questions are whether any aspects of police training are important for LPGCs to

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67. David Lester notes the worry by police that while "sometimes mistakes are made," there are too many instances of "officers getting shot when they did not fire first." Lester, *supra* note 65, at 183.

68. SKOLNICK & FYFE, *supra* note 15, at 193–216.

69. *See id.*

70. *See* Armacost, *supra* note 8, at 513 (discussing danger, police training, and isolation as possible factors).

71. *See* Editorial, *When 'Self-Defense' Violates Civil Rights*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/opinion/when-self-defense-violates-civil-rights.html> [https://perma.cc/UGJ7-8DJZ].



have and whether those things can be separated from the aspects of police license that fuel preemptive violence and escalation.

One template for this assessment is the contentious issue of campus carry. In 2007, Nevada's public universities considered a campus-carry proposal that would have allowed faculty members and staff to carry guns on campus.<sup>72</sup> After completing a physical and psychological exam, a background check, and classes on firearms, defensive tactics, and juvenile justice at the state's Law Enforcement Training Academy, volunteers would operate as a reserve officers' corps and would be authorized to carry handguns on state university property.<sup>73</sup>

This proposal offers a good base for considering how much, if any, police training for non-police is wise. The threshold vetting suggested by the Nevada proposal seems uncontroversial. Indeed, threshold background checks duplicate one of the common requirements for granting carry licenses.<sup>74</sup>

The physical and psychological exam are enhancements that would be controversial in the context of a permit purely for self-defense, where many would place a high burden on the state restricting an individual's last ditch opportunity to protect themselves from deadly attack—even if they were deemed unfit to intervene aggressively in the defense of others. But things are different when private citizens take on a heightened duty to protect others. With that assignment of responsibility, expecting these citizen protectors to be as mentally and physically fit as the (average? top decile? bottom decile?) officer seems like a basic requirement that would transfer easily.

On the other hand, the suggested requirement of classes in juvenile justice, with the implication that reserve officers would then intervene in incidents less serious than the deadly threats that define LPGC license, raises the concern about escalation that is a controversial aspect of police violence previously discussed. Expanding, even by implication, the license of non-police to respond with guns to violations of the countless rules of the modern state threatens to exacerbate an already-difficult problem.

Another general concern is how much of the training of people along the spectrum from basic LPGCs to “reserve officers” (in the style of the Nevada proposal) should be conducted by police and police trainers. The worry that police license, particularly perceived license, is intertwined with police culture suggests that generally we should think about and license citizens in a different way. Certainly for ordinary LPGCs, we should use structural limits to emphasize that they are not police through structural limits. This might mean a system that avoids the use of police trainers.

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72. See Kopel, *supra* note 51, at 525–26 (detailing how this proposal was offered by the police chiefs of Nevada's campus university system, but was ultimately rejected).

73. See *id.*

74. See, e.g., *Carrying Firearms in Pennsylvania*, PA. STATE POLICE, <https://www.psp.pa.gov/firearms-information/Pages/Carrying-Firearms-in-Pennsylvania.aspx> [<https://perma.cc/TAA2-JJQT>] (last visited Feb. 8, 2017).

These criticisms notwithstanding, the insight that license drives behavior of LPGCs underscores an opportunity to develop more fine-tuned approaches to difficult problems, like security in sensitive places where we do not have resources to station police. Private gun policy in sensitive places need not be a black-and-white choice between training LPGCs as surrogate police or allowing all LPGCs to bring in their guns. The demonstrated tendency of LPGCs to hew to the boundaries of their license suggests that we might fruitfully consider different classes of LPGCs.

The training of those classes poses a separate challenge of deciding what characteristics to seek in different classes of enhanced LPGCs while avoiding the hazards that come with the expanded license granted to police. If simply arming teachers or pilots, or sending them through deputy police training is too blunt a response, the license insight invites fine-tuning.

Filters might include enhanced training. For example, people who are qualified as trainers for permit applicants would presumably give greater comfort in sensitive places than the people they have recently trained. Also, as technology advances, some LPGCs might qualify for and submit to special permits with tracking functions that would verify whether they are onsite as potential resources in sensitive places. These are just some of the ways in which training might be implemented, although a consensus on best practices has yet to emerge.

