

# NONLETHAL SELF-DEFENSE, (ALMOST ENTIRELY) NONLETHAL WEAPONS, AND THE RIGHTS TO KEEP AND BEAR ARMS AND DEFEND LIFE

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When I cite a law with a quoted phrase in the parenthetical, such as "weapon capable of causing death or serious bodily injury," that means the law uses that generic phrase rather than specifically mentioning stun guns or irritant sprays. For a brief discussion of why such generic phrases generally cover stun guns and irritant sprays, see Appendix I. If no such parenthetical is included, that means the law covers stun guns and irritant sprays by name.

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## INTRODUCTION

Owning a stun gun<sup>1</sup> is a crime in seven states and several cities.<sup>2</sup> Carrying irritant sprays—such as pepper spray or Mace—is probably illegal in several jurisdictions.<sup>3</sup> Even possessing irritant sprays at home is illegal in Massachusetts if you’re not a citizen,<sup>4</sup> and in several states if you’re under eighteen (even if you’re sixteen or seventeen).<sup>5</sup>

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1. I use “stun gun” as the generic term, but the main stun guns now available are so-called Tasers, and Taser International is the main supplier. *See infra* Part I.

2. *See infra* Appendix II.A.1.

3. *See infra* Appendix II.B.2.

4. *See infra* note 67.

5. *See* Eugene Volokh, *Older Minors, the Right To Keep and Bear (Almost Entirely)*

Yet in most of these jurisdictions, people are free to possess guns in the same situations where stun guns or irritant sprays are illegal. So deadly devices are fine. But say you have religious, ethical, or emotional objections to killing, or don't want to risk accidentally killing an innocent bystander, or don't want your children potentially having access to a deadly weapon. Not wanting to kill, and knowing that stun guns and irritant sprays pose at most a very small risk of death, you get a stun gun (which over 198,000 civilians have apparently done) or an irritant spray.<sup>6</sup> Then you're a criminal.

In public places within some other jurisdictions, stun guns, irritant sprays, and firearms are equally banned. People there are entirely barred from defending themselves with any of the devices that are most effective for self-defense. That's the rule in many Illinois towns, in Milwaukee as to concealed carrying, for foreign citizens in Massachusetts,<sup>7</sup> and probably for eighteen- to twenty-year-olds outside the home in Connecticut and Memphis.<sup>8</sup>

It's the rule for minors, even ones old enough to use the deadly devices known as automobiles, in public places in several states and cities.<sup>9</sup> And it's the rule for felons (even nonviolent felons)—even in their own homes—in several

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*Nonlethal Arms, and the Right to Defend Life* (Aug. 17, 2009) (unpublished manuscript, on file with the author, to be published in the *Arizona State Law Journal*). Some such statutes allow possession under the immediate supervision of a parent, but they still limit sixteen and seventeen-year-olds' ability to defend themselves when out in public by themselves.

6. Taser International reports that it has sold 198,000 Tasers to civilians. *Sheriff Bucks Taser Trend*, FT. WORTH STAR-TELEGRAM, Oct. 13, 2009. There are no comparable numbers for irritant sprays, but in the one state where legally owning irritant sprays requires a license—Massachusetts—there were 12,804 active licenses as of July 15, 2009. Telephone interview by Robin Shofner with Jason Guida, Director, Mass. Firearms Record Bureau (July 16, 2009). Extrapolating to the nation at large yields an estimate of about 600,000 people who would legally possess irritant sprays if a license were required; there are thus likely many more who do possess irritant sprays, given that in most states possessing and even carrying irritant sprays doesn't require a license.

7. *See infra* note .

8. *See infra* Appendix II.B.2. In those places, everyone is probably forbidden to carry stun guns and irritant sprays, and eighteen- to twenty-year-olds can't get concealed handgun carry licenses.

People are sometimes arrested for violating the laws described in the Introduction. *See, e.g.*, Lisa Redmond, *Former Professor Suing Lowell Police After Arrest*, LOWELL SUN (Mass.), Apr. 15, 2009 (noting an arrest for, among other things, possession of pepper spray, presumably without the identification card that Massachusetts requires for such possession). But even when the laws aren't directly enforced, they likely have some effect on people's behavior: Stores, for instance, can't legally sell stun guns in jurisdictions that ban them. Massachusetts irritant spray dealers are only allowed to sell to people who have the requisite identification cards, MASS. GEN. LAWS ANN. ch. 140, § 123 (West 2009), for which foreign citizens aren't eligible. Some law-abiding citizens might be deterred by even a small risk that they'll be found to have a weapon on their persons. Plus, people who carry and use nondeadly weapons in self-defense against a crime despite the ban are likely not to report the crime or otherwise help the police in investigating the crime, for fear of being prosecuted themselves. *See Eugene Volokh, Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105 (1999) (discussing such "anticooperative effects").

9. *See* Volokh, *supra* note 5.

other states,<sup>10</sup> which also means that people who live with felons may find it dangerous to possess such defensive devices.<sup>11</sup>

People are likewise barred from having handguns, stun guns, or irritant sprays in many public universities, in public housing in Aurora (Illinois), and in some jurisdictions on public buses.<sup>12</sup> This also means that people who live in those places or who travel on those buses are practically barred from having such weapons even outside the place where the weapons are formally forbidden, since such people have no practical way of legally storing or transporting the weapon.

Finally, in many places people are barred from possessing handguns and stun guns, but allowed to have irritant sprays. This burdens self-defense less than a total ban on all three devices would. But it still substantially burden self-defense, since stun guns are often materially more effective than irritant sprays.<sup>13</sup>

Much has been written, both by scholars and by judges and legislators, about the use of deadly force in self-defense and defense of others. But nonlethal self-defense remains largely undiscussed. Bans on nonlethal weapons are the main form of restriction on nonlethal self-defense, yet scholars have almost entirely ignored them.<sup>14</sup>

This Article aims to fill that gap. It begins by explaining (Part I) how stun guns and irritant sprays operate, and why some people might reasonably choose one or the other as their preferred nonlethal weapon. It also discusses (Part II) why people might want to defend themselves with nonlethal weapons rather than with lethal ones.

The Article then turns to the arguments for and against bans on law-abiding adults' possession and carrying of nonlethal weapons, both where firearms are allowed (Part III.A) and where firearms are forbidden (Part III.B). Nonlethal weapons may indeed be used in crime, and might sometimes be used even if lethal ones are not, for instance if a robber decides to take a "when in doubt, stun" approach, or if someone wants to torture someone else with a stun gun or pepper spray as part of a criminal plan or as a juvenile prank. But Part III argues that the bans are nonetheless not justified, because they are unlikely to do much to diminish crime, and likely to do a good deal more to interfere with self-defense against crime.

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10. *See infra* Part V.

11. *See infra* note 123.

12. *See infra* Part VI.A.

13. *See infra* Part II.

14. The exceptions are James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141 (1989) (dealing with irritant sprays as they were regulated in the late 1980s, when they were more restricted than today), parts of Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387 (2009), and Lanning's unpublished article, *see supra* note \*.

And these arguments are not only policy arguments, but also constitutional arguments. First, at least forty state constitutions protect a right to bear arms in self-defense, and these include several no-stun-gun or partial no-stun-gun states. The Second Amendment applies in the District of Columbia and, by federal statute, in the Virgin Islands, two jurisdictions that ban stun guns; the Supreme Court is now considering whether it is incorporated against the states via the Fourteenth Amendment. Part IV.0 argues that the word “arms” in all these provisions should be interpreted to cover nonlethal personal defense weapons as much as lethal ones, and that the right to bear arms in self-defense should preclude stun gun bans and irritant spray bans.

Second, twenty-one state constitutions explicitly recognize a right to defend life, and the U.S. Constitution might implicitly do the same. This express state constitutional right has been almost entirely ignored by scholars; but courts have rightly treated it as legally binding.

And the right to defend life, Part IV.0 argues, should be read—like other rights—as including the right to possess devices that are necessary to effectively exercise the right. The right to decide whether to beget children protects the right to use contraceptive devices to better implement one’s decision. The right to protect property, expressly secured by all the states that also secure a right to defend life, has been read as including the right to use devices (such as weapons or traps) to stop animals that are consuming one’s crops. The First Amendment presumptively protects the right to associate, to spend money, and to use technological devices (such as telephones, amplifiers, and the like) to make one’s expression effective. Likewise, the right to defend life should protect the right to use nonlethal devices that help effectively defend life.

Felons are also often targeted by nonlethal weapon bans. Part V argues that, though the case for restricting possession of nonlethal weapons by felons is stronger than for law-abiding adults, nonviolent felons should nonetheless be free to possess such weapons. They need to defend themselves at least as much as the law-abiding do. And their need for nonlethal weapons is even greater, since they are generally denied access to the firearms that the law-abiding typically turn to when they need defensive weapons. Though felons are probably more likely to abuse such weapons than are the law-abiding, that risk should be modest enough that it’s worth running as to nonlethal weapons even if it isn’t worth running as to firearms. I make a similar point about older under-eighteen-year-olds in a separate article.<sup>15</sup>

Some jurisdictions have more localized bans on stun guns and irritant sprays. Part VI briefly discusses the policy and constitutional issues raised by bans focused on public housing, public universities, and public buses. Part VII briefly discusses bans that are limited to other places, such as parks and places (markets, restaurants, and bars) that sell alcohol.

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15. See Volokh, *supra* note 5.

Finally, Part VIII discusses some jurisdictions' licensing requirements and waiting periods for buying nonlethal weapons. These restrictions are often borrowed directly (and unwisely) from gun regulation without any attention to the special characteristics of stun guns and irritant sprays. They are thus likely to be more burdensome than they need to be, and less effective than they could be.

## I. WHAT NONLETHAL WEAPONS ARE

First, a few words about the devices discussed in this article. Stun guns and Tasers work by producing electrical pulses that make the target's muscles spasm, and thus quickly but temporarily disable him.<sup>16</sup> And unlike, say, a baton or a similar weapon, they generally stop the target with one blow, and can be used even by people who are weak or disabled.

The original stun guns were—despite the name—contact weapons: The user had to touch the target with his stun gun. But the Taser, developed in the early 1970s, shoots two wires tipped with barbed darts up to fifteen feet; the electrical shock is then delivered through the wires. The darts can generally penetrate clothing, so they need not land on exposed skin to work.

Stun gun shocks are almost never fatal. The most recent study reports no deaths caused by stun gun use in 1201 consecutive uses of stun guns by three police departments, and only three moderate or severe medical reactions, none leading to long-term harm.<sup>17</sup> The study reports that two of the targets did “die[] unexpectedly while in police custody,” but concludes that stun gun use “was not determined to be causal or contributory to death by the medical examiner in either case.”<sup>18</sup>

An Amnesty International report, “*Less Than Lethal*”? *The Use of Stun Weapons in US Law Enforcement*, reports that “in at least fifty cases [since June 2001], coroners are reported to have listed the Taser as a cause or contributory factor in the death.”<sup>19</sup> But this seems to be out of over 600,000 field uses against suspects since 1998.<sup>20</sup> This is why Amnesty agreed that, “overall, the death rate compared to the number of reported Taser field uses is relatively low,” though it argued that the police should be even more careful

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16. For more, see Mark W. Kroll, Patrick Tchou & Sandra Upson, *How a Taser Works*, IEEE SPECTRUM, Dec. 2007, at 25-31.

17. William P. Bozeman et al., *Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects*, 53 ANNALS EMERGENCY MED. 480 (2008).

18. *Id.* at 5-6.

19. AMNESTY INT'L, “LESS THAN LETHAL”? THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT I (2008), <http://www.amnesty.org/en/library/info/AMR51/010/2008/en> (click on “Download: PDF”).

20. TASER INT'L., TASER TECHNOLOGY—CHANGING THE WORLD AND PROTECTING LIVES I (2008), <http://www.taser.com/company/pressroom/Documents/TASER%20Intl%20Press%20Kit%2011%2008.pdf>.

about using Tasers, because “any risk of death” from “excessive or unnecessary force” by police “is unacceptable.”<sup>21</sup>

By way of comparison, the death rate from gunshot wounds caused in deliberate assaults on others is likely about 20%, and from knife wounds caused in deliberate assaults on others is likely about 2%.<sup>22</sup> Of course all attacks are potentially deadly: pushing someone may cause him to fall the wrong way and die. But stun guns and irritant sprays are so rarely deadly that they merit being viewed as tantamount to generally non-deadly force, such as a punch or a shove.<sup>23</sup>

Irritant sprays, chiefly Mace (originally a derivative of tear gas) and pepper spray, temporarily disable people by irritating the respiratory system and the eyes.<sup>24</sup> They too cause intense pain, and very rarely longer-term effects. Some people have died in police custody after having been subdued with irritant sprays, but I could find only one mention of a confirmed case of irritant spray being a major cause of death.<sup>25</sup>

Stun guns are apparently more effective than irritant sprays in some ways and less in other ways, so some users may prefer one and others the other.<sup>26</sup> Pepper spray (the most effective irritant spray in use today) may still leave the

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21. AMNESTY INT’L, *supra* note 19, at 86.

22. See Centers for Disease Control, WISQARS Nonfatal Injury Reports, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (select intent “Assault and Legal Intervention,” cause “Firearm,” year 2005) (reporting 51,354 nonfatal gun injuries); *id.* (same, but cause “Cutting/piercing”) (reporting 119,297 nonfatal cutting injuries); Centers for Disease Control, WISQARS Fatal Injuries: Mortality Reports, 1999-2005, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html) (select intent “Homicide,” cause “Firearm,” year 2005) (reporting 12,352 gun deaths); *id.* (same, but cause “Cut/Pierce”) (reporting 2,097 cutting deaths). I say “likely” because such statistics are of course highly imprecise, especially since not all wounds are reported to the authorities.

23. Cf. MODEL PENAL CODE § 3.11 (Official Draft 1985) (as adopted in 1962, defining “deadly force” as “force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury”).

24. See, e.g., Theodore C. Chan et al., *Pepper Spray’s Effects on a Suspect’s Ability to Breathe*, NAT’L INST. OF JUSTICE RESEARCH IN BRIEF, Dec. 2001, <http://www.ncjrs.gov/pdffiles1/nij/188069.pdf>, at 1.

25. See Craig H. Steffee et al., *Oleoresin Capsicum (Pepper) Spray and “In-Custody Deaths,”* 16 AM. J. FORENSIC MED. & PATHOLOGY 185, 187 (1995). The victim in the case had been “sprayed 10-15 times” by the police. See also C. Gregory Smith & Woodhall Stopford, *Health Hazards of Pepper Spray*, 60 N.C. MED. J. 268, 272 (1999) (reporting on reviews of in-custody deaths in which pepper spray was used during the arrest, and noting that “Exposure to [pepper] spray was not judged to be a precipitating cause in any case” but that “there is concern that its potential role was not adequately considered” in some of the incidents); *The Effectiveness and Safety of Pepper Spray*, NAT’L INST. OF JUSTICE RESEARCH FOR PRACTICE, Apr. 2003, <http://www.ncjrs.gov/pdffiles1/nij/195739.pdf>, at 1 (reporting on the results of studies that show “pepper spray was a contributing cause of death in 2 of the 63 fatalities” “in which people were sprayed with [pepper spray] in the arrest process and later died in custody”).

26. See Andrew Abramson, *New Guns Signal Shift by Sheriff*, PALM BEACH POST, Oct. 15, 2008, at 1A (reporting, seemingly based on an interview with a local police captain, that “[a] Taser . . . is much more effective than pepper spray in subduing someone”).

attacker able to attack, though he is distracted and in pain. It's especially likely to be ineffective when the attacker is less sensitive to pain because he's drunk or on drugs.<sup>27</sup> To be most effective, pepper spray requires a hit on the suspect's face rather than, as with a stun gun, any part of the suspect's body.

Pepper spray may in part blow back at the defender,<sup>28</sup> which can leave the defender especially vulnerable if the attacker isn't entirely stopped. It can also be less effective when two defenders (say, a couple walking home together) face two or more attackers: the pepper spray could blow into the face of the defender's companion as well as hitting one of the attackers, disabling the defender's ally and thus leaving the defender more vulnerable against the other attacker. And pepper spray has an effective range of only about seven feet—about the average width of a car—as opposed to fifteen feet for modern stun guns. Since an attacker can lunge seven feet in a split second, pepper spray gives a defender less time to react.<sup>29</sup>

At the same time, pepper spray can be used at a distance more than once, which is useful when the defender misses the first time, or needs to fight off multiple attackers. It's also much cheaper than a Taser. Some people might therefore reasonably find stun guns more useful for self-defense, while others might reasonably choose irritant sprays.

## II. WHY PEOPLE MAY WANT TO USE NONLETHAL WEAPONS

Some people may want to use nonlethal weapons because they are legally barred from possessing firearms (for instance, if they're felons or nonresident aliens<sup>30</sup>), or because they live in a jurisdiction where licenses to carry firearms are hard to get. But some people may be especially reluctant to use lethal force or possess lethal weapons, even when they legally can. There are many possible reasons for this, some of which may be mutually reinforcing:

- (1) Some people have religious or ethical compunctions about killing.<sup>31</sup>

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27. See, e.g., CHARLIE MESLOH, MARK HENYCH & ROSS WOLF, NAT'L INST. OF JUSTICE, LESS LETHAL WEAPON EFFECTIVENESS, USE OF FORCE, AND SUSPECT & OFFICER INJURIES: A FIVE-YEAR ANALYSIS 37 (2008), <http://www.ncjrs.gov/pdffiles1/nij/grants/224081.pdf>.

28. See Matthew Hamilton, *Tasers Reduce Police Injuries*, NEWS-STAR (Monroe, La.), Oct. 12, 2008, at 1B (quoting a local county sheriff); Steve Marantz, *'Stun Guns' Gain Popularity: More Than 300,000 Sold to Police and Private Citizens*, BOSTON GLOBE, May 22, 1985, at 2 (quoting a local constable); Lanning, *supra* note \*, at 9.

29. See MESLOH, HENYCH & WOLF, *supra* note 27, at 22-23, 30. Comparisons of the stopping power of Tasers and pepper spray in police hands have considerable limitations. Among other things, if Tasers and pepper spray are used under different circumstances (for instance, if one tends to be used against more severe threats than the other, or is relied on only when the other has failed to help), the relative stopping power would reflect the nature of the uses more than the nature of the weapon. This having been said, the data from police uses appears to suggest that Tasers have been more effective. Michael D. White & Justin Ready, *The TASER as a Less Lethal Force Alternative*, 10 POLICE Q. 170, 174-75 (2007).

30. 18 U.S.C. § 922(g)(1), (g)(5)(B) (2006).

31. See Jacobs, *supra* note 14, at 144 (making a similar point). For instance, noted

- (2) Some feel they will be emotionally unable to pull the trigger on a deadly weapon even when doing so would be ethically proper.<sup>32</sup>
- (3) Some worry about erroneously killing someone who turns out not to be an attacker.
- (4) Some are reluctant to kill a particular potential attacker, for instance when a woman doesn't want to kill her abusive ex-husband because she doesn't want to have to explain to her children that she killed their father, even in self-defense.
- (5) Some fear a gun they own might be misused, for instance by their children or by a suicidal adult housemate.<sup>33</sup>

These are not just esthetic preferences, such as a person's desire to have a particular gun that he most likes, or that has special sentimental value (for

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Mennonite theologian John Howard Yoder, noted Pentecostalist theologian David K. Bernard, and the Dalai Lama have expressed the view that one ought not use deadly force even in self-defense, but self-defense using nondeadly force is permissible. *See* JOHN HOWARD YODER, *NEVERTHELESS: VARIETIES OF RELIGIOUS PACIFISM* 31 (1971); JOHN HOWARD YODER, *WHAT WOULD YOU DO?* 28 (1983); DAVID K. BERNARD, *PRACTICAL HOLINESS: A SECOND LOOK* 284 (1985); Hal Bernton, *Students Urged to Shape World: Dalai Lama Preaches Peace in Portland*, *SEATTLE TIMES*, May 15, 2001, at B1 (paraphrasing the Dalai Lama). Some members of other religious groups might share the same view. *See* John Webster Gastil, *Queries on the Peace Testimony*, *Friends J.*, Aug. 1992, at 15 (noting the views of some Quakers); *Czubaroff v. Schlesinger*, 385 F. Supp. 728, 739-40 (E.D. Pa. 1974) (describing a conscientious objector application that expressed such a view). And some religious groups, such as the Presbyterian Church (U.S.A.), take the view that deadly force is improper even in self-defense, but express no view about nondeadly force, which suggests that nondeadly defensive force might be proper. *See Legislation to Modify the 1968 Gun Control Act: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong., 1st & 2nd Sess., serial no. 131, pt. 1, at 128, 130.

Other religious traditions take the view that defenders ought to use the least violence necessary. Some religious believers might therefore conclude that, when fairly effective nondeadly defensive tools are available, they should be used in preference to deadly tools. *See* Catechism of the Catholic Church, <http://www.vatican.va/archive/catechism/p3s2c2a5.htm>, at ¶ 2264; *BABYLONIAN TALMUD, SANHEDRIN* 74a; *THE CODE OF MAIMONIDES, BOOK ELEVEN, THE BOOK OF TORTS* 197 (Hyman Klein trans., 1954).

32. Lanning, *supra* note \*, at 10, makes a similar point; so does Jacobs, *supra* note 14, at 144, as to irritant sprays. Liqun Cao et al., *Willingness to Shoot: Public Attitudes Toward Defensive Gun Use*, 27 *AM. J. CRIM. JUST.* 85, 96 (2002), reports that 35% of a representative sample of Cincinnati residents age twenty-one and above said they would *not* be willing to shoot a gun at an armed and threatening burglar who had broken into their home. (The fraction was higher for women respondents. *Id.* at 100.) The study didn't ask further for the respondents' motivation, so perhaps people were worried that they would miss and thus only exacerbate the problem, which might lead them to avoid using nonlethal weapons as well. But it seems likely that many of the 35% felt that they would be ethically prohibited from trying to kill even an armed and threatening attacker, or psychologically unprepared to do so.

