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# Why the New York State System for Obtaining a License to Carry a Concealed Weapon is Unconstitutional

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# WHY THE NEW YORK STATE SYSTEM FOR OBTAINING A LICENSE TO CARRY A CONCEALED WEAPON IS UNCONSTITUTIONAL

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## Introduction

The New York State administrative system for obtaining a license to carry a concealed weapon violates the state constitution and the tenets of administrative law vital to a democratic society. The New York State Legislature has delegated the important power to grant licenses to carry a concealed weapon ("carry licenses") to city and county[1] administrative officials.[2] Because the legislature has not devised sufficient guidelines to implement its will, this grant of power is improper. Moreover, administrative officials acting without proper guidelines proceed beyond their constitutional authority. The license determination process and the accompanying disclosure rules are unfair to license applicants. As a result, persons denied carry licenses are not afforded meaningful judicial review.

This article discusses each of the above-listed failures of the New York State administrative procedures for issuing carry licenses.[3] In addition, this article asserts that by avoiding policy determinations, the legislature has created a system that disadvantages both individual applicants and the public at large. Part I of this article explains the current administrative procedures for obtaining a carry license in New York State. Part II describes the fundamental requirements of a fair and constitutional administrative system as well as contends that New York's system for obtaining a carry license fails to satisfy these requirements. Part III discusses ways to

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1. A government official, in his or her capacity to grant or deny carry permits, is acting as an administrative agent for he or she has "the power to determine, either by rule or by decision, private rights and obligations." *See* 1941 U.S. ATT'Y GEN.'s COMM. ON ADMIN. PROC. 7, *quoted in* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 13, n.1 (4th ed. 1994) [hereinafter SCHWARTZ, ADMIN. LAW].

2. N.Y. PENAL LAW § 400.00(3) (McKinney 1996).

3. This article does not, however, discuss the gun control debate or any policy changes in New York gun control laws.

change the current system so that it would comport with these requirements. This article concludes that both the New York Legislature and courts must act to rectify the state's unconstitutional and undemocratic scheme for issuing carry licenses.

## I. The New York State System for Applying for a License to Carry a Concealed Weapon

New York Penal Law provides that all applications for carry licenses be made to the city or county licensing officers where the applicant resides.[4] Each city and county chooses who shall be the licensing officer, and provides the appropriate application procedures for carry licenses.[5] New York City's application process is as follows:[6]

1. The applicant picks up a Pistol License Application from the police department.
2. The applicant completes the form, which requires a "letter of necessity," describing the need for a carry license "in connection with a business or profession." He is also required to submit documentation concerning citizenship, residence, arrest information, and proof of business ownership.
3. He then has the application notarized and his fingerprints taken. The fingerprints are cleared by the state in approximately ten weeks, and the FBI in approximately four months.
4. The applicant brings the completed application back to the police department and pays a $170 non-refundable application fee by postal money order.
5. An investigator at the police department interviews the applicant approximately two months after the application is submitted.
6. At the interview the investigator reviews any documents the applicant was told to bring to verify the information on the application form, and reviews the applicant's stated need for a license.
7. After the interview the investigator writes a report to a sergeant in the licensing division of the police department sum-

4. *See* § 400.00(3).

5. *See* N.Y.C. Admin. Code tit. 10, ch. 1 § 10-131 (1996) (pertaining to firearms) [hereinafter NYCAC]; NYCAC tit. 10, ch. 3 § 10-303 (pertaining to rifles and shotguns).

6. *See* Telephone Interview with Terence McCormack, Lieutenant, New York City Police Dep't Licensing Div. (Nov. 8, 1995) [hereinafter McCormack Interview]; NYCAC, *supra* note 5, at §§ 10-131, 10-303 (providing the authority to develop such procedures).

marizing the applicant's asserted need for a carry license. Sometimes the investigator will personally investigate the applicant's situation before writing the report.

8. The sergeant recommends issuance or denial to a lieutenant in the licensing division, and the lieutenant determines whether or not a license will be granted.
9. The applicant is notified by mail of his approval or disapproval. If the application is denied, the notice will state the reasons for disapproval. The applicant may appeal a denial to the commanding officer of the licensing division within thirty days of the denial.[7]
10. If the commanding officer affirms the denial, the applicant can file an Article 78 petition and appeal the determination in the state court system.[8]

New York State Penal Law states: "[a] license for a pistol or revolver shall be issued to . . . have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof."[9] This statute, however, does not clarify what constitutes proper cause, and no legislative intent on the matter exists. Further, there are no additional guidelines to assist the administratiave official in making the "proper cause" determination.

On the rare occasions that New York courts have interpreted "proper cause," they have called it "a legitimate reason, a circumstance or combination of circumstances justifying the granting of a privilege."[10] Some courts have held that failure to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession" is a sufficient basis for denying a carry permit.[11] Other courts have

7. *See* McCormack Interview, *supra* note 6; *see also* NYCAC, *supra* note 6, at § 10-303(e)(1) ("The applicant has the right to appeal pursuant to procedures established by the police commissioner for administrative review").

8. *See* McCormack Interview, *supra* note 6; *see also* N.Y. C.P.L.R. § 7801, cmt. C7801:1 (McKinney 1994) ("For the most part, Article 78 proceedings are used to challenge action (or inaction) by agencies and officers of state and local governments"). *See, e.g.,* Goldstein v. Brown, 189 A.D.2d 649, 592 N.Y.S.2d 343 (1993) (applicant for handgun carry permit brought Article 78 proceeding challenging city police department's denial of application); Klapper v. Codd, 78 Misc.2d 377, 356 N.Y.S.2d 431 (Sup. Ct. 1974).

9. N.Y. PENAL LAW § 400.00(2)(f) (McKinney 1996).

10. *In Re* O'Connor, 154 Misc.2d 694, 697, 585 N.Y.S.2d 1000, 1003 (West. County Ct. 1992).

