IN DEFENSE OF SELF-DEFENSE: *HELLER*'S SECOND AMENDMENT IN SENSITIVE PLACES

INTRODUCTION 1988
I. *HELLER* AND SENSITIVE PLACES 1991
  A. Sensitive Places 1991
    1. The Struggle to Define Sensitive Places 1991
    2. Traditional Acceptance of Place Restrictions 1993
  B. Self-Defense 1994
  C. Broad Application of Heller 1997
  D. The Duty to Protect 1999
  E. The Necessity of General Licensing to Carry a Weapon 2002
II. SENSITIVITY AND SECURITY: PLACES THAT MAY BE SENSITIVE 2003
  A. Government Buildings 2003
    1. Reasons for Sensitivity 2003
    2. Government Provisions of Security 2004
  B. Public Schools 2005
    1. Reasons for Sensitivity 2005
    2. Government Provisions of Security 2006
  C. Public Universities 2006
    1. Reasons for Sensitivity 2006
    2. Government Provisions of Security 2007
  D. Places of Worship 2007
    1. Reasons for Sensitivity 2007
    2. Government Provisions of Security 2008
III. TRADITIONAL ACCEPTANCE OF PLACE RESTRICTIONS REVISITED 2008
  A. Application of Due Process Principles to the Second Amendment 2010
  B. Factors Indicating a Duty to Protect 2011
IV. THREE-FACTOR ANALYSIS TO DETERMINE CONSTITUTIONALITY OF SENSITIVE PLACE HANDGUN PROHIBITIONS 2014
  A. Level of Scrutiny 2015
  B. Factor One: Is the Place Sensitive? 2017

C. Factor Two: Is the Place Private or Public? 2018
D. Factor Three: Is Sufficient Security Provided? 2019
E. Determining Sufficiency 2019
F. Limits on the Application of the Three-Factor Analysis 2020
V. JUSTIFICATION, AN ALTERNATIVE, AND RELEVANT COUNTERARGUMENTS 2021
A. Logical Justification of the Three-Factor Analysis 2021
B. Sensitive Places Licensing Alternative 2022
C. Counterarguments 2023
CONCLUSION 2024

INTRODUCTION

One Sunday morning in Atlanta, Georgia, Sheila Clancy Wilson went to church, a "sensitive place" in which the State of Georgia bans the carrying of firearms.[1] However, neither the "sensitive place" title nor the gun ban stopped Wilson from carrying a .44 caliber pistol into church that day. While preparing for the service that morning, Wilson shot and killed Rev. Johnny Clyde Reynolds, Wilson's mother, and herself.[2]

No criminal planning such a shooting would be deterred by the ban on guns in places of worship. Only law-abiding individuals obey firearm bans and disarm themselves in fear of criminal sanctions. What then are honest citizens to do when confronted with a serious threat of criminal violence in a place of worship?

---

[1] GA. CODE ANN. § 16-11-127 (2011). In oral arguments before the Eleventh Circuit Court of Appeals, the attorney for the State of Georgia, Laura Lones, argued that the statute does not completely ban the carrying of handguns in places of worship because there are some exceptions. Greg Bluestein, *Court Considers Ga. Ban on Guns in Churches*, YAHOO! NEWS (Oct. 6, 2011), http://news.yahoo.com/court-considers-ga-ban-guns-churches-153553370.html. Lones argued that "the law can be interpreted to allow gun owners to bring their weapons into houses of worship as long as they have permission and keep the weapons secured." *Id.* Circuit Judge Ed Carnes perceived the proposed loose interpretation of the statute as questionable. *Id.* Lones was referring to GA. CODE ANN. § 16-11-127(d)(2) (2011), which states that subsection (b) (which lists the places in which handguns cannot be carried) does not apply to someone with a license to carry a gun who approaches management of a location and follows instructions on "removing, securing, storing, or temporarily surrendering" the gun.

[2] Jefferey Gettleman, *Pastor and 2 Others are Killed in Shooting in Atlanta Church*, N.Y. TIMES (Oct. 6, 2003), http://www.nytimes.com/2003/10/06/us/pastor-and-2-others-are-killed-in-shooting-at-atlanta-church.html.

There is seemingly only one thing they can do, which is also particularly fitting considering the setting—pray. Laws prohibiting the carrying of handguns in a place where insufficient security is provided essentially divests people within these sensitive places of the fundamental right to self-defense when confronted with a serious threat of criminal violence.

In *District of Columbia v. Heller*, the Supreme Court declared laws that generally prohibited the possession of handguns and the possession of any other gun in operable condition inside one's home unconstitutional.[3] The Court declared that the right to self-defense was an inherent right contained within the Second Amendment.[4] The Court also determined that handguns were the most popular form of self-defense in the nation and depriving citizens of the ability to possess a working handgun in their home violated their fundamental right to self-defense.[5] The Court also recognized, however, that their decision should do nothing to overturn longstanding prohibitions on gun possession in "sensitive places" such as schools and government buildings.[6] However, the *Heller* Court gave no guidance as to defining a "sensitive place."

When a person enters a government building, airport, or public school, the right to self-defense is not infringed upon because the ability to defend is transferred to those providing security in that sensitive place. There are metal detectors and federal agents in federal buildings, and police officers and security guards in airports and public schools. However, it is a rarity to see any of these in each building on university campuses or places of worship.

One's right to self-defense can be subject to greater restrictions when present in "sensitive places." This Comment argues that a logical interpretation of the "sensitive places" language is a place which contains sensitive information, material, activities, or personnel. In such places, the Second Amendment allows the carrying of handguns to be prohibited as long as sufficient security is provided as a substitute for the ability of persons to defend themselves. The same sensitivity that

---

[3] District of Columbia v. Heller, 554 U.S. 570, 574-75, 635 (2008).

[4] *Id.* at 628.

[5] *Id.* at 629.

[6] *Id.* at 626.

justifies denying an individual the right to carry a handgun in a place also demands the presence of an alternative source of security in that place. A failure to provide a self-defense substitute in lieu of the ability to carry a handgun places the sensitivity of that place in question and should result in a finding of unconstitutionality of that law.

Applying both free speech and due process principles to a broad interpretation of the *Heller* decision creates a duty upon the State to protect individuals when the State's affirmative action's result in the limiting of the ability of individuals to defend themselves inside or outside their homes.

It is important not to misinterpret this Comment as advocating for the right to carry a handgun anywhere a person pleases. This Comment advocates only that individuals should have a means of defense available to them when the state restricts the carrying of handguns in a place. The way in which this security is provided—through self-defense by use of a handgun, or through the presence and action of a security force—is not as important as the general availability of the security.

This Comment proposes a three-factor test to determine if the level of security provided is in proper ratio to the level of sensitivity present in a place. First, a court must determine whether or not the place in question is sensitive. Second, a court must determine if the place in question is publicly or privately owned, and if privately owned, whether or not the public is invited to enter the premises. Finally, a court must determine if the security provided is sufficient to ensure the security of those found in that place. A comparison of the level of sensitivity of that place to the level of security provided can determine the sufficiency of the place's security.

Part I explores previous interpretations of sensitive places and gives an overview of the right to self-defense and a state's duty to protect. Part II examines why places traditionally labeled as sensitive are labeled as such. Part III reconsiders the traditional acceptance of handgun restrictions based on place and explores how prohibitions on handgun carrying in sensitive places creates and imposes upon the state a duty to protect individuals found in those sensitive places. Part IV proposes a three-part test to use when evaluating the constitutionality of handgun

prohibitions in sensitive places. Finally, Part V highlights the logic of the proposed approach, proposes an alternative to sensitive place handgun bans, and addresses relevant counterarguments.

I. *HELLER* AND SENSITIVE PLACES

In *District of Columbia v. Heller*, the Supreme Court addressed the constitutionality of laws that generally prohibited the possession of handguns and the possession of any gun in operable condition. [7] Plaintiff Dick Heller challenged the constitutionality of these laws on the grounds that his inability to carry a handgun without a license within his home violated his Second Amendment rights.[8] After an extensive historical analysis of the Second Amendment, the Court declared the laws in question to be unconstitutional.[9]

A. Sensitive Places

In *Heller*, the Court made it clear that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ."[10] The inclusion of the "sensitive places" language and the exclusion of any guidelines for determining what qualifies a place as sensitive has led to confusion and countless debates among legal scholars.

1. The Struggle to Define Sensitive Places

In *Nordyke v. King*, the Ninth Circuit Court of Appeals addressed the constitutionality of a law that prohibited the carrying of firearms or ammunition on county property.[11] Within the decision, the court discussed the *Heller* "sensitive places"

---

[7] *Id.* at 574.

[8] *Id.* at 575-76.

[9] *Id.* at 635.