33. *See* Jacobs, *supra* note 14, at 144; Lanning, *supra* note \*, at 10. It's not clear whether gun availability actually increases the risk of suicide, given the availability of other comparably lethal means, but it's reasonable to be concerned about the possibility that a gun would make suicide more likely. And this is especially so because some people might feel especially emotionally traumatized if their guns are used by a family member to commit suicide, even if they suspect the suicide would have happened in any event.

instance, his father's military-issue weapon), when other equally effective guns are available. Perhaps even those esthetic preferences should be respected in the absence of particularly good reasons to disregard them. But there should be even more respect for preferences that stem from understandable and even laudable moral belief systems, emotional reactions, or pragmatic concerns. Even if one thinks (as I do) that killing in self-defense is morally proper, people who take the opposite view should be presumptively free to act on their beliefs without having to forgo the most effective self-defense tools.<sup>34</sup>

Naturally, many people don't have such worries, or conclude that the value of having a gun for self-defense overcomes such worries. Both firearms and nonlethal weapons can stop people, and can deter through the risk of pain or incapacitation leading to arrest. But firearms have the major extra deterrent force of threatening death: that's why "I have a gun!" is more likely to scare off an attacker than "I have a stun gun!"<sup>35</sup>

Also, civilian stun guns today are good only for one shot. After the cartridge is shot, the stun gun can only be used in direct contact mode. This makes stun guns less useful than firearms against multiple attackers, or when the defender misses with the first shot.<sup>36</sup>

But this just shows that many people may reasonably prefer firearms for self-defense. It doesn't undermine the legitimacy of other people's preference for stun guns or irritant sprays instead of firearms.

### III. RESTRICTIONS ON LAW-ABIDING ADULTS' POSSESSION AND CARRYING OF NONLETHAL WEAPONS

#### A. *Laws That Restrict Nonlethal Weapons when Guns Are Allowed*

The nonlethality of stun guns and irritant sprays does make it possible that such weapons will be abused in situations where firearms wouldn't be, though each such abuse would likely be much less harmful. Robbers might be likelier to stun or spray victims than shoot them, because this won't expose the robber to a murder charge (and because it's quieter, even than shooting a gun with an illegal silencer).<sup>37</sup> People looking for nondeadly revenge, or trying to pull a

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34. A few people might be able to learn unarmed self-defense techniques. But many people can't, because they are physically disabled, aren't strong enough, or have work or family obligations that deny them the time needed to train themselves in such techniques. And even the comparatively well-trained might be considerably less effective with their limbs alone than they would be with a stun gun, especially against a much bigger attacker.

35. See Lerner & Lund, *supra* note 14, at 1398 (taking the same view). I thus disagree with Paul H. Robinson, *A Right to Bear Firearms but Not to Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-Lethal Weapons*, 89 B.U. L. REV. 251, 256-57 (2009), that stun guns are as effective as firearms, or are likely to be so any time soon.

36. See Lerner & Lund, *supra* note 14, at 1398-99 (noting this as well).

37. Cf. *Law Makes Stun Guns Illegal*, BUFFALO NEWS, June 26, 1990, at A7 (quoting "Ted Hallman, an aide to state Sen. Dale Volker" as arguing that a stun gun "lends itself real

prank, might stun or spray their victims even if they wouldn't have shot them.<sup>38</sup>

But three countervailing factors suggest such bans will be unproductive or counterproductive. First, bans on carrying nonlethal weapons are likely to only modestly affect the already seemingly modest level of stun gun or irritant spray crime, precisely because much such crime would be perpetrated by serious criminals.<sup>39</sup> Someone who is unfazed by the laws against robbery, rape, and kidnapping is unlikely to be much influenced by laws against possessing stun guns or sprays.<sup>40</sup>

Bans on buying such weapons might make the weapons less available, but not by much. Many criminals would have no trouble driving out of town or even to a neighboring state to buy the stun gun or the spray, or asking a friend to do so. And the more useful nonlethal weapons are to criminals, the more likely it is that a lively black market would develop.

Second, a crime committed with a stun gun or irritant spray will often be a crime that would otherwise have been committed with a gun or a knife. Banning nonlethal weapons might thus reduce painful stunnings or pepper spray attacks only by increasing knife and gun crimes that cause death, serious injury, and psychological trauma. And even if the stun gun crime or irritant spray crime would otherwise have been performed using only manual force,

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well to subway crimes"; "You go up behind some straphanger and stick this in their ribs, give them a shot and while they're doing the funky chicken on the floor, you lift their wallet.").

38. See, e.g., *Smoking Rules 'In,'* HERALD-PALLADIUM (Benton Harbor-St. Joseph, Mich.), May 4, 1978, at 8 (noting that supporters of a stun gun ban "said that in the hands of criminals, Tasers can become objects of torture" and that "[t]he weapons have already been used in several robberies"). Compare the conflicting views highlighted in *Newest Taser Stuns US Police*, N.Z. HERALD, Apr. 26, 2007 (quoting James Pasco, the executive director of the Fraternal Order of Police, as saying that "[i]nvariably, [Taser's latest consumer stun gun] will fall into criminal hands"; and Lancaster County (Neb.) sheriff Terry Wagner as saying, "It's kind of like when pepper spray came out . . . There was a lot of concern. But honestly, Mace and pepper spray in the hands of the public has never turned out to be a problem for us.").

39. Taser International tries to reduce Taser crime still further: "The TASER C2 ships in a locked state and can only be unlocked by with an activation code received upon successful registration with an identification verification and [felony] background check approval from the privacy of using a secure web site or a toll-free number." Taser International, *Taser Citizen Defense System Fact Sheet*, [http://www.taser.com/Documents/PDF/Detailed\\_Information\\_Sheet\\_C2.pdf](http://www.taser.com/Documents/PDF/Detailed_Information_Sheet_C2.pdf). Likewise, "Every time a TASER cartridge is deployed, 20-30 small confetti-like Anti-Felon Identification (AFID) tags are ejected. Each AFID is printed with the serial number of the cartridge deployed, allowing law enforcement to determine which cartridge was fired." Taser International, *Anti-Felon Identification (AFID)*, Mar. 12, 2007, <http://www.taser.com/research/technology/Pages/AFID.aspx>. This feature, however, doesn't operate when the stun gun is used in contact mode, and it's not useful for tracing the stun gun if it has been stolen, so I won't rely on it in my analysis.

40. Cf. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) (expressing skepticism that a permit requirement for door-to-door political solicitors would reduce the danger that criminals will pose as solicitors).

that too could have led to serious pain, lasting injury, or even death. The sorts of robbers who are likely to use manual force are likely ones who are strong enough to inflict significant injury.

Third, banning nonlethal weapons is likely to reduce self-defense by law-abiding citizens much more than it would reduce attacks by criminals. A woman who wants a stun gun or irritant spray for self-defense is much more likely to be deterred by the threat of legal punishment for illegally buying, possessing, or carrying the nonlethal weapon than a criminal would be. And if she can't get the nonlethal weapon that works best for her, she might be less able to protect herself against robbery, rape, abuse, or even murder.

Why then do some jurisdictions treat nonlethal weapons—especially stun guns—worse than firearms? Not, I think, because allowing stun guns is indeed more dangerous than allowing only firearms. Rather, it's because firearms bans draw public attention and hostility in ways that stun gun bans do not.

There is no well-organized National Stun Gun Association that has millions of members who fight proposed stun gun bans.<sup>41</sup> Stun guns are too new and too rare for that. There is no stun gun culture in which people remember their fathers taking them out to the woods to Taser a deer. There is no stun gun hunting, target shooting, or collecting that makes people want to protect stun gun possession even when they feel little need to have stun guns for self-defense.

Relatedly, because irritant sprays and stun guns are fairly uncommon compared to guns, legislatures sometimes partly deregulate guns without giving much thought to other weapons. Consider, for instance, state laws that allow pretty much any law-abiding adult to get a license to carry a concealed firearm,<sup>42</sup> or preempt local laws that ban firearms.<sup>43</sup> Many such laws cover only firearms, but probably not because of a considered judgment that stun guns or irritant sprays are more dangerous than firearms. Rather, supporters of gun rights argued for protecting the right to defend oneself with a gun, and no one was arguing for—or likely even thinking about—the right to defend oneself with nonlethal weapons.

Moreover, the state stun gun bans date back to the years from 1976 to 1990, before Taser International started widely marketing guns to the public.<sup>44</sup>

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41. See Jacobs, *supra* note 14, at 144-45 (offering a similar explanation for why personal tear gas sprays are more regulated than handguns in some jurisdictions).

42. See Steven W. Kranz, *A Survey of State Conceal and Carry Statutes*, 29 *HAMLIN L. REV.* 637, 639 n.15, 646-47 (2006) (discussing the movement towards such "shall-issue" licensing).

43. Consider, for instance, WARREN, OHIO, CODIFIED ORDINANCES § 549.11(a) (2008), which bans possession of firearms or stun guns within 1000 feet of a school, with no exception for people who live or work within that radius. OHIO REV. CODE ANN. § 9.68 (West 2009) preempts local firearms regulation, and thus preempts the Warren ordinance as to firearms. But the ordinance remains in effect for stun guns.

44. See Act effective June 13, 1988, ch. 275, § 134-16, 1988 Haw. Sess. Laws 510, 516; Act of July 10, 1986, ch. 212, 1986 Mass. Acts 456; Act effective July 1, 1976, No.

At the time, stun guns may have seemed like exotic weapons that were rarely used for self-defense by law-abiding citizens. It was thus easy to ignore the effect of stun gun bans on self-defense, even in states whose laws reflected the potential value of firearms for self-defense.<sup>45</sup> But today stun guns are practically viable self-defense weapons, owned by nearly 200,000 civilians. The self-defense interests of prospective stun gun owners and of prospective irritant spray owners ought not be ignored.

Much of this, of course, is speculation. There are no available data about how often stun guns or irritant sprays are used either criminally or defensively. The Uniform Crime Reports, our best source on crimes reported to the police, doesn't provide a category for such crime.<sup>46</sup> Neither does the National Crime Victimization Survey, our best estimate of all crimes, whether or not reported to the police.<sup>47</sup> Neither does the Centers for Disease Control's WISQARS Fatal Injury Reports and Nonfatal Injury Reports query system.<sup>48</sup> So speculation is all we have, and it's all that the legislatures that banned stun guns or irritant sprays had.

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106, § 1, 1976 Mich. Pub. Acts 225, 225; Act of Nov. 12, 1985, ch. 360, 1985 N.J. Laws 1488; Act effective Nov. 1, 1990, ch. 264, 1990 N.Y. Laws 761; Act of June 27, 1985, ch. 310, 1985 R.I. Pub. Laws 701; Laws of 1981, ch. 348, 1981 Wis. Sess. Laws 1456; Neil Davison, *The Development of "Non-Lethal" Weapons During the 1990's* 22 (Bradford Non-Lethal Weapons Research Project, Occasional Paper No. 2, 2007), available at [http://www.brad.ac.uk/acad/nlw/research\\_reports/docs/BNLWRP\\_OP2\\_Mar07.pdf](http://www.brad.ac.uk/acad/nlw/research_reports/docs/BNLWRP_OP2_Mar07.pdf) (noting Taser's move into the civilian market in the mid-1990s).

In the 1970s, the first Tasers used gunpowder to fire their barbs; this made them firearms, and thus subject to heavy regulation. *See, e.g.*, A.T.F.R. 76-6, Mar. 18, 1976; 58 Cal. Op. Att'y. Gen. 777, 779 (1975) (concluding that such a gunpowder-using Taser was a concealable firearm under California law); 76 Fla. Op. Att'y. Gen. 78, 78-79 (1976) (likewise); 61 Md. Att'y. Gen. Op. 647, 654 (1976) (likewise); La. Op. Att'y Gen. No. 1207 (Sept. 27, 1984) (likewise); 1977 S.C. Op. Att'y. Gen. 287 (1977), 1977 WL 24698 (likewise suggesting that a stun gun would qualify as a firearm if it uses gunpowder); 1984 S.C. AG LEXIS 73 (so concluding). Tasers became a viable consumer product only once they shifted from gunpowder to a compressed nitrogen firing system..

45. *See, e.g.*, 76 Pa. Op. Att'y Gen. 40, 41-42 (1976) (concluding that a stun gun is an "implement for the infliction of serious bodily injury which serves no common lawful purpose" because it is a "weapon[] having no peaceful purpose, whose only conceivable use is for purposes which our society has found to be criminal," without mentioning the possibility of self-defense as a potential "common lawful purpose").

46. *See* CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, U.S. DEP'T OF JUSTICE, NATIONAL INCIDENT-BASED REPORTING SYSTEM, VOLUME 1: DATA COLLECTION GUIDELINES 80-81 (2000), available at <http://www.fbi.gov/ucr/nibrs/manuals/v1all.pdf> (listing possible values for the "Type Weapon/Force Involved" field, and not having a separate entry for stun guns or for irritant sprays).

47. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES, at tbl. 66 (2008).

48. *See* National Center for Injury Prevention and Control, Centers for Disease Control, WISQARS Injury Mortality Reports, 1999-2006 (May 01, 2009), [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html); National Center for Injury Prevention and Control, Centers for Disease Control, WISQARS Nonfatal Injury Reports (Sept. 30, 2008), <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>.

But for the reasons I mentioned above, I think such speculation strongly points towards the choice selected by forty-three states (minus a few cities) for stun guns and by all states (minus some restrictions in a few states) for sprays:<sup>49</sup> allowing stun gun and irritant spray possession, and criminalizing only misuse.<sup>50</sup> This is especially so given the value of self-defense, a value that, as Part IV discusses, is constitutionally recognized. (Irritant sprays and stun guns are largely banned in other English-speaking Western countries—England, Canada, New Zealand, and much of Australia<sup>51</sup>—but this seems to be part of those countries’ generally more restrictive view of self-defense rights.<sup>52</sup>) And it is especially so given the value of freedom more broadly. If there is uncertainty, we should resolve this uncertainty in favor of letting law-abiding people use nonlethal tools to defend themselves and their families.

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49. Some states and the District of Columbia did prohibit even home possession of irritant sprays until recently, but those state-wide bans have been repealed. *See, e.g.*, Act effective Jan. 1, 1977, ch. 1340, § 2, 1976 Cal. Stat. 6078, 6079; Legalization of Self-Defense Sprays Amendment Act of 1992, No. 9-382, 1992 D.C. Sess. Law Serv. (West); Act of May 28, 1981, ch. 283, § 2, 1981 Minn. Laws 1295, 1296; Act of Nov. 1, 1996, ch. 354, § 4, 1996 N.Y. Laws (McKinney); Act of July 18, 1978, No. 603, 1978 S.C. Acts 1757; Act of Dec. 24, 1993, No. 91, 1993 Wis. Legis. Serv. (West).

50. *See, e.g.*, CAL. PENAL CODE § 244.5 (2009) (imposing extra punishment for stun gun crimes); FLA. STAT. § 790.10 (2009) (banning the threatening and unjustified brandishing of stun guns).

51. Australian Capital Territory Firearms Amendment Act, 2008, § 82, sched. 1, pt. 1.4(4)-(6) (Austl.); Western Australia Weapons Act, 1999, §§ 6, 10 (Austl.); New South Wales Weapons Prohibition Act, 1998, sched. 1, §§ 2(18), (22)-(23) (Austl.); Australian Capital Territory Firearms Act, 1996, §§ 5-10 (Austl.); Australian Capital Territory Prohibited Weapons Act, 1996, § 5 (Austl.); Tasmania Firearms Act, 1996, §§ 3, 9 (Austl.); Queensland Weapons Act, 1990, §§ 35, 50 (Austl.); South Australia Summary Offences Act, 1953, § 15 (Austl.); R.S.C., ch. C 46, § 84 (1985) (Can.) (definition of “prohibited weapon”); Firearms Act, 1968, c. 27, § 5(1)(b) (Eng.); *Regina v. Harding*, [2007] EWCA (Crim) 2634, [12] (Eng.); Arms Act 1983, 1983 S.N.Z. No. 44 § 4 (N.Z.); Northern Territory Weapons Control Regulations, 2009, sched. 2, §§ 17-19 (Austl.); Tasmanian Firearms Regulations, 2006, reg. 5A (Austl.) (stun guns only); Victoria Control of Weapons Regulations, 2000, sched. 2(20)-(22) (Austl.); South Australia Summary Offences Regulations, 2000, sched. 1, §§ 6-7 (Austl.); Western Australia Weapons Regulations, 1999, sched. 1(8) & regs. 4, 7 (Austl.) (stun guns only); Queensland Weapons Categories Regulation, 1997, § 8(d)-(f) (Austl.); Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted SOR/1998-462, sched. 3¶ 1(a)-(b) (Can.); Arms (Restricted Weapons and Specially Dangerous Airguns) Order 1984, 1984 S.R. No. 122, Sched. Weapons declared restricted weapons ¶¶ 8-9 (N.Z.).

52. *See, e.g.*, DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* 59-256 (1992) (discussing all four countries); JOYCE LEE MALCOLM, *GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE* 213-16 (2002) (discussing England).

B. *Laws That Ban Both Possession or Carrying of Stun Guns and of Handguns (and Sometimes of Irritant Sprays)*

In ten states, as well as the stun-gun-banning federal enclaves of Washington, D.C. and the Virgin Islands, even law-abiding adults generally can't get licenses to carry concealed handguns.<sup>53</sup> In most states, 18-to-20-year-olds generally can't get such licenses.<sup>54</sup> And nearly all the jurisdictions that generally restrict concealed carry of firearms also ban public carrying of stun guns,<sup>55</sup> as do some of the jurisdictions that ban concealed carry of firearms by 18-to-20-year-olds.<sup>56</sup>

Law-abiding citizens in those states are therefore denied the ability to carry in public what are for many people the most effective defensive weapons.<sup>57</sup>

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53. The states are California, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, Rhode Island, and Wisconsin, where concealed carry permits are never issued, rarely issued, or issued in the discretion of local law enforcement, with the exercise of this discretion varying widely from place to place. In Alabama, Connecticut, and Iowa, concealed carry permits are available in the discretion of law enforcement, but law enforcement has a reputation for issuing them to almost all eligible applicants. David B. Kopel, *Pacifist-Aggressives vs. the Second Amendment: An Analysis of Modern Philosophies of Compulsory Non-Violence*, 3 CHARLESTON L. REV. 1, 11 n.38 (2008). In the remaining thirty-seven states, concealed carry permits are available as a matter of right to pretty much all law-abiding adults (or, in Alaska and Vermont, are unnecessary because people can carry handguns concealed even without a permit). See Kranz, *supra* note 42 (discussing all the laws in effect as of the start of 2006); KAN. STAT. ANN. § 75-7c03 (2008) (a concealed carry statute enacted after the Kranz article was published); NEB. REV. STAT. § 69-2430 (2008) (same).

54. See Kranz, *supra* note 42, at 653.

55. See *infra* Appendix II. The exceptions are California, Delaware (outside the Wilmington area), and Maryland (outside the Annapolis/Baltimore area).

56. The major jurisdictions that ban both concealed carrying of handguns in public by 18-to-20-year-olds and possession or carrying of stun guns by 18-to-20-year-olds are Connecticut, Michigan, Akron, New Orleans, Oklahoma City, Philadelphia, and probably the rest of Oklahoma. See 430 ILL. COMP. STAT. ANN. §§ 65/2(a)(1), 65/4 (banning carrying of stun guns, as well as possession of stun guns, if the under-21-year-old can't get a parent's permission, or if both parents are dead, felons, or nonimmigrant aliens); AKRON, OHIO, CODIFIED ORDINANCES §§ 137.01.7, 137.06.C.2 (banning possession of stun guns by under-21-year-olds); MERIDIAN, MISS., CODE OF ORDINANCES § 16-43 (banning giving deadly weapons to "minor[s]," with "minor" defined by MISS. CODE ANN. § 45-9-101 as "any person . . . under twenty-one years of age," and "deadly weapon" treated by state law as covering stun guns, as in *Al-Fatah v. State*, 916 So. 2d 584, 589-90 & nn.1-2 (Miss. Ct. App. 2005)); UNIVERSITY HEIGHTS, OHIO, CODIFIED ORDINANCES §§ 632.04(a), (d)(2) (banning possession of stun guns by under 21-year-olds); DRUMRIGHT, OKLA., CITY CODE § 5-1C-1.B.3 (banning possession of "any . . . weapon" by under-21-year-olds); *infra* Appendices II.A.1 & II.B.1 (noting total bans on possession or carrying of stun guns in Connecticut, Illinois, Michigan, New Orleans, Oklahoma City, Philadelphia, and probably the rest of Oklahoma); Kranz, *supra* note **Error! Bookmark not defined.** (noting unavailability of concealed handgun carry licenses to under-21-year-olds in all these jurisdictions).

57. Wisconsin does allow open carrying, so in theory people could walk around with handguns holstered on their hips, though they couldn't have stun guns. But as the Wisconsin Supreme Court has acknowledged, there are huge social pressures against open carrying of deadly weapons. See *infra* note 95 and accompanying text; Eugene Volokh, *Implementing*

And even when this burden is limited to 18-to-20-year-olds, it remains grave, partly because 18-to-20-year-old women need defensive weapons even more than most adults do: the average 18-to-24-year-old woman's risk of being raped is five times greater than the risk for the average woman age 25 and above.<sup>58</sup>

On top of that, noncitizens in Massachusetts are denied not only handguns and stun guns but also irritant sprays.<sup>59</sup> Everyone in some Chicago suburbs and some other Illinois towns is denied all three kinds of weapons in public places; everyone in Chicago and in Milwaukee County is denied the right to carry any of these weapons concealed in public.<sup>60</sup>

Legislatures that ban carrying both stun guns and handguns (and in some places even irritant sprays) can at least say they are worried about the criminal uses of weapons generally, not just about the rare situations where a stun gun or irritant spray would be misused but a handgun would not be. And indeed stun guns can be used both for crime and for self-defense.