11. Bernstein v. Police Dep't of City of New York, 85 A.D.2d 574, 574, 445 N.Y.S.2d 716, 716 (1981)(quoting *In Re* Klenosky v. New York City Police Dep't, 75 A.D.2d 793, 793, 428 N.Y.S.2d 256, 256 (1980), *aff'd,* 53 N.Y.2d 685, 421 N.E.2d 503 (1981)).

labeled arguments such as spending time in a high crime area and a general desire to carry a gun for protection as insufficient reasons for obtaining a carry license.[12] Indeed, an appellate court rejected the "'high crime area' argument, the logical extension of which is to 'make the community an armed camp.'"[13]

Local authorities often create rules in order to implement the issuance of carry licenses as set forth in N.Y. Penal Law § 400.[14] For example, New York City has divided carry licenses unrelated to the requirements of an occupation into two categories—"Carry Business Licenses," which are unrestricted licenses to carry a concealed handgun, and "Limited Carry Business Licenses," which permit persons to carry a concealed handgun during specified times and to and from particular places.[15] The Rules of the City of New York include exposure "by reasons of employment or business necessity to extraordinary person danger," and exposure to "extraordinary personal danger, documented by proof of recurrent threats to life or safety" as factors for consideration when assessing if an applicant has shown "proper cause" for a carry license.[16]

The lack of guidelines from the Legislature creates problems for evaluating "proper cause" when an applicant presents a need for a license unrelated to business. The names of the two types of non-occupational carry licenses ("Carry Business License" and "Limited Carry Business License") and comments made by Lieutenant McCormack, a licensing officer in the New York City Police Department, reflect a general understanding amongst New York City government officials that "proper cause" refers only to business needs.[17] Lieutenant McCormack estimated that 99% of the "needs" put forth in the applications for carry licenses relate to the applicant's business, including: amount of money carried, past in-

12. *See* Sable v. McGuire, 92 A.D.2d 805, 805, 460 N.Y.S.2d 52, 52 (1983) ("Nor was it error for licensing official to reject the petitioner's 'high crime area' argument"); *In Re O'Connor*, 154 Misc.2d at 697 (declaring that "a generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause'").

13. *See, e.g., Sable*, 92 A.D.2d at 805.

14. *See* NEW YORK CITY CHARTER ch. 45, § 1043 (1996) (granting agencies power to adopt rules necessary to carry out its state law duties); RULES OF THE CITY OF NEW YORK [hereinafter RCNY] tit. 38, §§ 5-01-25 (1996) (regarding handgun licenses).

15. *See* RCNY tit. 38, § 5-01.

16. RCNY tit. 38, § 5-03.

17. *See* McCormack Interview, *supra* note 6. McCormack has made many of the gun licensing determinations at the New York City Police Department, and was involved in the gun licensing division for fifteen years.

stances of crime, the surrounding neighborhood, and other dangerous circumstances.

A general understanding that "proper cause" refers only to business need, however, may be a result of the application's failure to state that non-business needs will be considered.[18] Indeed, Lieutenant McCormack could not recall one applicant in his fifteen years with the police department whose stated need referred to the applicant being a victim of domestic violence.[19] He indicated that if he did receive such an applicant he would not know how to handle the matter, but supposed that he would probably meet with a higher authority, such as the Deputy Commissioner of Legal Matters, to discuss the situation.[20] Lieutenant McCormack further commented that the police department does not issue a carry license because an applicant's life has been threatened or that he has been beaten, because those situations "happen everyday."[21] Normally, if a carry license is given to a person because of danger, the order to do so comes from a "higher source" or "other agency."[22]

Lieutenant McCormack conceded that because the state legislature has not issued any guidelines for assessing proper cause, the system can never be entirely fair.[23] While he stated that the police "try to be fair,"[24] a recent New York City Police Department ("NYPD") scandal involving accusations of favoritism in issuing gun licenses suggests otherwise. Henry Krantz, the commanding officer of the NYPD's licensing division, agreed to pay a $10,000 fine and receive a reduction in rank to settle administrative charges that he had shown favoritism in granting gun licenses, and that he

18. *See* City of New York Pistol License Application (referring only to applicants needing a pistol in connection with a business or profession). The application contains a box marked "Carry Business," and requires an explanation of "why the [applicant's] employment requires the carrying of a concealed handgun." *Id.*

19. *See* McCormack Interview, *supra* note 6.

20. *See id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.*

ordered his subordinates to do so.[25] Other officials in the division were transferred, demoted, or forced to retire.[26]

The turnover of city officials also results in inconsistent interpretation and application of the meaning of "proper cause." For example, Lieutenant McCormack stated that before the police department developed a "formal system" for reviewing license applications, the department granted licenses to doctors easily.[27] Both attorneys Susan Courtney Chambers and Marc Benison agree that the standards to obtain a carry permit have become stricter and tougher over the last two decades, making police department determinations of such applications unpredictable.[28] Ms. Chambers claims that under Mayor Koch's administration, carrying $5000 per week guaranteed an unrestricted carry permit, but presently if an applicant carries $100,000 per week, he might be granted only a limited carry license.[29] Ms. Chambers, who represents several doctors seeking permits, claims that hundreds of other doctors in situations similar to her clients' have permits.[30]

Because there are no guidelines to assist applicants in assessing the chance of being issued a carry license, applicants might want to compare their "needs" with applicants to whom licenses have been granted. This practice would save the applicant time and money before applying. However, currently, carry license applications are not matters of public record available for full inspection. In November 1994, the law was changed to include only the name and address of persons to whom licenses have been granted as a matter of public record.[31] Prior to this change, New York Penal Law § 400

25. *See* Leonard Levitt, *Deal Avoids Trial/Pistol-License Cop to Pay $10G Fine*, N.Y. NEWSDAY, Feb. 4, 1997, at A7 [hereinafter Levitt, *Deal Avoids Trial*]; John Marzulli & Alice McQuillan, *Gun Licensing Boss Suspended by NYPD*, N.Y. DAILY NEWS, Jan. 23, 1997, at 26. (Some felt that Krantz was being "scapegoated because corruption and favoritism have run rampant within the pistol-licensing division for decades."); Leonard Levitt, *One Police Plaza/Confidential/Pistol-Packin' Partners Probed*, N.Y. NEWSDAY, Jan. 27, 1997, at A23.