[10] *Id.* at 626.

[11] Nordyke v. King, 563 F.3d 439, 443 (9th Cir. 2009), *vacated*, 611 F.3d 1015 (9th Cir. 2010).

dictum.[12] The court stated that schools and government buildings were specifically mentioned to be examples "because possessing firearms in such places risks harm to great numbers of defenseless people (e.g., children)."[13] Judge O'Scannlain, author of the opinion, further wrote that both "government buildings and schools are important to government functioning."[14] The court found that the county fairgrounds in question fit within the sensitive places exceptions because it is a place "where high numbers of people might congregate." [15] However, any precedential value this decision had was subsequently erased only three months later when the Ninth Circuit vacated the decision and ordered the case to be reheard in light of *McDonald v. Chicago*.[16] Upon rehearing, the court failed to repeat any of its relevant discussion of sensitive places addressed in the original decision.[17]

It has been suggested that schools are a place in which handgun regulations will be presumptively lawful because there is a high concentration of children present.[18] Some interpretations of *Heller* maintain that the sensitive places dictum (handgun bans are constitutional) refers to all public places, while the holding (handgun bans are unconstitutional) refers to only the home, "where there is no regular presence of the police or other state provided security."[19] This line of reasoning makes sense when one considers the idea that in both government buildings and public schools the government arguably has a duty to provide security.[20]

The idea that this public-private distinction relies on the difference of available security in the particular place counters the presumption of constitutionality regarding handgun bans in public

---

[12] *Id.* at 459.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 460.

[16] Nordyke v. King, 575 F.3d 890 (9th Cir. 2009); *see also Nordyke*, 611 F.3d 1015. *McDonald* addressed the constitutionality of a handgun ban in Chicago. 130 S. Ct. 3020 (2010). The Court found that the Second Amendment was applicable to the states through the Fourteenth Amendment. *Id.* at 3026.

[17] Nordyke v. King, 644 F.3d 776 (9th Cir. 2011).

[18] George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of this New Right*, 40 RUTGERS L.J. 353, 414 (2009).

[19] *Id.*

[20] *Id.*

places. That is, bans in public places are presumptively constitutional because there is a "regular presence of . . . police or other state provided security."[21] Likewise, bans inside private homes are presumptively unconstitutional because "there is no regular presence of . . . police or other state provided security."[22] Following this line of reasoning, one can argue that a handgun ban in any place in which there is no regular presence of police or other security is presumptively unconstitutional.

The need for a clearer understanding of the definition of a sensitive place is evidenced by the wide variation of places that courts have found sensitive when considering gun prohibitions. The point at which a court declares a private drive a sensitive place,[23] therefore maintaining the power to restrict a person's ability to carry a gun, is the point at which a standard defining sensitive places must be set.

2. Traditional Acceptance of Place Restrictions

While *Heller* did hold that an undue restraint on an individual's ability to defend oneself inside their home with a handgun was unconstitutional, the opinion set limits on the extent to which this holding could be applied.[24] The very language in dispute in this Comment attempts to limit the application of the holding and attempts to prevent justifying unreasonable and unrestricted freedom in carrying handguns. In the footnote following the "sensitive places" disclaimer, the Court states, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[25] Part, if not all, of the Court's reasoning in not calling into question other types of handgun prohibitions not specifically at issue in *Heller* is because those restrictions are "longstanding." Prior to *Heller*, many states addressed and affirmed the constitutionality of

---

[21] *Id.*

[22] *Id.*

[23] People v. Yarbrough, 86 Cal. Rptr. 3d 674, 682-83 (Cal. Ct. App. 2008). The California Court of Appeals found that, "a residential driveway that was not closed off from the public and was populated with temporary occupants falls within the 'historical tradition' of prohibiting the carrying of dangerous weapons in publicly sensitive places." *Id.*

[24] District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).

[25] *Id.* at 627 n.26.

prohibitions on carrying handguns, particularly concealed weapons,[26] into certain places.

Given the general historical acceptance of place restrictions on the ability to carry handguns, an exhaustive historical analysis of this tradition would be too time consuming for the reader and divert attention from the purpose of this Comment, that purpose being to consider place restrictions in a different light rather than their interpretation prior to *Heller*. Handgun prohibitions ruled upon after *Heller* must consider this tradition of acceptance along with a new emphasis placed upon the inherent and fundamental right to self-defense that is best provided by the handgun.

B. Self-Defense

The Court in *Heller* used a self-defense rationale to strike down the laws restricting handgun possession within the home. Justice Scalia wrote that "the inherent right of self-defense has been central to the Second Amendment right."[27] Further, the Court recognized that "the American people have considered the handgun to be the quintessential self-defense weapon."[28] In prohibiting people from utilizing handguns within their homes, the laws unconstitutionally divorced people from their right to self-defense.

Courts within the United States have long recognized self-defense as an inherent right.[29] In *United States v. Outerbridge*, the Circuit Court of the District of California declared:

> A man may repel force by force in the defense of his person, his family, or property, against any one, who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such case is founded upon the law of nature, and is not and can not be superseded by the law of society.[30]

---

[26] Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1516 (2009).

[27] *Heller*, 554 U.S. at 628.

[28] *Id.* at 629.

[29] *See* United States v. Outerbridge, 27 F. Cas. 390 (C.C.D. Cal. 1868).

[30] *Id.* at 392.

Critics of the so-called "safe-harbor" doctrine—the notion that traditionally accepted prohibitions within public schools, government buildings, etc. are "safe" from being declared unconstitutional under *Heller*—have trouble reconciling the recognition of a right as inherent and fundamental with the possibility of that right being suspended depending upon where a person may be. Instead, a more logical view seems to be that self-defense must be possible wherever people have a legal right to be.[31] In places where effective security is provided, the need for self-defense is less pressing as the state or security force present has assumed a protective role over the people present in that place. Restrictions on handgun carrying are not as threatening to the core interests protected by the Second Amendment in places where effective security is provided as they are in places providing insufficient security.[32]

The laws struck down in *Heller* specifically restricted one's right to possess an operable gun inside his or her home.[33] The Court stated that inside one's home is "where the need for defense of self, family, and property is most acute."[34] However, the Court never asserts that the home is the only place where self-defense is necessary or available. If read narrowly, as many courts have,[35] *Heller* may only protect a person's right to self-defense through the use of a handgun while inside the home.[36] However, such a narrow reading focused on only home defense would limit the application of the important part of *Heller's* rationale, namely the inherent right to self-defense.[37]

"[T]he most natural reading of *Heller* . . ." leads one to the conclusion that the right to bear arms in self-defense extends to

---

[31] Volokh, *supra* note 26, at 1515.

[32] *Id.* at 1526.

[33] *Heller*, 554 U.S. at 628.

[34] *Id.*

[35] *See* United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011); Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

[36] United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010). The court in *Skoien* emphasized the idea that the language used in *Heller* should not be used to achieve broader goals than what the Court intended. *Id.* The only clear and specific holding present in the *Heller* decision is "that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense." *Id.*

[37] Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551 (2009).

areas outside of one's home.[38] The fact that the inherent right to self-defense is infringed upon by a law that prohibits possession of a handgun (the principle found in *Heller*), plus the universally accepted principle that the right to self-defense extends further than the inside of one's home, leads one to conclude that a law prohibiting the possession of a handgun for self-defense outside of one's home is unconstitutional. One caveat that must be added to this analysis is that the right to self-defense is not alienated when an individual is not allowed to carry a handgun in a place that provides sufficient security. Instead, the means of defense is simply transferred from the individual to the security force. Nevertheless, people found outside their homes and within sensitive places should not be left defenseless.[39]

The ability and right to defend oneself is not restricted to a place of residence. Self-defense is available to a person wherever there is an imminent threat of bodily harm or another person's conduct puts one in apprehension of imminent bodily harm.[40] This right to self-defense exists as long as the danger exists, or as long as the person utilizing self-defense believes the danger exists.[41] While the place in which the act of self-defense occurs is a consideration, it is not a controlling factor. [42] A principle requirement in determining the availability of the defense of self-defense in both criminal and civil cases is that "the actor's conduct must be measured against the danger faced; to be characterized as self-defense the response must be in proportion to the danger . . . ."[43]

A person who arms himself in anticipation of the need for self-defense does not lose the right to self-defense simply because

---

[38] Michael P. O'Shea, *The Right to Defensive Arms after* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 378 (2009).

[39] Winkler, *supra* note 37, at 1568.

[40] Russell L. Wald, *Privileged Use of Force in Self-Defense*, *in* 33 AM. JUR. PROOF OF FACTS 2D 211 (1983).