But this is likewise true for the criminal law justification of self-defense: allowing lethal self-defense lets some murderers get away with their crimes by falsely claiming self-defense. The killer is alive and able to claim he was reacting to a threat from the victim. The victim is dead and can't rebut the killer's claim. The killer doesn't have to prove the victim had a weapon, since it is enough for him to claim that the victim said something threatening and reached for his pocket. And the prosecution has to disprove the killer's claims beyond a reasonable doubt.<sup>61</sup>

Sometimes the jury will see through the killer's false claims of self-defense and conclude the claims are false beyond a reasonable doubt. But sometimes it won't, and the killer will be acquitted. And sometimes a killer will be emboldened to kill by the possibility that he might get away on a self-defense theory.

Of course, the self-defense defense is a metaphorical weapon that can be used both by law-abiding citizens who are genuinely defending themselves and by criminals who are trying to cover their offensive attack. Stun guns are real weapons. But that the self-defense defense is like a weapon in that it is crime-

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

58. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUVENILE VICTIMIZATION AND OFFENDING, 1993-2003, at 4 tbl. 7 (2001-03 data).

59. MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B(1)(vii) (West 2009).

60. See Appendix II. See also AURORA, ILL., CODE OF ORDINANCES § 29-43(a)(12) (2008), which bars carrying of all three kinds of weapons within 1000 feet of a school or public park, with no exemptions for people who are going to or from their homes or workplaces that are within this radius.

61. That is the law in all states except Ohio, in which the prosecution need merely disprove them by a preponderance of the evidence. See *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (noting that in 1987, only Ohio and South Carolina had such a rule); *State v. Bellamy*, 359 S.E.2d 63, 64-65 (S.C. 1987) (retreating from this rule), *overruled on other grounds* by *State v. Torrence*, 406 S.E.2d 315 (S.C. 1991).

enabling as well as defense-enabling—and yet it still allowed, and rightly so.

Irritant sprays are likewise crime-enabling as well as defense-enabling; yet they are now legal nearly everywhere in the United States, with the narrow exceptions noted above, even though they are indeed sometimes used by criminals.<sup>62</sup> The same is true of the skills taught in fighting classes, whether the classes focus on street fighting (such as Krav Maga), Asian martial arts, or boxing.<sup>63</sup> Someone trained in these things can use the skills for crime—whether robbing someone or just beating someone up—as well as for lawful self-defense. (Some of the classes also provide physical fitness and recreation, but some, such as Krav Maga, are focused chiefly on self-defense.) Yet these classes are not only lawful, but generally seen as socially valuable.

Among other things, we expect that criminals will already have plenty of tools, often deadly tools such as guns and knives, for committing crimes. The marginal benefit to criminals of fighting skills is thus comparatively small. But the marginal benefit to law-abiding citizens of such skills is quite large, especially if the citizens are barred by law from carrying deadly weapons.

Stun guns and irritant sprays are in this respect much like fighting skills. Such weapons might be more effective than mere unarmed combat for committing crimes. But they are likewise more effective for self-defense. And for some people—such as the weak, the disabled, or those whose work or family commitments keep them from taking classes—unarmed self-defense is just not much of an option, while stun guns are.

Stun guns and irritant sprays should therefore be legal. The law rightly values self-defense, which should include effective self-defense. Nonlethal defensive weapons dramatically facilitate self-defense. They also facilitate crime, but comparatively slightly (again, because criminals have access to many other tools, both highly deadly, such as guns and knives, and less deadly, such as blunt weapons), and at a lower level of harm than lethal weapons such as guns and knives. The protection nonlethal weapons offer to law-abiding citizens should justify allowing such weapons, despite the modest risk of crime they pose.

#### IV. CONSTITUTIONAL OBJECTIONS TO NONLETHAL WEAPON BANS

The arguments in favor of allowing stun guns and irritant sprays aren't solely policy arguments. They are also constitutional arguments, under the federal and state constitutional rights to keep and bear arms and under the right to defend life that is secured by many state constitutions.<sup>64</sup>

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62. See, e.g., Thadeus Greenon, *A Pepper Spray Bandit?*, *TIMES-STANDARD* (Eureka, Cal.), May 9, 2008 (reporting three robberies that used pepper spray).

63. According to 2003 data, "An estimated 5 percent of adults say they participated in martial arts last year at least once, and a quarter of those (28 percent) say they do martial arts 'every chance they get.'" John Fetto, *Hi-Yah!*, *AMERICAN DEMOGRAPHICS*, May 2003, at 4.

64. Laws that restrict possession, carrying, or concealed carrying by foreign citizens

*A. The Right To Keep and Bear Arms in Self-Defense*

To begin with, let us consider the right to keep and bear arms in self-defense. This right is secured by at least 40 state constitutions, including those of many states that restrict stun guns or irritant sprays.<sup>65</sup> To quote the Michigan provision, for instance, “Every person has a right to keep and bear arms for the defense of himself and the state.”<sup>66</sup>

In federal enclaves, such as D.C., this right is secured by the Second Amendment. In the Virgin Islands, it is secured by the Virgin Islands Bill of Rights, which incorporates the Second Amendment.<sup>67</sup> And if the Court

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and out-of-state-residents likely also violate the Equal Protection Clause, *see Bernal v. Fainter*, 467 U.S. 216 (1984), and the Privileges and Immunities Clause of Article IV, *see Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Volokh, *supra* note 60, at 1515 n.303, cites further sources as to gun controls that discriminate against noncitizens, including cases going both ways on whether such restrictions are unconstitutional.

For bans on possession of stun guns and pepper sprays by foreign citizens, see 430 ILL. COMP. STAT. ANN. §§ 65/2(a)(1), 65/4(a)(2)(xi) (2008) (banning possession of stun guns by nonimmigrant aliens, a group that includes many legal, long-term visitors, students, and workers; CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE §§ 4-12.01, -18.01, -20.08 (2009); 8 C.F.R. § 214.2(H)(4)(ii) (2009)); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B(1)(vii), 129C (2009) (banning possession of pepper spray by noncitizens). For bans on concealed carrying by foreign citizens, see the Montana and New Mexico statutes and Oregon city ordinance cited in note 151. For a statute providing that citizens are entitled to licenses that would let them carry stun guns, but noncitizen licenses are to be issued at the police department’s discretion, see IND. CODE ANN. §§ 35-47-2-1 to -3, 35-47-8-4 (2009). For a ban that on its face bans possession of irritant sprays by out-of-state residents, see MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B(1)(vii), 129C, but the law has nonetheless seemingly been read to allow out-of-state residents to get irritant sprays permits, *see* E-mail from Jason Guida, Director of the Firearms Record Bureau, Massachusetts Criminal History Systems Board to Robin Shofner, July 17, 2009, 12:06 pm. For bans on concealed carrying of stun guns and irritant sprays by out-of-state residents, see the Montana, New Mexico, West Virginia, Wyoming, and Oregon city laws cited in note 151153, as well as the Mississippi (stun guns only) law cited in note 151. All the discriminatory concealed carry bans I cite here stem from (1) state or local requirements of a firearms license to carry concealed stun guns or irritant sprays, and (2) the unavailability of such licenses to foreign citizens or out-of-state residents in those jurisdictions, *see* Kranz, *supra* note **Error! Bookmark not defined.**

The state constitutional right-to-bear-arms analysis below might not apply to restrictions on noncitizens in those states where the constitutional right only covers citizens (including in Illinois and New Mexico, *see* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 196, 200 (2006)). But the Equal Protection Clause argument should prevail everywhere.

65. *See* Volokh, *supra* note 64. The exceptions are California, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New York, possibly Hawaii and Virginia, and Kansas, though Kansas is likely to enact an individual right to bear arms provision in 2010. *See* Volokh, *supra* note 57, at 1445 n.2.

66. MICH. CONST. art. I, § 6.

67. *See* 48 U.S.C.A § 1561 (West 2009). *United States v. Lewis*, No. 2008-45, 2008 WL 5412013 (D.V.I. Dec. 24, 2008), reasons that an individual right to bear arms in self-defense nonetheless doesn’t apply to the Virgin Islands, but I think that’s mistaken for reasons discussed in Eugene Volokh, *Statutory Rights To Bear Arms: New York, Guam, and*

concludes that the Second Amendment is incorporated via the Fourteenth Amendment,<sup>68</sup> then the right to keep and bear arms in self-defense would be secured throughout the nation even against state and local laws.

As I suggest elsewhere,<sup>69</sup> there are four kinds of possible justifications that would make particular weapon control laws constitutional notwithstanding a right to bear arms in self-defense: (1) The law might restrict activity that is *outside the scope* of the right, as defined by the text, original meaning, tradition, or background legal principles. (2) The law might *not substantially burden* the ability to defend oneself using arms. (3) The law might be justified because it *materially reduces a sort of danger* that is greater than the danger that normally attends exercise of the right. (4) The law might be justified because the government is controlling behavior *on or using its own property*.

The government-as-proprietor justification arises for some of the restrictions—on possession in public housing, universities, dorm rooms, buses, and parks—and I speak more about those in Parts VI and VII. The substantial burden and reducing danger arguments are covered in the policy discussion in Part III; those would apply equally to the constitutional argument I discuss here.<sup>70</sup> The remaining questions have to do with what I’ve labeled scope arguments.

#### 1. *Are nonlethal weapons “arms”?*

The first question is whether stun guns and irritant sprays should be treated as “arms” for constitutional purposes. Such weapons were historically unknown when all but the most recent right-to-bear-arms provisions were enacted,<sup>71</sup> but *District of Columbia v. Heller* expressly rejected the view “that only those arms in existence in the 18th century are protected by the Second Amendment.”<sup>72</sup>

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*the Virgin Islands* (Oct. 26, 2009) (in progress, manuscript on file with the author).

68. *McDonald v. City of Chicago*, 77 U.S.L.W. 3691 (2009) (granting certiorari on this question).

69. Volokh, *supra* note 60, at 1446-47.

70. *Cf.* Lanning, *supra* note \*, at 28 (discussing the constitutionality of more modest burdens on nonlethal weapons, such as limits on the size of pepper spray containers).

71. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 214-17 (2006) (listing recently enacted or amendment right-to-bear-arms provisions, including ones in Louisiana, Nebraska, and Wisconsin, where there are state- or city-level bans on possession or concealed carrying of stun guns). *Cf.* *State v. Delgado*, 692 P.2d 610, 614 n.8 (Or. 1984) (applying Oregon’s highly history-focused right-to-bear-arms analysis, but noting that this “may not be the same analysis that would be appropriate to the application of Article I, section 27, of the Oregon Constitution to a weapon such as a can of mace, not having a pre-twentieth century form or counterpart,” and noting—but not responding to—the view that “it is incongruous to believe that a woman today to defend herself from a rapist would have constitutional sanction for carrying a switch-blade knife but not for the can of mace because the latter was unknown to the mid-nineteenth century”).

72. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (2008).

Instead, *Heller* held, “Just as the First Amendment protects modern forms of communications [such as the Internet], and the Fourth Amendment applies to modern forms of search [such as heat detection devices], the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”<sup>73</sup>

Some early courts concluded that right-to-bear-arms guarantees covered only weapons “usually employed in civilized warfare,”<sup>74</sup> distinguishing such protected arms from unprotected weapons that “are employed in quarrels and brawls and fights between maddened individuals.”<sup>75</sup> And stun guns and pepper spray of course aren’t usually employed in warfare.

But, as *Heller* pointed out in rejecting this civilized-warfare test,<sup>76</sup> “arms” in the late 1700s generally meant “weapons of offence, or armour of defence,”<sup>77</sup> or “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.”<sup>78</sup> This includes purely civilian defensive weapons, which makes sense given *Heller*’s holding that the right protects arms used for self-defense, and the relevant state constitutions’ protection of arms for self-defense. As the Florida Attorney General reasoned in concluding that the Florida right to bear arms covers stun guns, “the term [‘arms’] is generally defined as ‘anything that a man wears for his defense, or takes in his hands as a weapon.’”<sup>79</sup>

*Heller* does limit “arms” to weapons that are “of the kind in common use,” and excludes “weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>80</sup> Many state cases have used similar definitions.<sup>81</sup> But, as I argue elsewhere,<sup>82</sup> this definition arose in cases involving weapons that were seen as unusually dangerous, not unusually

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73. *Id.* at 2791-92.

74. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840); *Fife v. State*, 31 Ark. 455, 457 (1876) (quoting *Aymette*, 21 Tenn. (2 Hum.) at 158).

75. *Fife*, 31 Ark. at 457 (citing JOEL PRENTISS BISHOP, 2 COMMENTARIES ON THE CRIMINAL LAW § 124 (1868)).

76. 128 S. Ct. at 2815.

77. *Id.* at 2791 (quoting 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773)).

78. *Id.* (quoting 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771) (definition of “Armour or Arms”)).

79. 1986 Fla. Op. Att’y Gen. 2 (1986) (concluding that stun guns are protected by the state constitutional right to bear arms, which reserves regulation of arms to the legislature, and that therefore county-level regulation is unconstitutional). *See also* Christine Neuberger, *Stun Guns Barred*, THE CAPITAL (Annapolis, Md.), Sept. 4, 1985, at 29 (noting that “Opponents of the [Anne Arundel County stun gun] ban argued that it would encroach on a citizen’s constitutional right to bear arms,” including the right both to possess weapons and to carry them).

80. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815-16 (2008).

81. *See, e.g.*, *Burks v. State*, 36 S.W.2d 892, 894 (Tenn. 1931) (giving definition of protected “arms” as those of the type usually kept by citizens for personal defense).

82. Volokh, *supra* note 60, at 1481-83.

safe. *Heller* in fact reasons that the “limitation [to weapons of the kind in common use] is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’” which suggests that weapons that are less dangerous than protected ones (though still unusual) should be outside the limitation and thus constitutionally protected.<sup>83</sup>

Thus, the Oregon courts—and some other recent authorities—are right in concluding that weapons such as knives and billy clubs, which are less lethal than guns, should be considered arms alongside guns.<sup>84</sup> They are designed as

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83. *Heller*, 128 S. Ct. at 2817; *see also* Lerner & Lund, *supra* note 17, at 1411-12 (suggesting a different approach—“courts should adopt a presumption that civilians may employ self-defense technologies in widespread use by the police,” with the presumption being “rebuttable by sufficiently strong evidence that a particular device is suitable for police work but not for civilian use”). This rule would yield a similar result to the one I propose, since most police officers carry handguns much like those commonly owned by the public, coupled with less deadly weapons such as stun guns, irritant sprays, and batons.

84. *See, e.g.*, *State v. Delgado*, 692 P.2d 610, 610-612 (Or. 1984) (striking down ban on possessing and carrying switchblades); *State v. Blocker*, 630 P.2d 824, 824-825 (Or. 1981) (striking down ban on carrying billy clubs in public); *State v. Kessler*, 614 P.2d 94, 100 (Or. 1980) (striking down ban on possessing billy clubs); *Barnett v. State*, 695 P.2d 991, 991 (Or. Ct. App. 1985) (striking down ban on possessing blackjacks); *see also* *Hill v. State*, 53 Ga. 472, 475 (1874) (taking the view that “swords” and “bayonets” are protected because they are “ordinarily used in battle”); *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931) (suggesting that swords are protected because they are “usually relied upon by good citizens for defense or pleasure”); *City of Akron v. Rasdan*, 663 N.E.2d 947, 952 (Ohio Ct. App. 1995) (treating a ban on public carrying of knives as implicating the right to bear arms, though concluding the ban was a “reasonable regulation” and thus didn’t violate the constitutional provision); *Ex parte Thomas*, 97 P. 260, 263-265 (Okla. 1908) (taking the view that “swords” and “bayonets” are protected because they “are recognized in civilized warfare”); *Cockrum v. State*, 24 Tex. 394, 395 (1859) (taking the view that carrying a bowie knife is constitutionally protected); *City of Seattle v. Montana*, 919 P.2d 1218, 1222 (Wash. 1996) (noting but not resolving the question of whether knives are protected); *Concealed Handgun Permits*, 1994 Alaska Op. Att’y Gen. (Inf.) 209 (suggesting that the Alaska courts may adopt a position similar to that adopted by the Oregon courts, though not making a definitive prediction). *But see* *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921) (“[None of a] ‘bowie knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knucks or razor or other deadly weapon of like kind’ . . . except ‘pistol’ can be construed as coming within the meaning of the word ‘arms’ used in the constitutional guaranty of the right to bear arms.”).

Those decisions that reject constitutional protection for non-firearms tend to do so on the grounds that those weapons are customarily used for criminal purposes—a rationale that I argue against in the text below—and not on the grounds that “arms” necessarily covers only firearms. *Cf. Brown*, 235 N.W. at 246-47 (upholding a ban on, among other things, blackjacks, because they are “too dangerous to be kept in a settled community by individuals” and their “customary employment by individuals is to violate the law,” but concluding that the legislature may not ban arms which “by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property,” and stressing in the law’s defense that the law “does not include ordinary guns, *swords*, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure” (emphasis added)); *State v. Swanton*, 629 P.2d 98, 99 (Ariz. Ct. App. 1981) (holding that nunchakus are unprotected, because the right is limited to “such arms as are recognized in civilized warfare and not those used by a ruffian, brawler or assassin”).

weapons. They are useful as weapons for self-defense. And given that the Second Amendment and state rights to bear arms have been interpreted as protecting the right to have arms for self-defense, less lethal arms should be no less protected than more lethal arms (such as handguns). A fortiori, stun guns and irritant sprays should be protected as well. And this interpretation has the merit of following function, as I noted above: Stun guns and irritant sprays are indeed useful “arms” for “defense of [one]self.”<sup>85</sup>

Only one case expressly considers whether bans on such nonlethal weapons violate the right to bear arms, *People v. Smelter*,<sup>86</sup> and here is its entire analysis:

Third, defendant claims that the statute prohibiting the possession of stun guns impermissibly infringes on defendant’s right to keep and bear arms for his own defense. We disagree. Const. 1963, art. 1, § 6 provides:

“Every person has a right to keep and bear arms for the defense of himself and the state.”

The right to regulate weapons extends not only to the establishment of conditions under which weapons may be possessed, but allows the state to prohibit weapons whose customary employment by individuals is to violate the law. [*People v. Brown*, 235 N.W. 245 (Mich. 1931) (upholding a ban on carrying blackjacks).] The device seized from defendant was capable of generating 50,000 volts. Testimony in the lower court established that such weapons can not only temporarily incapacitate someone but can result in temporary paralysis. Our Supreme Court in *Brown* . . . explained that the power to regulate is subject to the limitation that its exercise be reasonable. We conclude that the Legislature’s prohibition of stun guns is reasonable and constitutional.<sup>87</sup>

The court appears to reason that stun guns’ “customary employment by individuals is to violate the law,” and that therefore the regulation is “reasonable.” Presumably the theory is similar to *Heller*’s view that the right to bear arms doesn’t protect “weapons not typically possessed by law-abiding citizens for lawful purposes.”<sup>88</sup>

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85. See, e.g., MICH. CONST. art. I, § 6 (1964) (“Every person has a right to keep and bear arms for the defense of himself and the state.”).

86. 437 N.W.2d 341, 342 (Mich. Ct. App. 1989). Compare, e.g., *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967) (rejecting a Second Amendment defense to a charge of illegal possession of a tear gas pen, but on the grounds that the Second Amendment didn’t apply to the states, and not considering any state constitutional right to keep and bear arms because the Nevada Constitution didn’t then have such a provision, see Volokh, *supra* note 64, at 199); Memorandum from Don Salm & Shaun Haas, Wisconsin Legislative Council Staff, to Senator Robert Wirch 11-12 (Feb. 5, 1998) (on file with author) (noting the question of whether stun guns would be covered by the then-proposed Wisconsin right-to-bear-arms amendment, without trying to answer it).

87. *Smelter*, 437 N.W.2d at 342; see also *State v. Delgado*, 692 P.2d 610, 614 n.8 (Or. 1984) (noting the view that “it is incongruous to believe that a woman today to defend herself from a rapist would have constitutional sanction for carrying a switch-blade knife but not for the can of mace because the latter was unknown to the mid-nineteenth century,” but not discussing it in detail because the case itself involved knives and not irritant sprays).

88. *Heller*, 128 S. Ct. at 2816.

But I know of no evidence that stun guns were customarily used to violate the law in the late 1980s; neither the *Smelter* opinion nor the briefs offer such evidence.<sup>89</sup> And it seems especially unlikely that there is any such evidence today. Stun guns and irritant sprays, like handguns and other weapons, are today used both by law-abiding citizens and by criminals. And stun guns and irritant sprays are especially useful to law-abiding citizens, precisely because law-abiding citizens are more likely to comply with bans on gun carrying, and will therefore need an alternative defensive weapon.

## 2. *Is concealed carrying covered by the right?*

*Heller* did note another limitation on the scope of the right to bear arms: “[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”<sup>90</sup> This wouldn’t affect the right to have stun guns at home, or to carry them openly.<sup>91</sup> But does it allow bans on concealed carry of stun guns and irritant sprays, as in Chicago, Fargo, Milwaukee, North Carolina (stun guns only), Omaha (stun guns only), and probably Seattle and some other states and cities?<sup>92</sup>

I think it shouldn’t. The concealed carry exception rests entirely on a tradition of upholding bans on concealed carry of guns and knives—but those bans were justified by the lethality of the weapons.<sup>93</sup> Even if it is proper to defer to longstanding legislative and judicial judgment in carving out exceptions from constitutional guarantees, there’s no reason to defer to a judgment that had never been made.<sup>94</sup> Nineteenth-century legislatures didn’t have to consider whether concealed carry of nonlethal weapons should be banned, and nineteenth-century courts didn’t have to consider whether restrictions on such nonlethal weapons were reasonable.