After learning of the scandal, I attempted to interview officers in the NYPD's licensing division. However, officers in the division informed me that they were under strict orders not to give interviews unless they received permission to do so. Those requests were denied.

26. *See* Levitt, *Deal Avoids Trial*, *supra* note 25.

27. *See* McCormack Interview, *supra* note 6.

28. *See* Telephone Interview with Susan Courtney Chambers, Attorney (Nov. 3, 1995) [hereinafter Chambers Interview]; Telephone Interview with Marc Benison, Attorney (Oct. 31, 1995) [hereinafter Benison Interview].

29. *See* Chambers Interview, *supra* note 28.

30. *See id.*

31. *See* N.Y. PENAL LAW § 400.00(2)(f) (McKinney 1994).

had provided that granted applications in their entirety would be a matter of public record.[32] Despite this statutory authority, however, it was extremely difficult for persons to obtain such records even before the recent change.[33]

Procedures for review of licensing determinations are governed by the New York State Administrative Procedure Act.[34] New York law provides that filing an Article 78 petition[35] is the appropriate avenue for relief in the state court system for an alleged improper denial of a carry license.[36] Because proceedings for carry license determinations are not required by law to be made only on a record and after an opportunity for a hearing, they are not considered "adjudicatory proceedings."[37] Therefore, the applicable standard is "mandamus of review."[38] Under the standard a judge does not reevaluate administrative decisions, but rather affirms such decisions as denials unless he concludes that the determinations were "arbitrary or capricious."[39] New York State courts have held that the responsibility for determining whether a carry license applicant

32. *See id.*

33. Ms. Chambers, who represented Goldstein in *Goldstein v. Brown*, *see infra* notes 41-43 and accompanying text, has been involved in litigation against the City of New York since 1991 concerning the denial of her Freedom of Information Law (FOIL) requests for the full list of the names of the 7,000 carry licensees in New York City. Ms. Chambers handles many cases in New York City that challenge a denial of a carry license based on improper cause. She submits that there are so few cases like *Goldstein v. Brown*, where the courts are forced to face the inconsistencies in the system, because it is so difficult to view applications from which licenses were granted to make those comparitive arguments. *See* Chambers Interview, *supra* note 28. Moreover, a 1987 article in the *Village Voice*, listing many rich and well-connected people who have carry licenses, mentioned that the New York City Police Department refused to release the application forms. *See* William Bastone, *Born to Gun: 65 Big Shots With Licenses to Carry*, THE VILLAGE VOICE, Sept. 29, 1987, at 11.

34. *See* N.Y. C.P.L.R. § 7801, cmts. C7801:1, C7801:2, C7801:3 (McKinney 1994).

35. Procedure by which administrative determinations can be challenged in the state court system, which was previously obtained by writs of certiorari, mandamus, or prohibition. *See* N.Y. C.P.L.R. § 7801 (McKinney 1996).

36. *See* Goldstein v. Brown, 189 A.D.2d 649, 592 N.Y.S.2d 343 (1993) (police department's denial of carry license application should be appealed to court "pursuant to CPLR Article 78"); Klapper v. Codd, 78 Misc.2d 377, 356 N.Y.S.2d 431 (Sup.Ct. 1974) (police department's denial of carry license application appealed to court in an Article 78 proceeding); *see also* N.Y. C.P.L.R. § 7801, cmt. C7801:1 (McKinney 1994) ("For the most part, Article 78 proceedings are used to challenge action (or inaction) by agencies and officers of state and local governments.").

37. N.Y. A.P.A. § 102(3) (McKinney 1996).

38. *See* N.Y. C.P.L.R. § 7801, cmt. C7801:3 (McKinney 1994). Mandamus to review is the modern name for judicial review of "administrative" determinations involving the exercise of discretion.

39. *See* N.Y. C.P.L.R. § 7801 (McKinney 1996); N.Y. C.P.L.R. § 7803 (McKinney 1996) (providing that only final determinations can be reviewed).

has demonstrated proper cause is entrusted to the discretion of the licensing officials, whose decisions will not be disturbed unless shown to be arbitrary or capricious.[40]

If a judge does determine that an administrator's denial of a carry license was arbitrary or capricious, she can fashion an appropriate remedy.[41] In *Goldstein v. Brown*,[42] the applicant, who was denied a carry license, showed that the police department granted carry permits to others upon less specific proof of danger.[43] However, despite the court's conclusion that the police department failed to explain why the applicant was denied a license, the judge remanded the matter to the administrator for further review, rather than grant the license.[44]

## II. New York State's Gun Licensing System's Failure to Meet Constitutional and Administrative Law Standards

A government official, in her capacity to grant or deny carry licenses, is acting as an administrative agent, for she has "the power to determine, either by rule or by decision, private rights and obligations."[45] Yet, the New York State system for obtaining a carry license violates all three essential tenets of an administrative scheme: (i) it does not limit the powers delegated to administrative officials; (ii) it does not provide a fair system for dealings between citizens and administrative officials; and (iii) it does not afford citizens a meaningful opportunity to challenge the legality of a licens-

40. *See, e.g.*, Hochreich v. Codd, 68 A.D.2d 424, 426, 417 N.Y.S.2d 498, 499 (1979) (stating "the applicant [must] satisfy the Commissioner as to the existence of proper cause for issuance of [a] license"); *In Re* Bernstein v. Police Dep't of the City of New York, 85 A.D.2d 574, 445 N.Y.S.2d 716 (1981) (finding "the responsibility for determining whether an applicant has demonstrated proper cause is entrusted to the discretion of the licensing official").