[41] *Id.*

[42] Phoenix v. Carey, 108 So. 2d 268, 269 (La. Ct. App. 1959). The court stated that "[o]ne might be justified to act upon an impulse of self-preservation when suddenly confronted by an assailant from ambush, or by an intruder in his home." *Id.* This statement essentially equated the amount of force that could be used inside a person's home with the amount of force that could be used outside a person's home in case of "ambush."

[43] Wald, *supra* note 40.

he anticipated that need.[44] The means used in self-defense are justifiable as long those means were necessary to avert the threatened injury.[45] Therefore, the use of a handgun in self-defense would be acceptable, as long as a handgun would be deemed necessary to prevent the feared injury. Certainly, the use of a handgun should be considered reasonable and perhaps necessary to defend oneself against another using a gun.

C. Broad Application of Heller

Efforts to apply *Heller*'s recognition of an inherent right to self-defense through the use of a handgun to places outside an individual's home have been met with bitter opposition.[46] However, a broader reading of *Heller* is justified in light of how courts often broadly interpret prior decisions in order to extract important principles within those decisions.

The holding in *Brown v. Board of Education* and the line of cases that followed addressing racial segregation provide an illustrative example of how a broad reading of a court decision was justified and generally accepted.[47] The decision in *Brown* declared that "in the field of public education the doctrine of 'separate but equal' has no place."[48] Less than a year after *Brown*, the Fourth Circuit was presented with a case that demanded a ruling on the constitutionality of segregated beaches.[49] In deciding the case, the court looked to *Brown* to assess the constitutionality of the segregation.[50] After considering the line of reasoning the Court used in *Brown*, the Fourth Circuit stated:

> [I]t is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, . . . it

---

[44] *Id.*

[45] United States v. Outerbridge, 27 F. Cas. 390, 392 (C.C.D. Cal. 1868).

[46] *See* United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011); Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

[47] Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

[48] *Id.* at 495.

[49] Dawson v. Mayor of Baltimore, 220 F.2d 386 (4th Cir. 1955) (per curiam).

[50] *Id.* at 387.

> cannot be sustained with respect to public beach and bathhouse facilities . . . .[51]

After citing *Brown* in case after case to strike down laws mandating the separation of the races, it became clear that the Court accepted "the universality and permanence of the principle that segregated public facilities of any kind were no longer permissible under the Fourteenth Amendment."[52] Here, as in subsequent cases following *Brown*, it is imperative that the guiding principle and intent of the Court is not hidden by the details of the case announcing that principle.

The importance of the *Heller* decision lies in the recognition of the fact that each individual has an inherent and fundamental right to self-defense which is severely restricted by a prohibition on the ability to carry or possess a handgun.[53] While *Heller* specifically considered laws that applied only inside one's dwelling, the right to self-defense and the right to the means necessary to defend oneself extends beyond one's home.

The argument for a broad application of *Heller* is made even stronger when the Second Amendment is not considered separately but rather as a member of the Bill of Rights. Other provisions in the Bill of Rights are viewed as deserving of adherence, regardless of the impact on policy concerns.[54] This idea is most obvious when considering freedom of speech and the rights of criminal defendants.[55] Generally, Americans are accepting of the fact that citizens enjoy the right to say whatever they choose, even if that means they must endure speech that offends even the most calloused hearts.[56] Also, it is accepted that the American justice system ensures criminal defendants with due process and other protections, despite the fact that this inevitably will lead to

---

[51] *Id.*

[52] Palmer v. Thompson, 403 U.S. 217, 243 (1971).

[53] District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008).

[54] Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). Levinson cites Ronald Dworkin's "taking rights seriously" for the idea that, "what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so." *Id.* at 657-58.

[55] *Id.* at 658.

[56] Levinson cites "oppressed groups having to hear viciously racist speech" as an illustration of this. *Id.*

some criminals going free and potentially committing further crimes.[57]

This type of analogy often strikes a nerve with "liberal" defenders of the Bill of Rights as they often read the Second Amendment out of the Bill of Rights.[58] Conservatives will argue that statistics prove that fewer restrictions on the ability to carry a handgun will lead to less violent crime, while liberals will present just as much empirical data supporting their view that further restricting the carrying of handguns will reduce violent crime. Political alliances and opinions on whether or not it is justified aside, both sides can agree on the existence of a pedigree within American jurisprudence that individual rights often trump prudential arguments. There is no reason why the Second Amendment and the right to defend oneself with the most effective form of self-defense should be any different.

D. The Duty to Protect

The importance of a sufficient means of self-defense is brought to light when one realizes that "in general, the police have no duty to protect individuals."[59] The Seventh Circuit made this point clear in their decision of *Hernandez v. City of Goshen*, stating "police departments have no duty to protect private persons from injuring each other, at least where the police department has not itself created the danger."[60] Courts have reinforced a citizen's right to carry a gun by consistently holding that an individual's defense is primarily the duty of that individual.[61]

The fact that, in general, the government has no duty to protect individual citizens may seem to preempt the argument proposed in this Comment. Why would a government which prohibits the carrying of guns in sensitive places have to provide

---

[57] *Id.*

[58] *Id.*

[59] Robert A. Creamer, Note, *History is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. REV. 905, 932 (2004). The author further notes that the police only assume a duty of individual protection when a specific offer of protection is made to the citizen. *Id.*

[60] *Id.* at 933 (quoting Hernandez v. City of Goshen, 324 F.3d 535 (7th Cir. 2003)).

[61] *Id.* at 932.

security for its citizens if there is no duty to do so? In order to find the answer to this question relevant to the Second Amendment the Fourteenth Amendment must be considered for guidance.

The Court has declared that the protection of life, liberty, and property guaranteed by the Due Process Clause of the Fourteenth Amendment only protects citizens from the direct actions of the State, not other private citizens.[62] This principle holds true even when governmental intervention is necessary to preserve the life, liberty, or property of its citizens.[63] However, there are recognized exceptions to this general principle of no duty to protect. One such exception exists when the State holds someone in custody against his or her will—such is the case with prisoners.[64] In *DeShaney v. Winnebago County Department of Social Services*, the Court announced the rationale behind this exception:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and *reasonable safety*—it transgresses the substantive limits on state action set by the . . . Due Process Clause.[65]

The duty to provide protection to its citizens is imposed upon a State only when the positive actions of the State limit the individual's ability to "act on his own behalf," rather than the

---

[62] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195-99 (1989). This case involved a minor who had been beaten so severely by his father that the child suffered permanent brain damage and was rendered "profoundly retarded." *Id.* at 193. This occurred after the minor had been in temporary custody of the Winnebago County Department of Social Services. *Id.* at 192.

[63] *Id.* at 196. The Court went on to declare later in the opinion that "[a]s a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197; *see also* Walter v. Pike Cnty., 544 F.3d 182, 191-92 (3d Cir. 2008) (stating that the state-created danger doctrine provides an exception to the generally accepted rule that a state has no duty to protect individuals within its borders even if governmental intervention may be necessary to prevent harm to those individuals.).

[64] *Id.* at 199-200 (citing Youngberg v. Romeo, 457 U.S. 307, 317 (1982)).

[65] *Id.* at 200 (emphasis added) (citing Estelle v. Gamble, 429 U.S. 97, 103-04 (1976)).

State's knowledge of the need for protection.[66] The same positive action on the part of the State that deprives an individual of his liberty triggers the protection of the Due Process Clause.[67]

In *DeShaney*, the majority states that a duty to protect is imposed upon the State when the State assumes a protective role, while Justice Brennan's dissent argues for an even broader application of the scope of this exception.[68] Justice Brennan states that the majority's effort to restrict affirmative acts by the State only to those acts that directly physically control the individual is too narrow.[69] Instead, many affirmative State actions can impose a duty to act on the State.[70] Specifically, Justice Brennan argues that "the monopolization of a particular path of relief" may impose a positive duty.[71]

Courts differ over what elements must be present in order to apply the state-created danger doctrine. At a minimum, most courts agree that (1) the state had to have either created the danger or made the individual more vulnerable to danger, and (2) the state or state actor acted with a high degree of indifference for the safety of the individual.[72] Some courts also require additional elements that (3) the harm perpetrated upon the individual was foreseeable, and (4) that there existed some type of special relationship between the State and the individual.[73]

The State's enacting and enforcing gun control legislation places an individual in increased danger by removing their right

---

[66] *Id.* ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." (citing *Estelle*, 429 U.S. at 103)).

[67] *Id.*

[68] *Id.* at 206-07 (Brennan, J., dissenting).

[69] *Id.*

[70] *Id.* at 207 (Justice Brennan cites cases in which the Court recognized the imposition of positive duties on a state, including the "striking down [of] a filing fee as applied to divorce cases brought by indigents . . . and, in deciding that a local government could not entirely foreclose the opportunity to speak in a public forum.").