And banning concealed carry of stun guns is a substantial burden on people’s ability to defend themselves, though not as grave as a total carrying

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89. See Answer in Opposition to Application, *Smelter*, No. 100234 (Mich. Apr. 17, 1989); Application for Leave to Appeal, *Smelter*, No. 100234 (Mich. Mar. 14, 1989); Brief of Appellee, *Smelter*, No. 86-678412 (Mich. Ct. App. Feb. 24, 1988); Brief of Appellant, *Smelter*, No. 86-678412 (Mich. Ct. App. Nov. 10, 1987).

90. 128 S. Ct. at 2816.

91. For more on why the right to bear arms should be read as including the right to carry such guns outside the home, see Volokh, *supra* note 57, at 1516-21.

92. See Appendix II.C.

93. See, e.g., *State v. Reid*, 1 Ala. 612, 612-613 (1840) (upholding a law banning the concealed carrying of “deadly weapon[s]”); *Nunn v. State*, 1 Ga. 243, 246 (1846) (upholding the concealed carry ban and noting that the law “was passed to guard and protect the citizens of the State against the unwarrantable and too prevalent use of *deadly weapons*” (emphasis in original)); *Aymette v. State*, 21 Tenn. 154, 157 (1840) (noting state’s power to “protect our citizens[’] . . . lives from being endangered by desperadoes with concealed arms”).

94. I am indebted to my colleague Julian Eule for this line, which I heard him use a few years before his untimely death.

ban would be. Many people are understandably reluctant to openly carry stun guns, for fear of “frighten[ing] friends and customers” and passersby.<sup>95</sup> Moreover, many women’s clothes don’t readily offer places for stun guns or irritant sprays to be holstered—the logical place for many women to carry a stun gun or an irritant spray is inside a purse.

### B. *State Constitutional Rights to “Defend[] Life”*

Twenty-one state constitutions expressly secure a right to “defend[] life.”<sup>96</sup> To quote the Pennsylvania provision, to which the others are very similar, “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”<sup>97</sup>

The “defending life” and “protecting property” provisions have been read as securing a judicially enforceable right, including in many Ohio and Pennsylvania cases.<sup>98</sup> And it’s possible that the right to defend life is implicitly

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95. *State v. Hamdan*, 2003 WI 113, ¶ 73, 264 Wis. 2d 433, ¶ 73, 665 N.W.2d 785, ¶ 73, notes this as a burden imposed by bans on concealed carrying of handguns; but this is also true in considerable measure of stun guns, which many people might recognize as at least pain-inflicting weapons, and which some people might confuse for more dangerous weapons. *See also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958) (concluding, in a case where the Court found a First Amendment problem with the government’s forcing the NAACP to list its members, that “it is not sufficient to answer . . . that whatever repressive effect compulsory [self-identification may cause] follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the [law] that private action takes hold” (emphasis in original)).

<sup>96</sup> These include New Jersey, where stun guns are banned; Colorado, Delaware, North Dakota, Ohio, and Pennsylvania, which contain cities that ban stun guns; and Massachusetts, which bans stun guns and also bans pepper spray possession by foreign citizens. COLO. CONST. art. II, § 3; DEL. CONST. pmbl.; MASS. CONST. pt. I, art. I; N.J. CONST. art. I, para. 1; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 1; PA. CONST. art. I, § 1.

<sup>97</sup> PA. CONST. art. I, § 1.

<sup>98</sup> *See* Douglass v. Stephens, 1 Del. Ch. 465, 469 (1821) (Ridgely, Ch., dictum) (“The right of enjoying and defending life consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and in resisting, even to the commission of homicide, where such resistance is necessary to save one’s own life.”); JOHN HOLMES, THE STATESMAN, OR PRINCIPLES OF LEGISLATION AND LAW 179, 181 (Augusta, Severance & Dorr 1840) (treating the Maine Constitution’s “defending life” provision as securing a legally protected right to self-defense); TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 198 (Philadelphia, P.H. Nicklin & T. Johnson 1837) (discussing “defending life” provisions more broadly); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 35-36 (Boston, Little, Brown 1868) (enumerating the right “of . . . defending life” provisions as being related to the “fundamental rights of the citizen,” alongside provisions securing free speech, religious freedom provisions, freedom from unreasonable searches and seizures, and the like); Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 408-12 (2007) (citing more than twenty more recent cases from

guaranteed by the federal Due Process Clause or the Ninth Amendment.<sup>99</sup>

For the reasons discussed in Part II, nonlethal weapon bans substantially burden people's right to "defend[] life and liberty," because they take away a device without which defending life and liberty becomes much harder.<sup>100</sup> And as with other constitutional rights, such a substantial burden should be treated as presumptively unconstitutional.<sup>101</sup>

Contraceptive bans, for instance, remain substantial burdens on people's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,"<sup>102</sup> even though they leave people free to try to control conception by using the rhythm method. The right to control one's reproduction is implicated not just by overt prohibitions on begetting or not begetting a child, such as the mandatory sterilization at issue in *Skinner v. Oklahoma*.<sup>103</sup> It is also implicated by bans on devices that are especially useful for avoiding pregnancy, since such bans substantially burden the exercise of the right to control reproduction. The same logic should apply to bans on those devices that are especially effective at defending life.

Likewise, the freedom of speech includes the freedom to use physical devices, such as telephones, the Internet,<sup>104</sup> loudspeakers,<sup>105</sup> and the like in order to speak, because they too are important devices for making speech effective.<sup>106</sup> And, similarly, the right to defend property—a close cousin of the

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the 1900s and early 2000s). I've found only one decision, *State v. Carruth*, 81 A. 922, 923 (Vt. 1911), concluding that an expressly mentioned "defense of property" right is not judicially enforceable.

99. See Nicholas J. Johnson, *Self Defense?*, 2 J.L. ECON. & POL'Y 187 (2006); Nelson Lund, *A Constitutional Right to Self Defense?*, 2 J.L. ECON. & POL'Y 213 (2006); Volokh, *supra* note 100, at 415-18; see also WALKER, *supra* note 98, at 179, 198 (treating the express "defending life" provisions as being declaratory of broader principles that are "guaranteed by the constitution").

100. See Lanning, *supra* note \*, at 39-40 (making a similar argument).

101. I discuss this in much more detail in Eugene Volokh, *Facilitative Constitutional Rights* (Apr. 14, 2009) (unpublished manuscript, on file with the author).

102. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

103. 316 U.S. 535 (1942), *cited in Eisenstadt*, 405 U.S. at 453-54.

104. See *Reno v. ACLU*, 521 U.S. 844 (1997).

105. See *Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 211-12 (2d Cir. 2001) (striking down content-neutral ban on the use of sound amplification equipment); *Lilly v. City of Salida*, 192 F. Supp. 2d 1191, 1194 (D. Colo. 2002) (likewise); *Daley v. City of Sarasota*, 752 So. 2d 124, 125 (Fla. Dist. Ct. App. 2000) (likewise); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 802 (1989) (upholding such a ban but only after applying standard First Amendment scrutiny, and stressing that the law "[le]ft open ample alternative channels of communication," including the use of amplified sound with some "regulat[ion of] the extent of amplification"); *Service Employees International Union v. City of Houston*, 542 F. Supp. 2d 617, 630, 633-34 (S.D. Tex. 2008) (holding likewise as to noise control ordinance that applied to a wide range of noisy activity and not just to amplified speech).

106. See, e.g., *U.S. Labor Party v. Pomerleau*, 557 F.2d 410, 412 (4th Cir. 1977).

right to defend life—has been read by courts to include the right to use devices to kill wild animals that have been destroying one’s property.<sup>107</sup> No one suggests that the right to defend property lets one defend one’s crops against moose, but only with one’s bare hands, just as no-one suggests that the right to control one’s reproduction protects only device-free contraceptive techniques and not condoms. The right to defend life should similarly be interpreted as presumptively including the right to use those devices needed to make self-defense especially effective.

More broadly, courts have routinely recognized that various rights are unconstitutionally burdened when laws ban behavior that is needed to exercise those rights effectively. The freedom of speech presumptively protects the freedom to associate for expressive purposes, precisely because association is an important device for making speech effective.<sup>108</sup> The freedom of speech presumptively protects the freedom to spend money in order to speak, because spending money is an important device for making speech effective.<sup>109</sup>

Likewise, the right to hire a lawyer, the right to educate one’s children, and the right to get contraceptives or an abortion also presumptively protect the freedom to spend money to exercise the right.<sup>110</sup> Just as “the right to counsel is the right to the effective assistance of counsel,”<sup>111</sup> so other rights are the rights to more than just *some* opportunity to speak, to choose not to beget children, to educate one’s child, or to defend life. They are the rights to do so effectively—to be presumptively free of substantial burdens on the right, burdens that materially interfere with the right holder’s ability to accomplish the purpose for

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107. See, e.g., most of the cases noted in Volokh, *supra* note 98. Thus, for instance, *Commonwealth v. Stitler*, 22 Pa. D. & C.2d 240, 246-47 (Ct. Com. Pl. 1960), held that a law requiring that wild animals be killed with a .25 caliber rifle violated the right to defend property, when the animals were destroying the defendant’s crops and when the only weapon the defendant owned was a .22 caliber rifle. A fortiori, a law barring the use of all devices for protecting property would have been unconstitutional as well. Likewise, *State v. Thompson*, 563 S.E.2d 325 (S.C. 2002), held that the right to defense of property was implicated by a ban on trapping furbearing animals out of season, when those animals were endangering the defendant’s crops. The court concluded that the law was a “reasonable limitation,” but only because it “allow[ed] a property owner to trap without a permit within 100 yards of her home,” and allowed for the issuance of special trapping permits when there was evidence that an animal was indeed endangering property. *Id.* at 328.

108. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

109. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 416 (1988) (striking down a Colorado law against paying people to circulate initiative petitions).

110. See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (noting that “the Government [does not] deny that the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire”). For more on the spending of money to exercise constitutional rights, see Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1835-37 (2007).

111. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); Victoria Dorfman & Michael Koltonyuk, Note, *When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel*, 3 TEX. REV. L. & POL. 381 (1999).

which the right is secured.

Of course, these rights are not unlimited in scope. For instance, the right to speak might not include the right to use loudspeakers that are excessively distracting (for instance, when they're used at night or are too loud).<sup>112</sup> Likewise, the right to spend money to speak may sometimes be trumped by compelling interests in preventing quid pro quo corruption.<sup>113</sup>

Similarly, one can argue that the right to defend life does not include the right to possess deadly weapons, because those weapons pose special dangers of death well beyond the dangers inherently posed by recognizing self-defense as a defense to a charge of homicide. A court may conclude that such a dangerous right must be expressly secured through a right-to-bear-arms provision, rather than implicitly found in a provision protecting defense of life or liberty.<sup>114</sup>

But when it comes to nonlethal weapons, the extra danger of crime posed by their possession is not particularly great, and the burden on the right to defend life posed by bans on nonlethal weapons is great indeed.<sup>115</sup> So the general principle outlined above should apply: The right to defend life should include the right to possess the nonlethal weapons needed for effective self-defense, much as other rights include the right to possess and use similar devices needed to effectively exercise those rights.

## V. BANS ON POSSESSION BY FELONS

Felons are generally barred from owning or carrying a firearm.<sup>116</sup> Several states—plus of course the general no-stun-gun jurisdictions—add to this a ban on felons' possessing stun guns.<sup>117</sup> Some other jurisdictions bar felons from possessing irritant sprays.<sup>118</sup> Florida, Massachusetts, Minnesota, New Jersey,

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112. *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989); *Kovacs v. Cooper*, 336 U.S. 77, 82-83 (1949).

113. *See Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976).

114. *See Kasler v. Lockyer*, 2 P.3d 581, 585-86 (Cal. 2000); *In re Depasquale*, 2007 WL 1827219, at \*3 (N.J. Super. Ct. App. Div. June 27, 2007).

115. *See supra* Parts II and III.

116. 18 U.S.C. § 922(g)(1) (2006).

117. CONN. GEN. STAT. § 53a-217(a)(1) (2009); IDAHO CODE ANN. § 18-3325(1)(b) (West 2009); NEV. REV. STAT. § 202.357(2)(a) (2007); N.H. REV. STAT. ANN. § 159:21 (West 2009); PA. CONSOL. STAT. §§ 908.1(c), 6105 (2009) (mostly limited to people convicted of drug crimes and violent crimes, but including some thefts, some receipt of stolen property crimes, and repeated driving under the influence); COUNCIL BLUFFS, IOWA, MUN. CODE §§ 8.75.010(d)-.020 (2009) (any item “designed or hav[ing] been modified so as to be capable of causing bodily injury”); UNIVERSITY HEIGHTS, OHIO, CODIFIED ORDINANCES § 632.02(c) (2009); *see also* VA. CODE ANN. § 18.2-308.2(A) (West 2009) (carrying in public); BLACK HAWK COUNTY, IOWA, COUNTY CODE §§ 3-4-5, -9(B) (2004) (likewise).

118. CAL. PENAL CODE § 12403.7(a) (West 2009). Nevada and North Carolina ban possession of tear gas by felons, but not of pepper spray. NEV. REV. STAT. ANN. §§ 202.370, .375, .380(2) (West 2007) (excluding substances “whose active ingredient is composed of

New York, Wisconsin, and Portland (Oregon) try to entirely disarm felons, by barring them from possessing both stun guns and irritant sprays as well as guns.<sup>119</sup> Mississippi, Montana, and probably Idaho, New Mexico, West Virginia, and Wyoming ban felons from carrying any of these weapons concealed in public.<sup>120</sup> And these laws may also make it legally risky for felons' spouses and other housemates to possess such weapons.<sup>121</sup>

Yet felons need self-defense tools, too. They may need self-defense tools more than the rest of us: being a felon dramatically hurts your career prospects, which means you'll likely have to live in a poorer and therefore on average more crime-ridden part of town.<sup>122</sup> And the legal bar on felons' possessing firearms makes stun guns and irritant sprays even more valuable to them.<sup>123</sup>

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natural substances or products derived from natural substances which cause no permanent injury through being vaporized or otherwise dispersed in the air," so that possession of pepper spray appears to be legal but possession of other sprays, such as tear gas, does not); N.C. GEN. STAT. ANN. § 14-401.6 (West 2009).

119. FLA. STAT. § 790.23 (2009); MASS. GEN. LAWS ch. 140, §§ 121, 129B(1)(i)-(ii), 129C (2009); MINN. STAT. §§ 624.731 subdiv. 3(b), 624.713 subdiv. 1(2) (2009) (any violent crime); N.J. STAT. ANN. §§ 2C:39-1(r)(4), -5(d), -6(i) (West 2009); N.Y. PENAL LAW §§ 265.01, .20(a)(14)(b)(ii), 270.05 (McKinney 2009); WIS. STAT. §§ 941.26(1)(b), (4)(a), (4)(L) (2009); PORTLAND, OR., CITY CODE § 14A.60.030(A)(3), (B)(7) (2009). The New Jersey statutes apply to felon possession of weapons "under circumstances not manifestly appropriate for such lawful uses as it may have," but *State v. Kelly*, 571 A.2d 1286, 1289, 1291-92 (N.J. 1990), interpreted this phrase as banning possession for general self-defense purposes.

120. These prohibitions are outgrowths of those states' banning concealed carrying of weapons (likely including stun guns and irritant sprays) except by people who have licenses to carry concealed firearms—licenses that are unavailable to felons. *See infra* note 151.

121. Those people might be unable to safely possess such weapons in their homes because of the possibility that their felon housemate will be seen as constructively possessing the weapon. *See, e.g.*, *United States v. Hadley*, 431 F.3d 484, 507 (6th Cir. 2005); *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995). There are limits on the constructive possession doctrine, for instance if the housemate keeps the weapon locked in a combination-locked safe. But such practices can substantially burden the housemate's ability to possess the weapon for self defense, both by making the weapons hard to access in an emergency and by increasing the cost. And this danger is especially serious in jurisdictions which allow criminal liability for aiding criminal conduct whenever the defendant *knowingly* aids another's conduct (here, knowingly aids the felon's constructive possession), without a further requirement that the defendant *purposefully* aid the conduct. *See Eugene Volokh, Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1174 n.295 (2005).

122. *See Jacobs, supra* note 14, at 150 (making a similar argument as to defensive irritant sprays); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES tbl.14 (2008) (reporting data that shows that robbery, assault, and rape victimization rates are much higher for poor people).

123. I do not discuss here restrictions on people who are potentially dangerous but have not been convicted of any crime, chiefly targets of domestic restraining orders, 18 PA. CONSOL. STAT. §§ 908.1(c), 6105(c)(6) (2009) (banning possession of stun guns), and those who are under indictment and on pretrial release, *see* N.D. R. CRIM. P. 46(a)(2)(H) (banning possession of stun guns). For more on those, especially as to the right to bear arms, *see Volokh, supra* note 57, at 1500-01, 1503-07.

Some felons have committed violent crimes that might make us reasonably worry that they are especially likely to misuse stun guns or irritant sprays, either deliberately or out of anger. But many felons have been convicted only of nonviolent crimes. And while most nonviolent felons have generally shown a willingness to disobey the law, it seems unlikely that this willingness will map into a substantially greater risk that they will violently misuse nonlethal weapons. This is especially so when the past felony is fraud, embezzlement, and similar crimes that are rarely accompanied by violence.<sup>124</sup>

It thus seems to me that at least nonviolent felons should generally be allowed to possess stun guns and irritant sprays,<sup>125</sup> just as they are allowed to possess them in most states.<sup>126</sup> The precise line between which felons are dangerous enough that we need to deny them nonlethal weapons and which are not might be hard to draw. But at least for many nonviolent felons, the case for denying felons the tools needed for effective self-defense seems quite weak.

And this policy judgment might also be constitutionally compelled, though the case for nonviolent felons' constitutional rights to possess nonlethal weapons is considerably weaker than for law-abiding citizens. *District of Columbia v. Heller* categorically asserted that the right to bear arms doesn't apply to felons, because of the "longstanding" tradition of excluding felons from the right.<sup>127</sup> State courts have generally taken the same view under state right-to-bear-arms provisions.<sup>128</sup> Yet this might not be the right rule where nonlethal weapons are involved.

Felons who have finished their sentences—as opposed to people who are still on parole or probation<sup>129</sup>—generally have the same constitutional rights as

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124. Even embezzlers may sometimes be tempted to kill, when someone is about to uncover their crime. But such a person is unlikely to misuse *nonlethal* weapons to avoid being caught again, because using a nonlethal weapon will generally only add to a criminal's punishment rather than making the criminal harder to catch, especially when the criminal has already been identified (which is likely the case for repeat-offender embezzlers or defrauders who are about to get arrested).

125. Even N.J. STAT. ANN. §§ 2C:39-1(r)(4), -7(a) (West 2009), one of the few statutes that bans pepper spray possession by some convicts, nonetheless limits the ban to people with convictions for violent crimes (the one exception being "escape," which could be nonviolent but is often violent and is generally seen as serious).

126. See Lanning, *supra* note \*, at 18-19 (making a similar argument).

127. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008). There's a debate about whether such a tradition was indeed longstanding, and there is good reason to think that the tradition—at least dating back beyond about eighty years ago—does not cover most nonviolent felonies. See, e.g., C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698-706 (2009); Don B. Kates & Clayton E. Cramer, *The Second Amendment: Scope and Criminological Considerations* 17-18, 20 (2008) (unpublished manuscript, available at [http://works.bepress.com/clayton\\_cramer/2/](http://works.bepress.com/clayton_cramer/2/)). Nonetheless, it seems practically unlikely that the Court will depart from *Heller*'s statement on this subject.

128. See, e.g., *State v. Hirsch*, 114 P.3d 1104, 1109-36 (Or. 2005) (making the argument, and citing cases from other states).

129. See, e.g., *Johnson v. State*, 659 N.E.2d 194, 198-200 (Ind. Ct. App. 1995).

ordinary citizens, except when they are expressly excluded from the constitutional right, as many states do with voting.<sup>130</sup> The possession of deadly weapons is the rare exception to this rule, and the tradition that supports this exception (on which the Supreme Court relied) likely stems from the weapons' deadliness. It's hard to see why this exception should likewise cover the possession of nonlethal weapons, especially by nonviolent felons who seem not to be much more likely than the ordinary citizen to abuse such nonlethal weapons.

Moreover, there is no case law holding that felons lack the right to defend life. A few cases have read the right to defend life as justifying even felons' picking up firearms in an emergency (though not possessing firearms in ordinary life, in expectation that they might eventually be needed).<sup>131</sup> So nonviolent felons' constitutional claims on this score can't be lightly dismissed.

## VI. BANS ON POSSESSION IN PUBLIC HOUSING, IN PUBLIC UNIVERSITIES, AND ON PUBLIC BUSES

### A. Policy

Some states, cities, and university systems ban stun guns or irritant sprays in public housing,<sup>132</sup> in public universities,<sup>133</sup> or on public buses.<sup>134</sup> But such

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130. Felons are disenfranchised in state elections because state constitutional rights to vote expressly exclude them or authorize their exclusion, not because of some implicit view that felons generally lose constitutional rights. Those felons are then also disenfranchised in federal elections because the federal right-to-vote provisions generally rely on state eligibility rules, U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII, and because the Fourteenth Amendment expressly approves of such disenfranchisement, U.S. CONST. amend. XIV, § 2; *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

131. *State v. Jordan*, No. L-85-092, 1985 WL 7616, at \*3 (Ohio Ct. App. Sept. 27, 1985); *State v. Hardy*, 397 N.E.2d 773, 776 (Ohio Ct. App. 1978); *see also State v. Fryer*, 627 N.E.2d 1065, 1070 (Ohio Ct. App. 1993) (explaining limits of the exception).