41. *See* N.Y. C.P.L.R. § 7806 (McKinney 1996); *see infra* notes 268-69 and accompanying text.

42. 189 A.D.2d 649, 592 N.Y.S.2d 343 (1993).

43. *See id.* at 651.

44. *See id.* (concluding that the police department had failed to explain why the applicant was denied a license when the applicant showed that carry permits were granted to others upon less specific proof of danger). One reason for remanding the decision, rather than granting the license is that New York courts have maintained that a "denial of a license must be established by evidence where the record on its face does not establish that the license should otherwise be denied" in order to avoid anomalous and arbitrary results. Guida v. Dier, 54 A.D.2d 86, 87, 387 N.Y.S.2d 720, 721 (1976) (citing Falk v. City of New York, 41 A.D.2d 530, 340 N.Y.S.2d 127 (1973)). *See also* Fulco v. McGuire, 81 A.D.2d 509, 437 N.Y.S.2d 353 (1981).

45. SCHWARTZ, ADMIN. LAW, *supra* note 1 at 15.

ing determination through independent review.[46] Moreover, because the delegation and fair procedure requirements are not met, the system also violates the New York State Constitution.

## A. Delegation of Legislative Powers

### 1. *The Necessity of Standards to Guide Discretion*

The authority and duties granted to officials of an administrative system must be within the constitutional limits of legislative delegation. A legislative body cannot delegate powers that are "strictly and exclusively legislative," but it can delegate its other powers.[47] Generally, the delegation of licensing powers is proper.[48]

The New York State Constitution expressly requires legislative power[49] to be vested solely in the Senate and Assembly.[50] "[T]he [l]egislature cannot secure relief from its duties and responsibilities by a general delegation of legislative power to some one [sic] else."[51] Therefore, the legislature must create standards to guide administrative discretion.[52] The only constitutional discretion that

46. *See* Bernard Schwartz, *Fashioning An Administrative Law System*, 37 U.N.B. L.J. 59, 62 (1988) [hereinafter Schwartz, *Fashioning*].

47. Trustees of Saratoga Springs v. Saratoga Gas, Elec., Light & Power Co., 191 N.Y. 123, 132, 83 N.E. 693, 695 (1908) (quoting Wayman v. Southard, 23 U.S. 1, 42 (1825)).

48. *See id.* at 133-34 (citing *Wayman*, 23 U.S. 1, 42-43) (proposing that the long-standing exercise of powers by government officials should be assumed valid in the absence of a contrary constitutional provision).

49. *See* Tropp v. Knickerbocker Village, 205 Misc. 200, 211, 122 N.Y.S.2d 350, 361 (Sup. Ct. 1953) (describing legislative power as "the determination of [ ] legislative policy and its formulation and promulgation as a defined and binding rule of conduct" (quoting Yakus v. United States, 321 U.S. 414, 424-25 (1944)), *aff'd*, 284 A.D. 935, 135 N.Y.S.2d 618 (1954)).

50. N.Y. CONST. art. III, § 1 ("The legislative power of this state shall be vested in the Senate and Assembly.")

51. People v. C. Klinck Packing Co., 214 N.Y. 121, 108 N.E. 278 (1915).

52. *See* Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 283 (1938) (holding that "such field of discretion must be defined by the Legislature. The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field."); *see also In Re* Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 276, 283 N.E.2d 603, 606 (1972) ("[I]t is a well-established principle of administrative law that to prevent an unlawful delegation of power, it is incumbent upon the legislative authority to set forth standards to indicate to the agency the limits of its power . . . ."). Commentators have noted that although the United States Constitution requires standards for legislative delegations to administrative officials, in the past several decades federal courts have applied this requirement liberally, putting more emphasis on the requirement of procedural safeguards. *See* SCHWARTZ, ADMIN. LAW, *supra* note 1, at 82 (4th ed. 1994) (stating that the Supreme Court has not struck down a legislative delegation for lack of standards since Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). Although New York courts have acknowledged this trend in the federal courts, they still assert that in

can be delegated to an administrative officer in his power to grant licenses is discretion regarding the application and execution of the will of the legislature.[53] If, however, the delegated discretion allows an administrative official or body to create policy or apply personal standards, it is unconstitutional.[54]

The importance of this constitutional requirement that the legislature create standards to guide licensing officers is rooted in fundamental democratic principles. The orderly processes of a representative government require legislative bodies to make important and delicate policy decisions underlying such standards.[55] Generally, elected officials should remain responsive to the people they represent. Likewise, the represented show their like or dislike for policy choices through the electoral process. If, however, the legislature delegates the power to make important decisions, political accountability is reduced.[56] Furthermore, without standards to guide and govern delegated discretion, there will be no restraint

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order for a legislative delegation to be valid under the New York Constitution, the legislature must provide guiding standards. *See* Metro. Life Ins. Co. v. N.Y. State Labor Relations Bd., 280 N.Y. 194, 207, 20 N.E.2d 390, 395 (1939) (discussing the explicit set-up of procedural standards and their similarity to provisions in the National Labor Relations Act); *see also* Rapp v. Carey, 44 N.Y.2d 157, 162, 375 N.E.2d 745, 748 (1978) (asserting that the legislature is powerless to delegate functions unless it provides adequate standards) (citations omitted).

53. *See* Beer Garden, Inc. v. New York State Liquor Authority, 79 N.Y.2d 266, 276, 590 N.E.2d 1193, 1197 (1992) ("It is of course a fundamental principle of administrative law that agencies are possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary invitation . . . . Even when broad rule-making authority has been granted, an agency can not 'promulgate rules in contravention of the will of the Legislature.'").