[71] *Id.*

[72] Breen v. Tex. A&M Univ., 485 F.3d 325 (5th Cir. 2007); Ulibarri v. City of Denver, 742 F. Supp. 2d 1192 (D. Colo. 2010); Taylor v. Altoona Area Sch. Dist., 737 F. Supp. 2d 474 (W.D. Pa. 2010); Johnson v. City of Seattle, 385 F. Supp. 2d 1091 (W.D. Wash. 2005).

[73] Phillips v. Cnty. of Allegheny, 515 F.3d 224 (3d Cir. 2008); Ye v. United States, 484 F.3d 634 (3d Cir. 2007).

to defend themselves with a gun. Essentially, the same duty to protect that exists when the State has physical custody of someone exists when the State restricts a person's ability to provide for his or her own safety by restricting the individual's ability to carry a handgun in sensitive places.

E. The Necessity of General Licensing to Carry a Weapon

Before wading into the argument section of this Comment, it is imperative to understand that in all instances where this Comment advocates for the ability of an individual to be able to carry a handgun, it is referring to those individuals who are otherwise (aside from the sensitive place restriction) legally able to carry a gun. That is, the individual has obtained a permit or a license to carry a weapon (concealed or not, depending upon the state) within that state. At no point does this Comment advocate for an individual to be allowed the ability to carry a gun into sensitive places without a permit or a license to do so.

This Comment applies only to those laws prohibiting the carrying of handguns in states which (a) do not provide any avenue for citizens to obtain the ability to carry a handgun or (b) provide for the opportunity to obtain a license to carry a handgun, but restrict the carrying of that gun into sensitive places. The laws in states that provide the opportunity to obtain an enhanced license to carry handguns in sensitive places would not be affected by the analysis set forth in this Comment.

The *Heller* decision declared that the Second Amendment referred to carrying arms.[74] Further, the right to carry a gun in public for self-defense has been recognized by many state courts.[75] With that said, for the purpose of this Comment, a discussion of the details of gun carry licensing is not necessary. It is only necessary to know that courts have recognized a right of

---

[74] Volokh, *supra* note 26, at 1516 (citing Dist. of Columbia v. Heller, 554 U.S. 570, 584 (2008)).

[75] State v. Chaisson, 457 So. 2d 1257 (La. Ct. App. 1984). The Louisiana appellate court in this case recognized that a prohibition on "froggers" from carrying guns while "frogging" was in direct conflict with the provision of the Louisiana Constitution providing for citizens to "keep and bear arms." *Id.* at 1258-59. The necessity of the ability to carry a gun in this instance existed for purposes of self-defense.

individuals to obtain a license or permit to carry a weapon,[76] and that in many states, only minimal requirements need to be met to obtain a permit to carry a weapon.[77]

II. SENSITIVITY AND SECURITY: PLACES THAT MAY BE SENSITIVE

While the *Heller* opinion made it clear that the Court was not invalidating the restriction of handguns in sensitive places,[78] its failure to explain the "sensitive places" language weakens this presumption of constitutionality. The Court failed to lay out any framework on how to categorize or define a sensitive place. In an attempt to see through the haze surrounding sensitive places, this Comment analyzes places that are traditionally accepted as "sensitive." First, it will examine all the characteristics of each sensitive place which contribute to its sensitivity. This includes looking at the people, material, and activities that are usually present in that place. Second, the Comment will consider the different measures of security that are usually provided in those same places. This includes security personnel, cameras, locked doors, and various other measures.

A. Government Buildings

1. Reasons for Sensitivity

There are some logical explanations as to why a place may be deemed sensitive.[79] In the case of government buildings, a

---

[76] *E.g.*, Lovering v. Dettre, 55 York 142 (Pa. Ct. Q. Sess. 1941). In *Lovering*, a sixty-year-old man applied for a permit to carry a concealed weapon which was subsequently denied by the sheriff. *Id.* Upon review, the court found that because this man was older in age, had extensive experience with guns, lived in a rural area where police protection may take an extended amount of time to arrive, and since there was no reason to fear he would use a gun for unlawful reasons, he deserved the right to carry a concealed weapon. *Id.*

[77] *E.g.*, Iley v. Harris, 345 So. 2d 336 (Fla. 1977). In *Iley*, the Florida Supreme Court upheld the appellate court decision that previously stated that since the plaintiff met the age and good moral character requirements announced in the relevant statute, it was unnecessary for the plaintiff to prove he had good cause to carry a gun. *Id.*

[78] Dist. of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).

[79] GeorgiaCarry.org, Inc. v. Georgia, 764 F. Supp. 2d 1306, 1316-17, 1319 (M.D. Ga. 2011). First, the court states that there is no "unifying theme" which places of worship share with schools and government buildings that would cause the places of worship to

restriction on gun carrying may be made because of the type of activities that occur in these buildings. The activities pursued and the information contained within these buildings may themselves be "sensitive." This is easy to see if one considers homeland defense or security information. The government has a compelling interest in protecting information and activities associated with developing defense strategy. Also, there are often government officials present in these government buildings who could be directly targeted by criminals.

2. Government Provisions of Security

These buildings are deemed so "sensitive" that preventive security measures have been put in place to further secure those individuals inside these areas.[80] For example, federal courthouses have metal detectors and U.S. Marshalls present at public entrances. If a threat does slip by the initial screening, there is a sufficient security force (the U.S. Marshalls) to stop the threat quickly. The federal government has conducted studies assessing the security of government buildings and classifying the levels of security provided.[81] In the context of government buildings,

---

gain membership into the community of "sensitive places." *Id.* at 1316-17. Then, the court stated:

> A place, such as a school, might be considered sensitive because of the people found there. Other places, such as government buildings, might be considered sensitive because of the activities that take place there. A reasonable argument can be made that places of worship are also sensitive places because of the activities that occur there.

Id. at 1319.

[80] Recently, the Arizona legislature passed a bill addressing the ability of individuals to carry handguns inside of government buildings. Howard Fischer, *AZ House OKs Guns in Public Buildings*, ARIZ. DAILY STAR (Apr. 18, 2011, 12:00 AM), http://azstarnet.com/news/local/govt-and-politics/article_674e66f8-a6a5-53d5-9065-a855dd84801a.html. Prior to the passing of SB 1201, public agencies could keep guns off their premises "by posting signs at the doors and providing places for those coming in to check their weapons." *Id.* Senate Bill 1201 requires that metal detectors and security guards be present if the ability to carry a firearm is restricted. *Id.* In giving a justification of this bill, Rep. Eddie Farnsworth, R-Gilbert, stated that the prior restrictions were "meaningless." *Id.* Rep. Farnsworth viewed the situation with a focus on self-defense, concluding that if the state is going to remove the ability of an individual to defend him or herself, then the state also has a responsibility to secure that area through the use of metal detectors and security guards. *Id.*

[81] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-8, BUILDING SECURITY: SECURITY RESPONSIBILITIES FOR FEDERALLY OWNED AND LEASED FACILITIES 7 (2002), *available*

governments have recognized that a place's sensitivity should play a role in whether or not handguns are allowed into that place, as well as the amount and type of security provided in that place.

B. Public Schools

1. Reasons for Sensitivity

The prohibition of carrying guns on public school grounds also has a logical explanation. Public schools contain a high density of children who are vulnerable and likely unable to defend themselves. Also, ensuring the maintenance of the educational process is seen as vital to the overall well-being of the nation, particularly in the economic realm.[82]

---

at http://www.securitymanagement.com/archive/library/Gao0308_Building0203.pdf. Government building security came to the forefront of government concern following the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. *Id.* Following this attack, President Clinton called on the Department of Justice (DOJ) to "assess the vulnerability of federal office buildings." *Id.* The DOJ came up with a system in which buildings can be classified on a scale from one to five. *Id.* "A level I facility has 10 or fewer federal employees. In addition, the facility likely has 2,500 or less square feet of office space and a low volume of public contact or contact with only a small segment of the population." *Id.* at 43. "A level IV facility has over 450 federal employees. In addition, the facility likely has more that [*sic*] 150,000 square feet; high volume of public contact; and tenant agencies that may include high-risk law enforcement and intelligence agencies, courts, judicial offices, and highly sensitive government records." *Id.* "A level V facility is a building such as the Pentagon or CIA Headquarters that contains mission functions critical to national security. A level V facility is similar to a level IV facility in terms of number of employees and square footage." *Id.* at 44.