#### D. License, Escalation, And Race

Compared to LPGCs, police have a far broader license to draw, point, and fire guns. Preemptive violence (making the *first move* to violence) and escalation of violence (from minor, to serious, to deadly) are integral parts of the police assignment and license. Many observers contend that the broad discretion to initiate and escalate violence has long been exercised more harshly against racial minorities.<sup>75</sup> Recent episodes of blacks killed after being forced into contact with police over often-trivial regulatory infractions have sparked criticism from commentators across the spectrum, from police think tanks to civil-rights scholars.<sup>76</sup>

The concern that agents of the state exercise their license to use violence more harshly against blacks and other minorities has long been present. For most of the history of black people in America it was simply the norm,<sup>77</sup> and even today is a lingering concern. *Terry* stops are one good example.<sup>78</sup> This is an area where police are granted wide discretion to act on hunches and instincts that also can

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75. See, e.g., HUBERT WILLIAMS & PATRICK V. MURPHY, NAT. INST. OF JUSTICE, THE EVOLVING STRATEGY OF POLICE: A MINORITY VIEW 11 (1990) (noting that violence is often precipitated by police actions).

76. See, e.g., Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

77. See, e.g., Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1492 (2013).

78. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (holding that all that is required for an officer to stop and frisk a suspect is reasonable suspicion).

accommodate racial bias. Widely reported assessments show that *Terry* stops in New York City tilted dramatically against blacks, although they lead to no higher rates of actual arrests.<sup>79</sup>

*Terry* stops are an example of license (sometimes, but not always, related to gun use) expanding in practice beyond parchment barriers. The *Terry* protocol blessed existing practices with seemingly limiting but very flexible language. The perhaps necessarily vague language of “reasonable suspicion” to initiate contact grants tremendous flexibility to use violence on behalf of the state.<sup>80</sup> And the results are not surprising.

The bias in initiating *Terry* stops is also reflected in the exercise of discretion to use violence once the stop is underway. Two studies found a significantly disproportionate use of force against blacks and Latinos during *Terry* stops.<sup>81</sup>

Within the innocuously articulated “reasonable suspicion” to initiate contact is a tacit license to draw guns. In one study of New York City stops, nearly a third of respondents reported that police displayed their firearms, and in some documented cases officers added a racial slur to boot.<sup>82</sup>

Other critiques yield similar concerns. In Los Angeles, lethal chokeholds were deployed more aggressively against blacks. The outcome of one victim’s § 1983 suit to recover for injuries caused by a chokehold used on him during a traffic stop is instructive.<sup>83</sup> Chokeholds had resulted in multiple serious injuries and deaths, and this continued as the lawsuit proceeded.<sup>84</sup> The Los Angeles Police Department was aware of the pattern and continued to authorize the use of chokeholds. Street-level cops deployed them widely, especially against blacks.<sup>85</sup>

It is highly contestable whether police license is open to the sort of modification that would dramatically change the way that police exercise discretion in the context of race. The disproportionate use of police violence against minorities is a generations-old problem. The license critique helps explain what we see but it does not offer any novel or easy solutions. Change would require contracting police license to strike preemptively and to escalate. But that sort of change would mean fundamentally changing the assignment handed to American police.

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79. See Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 856 (2014) (discussing factual findings regarding patterns and practices of racial profiling within the NYPD).

80. See *id.*

81. See *id.* at 860 (reporting a study finding that in 2009 violence was used 75,424 times against blacks, 48,607 times against Latinos and 10,041 times against whites).

82. See *id.* at 860–63.

83. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983) (holding that although plaintiff might have been choked, that did not establish real and immediate threat that it would happen again in a subsequent stop).

84. See Armacost, *supra* note 8, at 491.

85. See *Lyons*, 461 U.S. at 111–12; Armacost, *supra* note 8, at 491 (discussing racial relations and chokeholds).

The issue of LPGCs in minority communities seems different. There, license is a more active policy variable because it is far less entrenched.<sup>86</sup> Indeed, today we are still in the midst of a first principles debate about lawful private gun carry. And black communities particularly are wrestling with whether to embrace or resist LPGCs.