54. *See* Packer Collegiate Inst. v. Univ. of N.Y., 298 N.Y. 184, 189, 81 N.E.2d 80, 81-82 (1948) (stating that a statute that attempts to empower an administrative officer to license or refuse to license under his own standards is patently unconstitutional); *see also* Seignious v. Rice, 273 N.Y. 44, 50, 6 N.E.2d 91, 93 (1936) (holding that the legislature must erect guidelines for administrative officers to carry out its will); *Moss*, 279 N.Y. at 297 (holding that "the Commissioner has no power to declare any legislative policy or to create the standards which govern the grant of a license").

55. *See* Levine v. O'Connell, 275 A.D. 217, 224, 88 N.Y.S.2d 672, 677-78 (1949), *aff'd*, 300 N.Y. 658, 91 N.E.2d 322 (1950) ("The Constitution of the State and the orderly processes of representative government require that the legislature should make such important decisions itself. Otherwise there is no method by which the people can locate responsibility for such fundamental determinations of public policy.").

56. *See Levine*, 275 A.D. at 222 (noting that "the Legislature cannot secure relief from its duties and responsibilities by a general delegation of legislative power to some one else").

upon administrative officials, thereby leading to discrimination or other arbitrary decisions.[57]

There are many examples of New York courts declaring statutes unconstitutional because they impermissibly delegate important policy making power. In *Packer Collegiate Inst. v. University of State of New York*,[58] the New York Court of Appeals declared a statute that required a nursery school to be "registered under regulations prescribed by the board of regents" unconstitutional.[59] "The legislature has not only failed to set out standards or tests by which the qualifications of the schools might be measured, but has not specified, even in the most general terms, what the subject matter of the regulations [was] to be."[60] Elsewhere, the New York Court of Appeals found a statute unconstitutional where an administrative officer "ha[d] the power without check or guidance . . . to veto the entire clause and decide that its benefits shall never be extended to any case, . . . or to permit the exemption in one case and deny it in another precisely similar one."[61] For that reason, a supreme court declared another statute that authorized the State Liquor Authority to prohibit the sale of any or all alcoholic beverages "in its discretion" unconstitutional.[62] As the court said, "[t]he Constitution of the State and the orderly processes of representative government require that the legislature should make such important decisions itself. Otherwise there is no method by which the people can locate responsibility for such fundamental determinations of public policy."[63]

Legislative standards for guiding administrative officials in exercising delegated authority are sufficient if they "are capable of a reasonable application and are sufficient to limit and define the [agency's] discretionary powers."[64] However, courts have differed about how broad those standards can be and under what circum-

57. *See Moss*, 279 N.Y. at 299 ("the legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination.").

58. 298 N.Y. 184, 81 N.E.2d 80 (1948).

59. *Id.* at 188.

60. *Id.* at 189.

61. *See C. Klinck Packaging Co.*, 214 N.Y. at 138 (holding a law that authorized an administrative officer to "in his discretion" exempt persons for compliance with the statute unconstitutional).

62. *See Levine*, 275 A.D. at 220.

63. *Id.* at 224.

64. *See* Tropp v. Knickerbocker Village, 205 Misc. 200, 211, 122 N.Y.S.2d 350, 361 (1953), *aff'd*, 284 A.D. 935, 135 N.Y.S.2d 618 (1954) (citations omitted).

stances standards stated in general or even vague terms will suffice. As a rule, general standards are constitutionally sufficient only when it would be difficult or impractical to lay down a definite, comprehensive rule.[65] When the legislature is dealing with complex technical fields,[66] broad delegations of authority to officials with special expertise are often acceptable.[67] At the same time, the New York Court of Appeals has cautioned that although general standards may be constitutionally sufficient, an express, or clearly implied, legislative standard, policy, or purpose must always guide administrative officials.[68]

New York case law concerning the validity of delegating statutes indicates that the "proper cause" standard of Penal Law § 400 is unconstitutional. Although examples are limited, where courts have accepted broad standards as sufficient discretionary guidelines for administrative officials, they have always pointed to either the impracticality of delineating standards, or the existence of an express or clearly implied policy as a justification—neither of which can be said of Penal Law § 400.

One such example of the impracticality exception dates back to 1908. In *Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*,[69] the New York Court of Appeals found that a requirement that gas and electric rates be "reasonable" was constitutionally sufficient because it would be impractical to state all the elements that should be used to determine a reasonable rate.[70] Twenty-seven years later, a statute allowing the public service commission to charge public utility costs of regulation when it deemed it "necessary" to carry out its statutory duties was also

65. *See* Marburg v. Cole, 286 N.Y. 202, 212, 36 N.E.2d 113, 117 (1941) (noting that "where it is difficult or impractical for the legislature to lay down a definite, comprehensive rule, a reasonable amount of discretion may be delegated to the administrative officials") (citing People *ex rel.* Lieberman v. Van De Carr, 199 U.S. 552 (1905)).

66. *See, e.g., Marburg*, 286 N.Y. at 212 (upholding legislature's authority to delegate licensing of a doctor to the Board of Regents); *see also Lieberman*, 199 U.S. 552 (upholding the authority of the New York City Board of Health to pass a sanitary code with criminal provisions regarding the regulation of milk).

67. *See In Re* City of Utica v. Water Pollution Control Bd., 5 N.Y.2d 164, 170, 156 N.E.2d 301, 305 (1959) (out of necessity, what constituted "harmful pollution" was properly left to a board of experts who were able to bring to their work a familiarity with conditions which the individual legislator could not be expected to possess).

68. *See* Bologno v. O'Connell, 7 N.Y.2d 155, 159-60, 164 N.E.2d 389, 391-92 (1959) ("Administrative discretion must be guided by an express or implied standard, policy or purpose.").