[82] In *United States v. Lopez*, the United States Supreme Court addressed the constitutionality of the Gun Free School Zones Act. 514 U.S. 549 (1995). While the majority of the Court found that the federal government could not prohibit the carrying of guns on school campuses through an interstate commerce rationale, Justice Breyer dissented arguing that this regulation was well within the power of the federal government. *Id.* at 615-31 (Breyer, J., dissenting). The reasoning employed by Justice Breyer involved connecting the carrying of guns on school campuses to a negative effect upon the economy. Justice Breyer cited studies that guns on and around school campuses often lead to "widespread violence." *Id.* at 619. This widespread violence then translates into a degradation of the quality of education as evidenced by the fact that gun violence is worst at inner-city schools and drop-out rates are highest in inner-city schools. *Id.* Justice Breyer concluded that guns at school lead to "teachers unable to teach [and] students unable to learn . . . ." *Id.*

2. Government Provisions of Security

These concerns have led public schools to take many steps to secure the perimeter of the schools.[83] The vast majority of public schools keep their premises locked and monitored.[84] Some schools employ the use of metal detectors to prevent the entrance of a dangerous weapon into the school. Like federal government buildings, some schools have either a capable security force or local police officers stationed at the school itself to quickly quell a violent outbreak. Public schools are sensitive enough to employ preventive security measures should a security or safety threat become real.

In both government buildings and public schools, legislatures have decided that these places are sensitive enough to ban the carrying of handguns. These places are also sensitive enough for the State or other capable entities to assume a protective role and provide preventive security. However, when one considers campuses of public universities and places of worship, the differences begin to appear as quickly as defenses provided disappear.

C. Public Universities

1. Reasons for Sensitivity

Carrying guns is often prohibited on the campuses of public universities.[85] There is usually a high density of people in the

---

[83] The U.S. Department of Education conducted a study during the 2007-08 school year on security and safety measures employed by public schools. *Fast Facts: School Safety and Security Measures*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=334 (last visited Apr. 11, 2012).

[84] *Id.* The study found that 80.6% of public schools control access into the building through means such as locking the doors or monitoring who comes through the doors. *Id.*

[85] Many critics of the right to carry handguns on the campuses of public universities believe that the presence of guns on campus increases many different types of risks to college students. Elise Gauthier & Penny Okamoto, *Student Safety: Oregon Should Ban Guns on Public College Campuses*, OREGONLIVE.COM (Oct. 4, 2011, 4:55 AM), http://www.oregonlive.com/opinion/index.ssf/2011/10/student_safety_oregon_should_b.html. Gauthier and Okamoto claim that somehow gun ownership is tied to binge drinking, cocaine and crack use, driving under the influence, vandalizing property, and in general gun owning students are more likely to "get in trouble with [the] police." *Id.*

buildings on campus, making them appealing for someone intending to inflict a high number of casualties. Also, the information conveyed within the buildings on campus may be controversial. Such information may arouse hostility towards professors and students as universities often encourage the unrestricted free flow of ideas and viewpoints.

2. Government Provisions of Security

Despite the presence of these sensitive place characteristics, the security provided on university campuses is often insufficient. Universities often have their own police forces which patrol the campus. However, these police forces have the same presence and capability as do police forces that patrol residential neighborhoods, a location in which handguns are allowed for self-defense. Acknowledging the obvious public-private property distinction in this example, the principle remains the same. Using the reasoning from *Heller*, people in residential neighborhoods are allowed to own handguns for self-defense because police will not always be able to respond quickly enough.

Further, police do not have the duty to protect individuals, but rather they have the duty to the general public to maintain peace and order. These principles do not disappear once we set foot on a university campus.

A possible remedy to this situation would be the presence of security through metal detectors or police officers or security guards in every building. Otherwise, the students and professors in the building are stripped of their ability to defend themselves with a handgun and are not provided a sufficient alternate form of security.

D. Places of Worship

1. Reasons for Sensitivity

A more obvious violation of the Second Amendment occurs in laws that prohibit the carrying of handguns in places of worship. First, places of worship are privately owned as opposed to the three previous places discussed—which are owned by the government. Naturally, the government should have less power in deciding who and what come on to private land, rather than public

land.[86] Second, places of worship rarely provide any type of security through the use of metal detectors, screenings, police officers, or security guards. Third, there is usually a high density of people inside a place of worship. Fourth, there is sensitive information being conveyed during the worship services which could be offensive to some listeners and evoke hostile reactions. Finally, there is the presence of a worship leader who sometimes conveys controversial messages, and is an easy target for one wishing to silence him or her.

2. Government Provisions of Security

If there are any police officers in the vicinity of the place of worship, the same principle of no duty to protect individuals still applies. Aside from the police officers who also have to patrol the rest of the city or county, there is often no type of security provided in places of worship. A prohibition of handgun carrying in places of worship and public universities is equivalent to the assumption of a protective role by the government. When a law bans the carrying of guns in places of worship, the government must provide sufficient security for that place in order for the application of that law to be constitutional.

III. TRADITIONAL ACCEPTANCE OF PLACE RESTRICTIONS REVISITED

As mentioned previously, courts have traditionally accepted place restrictions on the carrying of handguns. The Court in *Heller* states that its decision should not overturn other place restrictions and even goes so far as to say that these prohibitions are "presumptively lawful."[87] The language chosen by the Court here

---

[86] In speaking about handgun restrictions in places of worship, Kelly Kennett, president of GeorgiaCarry.org, reinforced the idea that challenging these laws are not requiring churches or synagogues or any other place of worship to allow guns into their sanctuary. Bluestein, *supra* note 1. Instead, these challenges are only intended to obtain equal treatment for places of worship as compared to other privately owned properties. *Id.* In relevant part, Kennett stated, "Churches should be treated like any other private property owner. Why are you treating people at churches differently than how you'd be treated at a store, at a bank, at a club?" *Id.*

[87] Dist. of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008).

is relevant to understanding the broad application of *Heller* to other cases.

On its face, it seems that the language advocating for a presumption of the lawfulness of place restrictions would defeat any claims of unconstitutionality lodged against these restrictions. However, the fact that something is presumed, by definition, means that the truth of the matter, or constitutionality of the law, is actually not known.[88] Therefore, a presumption can always be overcome by proving it untrue or incorrect. The clearest illustration of this principle is given in the justice system in which suspects are presumed innocent until proven guilty. Using this illustration, it is easy to see that legal presumptions are overcome all the time. Such is the case with place restrictions on the carrying of handguns.

Generally, states have the ability to restrict the movement of handguns into sensitive places. A presumption of constitutionality exists when considering these restrictions. However, each restriction must be considered on a case-by-case basis to determine whether this presumption will be maintained. In *Heller*, the presumption of lawfulness was overcome by a violation of an individual's right to self-defense. A similar analysis should be employed when considering other place restrictions on handguns. If the analysis of the particular case reveals that the individual is left without sufficient means to defend himself, and a sufficient means of security is not provided in that place, the presumption of lawfulness is overcome.

---

[88] *Presumption Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/presumption (last visited Apr. 11, 2012). A legal presumption is defined by Corpus Juris Secundum as:

> an inference or deduction which, in the absence of direct evidence on the subject, the law requires to be drawn from the existence of certain established facts; or a presumption which the law compels, and which may be conclusive or *rebuttable*. It is an assumption made by the law that a strong inference of fact is prima facie correct, and will therefore sustain the burden of evidence, *until conflicting facts on the point are shown*. Thus, the effect of a presumption of law is to invoke a rule of law compelling the factfinder to reach the conclusion *in the absence of evidence to the contrary from the opponent*. Where conflicting evidence is introduced, the presumption has served its purpose and drops out of sight, but the evidence must be credible.

31A C.J.S. *Evidence* § 211 (2008) (emphasis added).

A. Application of Due Process Principles to the Second Amendment

A state which prohibits the carrying of handguns in sensitive places assumes the duty to protect those citizens within that place. This proposition can be derived through analogizing the implications of handgun place restrictions with the creation of a state's duty to protect individuals brought about through a state-created-danger. To understand this, one needs only to look at the language the Court has used in cases concerning governmental duties imposed after the State removed or limited certain liberties or rights a law-abiding citizen is entitled to.[89]

As mentioned earlier, the Court declared in *DeShaney* that affirmative acts by the State which prevent an individual from ensuring reasonable safety for himself, accompanied with the failure of the State to provide a means of securing the individual's reasonable safety, results in a violation of the Due Process Clause.[90] In other words, a state which limits an individual's rights through affirmative acts assumes the responsibility of providing those rights through other avenues. Specifically, Justice Brennan stated "the monopolization of a particular path of relief—may impose upon the State certain positive duties."[91]

This principle is directly applicable to the fundamental and inherent right to self-defense contained within the Second Amendment. The State, through an affirmative act, limits the right to self-defense by creating and enforcing the gun control law. Under *Heller*, one cannot deny that a law prohibiting handgun carrying severely hinders the ability to defend oneself.[92] Further, if the State does not provide sufficient security to ensure the safety of citizens within that place, it has failed to ensure the right of self-defense which was handed over to the State. When a State bans the carrying of handguns in a place, the State becomes the only path to defense against threats of serious bodily harm and death. This obstructed path to defense leads only to a finding of unconstitutionality for the gun control law.