One aspect of that conversation is the familiar position represented by the black political establishment that more guns in the community is a plain hazard.<sup>87</sup> Another is represented by Otis McDonald and Shelly Parker, black plaintiffs in litigation that culminated in the Supreme Court affirming the individual right to arms. McDonald and Parker are fair embodiments of the fifty-four percent of blacks that support allowing trustworthy people to carry concealed firearms.<sup>88</sup>

Parker and McDonald proceeded on intuition about the utility of firearms against the threats that surrounded them. Empiricists now argue that this intuition was quite sound. One prominent researcher argues that LPGCs produce social goods in terms of the avoided cost of crime, and that blacks living in higher-crime urban areas “benefit disproportionately” from concealed-handgun laws.<sup>89</sup>

These sorts of detailed claims of benefit have raised objections. And even a scrupulously neutral assessment by the National Research Council generated a contested report, with James Q. Wilson dissenting that the majority had applied uneven standards to the competing positions.<sup>90</sup>

But even if LPGCs do not produce billions of dollars of community benefits for themselves and free riders, that does not settle the debate about LPGCs in the black community.

The fight over whether more guns in the hands of LPGCs is a disincentive to crime and generates large social benefits obscures the fact that the core initial objection to concealed carry was that it would lead to blood in the streets. The fear was that the mere presence of a gun would cause previously law-abiding people to escalate minor altercations into shootouts.<sup>91</sup> Even critics of the “more guns, less crime” thesis must acknowledge that concealed carry has not resulted in the bloodbath that skeptics predicted.

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86. The relatively recent vintage of some of the CCW regimes stands in contrast to the long history of police license. Police license is more complicated more nuanced, tougher to regulate and ultimately more vexing because of its long history. For LPGCs, the culture is shaped with time, and there is the advantage of the recent history being more restrictive. So people who move from a regime where gun carry was prohibited to a regime of allowance should naturally exercise more restraint in ambiguous situations. Also as we have seen in the culture, controversial uses of firearms by LPGCs things on the boundaries of self-defense have resulted in broad public condemnation of aggressive actors—for instance, George Zimmerman. Considered against the longstanding, broad complex signals that feed perceived police license the cultural signals against aggressive gun use by CCWs are incredibly strong.

87. See Johnson, *supra* note 77, at 1591–98 (noting that there are hazards and social costs of firearms).

88. See McDonald v. City of Chicago, 561 U.S. 742 (2010) (in which Otis McDonald was the plaintiff); District of Columbia v. Heller, 554 U.S. 570 (2008) (in which Shelly Parker was the plaintiff).

89. LOTT, *supra* note 1, at 224 (see text accompanying figure 9.8).

90. NAT'L RES. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 269–75 (2004).

91. See, e.g., Johnson, *supra* note 37.

People who go through the steps to lawfully carry a gun in public nearly always stay within the limited license they are granted. Nothing so far suggests that black LPGCs behave any differently.

Also consider that, as compared to LPGCs, police guns are structurally more risky because the police license is broader and more flexible. Police will draw, point, and shoot quicker and over more trivial things like violations of *ad hoc* arrest or investigation rules and other suspected infractions that have no root in violence. This risk seems to be elevated in minority communities where police perceive themselves as being in a war zone or where they proceed with an “us against them” mentality, that police scholars have criticized.<sup>92</sup>

Comparison of these two categories of lawful gun carriers and their governing license demonstrates something important about which group is more in tune with community norms. There is a discernable standard evident in episodes of public protest against egregious uses of guns. The moral outrage is rooted in our instincts about the necessity of violence. There is a long—indeed, ancient—tradition of approving defensive violence, which defines the boundaries of private gun use. On the other hand, though most Americans ultimately appreciate the need for a broader police license, the exercise of that license is often discomfiting and sometimes infuriating. When people spill into the streets to protest aggressive, egregious violence by criminals, or police, or aggressive LPGCs, they are invoking a viscerally felt, breached moral standard.