69. 191 N.Y. 123, 83 N.E. 693 (1908).

70. *See id.* at 146-47.

held constitutional.[71] The court determined that the intent and purpose of the statute provided sufficient guidelines for making such a charge.[72]

In *Thomas v. Board of Standards and Appeals*,[73] a statute providing that zoning requirements could be varied in order to secure the "public health, safety and general welfare" was upheld.[74] There, the appellate court found that it would be impractical, if not impossible, to define circumstances that present an appropriate case.[75] In addition, the court noted that the administrative officials had sufficient guidance from the general declarations of policy in other provisions of the statute.[76] Also persuasive was that other provisions of the statute listed factors to take into consideration when drafting the zoning requirements.[77]

The New York Court of Appeals has found that the delegation of power to administrative officials to determine qualifications or fitness for a particular business, in conjunction with an articulation of what those qualifications should be, constitutes sufficient constitutional guidance.[78] For instance, in *Elite Dairy Products v. Ten Eyck*,[79] the court found standards requiring the applicant to be "qualified by character, experience, financial responsibility and

71. *See* Kings County Lighting Co. v. Maltbie, 244 A.D. 475, 478-79, 280 N.Y.S. 560, 564 (1935) (holding that granting by legislature to the agency to "ascertain and determine what are reasonable maximum rates is not an invalid delegation of legislative authority").

72. *See id.* at 477-79 (finding the statute's purpose to be collecting expenses for investigating or valuating property when a proceeding was pending before the commission).

73. 263 A.D. 352, 33 N.Y.S.2d 219 (1942), *rev'd on other grounds*, 290 N.Y. 109, 48 N.E.2d 284 (1943) (failing to reach constitutional questions that had been argued).

74. *Id.* at 359-363.

75. *See id.* (noting that "it is impracticable, if not impossible to define in advance with precision the circumstance which present an appropriate case to authorize a variance").

76. *See id.* (opining that "a declaration of such policy and of such standards, which must necessarily be read into [the law] (and every subdivision thereof) . . . is sufficient to sustain the validity of these sections").

77. *See id.*

78. *See* Elite Dairy Products v. Ten Eyck, 271 N.Y. 488, 494-96, 3 N.E.2d 606, 609 (1936) (stating that while "the Legislature has determined the nature of those qualifications . . . it is not part of the legislative function to determine whether a particular applicant has these qualifications."); *see also* Mandel v. Board of Regents of University of New York, 250 N.Y. 173, 176-78, 164 N.E. 895, 897 (1928) (avering "the Supreme Court of the United States leave[s] 'no doubt that the confiring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of right secured by the fourteenth amendment'" (citing People *ex rel.* Lieberman v. Van De Carr, 199 U.S. 552 (1905))).

79. 271 N.Y. 488, 3 N.E.2d 606 (1936).

equipment to properly conduct the proposed business" constitutionally sufficient.[80] The court explained that any discretion left to the administrative officer was confined to a designated field "sufficient to properly conduct the proposed business."[81] Notably, the court found that the officer had discretion only to weigh the evidence and determine the facts, not to make policy.[82]

Similarly, in *Mandel v. Board of Regents of the University of New York*,[83] the New York Court of Appeals found a statute that provided for the revocation of a pharmaceutical license upon an administrative determination that one was "unfit or incompetent" to be a valid delegation of power from the legislature.[84] Of particular relevance was the fact that the statute provided additional guidance to the "unfit or incompetent" standard. It specifically articulated "negligence or bad habits" as possible considerations.[85] Furthermore, the statute provided explicit requirements, including adequate instruction and experience, for the initial issuance of such a license.[86]

On occasion, New York courts have upheld statutes delegating authority as constitutionally valid, even though the statute at issue lacked guiding standards. This rare event, however, is reserved for instances where courts have found standards expressly stated or clearly implied elsewhere in the law,[87] such as in the history of a law, its legislative intent, or in the common law.[88] For example, in *Trustees of Saratoga Springs v. Saratoga Gas, Electric, Light & Power Co.*,[89] the New York Court of Appeals upheld a statute permitting an administrative commission to fix the utility rates "within the limits prescribed by law."[90] The court found "the law" stated in the statute to include statutory as well as common law,[91] and found

80. *Id.* at 494-96.

81. *Id.*

82. *See id.* at 495 ("All that is left to the Commissioner is to weigh the evidence and determine the fact.").

83. 250 N.Y. 173, 164 N.E. 895 (1928).

84. *See id.* at 176-78.

85. *Id.* at 175-76.

86. *See id.*

87. *See* Barton Trucking Corp. v. O'Connell, 7 N.Y.2d 299, 306-13, 165 N.E.2d 163, 166-70 (1959) (finding delegation of licensing for public cart licenses valid because standards were implied in legislative scheme).

88. *See, e.g.*, Trustees of Saratoga Springs v. Saratoga Gas, Electric, Light & Power Co., 191 N.Y. 123, 83 N.E. 693 (1908).

89. *Id.*

90. *Id.* at 146.

91. *Id.*

a standard explicated in common law to be sufficient to maintain the statute's constitutionality.