---

[89] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[90] *Id.* at 200.

[91] *Id.* at 207 (Brennan, J., dissenting).

[92] *Heller*, 554 U.S. at 629.

Justice Brennan takes this idea a step further in his dissent in *DeShaney*.[93] Justice Brennan entertains the idea that inaction can be just as damaging as affirmative State actions, specifically when the State fails to carry out a duty assumed through affirmative action. Justice Brennan argues that he cannot agree with allowing "a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent."[94] When a state bans the carrying of handguns in a place, it limits an individual's private sources of defense, and when it fails to provide sufficient security for those individuals, it essentially turns its back on the duty of protecting the individuals in the sensitive place.

B. Factors Indicating a Duty to Protect

The duty to protect under the Due Process Clause is only imposed upon the state if at least two or four, depending upon the court and state, essential elements are met. In using due process doctrines to guide the application of the Second Amendment, a state banning the carrying of handguns and failing to provide alternate forms of security meets all these elements. Before analyzing the necessary elements, one must realize that there are inherent differences when comparing due process doctrine and Second Amendment doctrine that will not allow for all the elements in due process cases to line up exactly with the circumstances present in Second Amendment cases.

First, an individual must show that "the harm ultimately caused to the plaintiff was foreseeable and fairly direct."[95] When a person is harmed by the intentional violent act of a third party in a sensitive place where handguns are banned and security is not provided, this element is easily satisfied. Sufficient evidence of foreseeability is present in the determination of the place as sensitive. A place is usually deemed sensitive because there is some prospect of criminal activity. If this were not true, then the

---

[93] *DeShaney*, 489 U.S. at 203-12 (Brennan, J., dissenting).

[94] *Id.* at 212.

[95] Phillips v. Cnty. of Allegheny, 515 F.3d 224, 235 (3d Cir. 2008) (citing Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006)).

place would not be deemed sensitive and the carrying of handguns would be allowed on the premises.

Second, it is required that "the state-actor acted in willful disregard for the plaintiff's safety."[96] In addressing this element it is important to realize that usually in due process applications there is one or a limited number of state-actors—usually a police officer or prison guard. In a situation addressing the constitutionality of a gun control law, the State actor is the legislature. Disarming law-abiding citizens in a place that was deemed sensitive because there is some type of threat of violence, combined with the failure to provide sufficient security, is willful disregard for the safety of the individuals. Further, it is likely that the gun control law will only disarm those law-abiding citizens seeking to avoid criminal violations and will have no deterrence effect on criminals already set on killing or seriously harming others. It is only logical to realize that an individual's right to self-defense is alienated when that person is defenseless against the threats of serious bodily injury and death.

Third, there must be "some relationship between the state and the plaintiff."[97] As there is always some form of relationship between the state and its citizens, presumably this element calls for something more. When a state takes affirmative steps to remove an inherent and fundamental right, the relationship required under this element is formed. That is, when the State removes the ability of a person to defend himself, the State assumes a protective role over that individual. The fact that places where handguns are usually banned (public schools, public universities, places of worship, etc.) are places in which members of the general public are invitees makes this relationship visible.[98] In tort law, a property owner owes a higher level of duty

---

[96] *Id.*

[97] *Id.*

[98] RESTATEMENT (SECOND) OF TORTS § 332(1)-(2) (1965). The restatement defines an invitee as a public invitee or a business visitor. *Id.* "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." *Id.*

to those upon his land as invitees.[99] This general principle holds true in application to handgun prohibition laws.

Finally, the State or State actor must have "used his authority to create an opportunity for danger that otherwise would not have existed."[100] Critics of the application of due process doctrine to the Second Amendment would likely state in contention that the duty to protect is only imposed upon the State when the State creates the danger *and* "places the person in a position of danger the person would not otherwise have faced."[101] On its face, this counterargument seems to make sense. However, this position only holds true with the narrowest interpretations of this proposed application. In agreeing with this counterargument, one imposes on the State a duty to protect individuals only when the law restricting handguns actually causes the individual to be in a position that he or she would not have been in if it were not for the existence of the law. Upon reflection, one can see that that is exactly what happens when individuals are prohibited from carrying handguns and are not provided with alternative forms of security.

While there is something to be said for the argument that a handgun restriction actually causes crime,[102] a different attack can be made on this counterargument. A logical basis from which this attack must start is that the amount of danger present in any given situation is relative to the circumstances in that situation. For example, if one encounters an assailant wielding a knife who intends to inflict serious bodily harm or death upon a person, that individual is in grave danger if he has only his fists to protect him. If the victim in this situation also has a knife, the danger is still high, but his odds of survival are improved. A victim with a handgun, who will likely lose the title of victim, lowers the level of

---

[99] RESTATEMENT (SECOND) OF TORTS § 332 cmt. e (1965). "There are occasional instances where a possessor may be under a greater duty to those who enter as invited members of the public." *Id.*

[100] Rivas v. City of Passaic, 365 F.3d 181, 194 (3d Cir. 2004).

[101] Rranci v. Attorney Gen., 540 F.3d 165, 171 (3d Cir. 2008) (citing Kamara v. Attorney Gen., 420 F.3d 202, 216 (3d Cir. 2005)).

[102] This logical argument can be made if one concludes that if a potential criminal knows that nobody in a place can carry a handgun, and there is no security or police force in that place, then the criminal will be more likely to choose that place for the carrying out of a crime due to the reduced likelihood of resistance.

danger even further. In addition, the presence of a police officer or armed security guard would lower the level of danger substantially. As one can see from this example, the inability of an individual to arm himself with a handgun for self-defense actually *creates* a higher level of danger that would not be present but for the gun control law.

Some authorities allow the imposition of a duty to protect upon a state when the actions of the state render "the citizen more vulnerable to danger than had the state not acted at all."[103] As discussed above, an individual is more vulnerable to danger when that person is not afforded the most effective form of self-defense against armed assailants. Again, a counterargument threatens to derail this logical approach.

A critique of this proposed approach could argue that danger is actually lessened or eliminated when handguns are kept out of places. While this claim is debatable, and likely dependent upon one's political alignment, it is flawed. It is possible that the overall safety of a place may be increased by banning the carrying of handguns. However, it is also possible that a place is made less safe by banning the carrying of handguns in that place. Whether the handgun ban makes a place more safe is dependent upon whether an alternate form of security is provided for those individuals in that place. Without a sufficient form of security in place, individuals subject to the handgun prohibition are made more vulnerable to being subjected to serious bodily injury or death than they would be if the state had not imposed such a prohibition.

IV. THREE-FACTOR ANALYSIS TO DETERMINE CONSTITUTIONALITY OF SENSITIVE PLACE HANDGUN PROHIBITIONS

After reviewing those places that are commonly accepted as "sensitive places" (government buildings, public schools, public universities, places of worship, etc.), this Comment proposes a three-factor analysis that can be used to determine the constitutionality of a handgun prohibition in a particular place.

---

[103] Walter v. Pike Cnty., 544 F.3d 182, 192 (3d Cir. 2008) (citing Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006)).

Before introducing the proposed test, it is necessary to address the ramifications of a place being deemed "sensitive." The assumed meaning of "sensitive places" has always been that the place has certain characteristics which make the carrying of guns in that place illegal. However, when one views the meaning of "sensitive places" from an angle which is more concerned with self-defense and security, as was the Court in *Heller*,[104] additional implications arise.

When viewed with an eye on security, deeming a place sensitive necessitates that the governing body provide defense or security to those people within the sensitive place who are unable to defend themselves because of the ban on handguns. It is illogical for a legislature to declare a place sensitive and restrict the ability to carry handguns in that place, yet fail to provide an alternative source of security. As previously discussed, the removal of the ability to defend oneself only increases the need for security because the inability to defend oneself actually increases danger to that person. In fact, the failure to provide some form of security should call into question the actual sensitivity of that place. Any place deemed sensitive enough to prevent the carrying of handguns should also be sensitive enough to demand the provision of some type of security.