132. *See* 720 ILL. COMP. STAT. ANN. 5/24-1(a)(10) (West 2009) (stun guns, in public housing); AURORA, ILL., CODE OF ORDINANCES § 29-43(a)(12) (2009) (irritant sprays, in public housing); *see also* FLA. ADMIN. CODE ANN. r. 33-208.507(4)(d) (2009) (stun guns, in housing for prison staff and their family members); LA. ADMIN. CODE tit. 4, pt. VII, § 1729(B)(3)(c)(iv) (stun guns, in domestic violence shelters); LINCOLN, NEB., MUN. CODE § 9.36.140 (same); EVERETT, WASH., MUN. CODE § 41.090(J)(2)(k)(2) (2008) (all "weapons" in authorized homeless encampment on public land); KIRKLAND, WASH., ZONING CODE § 127.25(2)(k)(2) (2009) (same); SEATAC, WASH., MUN. CODE § 15.20.045(C)(7) (2008) (same). The Illinois, Florida, and Aurora laws allow the possession of certain types of firearms. Likewise, many bans on possession of firearms in government-owned buildings specifically exempt "any building used for public housing by private persons." *See, e.g.*, KY. REV. STAT. ANN. § 237.115(2) (West 2008) (mandating such exemptions); MO. ANN. STAT. § 571.107 (West 2009) (same).

133. *See, e.g.*, GA. CODE ANN. § 16-11-127.1 (West 2009) (stun guns); N.C. GEN. STAT. ANN. § 14-269.2(d) (West 2009) (stun guns); University of Illinois at Urbana-Champaign, Student Code 2009-2010 § 1-309, [http://admin.illinois.edu/policy/code/Full\\_Code\\_web.pdf](http://admin.illinois.edu/policy/code/Full_Code_web.pdf) (stun guns); Kansas Board of Regents, *Policy and Procedures Manual*,

bans also affect people when they are outside such government property.

Bans that apply to public housing or public university dorm rooms keep tenants from being able to defend themselves with nonlethal weapons anywhere: Because tenants can't possess the weapon at home, they have nowhere to keep it for when they have to go to work or to shop. Public housing complexes can avoid this by having weapons check stations at their entrances, but I suspect few complexes do this. And while tenants or students who have cars could keep the weapon in the car—assuming they're allowed to keep such weapons in the parking lot, or assuming they're willing to park outside the complex and walk unarmed from there—those who don't have cars lack that option.

Likewise, a ban on possessing nonlethal weapons while riding a public bus means that people who rely on public buses can't protect themselves with weapons anywhere other than within walking distance of home. The purpose of the ban might have been solely to keep weapons off buses, though it seems likely that criminals would not be much deterred by such a ban. But the effect, if people follow the law, is to disarm law-abiding bus riders much more broadly.

So these bans are in practice far broader than similar bans applicable to

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[http://www.kansasregents.org/download/aca\\_affairs/policymanual/062409\\_Policy\\_Manual\\_revised\\_links\\_2.pdf](http://www.kansasregents.org/download/aca_affairs/policymanual/062409_Policy_Manual_revised_links_2.pdf), at 69 (stun guns); University of Alaska, Fairbanks, *Resident Student Handbook 2009-2010*, <http://www.uaf.edu/reslife/documents/handbook.pdf>, at 13 (irritant sprays, apparently only as to possession in student housing); Central Arizona College, *2009-2010 College Catalog* 54, [http://www.centralaz.edu/Documents/catalogs/2009-2010\\_catalog\\_web.pdf](http://www.centralaz.edu/Documents/catalogs/2009-2010_catalog_web.pdf) (stun guns and irritant sprays); Indiana University, *Code of Student Rights, Responsibilities, and Conduct*, <http://www.indiana.edu/~iusa/code.pdf>, at 10, ¶ 15 (“dangerous article or substance”); University of Massachusetts, Dartmouth, *Frequently Asked Questions About Public Safety*, <http://www.umassd.edu/publicsafety/about/faq.cfm> (irritant sprays). For policies which apply unless the person gets written permission from the university, see CAL. PENAL CODE § 626.10(i) (West 2009) (stun guns); N.J. STAT. ANN. §§ 2C:39-1(r)(4), 2C:39-5(e)(2) (West 2009) (irritant sprays, stun guns banned by state law).

134. See, e.g., OKLA. STAT. ANN. tit. 21, §§ 1287(A), 1902(3), 1903(D) (West 2009) (stun guns); CHARLOTTE, N.C., CODE OF ORDINANCES §§ 15-14(a), -272(a)(5) (2009) (stun guns); DURHAM, N.C., CODE OF ORDINANCES §§ 46-22(b), -25 (2008) (stun guns). For statutes that don't expressly mention irritant sprays or stun guns, but likely cover them in any event—given the case law discussed in Appendix I, including Maryland and Oklahoma cases—see GA. CODE ANN. § 16-12-123(b) (West 2009) (“device designed or modified for the purpose of offense and defense”); MD. CODE ANN., TRANSP. § 7-705(b)(6) (West 2009) (“concealed weapon[] or other dangerous article[]”); MO. ANN. STAT. § 578.320(2) (West 2009) (any “deadly or dangerous weapon”); N.M. STAT. ANN. §§ 30-1-12, 30-7-13 (West 2009) (“any weapon which is capable of producing death or” “an injury to the person which . . . [among other things] results in permanent or protracted loss or impairment of the function of any member or organ of the body”); S.C. CODE ANN. § 58-23-1830(a)(3) (2008) (“any weapon”); see also FRESNO, CAL., MUN. CODE & CHARTER § 5-305(h) (2008) (“any weapon,” specifically including pepper spray but implicitly covering stun guns and other irritant sprays, which are certainly weapons at least as much as pepper spray is). Charlotte and New Mexico exempt people who have specific written permission from the city manager or the bus company authorities. N.M. STAT. ANN. § 30-7-13(B) (West 2009); CHARLOTTE, N.C., CODE OF ORDINANCES § 15-14(c)(5) (2009).

certain other kinds of government property, such as public office buildings. What's more, they affect people even when they travel in especially high-crime places and times. Someone going to and from her housing project apartment, or university dorm room, may well be traveling late at night, and (especially when it comes to public housing) through especially rough parts of town.

There is little justification for such restrictions, even given the government's interest in keeping its property safe. The burden on self-defense, as I mentioned, is quite great, not just on the government property but also off it. And the risk of misuse seems no greater than in other contexts.

Moreover, for most people who live in public housing and ride public buses, and for many students who go to public universities (which tend to be considerably cheaper than private universities), the government-provided service isn't just something that they can take or leave, the way they might take or leave access to a public park. Financial circumstances might leave them with little choice other than to take advantage of the government benefit. Yet they should be as entitled to meaningfully defend themselves as are people who are prosperous enough to be able to take advantage of private housing, transportation, and schooling.

#### B. *Constitutionality*

The government acting as proprietor often has fairly broad rights to control constitutionally protected behavior on its own property. The government, for instance, may refuse to allow abortions in government-owned hospitals.<sup>135</sup> It may restrict speech on various kinds of government property (though not sidewalks or parks) if it does so in a viewpoint-neutral and reasonable way.<sup>136</sup> It may institute searches at the entrances of government buildings even when it couldn't impose such searches outside government property.<sup>137</sup>

At the same time, government power is limited even on government property (and even if one sets aside traditional public fora such as sidewalks or parks). For instance, the government can't impose viewpoint-based restrictions on private speech, or restrictions that are otherwise viewed as unreasonable.<sup>138</sup> And lower court case law suggests that First Amendment and Fourth Amendment rights remain at full strength in public housing.<sup>139</sup>

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135. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989).

136. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee (ISKCON)*, 505 U.S. 672, 678-79 (1992).

137. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000).

138. *ISKCON*, 505 U.S. at 679.

139. *See, e.g., Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 795 (N.D. Ill. 1994) (holding that the Fourth Amendment bars warrantless sweeps through public housing projects, just as it does as to private housing); *Resident Action Council v. Seattle Hous. Auth.*, 174 P.3d 84, 88-89 (Wash. 2008) (evaluating restriction on public housing residents posting materials on the outside of their apartment doors the same way that restrictions on private residents' posting materials in their windows are evaluated). *Resident Action Council*

The government-as-proprietor doctrine is not well-developed as to the right to keep and bear arms<sup>140</sup> or the right to defend life. A full analysis of the government's power to restrict nonlethal weapons on its property would require more theoretical thinking than has so far been done in this field.

But some factors nonetheless suggest that at least the highly burdensome restrictions discussed in this Part should likely be unconstitutional.

First, one justification for the government's greater power over speech and abortions performed on its property is that people remain free to speak and get abortions so long as they shift their activities to private property (or, for speech, to traditional public fora).<sup>141</sup> What's more, people may exercise their rights elsewhere while still taking advantage of the services that the government does choose to provide on its property. If demonstrations are banned inside a welfare office, people remain free both to patronize the welfare office, and to convey their messages elsewhere (such as on the sidewalk in front of the building that houses the office). If abortions are banned inside a county hospital, people remain free to use the county hospital for any other procedure, and to get abortions in a private clinic.

But this isn't so as to the right to self-defense, or the right to have nonlethal weapons for self-defense. If you are barred from defending yourself inside your government-owned apartment, you can't just respond by shifting your self-defense to places outside your home.

Self-defense, as opposed to speech or abortion, is something you must engage in where and when the need arises. So if nonlethal weapons are banned in public housing, universities, or buses, people are faced with a choice: either forgo entirely the important government benefit, or become unable to effectively defend themselves in their homes.

Second, as the previous Subpart noted, restrictions on possessing stun guns in government-owned housing (whether public housing or public university dorm rooms) and on government-owned transportation systems don't just affect people on that property. These restrictions also end up blocking tenants, students, and bus riders from using stun guns and irritant sprays elsewhere, since those people can't legally possess such weapons in their homes or on the

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involved the outside of public housing units, but its reasoning would apply at least as forcefully to speech inside such units.

140. Volokh, *supra* note 57, at 1529-33. The "sensitive places" exception recognized by *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008), shouldn't be relevant to nonlethal weapon possession, for the same reasons the accompanying concealed carry and felon possession exceptions shouldn't be relevant: all these exceptions are based on traditions of restricting the possession of deadly weapons, traditions that are in large part based precisely on the weapons' deadliness. *See supra* Parts IV.0.2 ("Even if it is proper to defer to longstanding legislative and judicial judgment in carving out exceptions from constitutional guarantees, there's no reason to defer to a judgment that had never been made."), V.

141. *See, e.g., Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509 (1989); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985).

buses they take. This sort of leveraging of government power over its own property into power over private property (or over public streets and sidewalks) is generally unconstitutional even under the First Amendment.<sup>142</sup>

Finally, it's worth noting again that the risk posed by nonlethal weapons in public housing, in public universities, and on public buses is considerably less than the risk posed by firearms. There's some risk of crime from the presence of such weapons, but virtually no risk of death. And those most likely to commit crimes are also those most likely to break the law and carry the forbidden nonlethal weapons, and even forbidden guns or knives. In my view, the government can't justify the substantial interference with self-defense created by restricting stun guns and irritant sprays in these places, given the modest risk of harm posed by allowing such weapons.

## VII. BANS ON POSSESSION IN NARROWER ZONES

Some jurisdictions ban stun guns or irritant sprays from parks<sup>143</sup> and from places that sell alcohol—sometimes all such places including markets,<sup>144</sup> sometimes only restaurants and bars,<sup>145</sup> and sometimes just bars.<sup>146</sup> These are

142. See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 398-400 (1984).

143. *E.g.*, GA. CODE ANN. § 12-3-10(o) (West 2009) (state parks) (“device which discharges projectiles by any means,” which likely covers Tasers); SAN JOSE, CAL., CODE OF ORDINANCES § 13.44.200 (2008) (irritant sprays); CHESHIRE, CONN., CODE OF ORDINANCES §§ 11-20(8), -34(q) (2008) (stun guns); BREVARD COUNTY, FLA., CODE OF ORDINANCES §§ 78-76, -115 (2009) (irritant sprays); GWINNETT COUNTY, GA., CODE OF ORDINANCES §§ 78-1, -32(b) (2009) (stun guns); AURORA, ILL., CODE OF ORDINANCES § 29-43(a)(12) (2009) (irritant sprays); GREAT FALLS, MONT., CITY CODE § 9.8.65.020 (2009) (“weapon[,]” which likely covers stun guns and irritant sprays); BROOME COUNTY, N.Y., CODE OF ORDINANCES § 158-3.C (2009) (irritant sprays); DURHAM COUNTY, N.C., CODE OF ORDINANCES §§ 17-92, -93 (2008) (stun guns, one of many North Carolina city and county ordinances that imposes such a ban).

144. For laws banning possession in all places licensed to sell alcohol, though in some cases excluding those that only sell for off-premises possession, see N.D. CENT. CODE §§ 62.1-01-01, -02-04 (2009) (stun guns and irritant sprays); PUEBLO, COLO., MUN. CODE §§ 11-1-601(a)(4)(d), 11-3-27 (2009) (stun guns).

145. For laws banning possession in all places that sell alcohol for on-premises consumption, which includes restaurants, see, for example, SEDGWICK COUNTY, KAN., CODE §§ 4-36(d), -81(d) (irritant sprays and “any device capable of . . . propelling a projectile which has the ability to cause death or inflict bodily harm,” which would include Tasers) (Sedgwick County contains Wichita); BATON ROUGE & EAST BATON ROUGE PARISH, LA., CODE OF ORDINANCES § 13:95.3 (2009) (“instrumentality customarily used or intended for probable use as a dangerous weapon,” “including the parking lot” of the building, one of many such Louisiana local ordinances); NEW ORLEANS, LA., CODE OF ORDINANCES § 10-7 (2009) (“dangerous weapon[s]”); WRANGELL, ALASKA, MUN. CODE § 10.32.030 (2008) (irritant sprays); ISSAQUAH, WASH., MUN. CODE § 9.10.040 (2009) (stun guns, one of many such Washington local ordinances); OMAK, WASH., MUN. CODE § 7.84.050(d) (2009) (irritant sprays); QUINCY, WASH., MUN. CODE §§ 9.13.010, 9.13.020 (2007) (same); RICHLAND, WASH., MUN. CODE §§ 9.27.010(A), 9.27.020(A) (2009) (“weapon capable of discharging a projectile by means of compressed air, chemical combustion or otherwise and having a barrel less than twelve inches in length,” which would cover stun guns).

places where most people spend relatively little time. (Employees of such places are an exception, but some of the restrictions exempt employees.<sup>147</sup>) They are also places that people can often avoid, if they really want to. Such restrictions are thus comparatively modest burdens on self-defense, and this also makes them more likely to be constitutional.<sup>148</sup>

Moreover, a few of the places where nonlethal weapons are often banned are relatively safe: Consider government buildings, especially ones that are usually visited during daylight hours or during the early evening when many people are present.<sup>149</sup> Bans in those locations thus interfere especially little with self-defense.

But other restrictions burden self-defense considerably more, especially since the restrictions have an effect even outside the forbidden places. Banning weapons from bars or restaurants that serve alcohol, for instance, means that people also can't have weapons on the late-night walk back from the bar or restaurant (whether on the way home, to the bus, or even a few blocks to one's parked car). In those situations, a defensive weapon may be as likely to be needed as it is in one's private home, or while walking on a typical street.

Nor is there evidence that irritant sprays or stun guns in parks, restaurants, or even bars pose an especially high risk of abuse. People who are under the influence of alcohol are probably more likely to misuse weapons. But damage caused by misuse, even in and around bars, is almost certain to be only temporary. And the need for self-defense seems likely to be especially high, partly because others are also under the influence and more likely to act violently.

Indeed, as I noted, some of these places can be avoided. One could walk or jog on the street rather than through a park, or avoid going to bars or even restaurants that serve alcohol.

Yet one purpose of the right to self-defense is to help people live their lives with less need to avoid potentially dangerous places. A young woman should be able to go to a restaurant, or walk through the park at night, knowing that she has a relatively effective defensive weapon at hand should someone want to

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146. For laws banning possession in all places that sell alcohol and are open only to people age 21 and above, see, for example, REDMOND, WASH., MUN. CODE § 9.24.040 (2009) (both irritant sprays and stun guns, one of many such Washington local ordinances).

147. See, e.g., NEW ORLEANS, LA., CODE OF ORDINANCES § 10-7 (2009).

148. For an extended discussion of the substantial burden threshold as to the right to bear arms, both generally and as to restrictions on possession in certain places, see Volokh, *supra* note 57, at 1454-61, 1524-33. I expect that similar arguments could be raised as to the right to defend life.

149. See, e.g., CAL. PENAL CODE § 171b(a)(5) (West 2009) (stun guns); 25 IND. ADMIN. CODE §§ 8-2-1, 8-3-1 (2009) (stun guns); OR. REV. STAT. ANN. §§ 166.360, .370 (West 2009) (stun guns and irritant sprays); VA. CODE ANN. § 18.2-283.1 (West 2009) (stun guns); DOTHAN, ALA., CODE OF ORDINANCES §§ 62-137(a), (i) (2008) (irritant sprays); LAPORTE COUNTY, IND., CODE OF ORDINANCES §§ 130.15, .16 (2009) (stun guns and irritant sprays); WEST COVINA, CAL., CODE OF ORDINANCES § 15-32(a) (2008) (stun guns and irritant sprays).

rape, beat, rob, or kill her. And that's especially so precisely for women and for others who are more tempting targets for some criminals or physically less capable of defending themselves. Without some sort of weapon, they are likely to be easy marks for criminals who are much stronger than they are.

So such restrictions, while less burdensome than total bans on possession, carrying, or concealed carrying, should nonetheless be improper, except (1) when the location is already very safe (ranging from the secure area of the airport or a courthouse to a government building that is usually visited in the daytime, when many people are present), or (2) when the possible danger from abuse seems extremely high.

#### VIII. SHALL-ISSUE LICENSING SCHEMES, LICENSING FEES, AND WAITING PERIODS

Some jurisdictions require people to get a license to possess an irritant spray<sup>150</sup> or to carry a concealed stun gun,<sup>151</sup> but make these licenses available to pretty much all law-abiding citizens. Other jurisdictions ban all carrying of concealed "dangerous" or "deadly" weapons, terms that have generally been read to cover stun guns and irritant sprays,<sup>152</sup> unless one has a license to carry a concealed handgun, which is likewise available to pretty much all law-abiding citizens.<sup>153</sup> When one has such a license, one can then carry all dangerous or

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150. MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B(3), 129C (West 2009); N.Y. CITY ADMIN. CODE § 10-131(e)(1) (2009).

151. For statutory schemes expressly requiring a license to carry concealed stun guns, and authorizing the charging of fees for such a license, see IND. CODE ANN. §§ 35-47-2-1 to -3, 35-47-8-4 (West 2009); IOWA CODE ANN. §§ 702.7, 724.4, 724.7, 724.8 (West 2009); MISS. CODE ANN. § 45-9-101 (2008); N.D. CENT. CODE ANN. §§ 62.1-04-02 to -03, 62.1-02-01(1)(d) (West 2008). Permits in Iowa may be issued or denied at the permitting agency's discretion, but Iowa is reputed to generally grant concealed carry permits. *See, e.g.*, Kopel, *supra* note 56, at 11 n.38. BLACK HAWK COUNTY CODE OF ORDINANCES §§ 3-4-3, -4, -10 (2004), and COUNCIL BLUFFS, IOWA, MUN. CODE §§ 8.75.010(d), .020 (any item "designed or have been modified so as to be capable of causing bodily injury") require a license in order to *possess* a stun gun, and not just to carry it concealed.

152. *See infra* App. I.

153. These jurisdictions are Montana and probably Idaho, New Mexico, West Virginia, and Wyoming, plus several towns in Oregon. IDAHO CODE ANN. §§ 18-3302(1), (7) (West 2009) ("deadly or dangerous weapon"); MONT. CODE ANN. §§ 45-2-101(66), (79), 45-8-316(1) (West 2007) ("deadly weapon," with "weapon" defined as "an instrument, article, or substance that, regardless of its primary function, is readily capable of being used to produce death" or "bodily injury that creates a substantial risk of death [or which] causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ"); *State v. Evans*, 806 P.2d 512, 516 (Mont. 1991) (concluding that a stun gun qualifies under that definition, because it "is capable of immobilizing a person and could seriously injure a person who falls after being shocked by the gun," a rationale that would likely apply to irritant sprays as well), *overruled on other grounds*, *State v. Herman*, 188 P.3d 978, 981 n.1 (Mont. 2008); N.M. CODE ANN. §§ 30-1-12(A)-(B), 30-7-2 (West 2009) ("any weapon which is capable of producing death or" "an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which

deadly weapons, including handguns; the licensing requirements therefore often mandate handgun-focused training, knowledge, or testing, such as a “firearms training course . . . not less than fifteen hours in length.”<sup>154</sup> A few jurisdictions also have a waiting period before one can possess a stun gun or irritant spray.<sup>155</sup>

These restrictions can be fairly minor and thus constitutionally permissible burdens on self-defense if the license is available to all applicants,<sup>156</sup> can be gotten without much money or hassle, and doesn’t require a long waiting period.<sup>157</sup>

Nonetheless, many such restrictions seem unwise. There seems to be little reason, for instance, to require that people who want to carry concealed stun guns take a safety course that focuses on handguns. Likewise, even if a long waiting period for handguns is justified, it’s hard to see why there should be up to a forty day waiting period to get a license to possess irritant sprays.