However, courts have stated that a broad outline, such as the introduction of an act declaring a "national emergency" or stating a legislative policy such as the maintenance of "fair competition," without subsequent declarations or other expressions defining legislative policy, are insufficient to save statutes without standards.[92] In *Marburg v. Cole*,[93] the New York Court of Appeals upheld a standardless delegating statute for the endorsement of an out-of-state physician's license on the grounds that the administrative agency, in interpreting the broad powers granted to it, had adopted a rigid, objective test as a standard.[94] The court noted that the numerous circumstances justifying the broad standards, such as the impracticality of the legislature laying down specific standards, a stated intent that helped define the standards, a recognizable history, and the expertise of the administrative agency, likewise supported the statute's validity.[95]

Although New York courts have upheld a legislative delegation which lacked specific objective standards circumstances where legally recognized exceptions were present, the courts have not hesitated to invalidate such delegation in the absence of such compelling circumstances. Unlike the court in *Kings County Lighting Co. v. Maltbie*,[96] which upheld the legislature's delegation of rate setting because it was "necessary in order to carry out its statutory duties,"[97] the supreme court in *Novak v. Town of Poughkeepsie*[98] found the legislatively delegated standard of "qualifications as may be deemed necessary" by an administrative official for a plumbing license to be limitless.[99] In *Concordia Collegiate Institute v. Miller*,[100] the New York Court of Appeals found a village ordinance providing that licenses to erect buildings only be granted when the building's purpose was "educational, religious or elee-

92. *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 416-18 (1935); Darweger v. Staats, 243 A.D. 380, 382-83, 278 N.Y.S. 87, 90, *aff'd*, 267 N.Y. 290, 196 N.E. 61 (1935) (applying the Ryan rule to New York's Schackno Act, N.Y. Ex. Sess., §§ 781 & 783 (1933)).

93. 286 N.Y. 202, 36, N.E.2d 113 (1941).

94. *See id.* at 209-12 (concerning the granting of medical licenses to foreigners).

95. *See id.*

96. 244 A.D. 475, 280 N.Y.S. 560 (1935); *see supra* notes 71-72 and accompanying text.

97. *Id.* at 477-8.

98. 57 Misc.2d 927, 293 N.Y.S.2d 780 (Sup. Ct. 1968).

99. *See id.* at 928.

100. 301 N.Y. 189, 93 N.E.2d 632 (1950).

mosynary"[101] to be invalid. The court reasoned that the ordinance lacked adequate standards or guides in its descretion.[102]

The New York Penal Law, which authorizes a licensing official to issue a carry license when "proper cause" exists,[103] does not provide reasonably applicable standards. Thus, it is an unconstitutional delegation of legislative powers. As the above cases demonstrate, the New York State Constitution demands that the legislature not delegate policy-making power, but rather create specific and objective standards when delegating other powers to administrative officials. Without further clarification, the "proper cause" standard does not convey the will of the legislature regarding which situations warrant the granting of a carry license. Therefore, the discretion granted to administrative officials in making licensing determinations allows them to make their own policies and apply their own standards.

Courts that have assessed the validity of "good cause" as a guiding standard for delegated authority have determined that it does not provide guidance to administrative officials. For instance, in *Nicholas v. Kahn*,[104] a provision of validly promulgated rules by the Chairman of the Public Service Commission allowed exemption from a rule prohibiting employee ownership of stocks or bonds in a utility when the extent of equity holdings were minimal enough to constitute "good cause for exemption."[105] The New York Court of Appeals invalidated the exception because the "good cause" standard granted unfettered discretion to the administrative official.[106] Accordingly, the court found any denial of exemption under that standard to be arbitrary or capricious as a matter of law.[107] Similarly, in *Squire Restaurant and Lounge, Inc. v. City and County of Denver*,[108] the Colorado Court of Appeals found that a "good cause" standard, without further regulation, created "no meaningful limits on each hearing officer's selection of criteria for determin[ation] . . . ."[109]

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101. *Id.* at 196-97.
102. *See id.*
103. *See* N.Y. PENAL LAW §400.00(2)(f) (McKinney 1989).
104. 47 N.Y.2d 24, 389 N.E.2d 1086 (1979).
105. *See id.* at 32-33.
106. *See id.* at 33.
107. *Id.* at 34.
108. 890 P.2d 164 (Colo. 1994).
109. *Id.* at 167. Because Colorado adopts the federal standard regarding delegation, the court in *Squire* did not facially strike the statute down as an unconstitutional delegation of legislative power, but rather struck it down as a violation of due process

"Proper cause," like "good cause," is not capable of reasonable application, and therefore is not a sufficient standard to guide administrative officials in their licensing determinations.[110] The recent scandal involving favoritism for obtaining gun permits in the New York City Police Department's licensing division[111] shows the lack of restraint on discrimination and other arbitrary action facilitated by a "proper cause" standard for making carry license determinations.[112] Additionally, none of the circumstances in which the New York courts have upheld delegations with similarly broad standards are applicable to this statute. The courts have upheld standardless delegating statutes only when it would be both impractical for the legislature to lay down a comprehensive rule, and when the relevant policy was express or implied.[113] However, the applicable criteria for carrying a concealed weapon is not a complex or technological determination that requires the particular expertise of a delegated administrative official.[114] This notion is confirmed by the fact that the official who administers such licenses varies from county to county. Moreover, that relevant criteria for issuing a gun license are listed in comparable statutes in other states illustrates that it would not be complex or impractical for the legislature to articulate factors for the issuing of carry licences by administrative officials.[115] The legislature need not create a list of necessary standards, but need only state factors to be considered. Given the public's strong opinions about guns and self-defense, the New York State Legislature should be able to gather constituents' opinions about the legitimate circumstances for carrying a concealed weapon.

Even if it were too complex or impractical for the legislature to lay down standards, New York Penal Law § 400.00(2)(f) would be unconstitutional for failure to convey an express or implied stan-

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since the statute and procedures as a whole did not protect against unnecessary and uncontrolled exercise of discretionary power. *Accord supra* note 51.

110. *See supra* notes 102-108 and accompanying text.

111. *See supra* notes 25-26 and accompanying text.

112. *See supra* note 56 and accompanying text.

113. *See supra* note 63 and accompanying text.

114. *See supra* notes 66-67 and accompanying text.