A. Level of Scrutiny

A common question when addressing the constitutionality of laws that restrict access to, or possession of, guns is what level of scrutiny should be applied. While *Heller* did not explain what level of scrutiny to apply, it did declare that rational basis should not be employed.[105] Left with only the choice between intermediate and strict scrutiny, most courts have employed an intermediate level of scrutiny to this analysis.[106]

The court in *Peruta v. County of San Diego* followed the intermediate scrutiny test set out in *United States v. Marzzarella*.[107] The *Marzzarella* court adopted the scrutiny level

---

[104] Dist. of Columbia v. Heller, 554 U.S. 570 (2008).
[105] GeorgiaCarry.org v. Georgia, 764 F. Supp. 2d 1306, 1317 (M.D. Ga. 2011).
[106] *Id.*
[107] Peruta v. Cnty. of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010).

standards employed in First Amendment challenges.[108] Under this standard accepted by the Third Circuit, a state must assert an interest that is "significant, substantial, or important."[109] The challenged restriction must also have a "reasonable, not perfect" fit with the asserted state interest.[110]

In almost all cases regarding a restriction on the carrying of handguns in a sensitive place, the asserted state interest will be the preservation of public health and safety. There is no argument against the idea that public health and safety are significant, substantial, or important state interests. However, the constitutionality of the restriction will turn on the fit that the restriction has with the asserted state interest. That is, the restriction must, in some degree, promote the asserted state interest.

In essence, this proposed test is an intermediate scrutiny test. The challenged restriction cannot be deemed substantially related to the asserted state interest of public health and safety if people within that place are left without any form of defense or security. The security of a people is inherent in the concept of public safety. However, if a handgun restriction provides alternate forms of security for people, that restriction will be substantially related to the asserted state interest of public health and safety.

When considering handgun place restrictions, a useful analogy to determine the level of scrutiny may be drawn to place restrictions of protected speech. Within the context of First Amendment free speech cases, the time, place, and manner of protected speech may be constitutionally restricted.[111] The speech restriction will pass constitutional muster if it satisfies an intermediate level of scrutiny.[112] This test will be satisfied if the state:

> [D]emonstrate[s] that the restriction furthers an important, significant, or substantial government interest, that the interest is unrelated to the suppression of speech, and that the restriction is not substantially broader than

---

[108] *Id.*

[109] *Id.* (internal quotation marks omitted).

[110] *Id.*

[111] 16B C.J.S. *Constitutional Law* § 828 (2005).

[112] *Id.*

> necessary to further the important governmental interest or that ample alternative methods of communicating the message have been left open.[113]

The important implication for place restrictions within the Second Amendment is that in order for a restriction to survive intermediate scrutiny, the state must leave open ample alternative means of self-defense or security. Just as a law that restricts the ability of a person to convey a message without allowing the person another means to convey that message is unconstitutional, a law that restricts a person's right to self-defense by not allowing that person to carry a handgun in certain places is unconstitutional if that person is not provided with alternative means of security.[114]

B. Factor One: Is the Place Sensitive?

First, the threshold issue of whether or not a place is sensitive must be determined. A place may be deemed sensitive if there is sensitive information or material contained or conveyed in that place. A liberal interpretation of the word "sensitive" should be employed under this threshold issue as there are many characteristics that could make material sensitive. Information regarding defense, homeland security, or military operations is deemed sensitive because of the potential disastrous effects of this information falling into the hands of people with malicious intent. Information may also be sensitive if there is a possibility or likelihood that the information conveyed may be controversial or

---

[113] *Id.*

[114] Still another important analogy can be drawn between the First and Second Amendments regarding the level of scrutiny when generally considering gun restrictions. While this Comment focuses on restrictions placed on carrying handguns outside an individual's home, further research should be conducted upon the different levels of scrutiny used on handgun restrictions depending upon where those restrictions are enforced. For example, the United States Supreme Court has stated that "[g]overnment restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." Pleasant Grove City v. Summum, 555 U.S. 460, 469-70 (2009). However, other time, place, and manner restrictions are subject to intermediate scrutiny. Likewise, it is generally accepted that restrictions on the ability to carry a handgun outside one's home are subject to intermediate scrutiny. However, restrictions on an individual's ability to carry a gun in his home or on his private property, that is not open to the public, should be subject to a stricter scrutiny.

evoke violent reactions. For example, controversial information is consistently conveyed in places of worship as opinions on religious topics are often met with high levels of opposition.

A place may also be deemed sensitive based upon the type or number of people present. A higher density of people may make a place more attractive to a person intending on inflicting the greatest damage possible, and should, therefore, be categorized as sensitive. Also, the presence of government officials, judges, preachers, and other figures may make a place sensitive as they often make controversial decisions or convey controversial information and are more obvious targets.

C. Factor Two: Is the Place Private or Public?

Second, the place must be evaluated as public or private. If the gun control measure applies to public land, the government making and enforcing the law is presumed to have a greater power in issuing regulations as opposed to a regulation that applies to gun carrying on private land. A law restricting gun carrying on private land should be viewed with skepticism and possibly a higher level of scrutiny, as historically governments have had less power to tell private citizens what legal items can and cannot be brought onto their land. The use of the place in question must be a further consideration. That is, if a privately owned place is opened up to the public, the government would have more power to control what goes onto that land than if it were not open to the public.

This factor may be understood more easily if one analogizes the ability of the State to restrict handgun carrying in certain places to the difference in the government's ability to regulate speech in public and non-public forums. Within the context of First Amendment free speech cases, a public forum is a place in which individuals are allowed more freedom to speak and are subject to less subject matter and speaker identity restrictions.[115]

---

[115] 16A AM. JUR. 2D *Constitutional Law* § 543 (2009); *see also Municipal Police Power and Ordinances*, 7 MCQUILLIN MUN. CORP. § 24:439 (3d ed. 2011) (stating that "[r]egulation of the kind of property traditionally made available for public expression—such as a street or park—is subject to the highest scrutiny, and will survive only if narrowly drawn to achieve a compelling state interest. . . . If the property is not a public forum at all, limitations on expressive activity on that property

However, in a non-public forum, the government may restrict what the speaker says as long as that restriction is viewpoint neutral and reasonable.[116] The concept is the same when considering this second factor. A government's ability to restrict gun carrying varies depending upon who owns the property and the activity taking place on the property upon which the prohibition is in place.

D. Factor Three: Is Sufficient Security Provided?

The third part of the analysis involves examining the type and level of security provided in the place where gun carrying has been restricted. Metal detectors and guards performing screenings provide types of preventive security; however, these types of security may be ineffective without the presence of sufficient armed personnel. The most effective means of protecting people within a place with a handgun restriction is the presence of either armed security guards or police officers. A failure to provide sufficient security effectively renders the people within the sensitive place without any form of defense. The particular circumstances present in each case will decide the outcome of this third factor. For example, the fact that some form of security is provided in a place where handguns are prohibited is not enough to constitutionally validate the law. The security provided must be sufficient to protect the citizens in that place.

E. Determining Sufficiency

The fact that this third factor calls for "sufficient" security raises the question as to what is sufficient. A subjective analysis can be employed to determine whether or not sufficient security is provided. This must be so, as it is difficult to quantify amounts of sensitivity and amounts of security. However, an analysis of the ratio of the level of sensitivity to the amount and type of security may provide a rough standard to determine these levels.

A logical approach to this problem could be to assign a level of sensitivity to a place based upon how many sensitivity factors

---

need only be reasonable so long as the regulation is not an attempt to silence a speaker due to disagreement with the speaker's view.").

[116] *Id.*

were used in the first step of the analysis. The more factors present that contributed to that place being labeled sensitive, the higher level of sensitivity that place will earn. For example, in government buildings, there is often sensitive information, activities, and personnel present. For illustrative purposes, we can say the presence of three factors qualifies a place as highly sensitive. Public schools may be deemed to have a medium to low level of sensitivity because they are sensitive usually only because of the type and density of people in that place. Accordingly, the government building should have a higher level of security than the school.

The same approach may be taken in regard to the level of security assigned to a place for purposes of this analysis. That is, the level of security achieved by a place will go up based upon the number of security measures in place. However, in evaluating security levels, a further judgment may be made on the effectiveness of the security measures. For example, a place that has security cameras, metal detectors at entrances, and some form of screening procedure has in place three security measures, but these measures without the presence of armed security guards or police officers decrease the overall level of security for purposes of this analysis. Likewise, a place that provides a number of armed security guards or police officers in reasonable proportion to the number of people in a place can be labeled as having achieved a high level of security.

Once the levels of sensitivity and security have been determined, the court must determine whether these levels are in reasonable proportion to each other. Once again, this will entail a subjective determination by the court. However, logic may provide all the guidance that is needed in this ratio analysis. A low level of sensitivity mandates at least a low level of security or higher. Likewise, a high level of sensitivity demands a high level of security.

F. Limits on the Application of the Three-Factor Analysis

As discussed earlier, this Comment should not be misinterpreted as advocating for the absolute right to carry a handgun into any and all places. Rather, the proposed test only advocates for the ability of individuals to carry with them the

right of self-defense or security in places where they have a right to be and, if applicable, where the private owner allows for the carrying of handguns.