Some of the restrictions, such as the generic restrictions on concealed carry of dangerous weapons unless one has a license to carry concealed firearms, were seemingly enacted with little thought about irritant sprays and stun guns. And even the licensing schemes and waiting periods that mention nonlethal weapons by name, such as Massachusetts’s waiting period of up to forty days, seem to have been grafted onto gun controls, and inherited features of those gun controls. Massachusetts law, for instance, regulates irritant sprays by enlarging the existing definition of “ammunition” to include irritant sprays,<sup>158</sup> and extending (with some modifications) the already established “firearm identification card” requirement from firearms to irritant sprays.<sup>159</sup> The waiting

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results in permanent or protracted loss or impairment of the function of any member or organ of the body”); *State v. Neatherlin*, 154 P.3d 703, 710 (N.M. Ct. App. 2007) (interpreting “capable of” in this definition—although outside the context of concealed carry—as referring to “any probability of” the result taking place); W.V. CODE ANN. §§ 61-7-2(9), -3, -4 (West 2009) (“instrument which is designed to be used to produce serious bodily injury or death or is readily adaptable to such use”); WYO. CODE ANN. §§ 6-1-104(a)(iv), 6-8-104 (West 2009) (“device, instrument, material or substance, which in the manner it is . . . intended to be used is reasonably capable of producing death or serious bodily injury”); HILLSBORO, OR., MUN. CODE § 9.12.010 (2009) (any “weapon” “by the use of which injury could be inflicted upon person or property”) (one of several such city-level ordinances in Oregon).

154. *See, e.g.*, N.M. STAT. ANN. § 29-19-7 (West 2009).

155. *See, e.g.*, 720 ILL. COMP. STAT. ANN. § 5/24-3(A)(g) (West 2009) (twenty-four hour waiting period required to get a stun gun); UNIVERSITY HEIGHTS, OHIO, CODIFIED ORDINANCES § 632.04 (2008) (at least a seven-day waiting period required to get a stun gun); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B(3), 129C (West 2009) (waiting period of up to forty days required to get irritant spray).

<sup>156</sup> Of course except those, such as young minors or violent felons, who are rightly denied a license.

157. *See* Volokh, *supra* note 57, at 1538-45 (discussing waiting periods and license fees under the right to keep and bear arms).

158. MASS. GEN. LAWS ANN. ch. 140, § 121 (West 2009).

159. *Id.* §§ 129B, 129C.

period for getting a card that would let one possess irritant sprays is the same as that required for a card that would let one possess actual firearms.<sup>160</sup>

Most states have not concluded that requiring licenses to possess or carry stun guns or irritant sprays would be helpful. Most states are probably right on this, because such licensing procedures create undue work for law enforcement and undue hassle for citizens with little likely payoff in crime control.

But if some such licensing is to be implemented, for instance to make sure that people know how to use the devices legally, then the scheme should be tailored to that device. People should have to show knowledge about stun guns or irritant sprays, not about handguns. And they shouldn't have to face a waiting period—which may often be burdensome to people who have just been threatened, or broken up with an abusive lover—unless there is real reason to think that pepper-spray or stun-gun crimes of passion are as serious a problem as firearm crimes of passion.<sup>161</sup>

#### CONCLUSION

Self-defense is not just a criminal law defense to charges of homicide or assault. It is also a moral and policy principle that protects people's ability to possess the tools needed for effective self-defense. It is an expressly guaranteed constitutional right, at least under many state constitutions that secure a right to defend life. And it is implicitly protected by the right to keep and bear arms, which secures the ability to possess weapons useful for self-defense.

There are powerful arguments for limiting deadly defensive tools, especially firearms, given the grave harms that gun misuse routinely causes. I don't generally endorse such arguments, partly because I think gun bans will do little to stop the misuse but much to stop lawful defensive use. But I see the force of those arguments.

Yet the crime control arguments for gun bans do not apply with anywhere near the same force to stun guns and to irritant sprays. And the self-defense arguments against gun bans do apply to such nondeadly weapons. On balance, people's right to defend themselves nonlethally with stun guns ought to be protected—both as a matter of sound policy and as a matter of our nation's and states' Constitutions.

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160. *Id.* § 129B(3).

161. *See generally* Volokh, *supra* note 57, at 1538-42 (discussing waiting periods as to firearms). I don't generally support such waiting periods even as to guns, but I acknowledge there are substantial arguments for them where lethal weapons are concerned; my point here is that the arguments are much weaker for nonlethal weapons.

## APPENDIX I: A NOTE ON GENERIC RESTRICTIONS

Most of the statutes and ordinances cited in this article specifically refer to stun guns or irritant sprays, so there's no doubt that such nonlethal weapons are covered.

Some laws, however—especially laws restricting concealed carrying—generally regulate “weapons,” “defensive weapons,” “offensive weapons,” “deadly weapons,” “dangerous weapons,” or “dangerous instruments.”<sup>162</sup> And many such laws likely apply to irritant sprays and stun guns.<sup>163</sup> Let me briefly

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162. I focus here on statutes that use these as general terms. Naturally, if a statute provides a detailed enumerated list of what constitutes a deadly or dangerous weapon, there's no need to speculate about whether stun guns and irritant sprays are included or excluded.

“Deadly weapon” and “dangerous weapon [or instrument]” are sometimes defined differently, *e.g.*, 11 DEL. CODE ANN. § 222 (West 2009); MO. ANN. STAT. §§ 556.061(9)-(10) (West 2008); OR. REV. STAT. §§ 161.015(1)-(2); *People v. Brookins*, 264 Cal. Rptr. 240, 243-44 (Cal. Ct. App. 1989), but are often seen as synonymous, *e.g.*, *State v. J.R.*, 111 P.3d 264, 266 (Wash. Ct. App. 2005); *State v. Colbert*, 769 P.2d 1168, 1172 (Kan. 1989); *State v. Collier*, 381 N.W.2d 269, 271 (S.D. 1986); *State v. Sturdivant*, 283 S.E.2d 719, 727 (N.C. 1981).

163. For government actions treating stun guns and irritant sprays as covered by generic concealed weapon statutes, see MISS. CODE ANN. § 45-9-101 (West 2009) (providing for the granting of concealed carry permits for stun guns, though the only Mississippi statute that might require such permits is the general statute dealing with carrying deadly weapons, MISS. CODE ANN. § 97-37-1 (West 2008); *Whatcott v. Luther*, 2000 WL 34230257, at \*2 (W.D. Wis. Feb. 23, 2000) (noting arrest for concealed carry of pepper spray); *Patterson v. State*, 255 N.E.2d 520, 524 (Ind. 1970) (noting arrest for tear gas possession under concealed weapon statute, OHIO REV. CODE § 2923.01 (1958)); *State v. Bar-Jonah*, 2004 MT 344, ¶ 65, 102 P.3d 1229, 1241 (Mont. 2004) (assuming this as to stun guns); *City of St. Paul v. Azzone*, 177 N.W.2d 559, 561 (Minn. 1970) (so concluding as to tear gas); *Village of Barboursville ex rel. Bates v. Taylor*, 174 S.E. 485, 486-87 (W. Va. 1934) (concluding that tear gas might be covered, depending on the facts about its dangerousness that are developed at trial), *overruled on other grounds*, *State v. Choat*, 363 S.E.2d 493, 502 (W. Va. 1987); 61 Md. Att'y Gen. Op. 647, 655 (1976) (so concluding as to Tasers); S.C. Op. Att'y Gen. Op. No. 77-360, 287 (1977) (so suggesting as to stun guns); S.C. Op. Att'y Gen., 1975 WL 28918 (1975) (so concluding as to tear gas); *Tear Gas—Pencil Gun—Dangerous Weapon*, 26 Conn. Op. Att'y Gen. 207 (1950) (so concluding as to tear gas); *see also* *United States v. Wallace*, 800 F.2d 1509, 1513 (9th Cir. 1986) (so concluding as to stun guns for statute limited to carrying on airplanes); *United States v. Brown*, 376 F. Supp. 451, 459 (W.D. Mo. 1974) (indicating the same as to tear gas pistol), *rev'd on other grounds*, 508 F.2d 427 (8th Cir. 1974); *State v. Geier*, 484 N.W.2d 167, 170-71 (Iowa 1992) (concluding so as to stun guns for statute limited to carrying with intent to use in crime); *State v. Eliason*, 1999 WL 486578, \*1 (Minn. Ct. App. July 3, 1999) (so concluding as to tear gas for statute limited to possession of “dangerous article or substance” with intent to use it in a crime, though not opining on whether tear gas would constitute a “dangerous weapon”); Pa. Op. Atty. Gen. no. 76-14, 75 Pa. D. & C.2d 597 (1976) (concluding that a stun gun qualifies as an “implement for the infliction of serious bodily injury which serves no common lawful purpose” for purposes of a ban on possession of such weapons); 1976 D.C. A.G. LEXIS 10 (concluding that a Taser qualifies as a “destructive device” for purposes of a ban on possession of such devices); S.C. Op. Att'y Gen., 1995 WL 803371 (so concluding as to pepper spray for statute

walk through the various definitions, and how courts have applied each definition to nonlethal weapons. (Note, though, that this categorization can't be entirely reliable, because a few cases and attorney general opinions seem to treat these seemingly different terms interchangeably.<sup>164</sup>)

A. *"Weapons" and "Defensive Weapons"*

Some restrictions apply to "any weapon" that can be used to inflict serious bodily harm. Unsurprisingly, some court and attorney general opinions have held that such restrictions cover stun guns and irritant sprays.<sup>165</sup>

B. *Projectile Devices*

Some restrictions apply to any device that fires "a projectile."<sup>166</sup> These likely cover Tasers, which fire a dart connected by wire to the stun gun.<sup>167</sup>

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covering all "weapons" but limited to schools).

164. See, e.g., 69 Ohio Op. Att'y Gen. [*is this the right citation format?*] (1969) (treating "likely to produce death or great bodily injury" as synonymous with "may endanger life or inflict cause [*is "inflict cause" really right?*] bodily harm") (emphases added) (quoting Price v. United States, 156 F. 950, 952 (9th Cir. 1907)); *In re Michelle*, 512 N.W.2d 248, 251 (Wis. App. 1994) (treating the conclusion that a weapon is "likely to produce great bodily harm" as "correspond[ing]" to the statutory language that the weapon must be "capable of producing . . . great bodily harm"); State v. Evans, 806 P.2d 512, 516 (Mont. 1991) (burglary and assault) (treating stun gun as a dangerous weapon because it is "capable of immobilizing a person and could seriously injure a person" even though the statute says "readily capable"), *overruled on other grounds*, State v. Herman, 2008 MT 187, 188 P.3d 978, 981 n.1 (Mont. 2008); State v. Clemo, 1999 MT 323, ¶ 11, 992 P.2d 1263, 1264-65 (Mont. 1999) (defining "readily capable" as "easily able," without casting doubt on *Evans*).

165. S.C. Op. Att'y Gen., 1995 WL 803371, at \*2 (concluding that pepper spray could qualify as a "weapon, device or object which may be used to inflict bodily injury"); 1977 S.C. Op. Att'y Gen. 287, 1977 WL 24698 (suggesting the same was possible as to stun guns); see also Pitts v. State, 649 P.2d 788, 791 (Okla. Crim. App. 1982) ("[M]ace is a substance which is designed as a defensive weapon, but may be used in such a manner as to cause great bodily harm.").

166. OAKLAND, CAL., MUN. CODE § 9.36.070.B, 9.36.130 (2008) (banning possession by minors of "projectile weapon[s]," defined as "any device or instrument used as a weapon which launches or propels a projectile by means other than the force of an explosion or other form of combustion with sufficient force to cause injury to persons or property," and expressly including "dart guns"); CITY & COUNTY OF S.F., CAL., POLICE CODE § 4501(b), 4507 (2009) (same as in Oakland); SAN LUIS OBISPO, CAL., MUN. CODE § 9.16.010.A, .020.A (2008) ("any weapon or device capable of catapulting, dispelling or discharging any projectile, missile or object of any type"); RICHLAND, WASH., MUN. CODE § 9.27.010.A, .020 (2009) ("weapon capable of discharging a projectile by means of compressed air, chemical combustion or otherwise and having a barrel less than twelve inches in length").

167. See *People v. Heffner*, 139 Cal. Rptr. 45, 46-48 (Cal. Ct. App. 1977) (so holding).

C. *Weapons Capable of Causing Death or Serious Injury (or, in Some Jurisdictions, Extreme Pain)*

Some restrictions cover “any weapon which is *capable* of producing” death or (among other things) “protracted loss or impairment of the function of any member or organ of the body,”<sup>168</sup> or sometimes extreme pain. Both irritant sprays and stun guns are *capable* of impairing the function of a bodily member or organ, even if such impairment isn’t *likely*, and are certainly capable of causing extreme pain. It thus makes sense that statutes that define “dangerous weapon” in such terms have generally been read as covering irritant sprays and stun guns.<sup>169</sup> (Most of the cases I cite here involve the interpretation of “dangerous weapon” when applying violent crime sentencing enhancements, not weapon carrying bans; but the definitions for the two are often the same in each jurisdiction,<sup>170</sup> and cases from one field often cite cases from the

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168. N.M. STAT. ANN. §§ 30-1-12, 30-7-2 (West 2009) (emphasis added); *see also* CONN. GEN. STAT. ANN. §§ 29-38, 53-206, 53a-3(4), 53a-3(7) (West 2009); ME. REV. STAT. ANN. tit. 17-A, § 2(9)(C), 2(23), tit. 25, § 2001-A(1)(B) (2009) (requiring that the device be “designed as a weapon”; the title 17-A definition by its terms only applies to that title, but would likely be influential in interpreting the title 25 concealed weapon ban); NEB. REV. STAT. §§ 28-109(7), -109(20), -1202(1)(a) (2008); UTAH CODE ANN. § 76-10-501(2), -501(5), -504 (2009); WIS. STAT. ANN. § 939.22(10), (14) (West 2009) (requiring that the device be “designed as a weapon”).

169. *United States v. Melton*, 233 F. App’x 545, 547 (6th Cir. 2007) (pepper spray); *United States v. Neill*, 166 F.3d 943, 949-50 (9th Cir. 1999) (pepper spray); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998) (mace); *United States v. Dukovich*, 11 F.3d 140, 142 (11th Cir. 1994) (tear gas); *United States v. Agron*, 921 F.2d 25, 26 (2d Cir. 1990) (stun gun); *United States v. Wallace*, 800 F.2d 1509, 1513 (9th Cir. 1986) (stun gun); *United States v. Brown*, 376 F. Supp. 451, 458-59 (W.D. Mo. 1974) (tear gas gun), *rev’d on other grounds*, 508 F.2d 427 (8th Cir. 1974); *see also* *People v. Blake*, 11 Cal. Rptr. 3d 678, 687, 690 (Cal. Ct. App. 2004) (chemical spray and mace, under definition that covered weapons “capable of inflicting great bodily injury or death”); *Commonwealth v. Lord*, 770 N.E.2d 520, 524 & n.7, 525 (Mass. App. Ct. 2002) (mace, under definition covering weapons designed to inflict, and capable of inflicting, death or “hurt or injury [that] need not be permanent, but . . . [is] more than merely transient and trifling” (quoting *Commonwealth v. Farrell*, 78 N.E.2d 697, 705 (Mass. 1948) (internal quotation marks omitted))); *People v. Norris*, 600 N.W.2d 658, 661 & n.3, 662-63 (Mich. Ct. App. 1999) (mixture of tear gas and pepper spray, under definition covering weapons “designed to be dangerous and capable of causing death” or injury “that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body” (internal quotation marks omitted) (citation omitted))); *People v. Faison*, No. 202653, 1999 WL 33444161, at \*1 & n.2, \*2 (Mich. Ct. App. May 25, 1999) (same); Pa. Op. Att’y Gen. No. 76-14 [check if Westlaw accessible; if not, read 75 Pa. D. & C.2d 597, 598], at 40-42 (1976) (stun guns, applying as a test whether a weapon is capable of inflicting “serious bodily injury”). *But see* *United States v. Kaufman*, 546 F.3d 1242, 1266-67 (10th Cir. 2008) (concluding that the government had not introduced enough evidence as to whether stun guns qualified under this definition, and remanding for more fact-finding); *United States v. Harris*, 44 F.3d 1206, 1214, 1216 (3d Cir. 1995) (concluding that the government had not introduced enough evidence as to whether mace qualified); *State v. Wood*, 825 A.2d 1178, 1180 (N.J. Super. Ct. App. Div. 2003) (concluding likewise as to stun guns, and remanding for more fact-finding).

170. *See, e.g.*, NEB. REV. STAT. §§ 28-109(7), -109(20), -1202(1)(a), -1205(1) (2008).

other.<sup>171)</sup>

Moreover, some of the irritant spray uses discussed in the cases involved serious injury, including “lifelong severe asthma” that required taking pills each day to control,<sup>172</sup> and “chemical pneumonia” that kept the victim out of work for two weeks and required that she “take daily steroid shots for over four months and steroid pills for one year to cleanse the mace from her system.”<sup>173</sup> Even statutes that require that the weapon be capable of causing protracted impairment,<sup>174</sup> and not merely capable of causing extreme pain or need for medical intervention, should thus be satisfied as to irritant sprays and stun guns.<sup>175</sup>

#### D. Weapons Readily Capable of Causing Death or Serious Injury

Other restrictions cover weapons that are *readily capable* of producing such results.<sup>176</sup> Irritant sprays and stun guns only rarely cause death and serious injury (at least when such harm is defined to cover only protracted injury and not just pain, however severe). It thus seems to me that they shouldn’t qualify as “readily capable” of causing death or serious injury. But the two cases applying such a test hold that a jury may indeed find such a “readily capable” test to be satisfied.<sup>177</sup>

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171. See, e.g., *United States v. Wallace*, 800 F.2d 1509, 1513 (9th Cir. 1986) (citing *McLaughlin v. United States*, 476 U.S. 16, 17 (1986)); *State v. Geier*, 484 N.W.2d 167, 171-72 (Iowa 1992) (citing *State v. Evans*, 806 P.2d 512, 516-17 (Mont. 1991)).

172. *Neill*, 166 F.3d at 949-50.

173. *Bartolotta*, 153 F.3d at 879.

174. See, e.g., the Connecticut, Maine, Nebraska, New Mexico, Utah, and Wisconsin statutes, cited *supra* note 168.

175. See *State v. Geier*, 484 N.W.2d 167, 171 (Iowa 1992) (concluding that stun guns qualify as dangerous weapons under definition that covers weapons capable of causing death); cf. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, ¶¶ 5, 11, 154 P.2d 703 [again, why have all these parallel cites? -EV] (concluding that “[a]lthough it is not likely that the [hepatitis C] virus would be transmitted through a human bite, it is ‘certainly possible,’” and that therefore a bite by someone infected with hepatitis C could be treated as use of a “deadly weapon” under a “capable of producing death or great bodily harm” standard).

176. IDAHO CODE ANN. §§ 18-3302(7), -3302I (West 2009) (“readily capable of”) (the definition in § 18-3302I is applicable only to that section, which covers only carrying on school property, but it seems likely that it would be seen as influential in interpreting the undefined term “deadly or dangerous weapons” in § 18-3302(7)); MONT. CODE ANN. §§ 45-8-316(1), -2-101(79) (West 2008) (“readily capable of”); W. VA. CODE §§ 61-7-2(9), -3 (2009) (“readily adaptable to”); WYO. STAT. ANN. §§ 6-1-104(a)(iv), -8-104 (West 2009) (“reasonably capable of”) *Duckworth v. State*, 477 So. 2d 935, 938 (Miss. 1985) (applying a “reasonably capable of or likely to” test in defining “deadly weapon” for purposes of MISS. CODE ANN. § 97-37-1 (West 2007)).

177. *Perry v. State*, 500 N.E.2d 1205, 1206 (Ind. 1986) (tear gas); *State v. Evans*, 806 P.2d 512, 516 (Mont. 1991) (stun gun), *overruled on other grounds* by *State v. Herman*, 2008-MT-187, ¶ 17 n.1, 343 Mont. 494, 188 P.3d 978.

*E. Weapons Capable or Readily Capable of Causing Death*

Other restrictions cover only weapons capable (or readily capable) of inflicting death, and not just serious injury.<sup>178</sup> Stun guns are capable of causing death, though they do so very rarely; irritant sprays seem to cause death even more rarely. The few court or attorney general opinions applying such definitions seem to treat stun guns but not irritant sprays as capable of causing death.<sup>179</sup>

*F. Weapons Likely to Cause Death or Serious Bodily Injury*

Other restrictions cover only weapons that are likely to produce death or serious injury,<sup>180</sup> or just likely to produce death.<sup>181</sup> Stun guns and irritant sprays are generally not likely to kill or cause great bodily harm, and thus shouldn't be covered under definitions that require such likelihood. But the cases applying such definitions are split.<sup>182</sup>

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178. IOWA CODE §§ 702.7, 724.4 (2009) (“capable of”); MO. REV. STAT. § 571.030(1) (2009) (“readily capable of”); OHIO REV. CODE ANN. §§ 2923.11(A), .12(A) (West 2009) (“capable of”).

179. Geier, 484 N.W.2d at 171 (stun guns qualify); 1971 Del. Op. Att’y. Gen. 18 (1971), 1971 Del. AG Lexis 7 (mace does not qualify); 1980 Iowa Op. Att’y. Gen. 646 (1980), 1980 WL 25957 (mace does not qualify); Miss. Op. Att’y Gen. No. 93-0865 (March 10, 1994), 1994 WL 117324 (concluding that mace was not a “deadly weapon,” under statute that didn’t define “deadly weapon” further). *But see* State v. Harris, 42,376, p. 7, 9 (La. App. 2 Cir. 9/26/07) 966 So. 2d 773 (concluding that use of pepper spray qualified as “endanger[ing]” “human life” for purposes of statute that enhanced punishment for escape from prison when human life was endangered; the endangerment seemed to stem chiefly from the guard-victim’s fear of further attack by prisoners when he was incapacitated by the pepper spray, not from the pepper spray attack as such).