Ironically, one of the keenest examples comes from the Trayvon Martin shooting. The outrage there centered on George Zimmerman’s attempt to act as a surrogate for police. Standing alone, the evidence that Martin was on top of Zimmerman beating him might leave many convinced that the shooting was justified.

But all of that changes when we incorporate the unprovoked approach by Zimmerman, his pursuit of Martin (where there was no immediate threat to Zimmerman), and the confrontation by Zimmerman. The public outcry reflected the basic impulse that classic, unavoidable self-defense is legitimate. But violence beyond that scenario, the type of aggressive, preemptive violence that police engage in as part of establishing control, investigating crimes, assessing potentially criminal activity, and apprehending people who may or may not be guilty of breaking an array of government rules is far more problematic. We recoil against this sort of violence. But this violence is nonetheless squarely within the permission granted to police.

Of course people were doubly outraged by George Zimmerman, an LPGC who mimicked police by assessing, investigating, and pursuing Trayvon Martin. This outrage was amplified by the worry that Zimmerman’s initial assessment of Martin as a threat was motivated by the sorts of racial and class biases that are manifest in *Terry* stops and other exercises of police discretion.

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92. See Armacost, *supra* note 8, at 513 (“Police authority in these areas creates a we/they mentality . . .”).

This helps frame the open normative question: given the respective histories and structural risks, why should LPGCs be less welcome in the community than police?<sup>93</sup> Good people with guns have been part of the community for a very long time. This is a long and rich tradition that has been elaborated in great detail.<sup>94</sup> That tradition is a start into the inquiry of whether sober, mature members of the black community can, in fact, be trusted in the same way as the general class of LPGCs. This prescription is open to countervailing evidence that lawful black gun carriers, constrained by the license that applies to all LPGCs, somehow pose greater threats than whites. If black LPGCs turn out to behave differently from the broader class and, like Zimmerman, treat their license as some sort of surrogate police authority that would introduce concerns about escalation and disproportionate violence. In turn, that would bolster the claims for exceptional limits on black LPGCs. But if black LPGCs mirror the behavior of the general class—and mirror in the behavior of prior generations of responsible armed black people—then we should be optimistic about, or at least should not dread, the results.

#### IV

#### CONCLUSION

License best explains the behavior of all lawful gun carriers, both police and private citizens. License explains the generally hyper-law-abiding nature of lawful private gun carriers. License also largely explains the use of firearms by police outside the boundaries of self-defense. The license critique weakens the claim that private gun carriers are a hazard because they are not trained like police. Finally, the license critique illuminates the conversation about gun carrying in minority communities, where broad police license to use guns has

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93. None of this need be perceived as hostility to police. It is just an observation that actors will press the edges of the permission they are granted and police license is broad, flexible, and amorphous. On the principle that permissions drive lawful behavior, we should expect state agents to operate more often in this sphere, more aggressively, and we should expect more boundary-pushing by state actors, because the boundaries are amorphous. That is in fact what we see. At the boundaries the violence license granted to both police and LPGCs is subject to the phenomenon of spill over beyond the boundaries. The nature of the boundaries is a variable here. For distinct, clearly articulated boundaries the danger should be less. Gun carriers bound by a robust self-defense standard have far less discretion, far fewer excuses, far less expectation that formally ultra vires violence will be sanctioned. Gun carriers bound by a looser, more amorphous license will generate the results that we observe. The spillover in the latter case will manifest in more jolting troublesome circumstances. Some degree of aggression is inherent in the preemption and interdiction that state agents are charged with. Enforcement of order, enforcement of bureaucratic diktats (even petty ones) motivated by petty things, will and do prompt state actors to behave aggressively in the role of enforcement. The possibility that the subject will be disagreeable prompts, aggressive preemption with the aim of taking control. Sometimes, as we have seen recently, this results in escalation to violence by state agents, where the underlying issue presented no threat of violence.

94. See CHARLES E. COBB, THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE (2014); NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014); AKINYELE OMOJALE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT (2013); Nicholas Johnson, *supra* note 77.

generated heated controversy, and where the wisdom of encouraging lawful gun carrying by blacks remains contested.