It is important to recognize that this analysis only applies to restrictions placed upon the carrying of handguns by state legislatures. That is, an owner of private property may prohibit the carrying of handguns on their property without being forced to provide sufficient security. This must be the case because it would likely place an undue burden upon the owner or be financially impossible for private individuals to provide for sufficient security for all those present on the property. People can prohibit others from carrying guns on their property just as proprietors of places of worship can make their own decision to prohibit the carrying of guns on their property.

V. JUSTIFICATION, AN ALTERNATIVE, AND RELEVANT COUNTERARGUMENTS

A. Logical Justification of the Three-Factor Analysis

Simple logic can be used to explain this proposed three-part analysis of sensitive place gun control laws. A law that prohibits the carrying of handguns into a certain place will only be effective in deterring handgun carrying by those people whose desire to carry a handgun is trumped by their desire to obey the law.[117] A law banning the carrying of handguns into a place will not deter someone intent on using a handgun for criminal purposes.

Further, a place in which law-abiding citizens are unable to carry handguns for self-defense should be particularly appealing to a criminal who does have a gun, or any kind of weapon that gives him an advantage over an unarmed victim. The offer of little

---

[117] In discussing a proposal to ban guns within government buildings in Hartford, Wisconsin, President of the Hartford Common Council echoed this sentiment stating that "[a] sign in front of a building is not going to stop the bad guys from walking into the building with a handgun. All it does is make sure that those people who are law-abiding don't have a handgun. . . . What it does is it assures the bad guys that the only people who are going to have guns in the buildings are bad guys. That to me is rather ridiculous." Mike Johnson & Larry Sandler, *Some Cities Act to Ban Guns from Government Buildings*, J. SENTINEL ONLINE (Aug. 20, 2011), http://www.jsonline.com/news/statepolitics/128132258.html.

or no resistance by the victim increases the likelihood that a criminal will be successful in executing the crime. This same logic can be used when examining a lack of sufficient security in a place. Someone intent on committing a crime would naturally choose a place which provides the best opportunity to successfully carry out that crime. The most daunting obstacle in the execution of a crime is the presence of a security or police force. Knowledge of a lack of security or police in a certain place, along with the knowledge that the law-abiding citizens in that place cannot carry handguns, presents the successful completion of a crime to the criminal on a silver platter.

B. Sensitive Places Licensing Alternative

Critics of this approach may agree with the idea of continual availability of defense and security but oppose the implementation of a sufficient security force due to the large administrative costs that will come with this approach. A knee jerk reaction to this opposition would be to claim that a state cannot limit the security of its citizens simply because it costs too much. However, in the real world, a lack of resources often prevents governments from implementing ideal legislation.

An alternative to, and a way to completely forgo, strict adherence to the three-factor analysis introduced earlier—which may not be viable for some financially stretched states—would be to allow for a tiered handgun licensing system. A tiered, or enhanced, licensing system may be employed if a state wishes to restrict the ability of people to carry handguns in sensitive places and cannot afford to provide security, while also recognizing the need for some available means of defense for individuals in those sensitive places.

Under this proposed compromise, a state may offer the ability to obtain a license to carry a handgun in non-sensitive places (first tier) as discussed in the background section of this Comment. For many states, this would simply mean that they would keep their current carry statutes, which usually involve meeting an age requirement, not being convicted of a felony, and following the

state's application process.[118] However, a state must also provide for the ability to obtain a license to carry a weapon in sensitive places (second tier) if sufficient security cannot be supplied. This license can contain additional requirements that the general license does not.[119] For example, a state may require that an applicant complete some type of instructional or educational course on the carrying of handguns in sensitive places. However, the additional requirement cannot impose an undue burden upon the applicant so as to make acquiring the license virtually impossible.

C. Counterarguments

Skeptics of this approach may challenge the point from which this analysis begins. That is, they may claim that a sensitive place does not necessarily mean that some form of security must be provided, but instead that a sensitive place simply renders an

---

[118] For example, the State of Mississippi provides for the licensing of its citizens to carry concealed pistols or revolvers in § 45-9-101 of that state's code. Mississippi requires that an applicant be twenty-one years or older, not suffer from any physical or mental infirmity or addiction that would prevent that person from the safe handling of a gun, not have been convicted of a felony, and not be prohibited by federal law to obtain a license to carry a concealed weapon. MISS. CODE ANN. § 45-9-101(2) (2011). The applicant must fill out a form, provide a full-face photograph, a full set of fingerprints, and sign a waiver "authorizing the Department of Public Safety access to any records concerning commitments of the applicant to any . . . treatment facilities . . . and permitting access to all the applicant's criminal records." MISS. CODE ANN. § 45-9-101(5) (2011). Section 45-9-101 also provides that a person who does obtain a license cannot carry a concealed gun into any police station, courthouse, meeting place of a governing body, establishment primarily devoted to serving alcohol, school, college, university, airport, church, place of worship, or any other place that federal law prohibits the carrying of guns into. MISS. CODE ANN. § 45-9-101(13) (2011).

[119] Mississippi provides the opportunity for its citizens to obtain an "enhanced" permit to carry a concealed weapon in places that are prohibited under § 45-9-101. MISS. CODE ANN. § 97-37-7(2) (2011). The relevant section states:

> A person licensed under Section 45-9-101 to carry a concealed pistol, who has voluntarily completed an instructional course in the safe handling and use of firearms offered by an instructor certified by a nationally recognized organization that customarily offers firearms training, or by any other organization approved by the Department of Public Safety, shall also be authorized to carry weapons in courthouses except in courtrooms during a judicial proceeding, and any location listed in subsection (13) of Section 45-9-101, except any place of nuisance as defined in Section 95-3-1, any police, sheriff or highway patrol station or any detention facility, prison, or jail.

MISS. CODE ANN. § 97-37-7(2) (2011).

individual's right to carry a gun restricted. This position does have support, as it has been the generally accepted meaning of "sensitive places." However, this accepted view of sensitive places essentially disregards a citizen's right to self-defense. No matter where a person is, he or she still has a right to some form of protection, whether that be through self-defense or through protection provided by the government or other agency.[120]

As discussed earlier, the inevitable difficulty in quantifying sensitivity and security will likely be pointed out as a weakness of this proposed approach. However, there is no need to conduct this subjective analysis with scientific exactitude. The adoption of the standard proposed earlier will provide a level of guidance to review sensitive place handgun restrictions that did not previously exist. In previous cases, judges were simply left with the broad discretion to deem a place sensitive due to the presence of any factor they thought could possibly justify that label. A step in the direction of clarity and uniformity must be seen as an improvement.

CONCLUSION

The lack of explanation of the "sensitive places" dictum given by the Court in *Heller* has provided legal scholars with an issue ripe for debate. Despite the traditional acceptance of place restrictions on handguns, the time has come to reevaluate this tradition in light of *Heller*'s emphasis on self-defense. Applying principles within due process jurisprudence, one can conclude that a state assumes a protective role over those individuals found within sensitive places who have had their right to bear arms momentarily suspended while present therein. This protective role implies a duty to protect those individuals from threats of violent crime that could otherwise be repelled with the use of a handgun.

Applying intermediate scrutiny to handgun restrictions within sensitive places, it is clear that a government that fails to provide sufficient security has unconstitutionally violated those individuals' Second Amendment rights. Examination of the handgun restriction under the proposed three-factor analysis proves the constitutional violation.

---

[120] Volokh, *supra* note 26, at 1515.

First, a court must determine whether or not the place in question is sensitive. Generally, places are labeled as sensitive due to the people, information, or activities that are contained or carried out within that place. Second, a court must determine if the place in question is publicly or privately owned, and if privately owned, whether or not the public is invited to enter the premises. Finally, a court must determine if the security provided is sufficient to ensure the security of those found in that place. The sufficiency of security can be determined by comparing the level of sensitivity of that place to the level of security provided. Despite an inevitable level of subjectivity involved in carrying out this proposed analysis, it provides a much needed starting point for evaluating handgun restrictions where no framework for evaluation existed before.

The politically moderate nature of this analysis must also be considered. Despite the fact that the analysis subjects government restrictions on handgun carrying to a higher level of scrutiny than previous evaluations, it also mandates the licensing of the individual carrying the handgun. States with liberal licensing statutes may need to require a higher level of qualification for those individuals seeking to carry guns in sensitive places. Finally, states may completely prevent the carrying of handguns in sensitive places simply by providing a sufficient security force therein.

Brian C. Whitman[*]

---

* The author is a third-year student at the University of Mississippi School of Law, where he is an Associate Cases Editor of the *Mississippi Law Journal*. He wishes to thank Professor Jack W. Nowlin and Professor Christopher Green for their guidance in writing this Comment; his editors at the *Mississippi Law Journal* for their patience and suggestions; and his family and friends for their support throughout the writing and editing of this Comment.