180. LA. REV. STAT. ANN. § 14:2(3) (West 2008); NEV. REV. STAT. §§ 193.165(6)(a), 202.350(1) (2007) (though the § 193.165 definition is on its face limited to sentence enhancements, and the term in the concealed carry ban, § 202.350, is not expressly defined); S.C. CODE ANN. § 16-23-460 (West 2008); State v. Bennett, 493 S.E.2d 845, 851 (S.C. 1997).

181. WASH. REV. CODE §§ 9.41.250(1), .94A.602 (2009); State v. J.R., 111 P.3d 264, 266 (Wash. Ct. App. 2005).

182. *Compare* People v. Jefferson, No. B165438, 2004 WL 575772, at \*3 (Cal. Ct. App. Mar. 24, 2004) (holding that a stun gun didn’t qualify under such a definition), Nguyen v. State, 858 So. 2d 1259, 1260 (Fla. Dist. Ct. App. 2003) (same), *and* Austin v. State, 336 So. 2d 480, 481-82 (Fla. Dist. Ct. App. 1976) (same as to mace), *with* People v. Huerta, Nos. G037696, G039457, 2008 WL 1701746 at \*5 (Cal. Ct. App. April 11, 2008) (holding that jury could conclude that a stun gun qualified under such a definition), Harwell v. State, 512 S.E.2d 892, 895 (Ga. 1999) (same), James v. State, 521 S.E.2d 465, 466 (Ga. Ct. App. 1999) (same), State v. Lemeunier, 07-230, p. 7 (La. App. 4 Cir. 5/27/08), 986 So. 2d 130 (same, as to pepper spray; this likely supersedes La. Att’y Gen. Op. No. 81-436 (June 8, 1981), 1981 WL 155426, which concluded that “CS type tear gas” likely doesn’t qualify as a “dangerous weapon” because of “its inability to cause death or great bodily harm”), *and* Al-Fatah v. State, 2003-KA-01824-COA (¶ 16 & nn.1-2) (Miss. 2005) (stating that stun gun would qualify under such a definition).

G. *Undefined “Dangerous Weapons,” “Deadly Weapons,” or “Offensive Weapons”*

Other state rules cover “dangerous weapon[s],”<sup>183</sup> “deadly weapon[s],”<sup>184</sup> or “offensive weapon[s],”<sup>185</sup> with no definition given either in the statute or in the (often sparse or nonexistent) case law. Cases applying such rules generally hold that an irritant spray or stun gun may qualify.<sup>186</sup>

H. *Weapons “Closely Associated with Criminal Activity”*

The Hawaii concealed weapon statute covers any “deadly or dangerous weapon,” but case law seems to interpret this as covering only instruments that

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183. MD. CODE ANN., CRIM. LAW § 4-101(c)(1) (West 2009); MICH. COMP. LAWS § 750.227(1) (2009); N.D. CENT. CODE § 62.1-04-02 (2008).

184. S.C. REV. STAT. § 16-23-460 (2008) (barring concealed carrying of “deadly weapon usually used for the infliction of personal injury”); S.C. Op. Atty. Gen., 1978 WL 35062, at \* 1 (Aug. 25, 1978) (interpreting this as covering “instruments which when used in the ordinary manner contemplated by their design are likely to cause bodily harm,” perhaps meaning “great bodily harm”); *see also* State v. Bennett, 493 S.E.2d 845, 850-51 (S.C. 1997) (defining “deadly weapon,” in a robbery case, as “any article, instrument or substance which is likely to produce death or great bodily harm”).

185. OKLA. REV. CODE § 21-1272 (2009). *See* BLACK’S LAW DICTIONARY 1233 (4th ed. 1951) (defining “offensive weapon” as “a weapon primarily meant and adapted for attack and the infliction of injury, but practically the term includes anything that would come within the description of a ‘deadly’ or ‘dangerous’ weapon”).

186. *See* People v. Lampton, 898 N.E.2d 680, 687-88 (Ill. Ct. App. 2008) (holding that pepper spray may qualify as a “dangerous weapon”); State v. Loparo, 2007-Ohio-2783, at ¶ 13, No. 88229, 2007 WL 1641918, at \*2 (Ohio. Ct. App. June 7, 2007) (asserting that “a stun gun may qualify as [a] deadly weapon[.]”); State v. Gay, 566 S.E.2d 121, 124 (N.C. Ct. App. 2002) (holding that a stun gun may qualify as a “dangerous weapon”); Handy v. State, 745 A.2d 1107, 1111-14 (Md. 2000) (holding that pepper spray may qualify as a “dangerous or deadly weapon”); People v. Elliott, 702 N.E.2d 643, 647-48 (Ill. Ct. App. 1998) (holding that pepper spray may qualify as a “dangerous weapon”); People v. Bender, 335 N.W.2d 85, 88 (Mich. Ct. App. 1983) (holding that tear gas may qualify as a “dangerous weapon”), *disapproved on other grounds*, People v. Saffold, 631 N.W.2d 320, 324-25 (Mich. 2001); Pitts v. State, 649 P.2d 788, 791 (Okla. Crim. App. 1982) (holding that mace may qualify as a “dangerous weapon”); 61 Md. Atty. Gen. Op. 647, 655 (1976) (concluding that a stun gun was a dangerous weapon); S.C. Op. Atty. Gen., 1975 WL 28918, at \*1 (June 13, 1975) (opining that tear gas sprays would be covered as deadly weapons); S.C. Op. Atty. Gen., 1967 WL 12299 (Mar. 30, 1967) (likewise). *See also* Harwell v. State, 512 S.E.2d 892, 894-95 (Ga. 1999) (assuming that stun guns qualify as offensive or defensive weapons, though there the weapon was used offensively); James v. State, 521 S.E.2d 465, 466-67 (Ga. Ct. App. 1999) (following *Harwell*, again where the weapon was used offensively). *But see* People v. Gill, No. E037087, 2006 WL 137416, at \*1 (Cal. Ct. App. Jan. 19, 2006) (concluding that a stun gun was not a “dangerous or deadly weapon”); Miss. Atty. Gen. Op., 1994 Miss. AG LEXIS 158 (concluding that mace was not a “deadly weapon”); Op. No. 6709, 34 Or. Op. Atty. Gen. 1059 (1970) (concluding that tear gas isn’t covered under the concealed weapons statute, because “the normal and adaptive use of the described device would result in momentary incapacity through temporary eye and respiratory irritation,” something which might not be true as to pepper spray, which can lead to more than just momentary incapacity).

are “closely associated with criminal activity,” as well as being designed “to inflict bodily injury or death.”<sup>187</sup> This would likely not cover stun guns or irritant sprays, but I could find no case law on the subject.

#### APPENDIX II: GENERAL RESTRICTIONS ON STUN GUNS AND IRRITANT SPRAYS

In the lists of jurisdictions below, states are listed first, then relatively major cities or groups of towns, then minor towns. Within each category of restriction, I list stun gun restrictions, then irritant spray restrictions, then restrictions on both. In some situations, a jurisdiction is listed as imposing a certain restriction (e.g., concealed carry ban) on both stun guns and irritant sprays even if that restriction is specifically imposed on one (e.g., concealed carry of irritant sprays is banned) and a greater restriction is imposed on the other (e.g., possession of stun guns is banned, which necessarily also bans concealed carry of stun guns).

While the list covers many city and county ordinances, it doesn't comprehensively deal with all cities and counties. City and county ordinances are not as accessible or searchable as state laws. Many are not online at all. Some are only on the city or county's own Web site; some of those don't even have their full text indexed on Google. Others are scattered among several databases, including Lexis, Municode, American Legal Publishing, Code Publishing, and more. Some of those databases offer convenient multiple-code searching, but others do not. With the help of the UCLA School of Law research librarians, I've tried to find many of the local laws that regulate nonlethal weapons, but I'm sure I couldn't find them all.

##### *A. Bans on Possession, Including in the Home*

Home possession of firearms is generally allowed in all these jurisdictions.

###### *1. Stun guns*

Hawaii: HAW. REV. STAT. §§ 134-1, § 134-16 (2009).

Massachusetts: MASS. GEN. LAWS ANN. ch. 140, § 131J (2009).

Michigan: MICH. COMP. LAWS ANN. § 750.224a (West 2009).

New Jersey: N.J. STAT. ANN. §§ 2C:39-1(r), (t), 2C:39-3(h) (West 2009).

New York: N.Y. PENAL LAW §§ 265.00(15-c), 265.01 (McKinney 2009).

Rhode Island: R.I. GEN. LAWS § 11-47-42 (2008).

Wisconsin: WIS. STAT. ANN. § 941.295 (West 2009).

Annapolis/Baltimore area (including Anne Arundel, Baltimore, Harford, and Howard Counties, totaling about 1/3 of Maryland's population):

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187. *State v. Rackle*, 523 P.2d 299, 303 (Haw. 1974), *interpreting* HAW. REV. STAT. § 134-51 (2009).

ANNAPOLIS CITY CODE § 11.44.070(B) (2009); ANNE ARUNDEL COUNTY, MD., CODE §§ 9-1-603(a), (c) (2009); BALT. CITY CODE § 19-59-28(a)(2) (2009); BALT. COUNTY, MD., CODE §§ 17-2-104(a),(b)(1) (2008); HARFORD COUNTY, MD., CODE §§ 260-2, -3; HOWARD COUNTY, MD., CODE §§ 8.400, 8.404 (2008).

New Orleans: NEW ORLEANS CODE OF ORDINANCES § 54-339(1) (2009).

Overland Park (Kansas) (population 150,000, the second largest city in Kansas): OVERLAND PARK, KAN., CITY CODE § 11.60.010.A.1.

Philadelphia: PHILA. CITY ORDINANCES § 10-825(2) (2009).

South Bend (Indiana): SOUTH BEND, IND., MUN. CODE art. VII, § 14-36(b) (2005).

Tacoma (Washington) and some suburbs: TACOMA, WASH., CITY CODE §§ 8.66.010, .080.A.1 (2009); PACIFIC, WASH., MUN. CODE § 9.66.200.A (2008); RUSTON, WASH., MUN. CODE § 9.11.015(a) (2008).

Virgin Islands: 14 V.I. CODE ANN. tit. 14, ch. 113, § 2251(a) (2009).

Washington, D.C.: D.C. CODE §§ 7-2501.01(7)(D), 7-2502.01(a) (2001).

Wilmington (Delaware) and some suburbs: WILMINGTON, DEL., CITY CODE § 36-161(a) (2008); ELSMERE, DEL., CITY CODE § 99-4 (1986); NEW CASTLE, DEL., CITY CODE § 22.03.009.A (2008).

Chicago suburbs (aggregate population about 100,000): BARRINGTON, ILL., VILLAGE CODE § 5-2-2-3.B.5 (2008); BARTLETT, ILL., CITY CODE §§ 5-4-1, -7.A (2008); DEERFIELD, ILL., CITY CODE § 15-54(a) (2008); NEW LENOX, ILL., VILLAGE CODE §§ 54-211(a)(1)(c), (a)(2) (2007); WORTH, ILL., VILLAGE CODE §§ 10-5-1, -3 (2009).

Cleveland/Akron suburbs (aggregate population over 60,000): CANAL FULTON, OHIO, CODIFIED ORDINANCES § 549.12(a) (2004); LAKEWOOD, OHIO, CODIFIED ORDINANCES § 549.051(a) (1985); SHEFFIELD LAKE, OHIO, CODIFIED ORDINANCES § 549.13(a) (2009).

Denver suburbs (aggregate population over 150,000): MILLIKEN, COLO., CITY CODE § 10-9-40 (2006); PARKER, COLO., MUN. CODE § 5.06.190(7) (1994); THORNTON, COLO., CODE OF ORDINANCES § 38-239 (2008).

Northern Washington towns (aggregate population about 75,000): BELLINGHAM, WASH., MUN. CODE § 10.30.020.A (2005); BURLINGTON, WASH., MUN. CODE § 9.76.020(A) (2006).

Also FORT MCDOWELL, YAVAPAI NATION, ARIZ., LAW & ORDER CODE §§ 6-120(A)(4)(I), -124 (2006); MINTURN, COLO., MUN. CODE § 10-12-40; OCEAN CITY, MD., CITY CODE § 58-123 (2004); STORM LAKE, IOWA, CITY CODE § 8-2-1(B)(3) (1997).

A permit is required to buy a stun gun in Chicago and one of its suburbs, CHI., ILL., MUN. CODE § 4-144-010, -060, -070 (2008); WEST DUNDEE, ILL., VILLAGE CODE §§ 6-6-1, -16 (2008), but not to buy it elsewhere and then bring it into the city.

Berkeley purports to ban stun guns, but defines them as “Any ‘taser public

defender' or other similar electronic immobilizer which causes, by means of an electrical current, a person to experience muscle spasms and extreme pain, followed by unconsciousness"; this would presumably not include any modern stun guns, because they do not routinely cause unconsciousness. BERKELEY, CAL., MUN. CODE §§ 13.68.010, .020 (2009).

Stun gun bans have also been proposed recently in Florida, Indiana, Kansas, Mississippi, Missouri, New Mexico, and Texas, and earlier in Maryland and Pennsylvania. S.B. 340, 108th S., Reg. Sess. (Fla. 2006); H.B. 1526, 114th Gen. Assem., Reg. Sess. (Ind. 2005); H.B. 2033, 81st Leg., Reg. Sess. (Kan. 2005); S.B. 2258, 123d Leg., Reg. Sess. (Miss. 2008); S.B. 83, 95th Gen. Assem., Reg. Sess. (Mo. 2009); S.B. 1092, 47th Leg., Reg. Sess. (N.M. 2005); H.B. 1935, 80th Leg. Sess. (Tex. 2007); H.B. 130, 1996 Leg. Sess. (Md. 1999); S.B. 1349, 176th Gen. Assem., Reg. Sess. (Pa. 1993).

## 2. *Irritant sprays*

All these ordinances are in Illinois; the towns put together have a population of over 400,000.

Chicago suburbs: (1) STREAMWOOD, ILL., VILLAGE CODE §§ 4-4-1, -3 (2008) (expressly banning possession). (2) BURBANK, ILL., MUN. CODE § 9-64(c) (2007); CARPENTERSVILLE, ILL., MUN. CODE § 9.28.040(A)(3) (2008); CHICAGO HEIGHTS, ILL., MUN. CODE § 30-101(c) (2007); GENEVA, ILL., CITY CODE § 6-2-5(A)(3) (2008); HAMPSHIRE, ILL., VILLAGE CODE § 2-3-10(A)(3) (2007); HAZEL CREST, ILL., MUN. CODE § 20-79(a)(3); ISLAND LAKE, ILL., CODE OF ORDINANCES § 6-5-2-11(c) (2008); LAKE FOREST, ILL., CODE OF ORDINANCES § 47-7.2(a)(3); LAKE VILLA, ILL., VILLAGE CODE § 6-2-10(A)(3) (2008); LINDENHURST, ILL., VILLAGE CODE § 131.23(A)(3) (2007); MANTENO, ILL., VILLAGE CODE § 4-1-3-15(A)(3); MONTGOMERY, ILL., CODE OF ORDINANCES § 12-17(a)(3) (2009); MUNDELEIN, ILL., MUN. CODE § 9.60.380(A)(3) (2008); NORRIDGE, ILL., CODE OF ORDINANCES § 62-101(A)(3) (2009); NORTH AURORA, ILL., CODE OF ORDINANCES § 9.28.010.C (2009); NORTH CHI., ILL., CODE OF ORDINANCES § 8-24-36(A)(3) (2008); ROUND LAKE, ILL., CODE OF ORDINANCES § 9-28-010(A)(3) (2008); ROUND LAKE BEACH, ILL., CODE OF ORDINANCES § 4-7-9-1(A)(3) (2008); ST. CHARLES, ILL., CODE OF ORDINANCES § 9.60.010.D (1969); WAUCONDA, ILL., CODE OF ORDINANCES § 132.03(C) (2008); WEST CHI., ILL., CODE OF ORDINANCES § 11-133(a)(3) (2009); WILLOWBROOK, ILL., CODE OF ORDINANCES § 5-3-19(A)(3) (2009). With the exception of the Burbank and Norridge ordinances, these ordinances make it "unlawful for any person to" "[c]arry on or about his person or in any vehicle a tear gas gun projector or bomb, or any object containing noxious liquid gas or substance." I treat this as tantamount to a possession ban because it does not exempt carrying in the home (unlike neighboring provisions in all these ordinances that ban concealed carrying of firearms but expressly exempt a person's carrying a firearm "when on his land

or in his own abode or fixed place of business”). Also, the ordinances generally don’t exempt carrying to and from the place of purchase (except in a few ordinances that exempt “[t]ransportation of weapons” that are “not immediately accessible” or “broken down in a nonfunctioning state,” see CHICAGO HEIGHTS, ILL., MUN. CODE §§ 30-108(6) (2007); CARPENTERSVILLE, ILL., MUN. CODE § 9.28.040(B)(2)(c) (2008)).

St. Louis suburbs in Illinois: COLUMBIA, ILL., CODE OF ORDINANCES § 9.28.010 (1997); EAST ST. LOUIS, ILL., CODE OF ORDINANCES § 82-82 (2003); SWANSEA, ILL., CODE OF ORDINANCES § 13-601(A)(3) (2004) (same sort of ordinance as in all the Chicago suburbs except Streamwood).

Other Illinois towns: CANTON, ILL., CITY CODE § 6-12-1, -4 (2008); EAST PEORIA, ILL., CODE OF ORDINANCES § 10-1-3.15(a)(3) (2008); LINCOLN, ILL., CITY CODE § 6-4-7(B) (2009); LINCOLNWOOD, ILL., VILLAGE CODE § 14-3-19(C) (2009); NORTH PEKIN, ILL., VILLAGE CODE § 6-2-3-15(A)(3) (2007); OREGON, ILL., CODE OF ORDINANCES § 6-86(a)(3) (1996); SOUTH BELOIT, ILL., CODE OF ORDINANCES § 62-207(a)(1)(c) (2007); SULLIVAN, ILL., CODE OF ORDINANCES § 27-4-6(C) (same sort of ordinance as in the Chicago suburbs except Streamwood).

### 3. *Stun guns and irritant sprays*

DAVENPORT, IOWA MUN. CODE §§ 9.42.010, .030 (2000) (population almost 100,000) (banning possession of all “dangerous weapon[s]”).

## B. *Bans on Carrying in Most Places Outside the Home, Including Public Streets and Sidewalks*

Carrying of firearms is generally allowed in all the jurisdictions noted below (with a license that is available to pretty much all law-abiding adults), except in Illinois and Amite City (Louisiana), *see* Kranz, *supra* note 45.

### 1. *Stun guns*

Connecticut: CONN. GEN. STAT. §§ 29-38(a), 53-206, 53a-3 (2009).

Illinois: 720 ILL. COMP. STAT. ANN. §§ 5/24-1(a)(4), (10) (2009).

Fargo (North Dakota): FARGO, N.D., CITY CODE § 10-0304 (2009).

Oklahoma City: OKLA. CITY, OKLA., CITY CODE § 30-302 (2007).

Cleveland/Toledo area towns (population about 80,000): INDEPENDENCE, OHIO, CODIFIED ORDINANCES § 672.16 (2009); MAUMEE, OHIO, CODIFIED ORDINANCES § 549.06(a) (2009); ROCKY RIVER, OHIO, CODE OF ORDINANCES § 549.11(A) (2009); SANDUSKY, OHIO, CODIFIED ORDINANCES § 549.16(a) (2008); VALLEY VIEW, OHIO, CODIFIED ORDINANCES § 672.17(a) (2009).

Also LENEXA, KAN., MUN. CODE § 3-9-I-1.A.4 (2009).

## 2. *Stun guns and irritant sprays*

(Probably) Connecticut: CONN. GEN. STAT. ANN. §§ 29-38(a), 53-206, 53a-3 (2009) (“dangerous or deadly weapon or instrument”); *Tear Gas—Pencil Gun—Dangerous Weapon*, 26 Op. Conn. Att’y. Gen. 207 (1950) (treating tear gas pencils as covered by the predecessor of § 53-206, using logic that would equally apply to pepper spray, which was not then available).

(Probably) Oklahoma: 21 OKLA. STAT. ANN. § 1272 (2009) (“offensive weapon”).

(Probably) Akron: AKRON, OHIO, CODE OF ORDINANCES § 137.02(A) (2008) (“deadly weapon without proper justification,” though exempting any person “engaged in a lawful business, calling, employment or occupation and the circumstances in which he was placed justified a prudent man in possessing such a weapon for the defense of his person, property or family”); *see also* OHIO REV. CODE § 2923.11 (2009) (defining “deadly weapon” as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon”).

(Probably) Memphis and nearby town: MEMPHIS, TENN., CODE OF ORDINANCES § 10-32-2 (2009) (“any . . . dangerous weapon” “with intent to go armed”); COLLIERVILLE, TENN., CODE OF ORDINANCES § 130.075(A) (same); TENN. CODE ANN. § 39-11-106(5)(B), (34)(C) (2009) (defining “deadly weapon”—which would presumably also qualify as a “dangerous weapon”—as including any device that is “made or adapted for the purpose of inflicting death or serious bodily injury” or “is capable of causing death or serious bodily injury,” and defining “serious bodily injury” as including “bodily injury that involves” “[e]xtreme physical pain”).

Chicago suburbs (population over 80,000): BOURBONNAIS, ILL., MUN. CODE § 22-13(b) (2008) (“dangerous or deadly weapon”); GOLF, ILL., VILLAGE CODE § 5-2-1(C) (2008) (“dangerous weapons”); OAK LAWN, ILL., CODE OF ORDINANCES § 10-5-8(B)(2) (2008); RICHTON PARK, ILL., CODE OF ORDINANCES § 692.03(c)(2)(A) (2008).

Oklahoma towns (aggregate population over 100,000): (1) Oklahoma City vicinity, plus Ada and Ardmore, all covering any “defensive weapon,” with exceptions for when “provided” or “authorized” by state law, but no Oklahoma law specifically authorizes for the carrying of stun guns: ADA, OKLA., CITY CODE § 50-76(a) (2001); ARDMORE, OKLA., CITY CODE § 19-46 (2008); HARRAH, OKLA., CITY CODE § 10-305 (2008); JONES CITY, OKLA., TOWN CODE § 6-2C-7(A); MOORE, OKLA., CITY CODE § 10-405 (2008); NICOLS HILLS, OKLA., CITY CODE § 15-148 (2008). (2) The town of Mustang, covering “weapon[s] primarily meant and adapted for attack and the infliction of injury,” including any “dangerous weapon[s]”: MUSTANG, OKLA., CODE OF ORDINANCES §§ 78-166, -168 (2000). (3) Other towns, all covering any “dangerous or deadly weapon”: ALVA, OKLA., CODE OF ORDINANCES § 32-70

(2009); ANADARKO, OKLA., CITY CODE § 5-1C-1(A)(1) (2007); CHANDLER, OKLA., CODE OF ORDINANCES § 6-2A-3(A) (2007); NEWCASTLE, OKLA., CODIFIED ORDINANCES § 132.01(A) (2005); NORMAN, OKLA., CODE OF ORDINANCES § 15-504(a)(3) (1979); WOODWARD, OKLA., CODE OF ORDINANCES §131.12(B)(1) (2008).

Also AMITE CITY, LA., CODE OF ORDINANCES § 11-4017(a) (2008) (“any arms or weapons of any kind . . . other than the ordinary or common penknife or pocket knife”); GAITHERSBURG, MD., CODE OF ORDINANCES § 15-16 (2007) (“dangerous weapon”); WESTLAND, MICH., CODE OF ORDINANCES § 62-283(b)(4) (2009); DELANO, MINN., GEN. CODE § 812.01, subdiv. 2(B) (any “dangerous weapon,” defined to include “any . . . device as defined in Minn. Stat. §609.02, Subdivision 6, capable of producing death or great bodily harm,” with “dangerous weapon” defined in MINN. STAT. §609.02, Subd. 6 (2009) to include any “device or instrumentality that, in the manner it is . . . intended to be used, is calculated or likely to produce death or great bodily harm”).

### C. *Bans on Carrying Concealed Outside the Home*

Concealed carrying of firearms (with a license that is available to pretty much all law-abiding adults) is allowed in all the states noted below, except Delaware, Illinois, Maryland, and Wisconsin, *see* Kranz, *supra* note 45, at app.

#### 1. *Stun guns*

(Probably) Delaware: DEL. CODE ANN. tit. 11, §§ 222(4), (10), 1443(a) (West 2009). There is an exception when “the defendant was carrying the concealed dangerous instrument for a specific lawful purpose and that the defendant had no intention of causing any physical injury [defined as ‘impairment of physical condition or substantial pain’] or threatening the same,” *Id.* §§ 222(24), 1443(b). But this exception probably doesn’t apply to carrying of stun guns; people carrying them for self-defense probably have some intention of causing substantial pain to attackers should self-defense be necessary, and in any event “specific lawful purpose” probably doesn’t cover generalized desire to defend oneself against unspecified threats. *See* State v. Kelly, 571 A.2d 1286, 1291, 1294 (N.J. 1990) (interpreting concealed carry exemption for carrying “under circumstances . . . manifestly appropriate for . . . lawful use” as covering only “seiz[ing] the weapon spontaneously and us[ing] it to defend” against “immediate” “danger” and as not covering carrying for general self-defense).

(Probably) Maine: ME. REV. STAT. ANN. tit. 25, § 2001-A(1)(B) (West 2009) (“dangerous or deadly weapon usually employed in the attack on or defense of a person”); ME. REV. STAT. ANN. tit. 17-A, § 2(9)(C) (West 2009) (defining “dangerous weapon,” albeit as to a different part of the Maine code, to include “any device designed as a weapon and capable of producing death or

serious bodily injury”).

(Probably) Maryland: MD. CODE ANN., CRIM. LAW § 4-101(c) (West 2009) (“dangerous weapon of any kind,” expressly excluding irritant sprays).

(Probably) Missouri: MO. REV. STAT. § 571.030(1)(1) (2009) (“weapon readily capable of lethal use”); MO. REV. STAT. §§ 571.010(10), .020 (2009) (exempting irritant sprays from a ban on possession of “gas gun[s],” defined as devices “designed or adapted for the purpose of ejecting any poison gas that will cause death or serious physical injury,” but not saying anything about the concealed carry prohibition).

North Carolina: N.C. GEN. STAT. § 14-269(a) (2009).

(Probably) Ohio: OHIO REV. CODE ANN. §§ 2923.11(A), .12(A)(1) (West 2009) (“deadly weapon,” defined as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon”).

(Probably) Des Moines: DES MOINES, IOWA, MUN. CODE § 70-85(a)(6), (b) (2008) (exempting “any officer of the United States or of any state, any person having an authorized permit or any peace officer from wearing or carrying such weapons as may be convenient, necessary and proper for the discharge of his or her official duties,” which suggests that the “any person having an authorized permit” exemption is limited to people who have professional permits to carry weapons, IOWA CODE § 724.6 (2009), and not the nonprofessional permits, *id.* § 724.7).

Omaha: OMAHA, NEB., MUN. CODE §§ 20-191, -192, -206(a), (b)(10) (2008).

Pueblo (Colorado) (population over 150,000): PUEBLO, COLO., MUN. CODE OF ORDINANCES §§ 11-1-601(a)(4)(d), (b), (e)(2) (1997) (carrying concealed in a car permitted).

Minneapolis suburbs: BAYPORT, MINN., MUN. CODE §§ 38-31, -32(3) (2008); STILLWATER, MINN., CITY CODE § 52-3 (2009).

Mississippi towns: GAUTIER, MISS., CODE OF ORDINANCES § 15-23 (2009); MERIDIAN, MISS., CODE OF ORDINANCES § 16-41 (2008); OXFORD, MISS., CODE OF ORDINANCES § 74-7 (2009); VICKSBURG, MISS., CODE OF ORDINANCES § 17-151 (2008) (all covering “deadly weapon[s]”).

Also EAGLE, COLO., CITY CODE § 9.12.130(A) (2004).

## 2. *Irritant sprays*

(Possibly) Longboat Key (Florida): LONGBOAT KEY, FLA., CODE OF ORDINANCES § 130.04(A), (C) (2008). *But see* 1986 Fla. Op. Att’y Gen. 2 (concluding that the state constitutional right to bear arms precludes regulation of stun guns by local governments; this logic applies equally to irritant sprays).

Wabash (Indiana): WABASH, IND., CODE OF ORDINANCES § 6-162 (2008); IND. CODE § 35-41-1-8(a)(2) (2009) (“chemical substance . . . that in the matter

it . . . could ordinarily be used . . . is readily capable of serious bodily injury”).

### 3. *Stun guns and irritant sprays*

Note that statutes in Michigan, South Carolina, and Wisconsin expressly exempt irritant sprays from bans on *possessing or transporting* various weapons, but don't expressly mention the ban on *carrying such weapons concealed*. MICH. COMP. LAWS ANN. §§ 750.224(1)(e), .224(3)(a), .224d (West 2009); S.C. CODE ANN. § 16-23-470 (2009); WIS. STAT. ANN. § 941.26(1)(b), (4) (West 2009). I infer that such exemptions therefore don't apply to the concealed carry bans, much as the legality of possessing various weapons (such as handguns) in most places doesn't mean they may be carried concealed.

(Probably) Louisiana: LA. REV. STAT. ANN. §§ 14:2(A)(3), :95(A)(1) (2009) (“instrumentality customarily used or intended for probable use as a dangerous weapon,” with “dangerous weapon” defined as “any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm”).

(Possibly) Michigan: MICH. COMP. LAWS ANN. § 750.227 (West 2009) (“dangerous weapon”).

(Probably) Nebraska: NEB. REV. STAT. ANN. §§ 28-109(7), -109(20), -1202 (West 2009) (“deadly weapon,” defined to include anything “which in the manner it is . . . intended to be used is capable of producing death or” “bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body”).

(Probably) South Carolina: S.C. CODE ANN. § 16-23-460 (2008) (“deadly weapon usually used for the infliction of personal injury”).

(Probably) Utah: UTAH CODE ANN. § 76-10-504(1) (West 2009) (“dangerous weapon[s]”); *id.* §§ 76-10-501(5)(a), 76-1-601(3), 76-1-601(11) (defining “dangerous weapon” as “any item that in the manner of its use or intended use is capable of causing death or” “physical pain, illness, or any impairment of physical condition” “that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death”).

(Possibly) Washington: WASH. REV. CODE ANN. § 9.41.250(1)(b) (West 2009) (banning “[f]urtively carr[ying] with intent to conceal any dagger, dirk, pistol, or other dangerous weapon”); *State v. Myles*, 903 P.2d 979, 983-84 (Wash. 1995) (interpreting “furtive[] carr[ying]” as simply concealed carrying); *State v. Bonebright*, No. 20399-9-III, 2002 WL 1389426, at \*1 (Wash. Ct. App. June 27, 2002) (interpreting “dangerous weapon” as “an object capable of inflicting great bodily harm”); *State v. Werner*, No. 15998-1-III, 1998 WL 283537, at \*1 (Wash. Ct. App. June 2, 1998) (same).

(Possibly) Wisconsin: WIS. STAT. ANN. §§ 939.22(10), 939.22(14), 941.23 (West 2009) (“dangerous weapon,” defined to include “any device designed as

a weapon and capable of producing death or” “bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury”).

Anchorage: ANCHORAGE, ALASKA, MUN. CHARTER, CODE & REGS. § 8.25.020(A)(4) (2009) (“instrument or thing” that “could reasonably be construed as being kept as a weapon or in order to achieve some violent purpose, and by which injury could be inflicted upon the person of another”).

Chicago: CHICAGO, ILL., MUN. CODE § 8-24-020 (2009) (“dangerous weapon”).

Chicago suburbs, plus some other Illinois towns (aggregate population over 600,000): (1) Covering irritant sprays or stun guns expressly: BURNHAM, ILL., CODE OF ORDINANCES § 62-181(a)(12) (2005); CALUMET CITY, ILL., MUN. CODE § 62-251(a)(10) (2009); DARIEN, ILL., CITY CODE § 8-15-2(C) (2009) (in motor vehicles only); ELK GROVE VILLAGE, ILL., VILLAGE CODE § 6-6-1-1(G) (2008); FORD HEIGHTS, ILL., CODE OF ORDINANCES § 30-50(13) (2009); FRANKLIN PARK, ILL., VILLAGE CODE § 5-6-18(A)(7) (2009); HAINESVILLE, ILL., MUN. CODE § 9.12.010(A)(7) (2008); HARWOOD HEIGHTS, ILL., MUN. CODE § 9.04.050(I) (2008); JOLIET, ILL., CODE OF ORDINANCES § 32-2 (2009); JUSTICE, ILL., CODE OF ORDINANCES § 7-45(a)(8) (2007); LAKE BARRINGTON, ILL., VILLAGE CODE § 4-1-4-2(G) (2009); LISLE, ILL., VILLAGE CODE § 9-4-2(H)(1) (2009); LONG GROVE, ILL., VILLAGE CODE § 10-1-6(G) (2007); NORTH BARRINGTON, ILL., VILLAGE CODE § 6-3-2-2(G) (2008); OAK FOREST, ILL., CODE OF ORDINANCES § 131.04(G) (2009); PARK CITY, ILL., MUN. CODE § 9.32.010(A) (2008); PHOENIX, ILL., CODE OF ORDINANCES § 62-50(13) (2008); PROSPECT HEIGHTS, ILL., CITY CODE § 9-2-10(A) (2006); RIVERDALE, ILL., CODE OF ORDINANCES § 9.04.010(G) (2008); ROCKFORD, ILL., CODE OF ORDINANCES § 19-13(19) (2008); SOUTH CHICAGO HEIGHTS, ILL., CODE OF ORDINANCES § 50-2(a)(8) (2008); THORNTON, ILL., CODE OF ORDINANCES § 10-1-1(A)(7) (2009); UNIVERSITY PARK, ILL., CODIFIED ORDINANCES § 640-01(h) (2006); VILLA PARK, ILL., MUN. CODE § 16-115(b)(7) (2009); WARRENVILLE, ILL., CITY CODE § 4-3-1(A)(7) (2008); (2) Covering any “dangerous or deadly weapon”: BEACH PARK, ILL., MUN. CODE § 9.08.040(A) (2003); CAHOKIA, ILL., CODE OF ORDINANCES § 137.07 (2005); CHATHAM, ILL., CODE OF ORDINANCES § 130.01(A) (2009); COAL CITY, ILL., CODE OF ORDINANCES § 137.05(A) (2008); COUNTRYSIDE, ILL., CITY CODE § 4-2-9(A) (2009); CRYSTAL LAKE, ILL., CODE § 521-2; DES PLAINES, ILL., CITY CODE § 6-2-13(A)(1) (2008); DIXON, ILL., CITY CODE § 9-2-9 (2008); ELMWOOD PARK, ILL., VILLAGE CODE § 35-15 (2008); FOX LAKE, ILL., VILLAGE CODE § 4-1-1-4(A)(1) (2008); FREEPORT, ILL., CODIFIED ORDINANCES § 692.02(a) (2009); MOMENCE, ILL., CITY CODE § 5-1-12 (2008); PALOS HILLS, ILL., MUN. CODE § 9.48.010 (2008); RIVER FOREST, ILL., VILLAGE CODE § 8-6-17(A) (2008); RIVER GROVE, ILL., VILLAGE CODE § 9-5-1 (2007); RIVERSIDE, ILL., VILLAGE CODE § 6-1-16(B)(3) (2008); ROANOKE, ILL., VILLAGE CODE § 6-1-5

(2007); STRONGHURST, ILL., VILLAGE CODE § 5-3C-10 (2005); VANDALIA, ILL., MUN. CODE § 9.24.010 (2008); WATERLOO, ILL., CODE OF ORDINANCES § 27-1-8 (2008); WILLOW SPRINGS, ILL., VILLAGE CODE § 10-1-12(B) (2007) (“dangerous, offensive or deadly weapon[.]”); (3) NORTHFIELD, ILL., VILLAGE CODE § 15-2(6) (2008) (“dangerous weapon”); OLYMPIA FIELDS, ILL., CODE OF ORDINANCES § 13-7 (2008) (“dangerous weapon”); WORTH, ILL., VILLAGE CODE § 10-4-3(G) (2009) (“dangerous weapon”); (4) Covering any “concealed weapons” without a state-issued license, but Illinois does not issue licenses to carry irritant sprays concealed: BROADVIEW, ILL., VILLAGE CODE § 6-2-21(B) (2008); HINSDALE, ILL., VILLAGE CODE § 5-3-11(B) (2008); OSWEGO, ILL., VILLAGE CODE § 6-2-25 (2008); SLEEPY HOLLOW, ILL., VILLAGE CODE § 4-3-8 (2009); TINLEY PARK, ILL., CODE OF ORDINANCES § 133.35 (2008); WADSWORTH, ILL., VILLAGE CODE § 5-6-3(A) (2008); WESTERN SPRINGS, ILL., VILLAGE CODE § 6-1-2(E) (2008); WINTHROP HARBOR, ILL., CODE OF ORDINANCES §130.10(A) (2009).

Fargo (certainly as to stun guns, probably as to irritant spray): FARGO, N.D., MUN. CODE §10-0304(A) (firearms, stun guns, or “any sharp or dangerous weapon such as is usually employed in attack or in defense of the person”); N.D. CENT. CODE §§ 12.1-01-04(6), 62.1-01-01 (West 2008) (defining “dangerous weapon,” for purposes of the North Dakota criminal code and weapons code, to include irritant sprays). *But see* N.D. CENT. CODE § 62.1-04-02 (West 2008) (stating that, for purposes of the *state* concealed dangerous weapons ban, irritant sprays don’t qualify as dangerous weapons).

Milwaukee County (Wisconsin): MILWAUKEE COUNTY, WIS., CODE OF GENERAL ORDINANCES § 63.015 (2007).

(Possibly) Oregon towns: BANDON, OR., MUN. CODE § 9.28.010 (2008); CARLTON, OR., § 9.02.005 (Lexis 2008); CAVE JUNCTION, OR., MUN. CODE § 9.24.010 (2007); CENTRAL POINT, OR., MUN. CODE § 9.90.010 (2008); ELGIN, OR., MUN. CODE § 9.28.010; NEWPORT, OR., CODE OF ORDINANCES § 130.055(A). All these cover “any instrument” or “any . . . weapon . . . by the use of which injury could be inflicted upon the person . . . of another.” *But see* 34 Or. Op. Att’y Gen. 1059 (1970) (concluding that similar language should not be read as covering irritant sprays because the other instruments listed in such a statute “in their normal and adaptive use have the capability to produce serious bodily injury,” and the listing of such other more dangerous weapons in the statute “indicates a concern with invasions of personal rights beyond the infliction of temporary incapacity through eye and respiratory irritation”).

Oklahoma towns: (1) “[O]ffensive or defensive weapon”: DUNCAN, OKLA., CITY CODE § 10-306.A (2008). (2) “[D]angerous or deadly weapon”: DURANT, OKLA., CODE OF ORDINANCES § 132.04 (2006); FORT GIBSON, OKLA., TOWN CODE § 5-6B-6(A) (2005); GROVE, OKLA., CITY CODE § 10-306 (2007); LINDSAY, OKLA., CODE OF ORDINANCES § 19-88 (2007); MARLOW, OKLA., CITY CODE § 5-1B-1(A) (2007); NICOMA PARK, OKLA., CITY CODE § 62-63(a) (2008); OKEMAH, OKLA., CITY CODE § 5-4B-7(A)(1) (2006); POTEAU, OKLA.,

CITY CODE § 5-4C-4(A) (2002); PRYOR CREEK, OKLA., CITY CODE § 5-4C-4(A) (2008); SALLISAW, OKLA., CODE OF ORDINANCES § 66-71(a) (2008); WEWOKA, OKLA., CITY CODE § 5-5C-8(A) (2008) (“dangerous or deadly weapon”). (3) “[W]eapon”: MCALESTER, OKLA., CODE OF ORDINANCES § 82-117 (2008).

St. Louis suburb: OLIVETTE, MO., REV. CODE § 170.030(a)(1), 215.120(a)(3) (2007).

Washington towns: AIRWAY HEIGHTS, WASH., MUN. CODE § 9.36.020(B) (2009); CHENEY, WASH., MUN. CODE § 9A.07.020(d) (Lexis 2008); WESTPORT, WASH., MUN. CODE § 9.56.040 (2009); YAKIMA, WASH., MUN. CODE § 6.44.040(a) (2008); YELM, WASH., MUN. CODE § 9.32.125 (2008). All these cover “any . . . instrument by the use of which injury could be inflicted upon the person or property of another,” or, in the case of Yakima, “dangerous weapon or instrument which may be used to inflict injury upon the person of another.”

*D. Requirements of a Permit to Possess, Carry, or Carry Concealed, with the Government Having Some Discretion Whether To Issue the Permit*

All these jurisdictions allow firearms possession without a discretionary permit. All except California give licenses to carry concealed firearms on a shall-issue basis, or allow concealed carry of firearms without a license. The Florida ordinances might be preempted by the Florida Constitution. *See* 1986 Fla. Op. Att’y Gen. 2 (concluding that the state constitutional right to bear arms precludes regulation of stun guns by local governments, using logic that applies equally to irritant sprays).

1. *Stun guns*

Akron (Ohio): AKRON, OHIO, CODIFIED ORDINANCES §§ 137.01, .02, .06, .28(A)(2) (2008) (possession) (“Taser or any device which shoots a dart-like object charged with volts of electricity”).

Also (possibly) JUNO BEACH, FLA., CODE OF ORDINANCES § 16-4 (2008) (carrying) (“dart gun[s]”); LAFAYETTE, COLO., CODE OF ORDINANCES §§ 75-46, -49 (2009) (carrying) (“mechanical gun[s],” defined broadly enough to include projectile stun guns); WRANGELL, ALASKA, MUN. CODE § 10.32.020 (2008) (carrying) (any “projectile-propelling device which contains any cartridge, pellet, B-B, dart, or other ammunition within the chamber or magazine thereof”); WHITE MOUNTAIN APACHE, ARIZ., CRIM. CODE §§ 1.1.B.5.a, 2.18.A-B.

2. *Irritant sprays*

Mobile (Alabama): MOBILE, ALA., CODE OF ORDINANCES §§ 62-21, -23, -

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29 (2008) (carrying).

(Possibly) Oakland (Florida): OAKLAND, FLA., CODE OF ORDINANCES § 50-55(b) (2007) (possession) (limited to tear gas).

Grosse Point Woods (Michigan): GROSSE POINT WOODS, MICH., CODE OF ORDINANCES § 28-431 (2008) (carrying) (limited to mace or tear gas).

3. *Stun guns and irritant sprays*

(Probably) Nevada: NEV. REV. STAT. §§ 202.350(1)(d)(3), 202.350(3) (West 2008) (concealed carrying) (“dangerous or deadly weapon[s]”).