115. *See* HAW. REV. STAT. § 134-9(a) (1996) ("show [ ] reason to fear injury to applicant's person or property"); MD. ANN. CODE OF 1957 Art. 27, § 36E(A)(5) (1996) ("necessary as a reasonable precaution against apprehended danger"); MINN. STAT. ANN. § 624.714(5)(c) (West 1996) ("occupational or personal safety hazard requiring a permit"); R.I. GEN. LAWS § 11-47-11 (1956) ("good reason to fear an injury to his or her person or property").

dard.[116] There are no declarations of intent elsewhere in the statutory scheme or in other parts of the law or history to guide the licensing official in his determination.[117] Furthermore, the statute does not indicate what subject matters an administrative official should consider when he reviews carry license applications.[118]

New York law does not provide legislative guidance regarding how prevalent gun carrying should be, or which reasons are legitimate for carrying a gun. It thus follows that the delegation of authority in Penal Law § 400 is solely to determine important policy.[119] However, such delegation blatantly violates the New York State Constitution and basic democratic principles,[120] and makes it impossible to place responsibility for a city or county's gun control policy. For example, New York City officials have determined that danger with respect to one's business may constitute proper cause for a carry license, while incidents of past threats and abuse may not.[121] But which unelected official is responsible for such policy decisions, and how can the public let its view on the matter be known? Voting out an entire administration is one alternative; yet, such an over inclusive and drastic measure would not cure the absence of accountability fundamental to a democracy.[122]

This unconstitutional delegation unnecessarily causes carry license applicants to waste time and money. Because the legislature has failed to delineate standards for the granting of carry licenses,

116. *See supra* text accompanying note 68.

117. *Cf. In Re* Preis, 118 N.J. 564, 571-72, 573 A.2d 148, 152 (1990) (looking to legislative intent to interpret "justifiable need" requirement for permit to carry a gun).

118. *See supra* text accompanying note 9.

119. *See, e.g., Moss, supra* note 52; *Sullivan County Harness Racing Ass'n, supra* note 52.

120. *See supra* notes 45-54 and accompanying text.

121. *See supra* notes 10-16 and accompanying text; *see also* 38 RCNY § 5-03 (citing danger to life and well-being of person, evidenced by threats, as a factor for consideration in issuance of carry licenses, ironically under "Carry Business and Special Validation Carry Business Handgun Licenses" heading).

122. *See* Gravel v. United States, 408 U.S. 606, 640-41 (1972) (Douglas, J., dissenting) (quoting *Secrecy in a Free Society*, 213 NATION 454, 456 (1971)) (declaring "when the people do not know what their government is doing, those who govern are not accountable for their actions—accountability is basic to the democratic system"); *see also* Missouri v. Jenkins, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) (stating that "[t]here are simply certain things that courts, in order to remain courts, can not and should not do. There is no difference between courts running school systems or prisons and courts running executive branch agencies"); Immigration and Naturalization Serv. v. Chada, 462 U.S. 919, 997 (1982) (White, J., dissenting) (opining that "[i]n the Court of Appeals' view, inaction by Congress 'could equally imply endorsement, acquiescence, passivity, indecision or indifference'").

people are unable to assess their chances of success prior to initiating the application process which requires payment. Similarly, people cannot accurately assess whether they should hire a lawyer to either determine if an application denial has been "arbitrary or capricious," or to represent them in a judicial challenge to the denial. The reasoning applied by the Colorado Court of Appeals concerning a statutory "good cause" standard is applicable here: "A standard of 'good cause' as the criterion for determining whether to renew a liquor license, without any implementing regulations, fails to provide sufficient definiteness that ordinary people can understand what conduct and conditions are required to avoid having the request refused."[123]

### 2. *Ultra Vires—If Standards Are Being Applied, They Have Been Impermissibly Created by an Administrative Officer*

If officials who issue carry licenses have developed their own standards for issuing such licenses, they have unconstitutionally created their own policies and rules. The New York State Legislature has not delegated the power to declare policy or promulgate rules to those administrative officials. Therefore, the creation of such policy or rules violates *ultra vires*, a fundamental concept of administrative law which provides that the power of an administrative agency does not exceed that which has been delegated to it by the legislature.[124]

An agency's guidelines or policies constitute a "rule" if it is a "fixed, general principle applied regardless of the facts and circumstances of the individual case."[125] In *Cordero v. Corbisiero*,[126] because a Racing and Wagering Board established a mandatory procedure applicable to every jockey whose license suspension fit specific criteria, the New York Court of Appeals determined that the policy was a rule.[127] Similarly in *Sunrise Manor Nursing Home*

123. Squire Restaurant and Lounge, Inc. v. City of Denver, 890 P.2d 164, 171 (Colo. 1994).

124. *See* Schwartz, *Fashioning*, *supra* note 46, at 63.

125. Cordero v. Corbisiero, 80 N.Y.2d 771, 772, 599 N.E.2d 670, 671 (1992) (citing Matter of Roman Catholic Diocese v. New York State Dep't of Health, 66 N.Y.2d 948, 951, 489 N.E.2d. 749, 750 (1985)); *see also* Sunrise Manor Nursing Home v. Axelrod, 135 A.D.2d 293, 296-97, 525 N.Y.S.2d 367, 369-70 (1988) (stating that "a guideline established by an agency is considered to be a rule or regulation requiring filing if it is a 'a fixed, general principle to be applied by [the] agency to other facts and circumstances relevant to the regulatory scheme of the statutes it administers'").

126. 80 N.Y.2d 771, 599 N.E.2d 670 (1992).

127. *See id.* at 772.

*v. Axelrod*,[128] a New York appellate court found the Department of Health's policy of refusing to reimburse Medicaid providers for parity items to be a rule, as it was applied without considering other facts and circumstances relevant to the regulatory scheme.[129] In both cases, the courts held that the rules could not be applied because they were not properly promulgated.[130]

The New York City pistol license application and rules indicate that the standards by which administrative officials evaluate carry license applicants have been created at the local level.[131] The supposed consistent and predictable licensing determinations that are issued without any state-issued guidelines lack any other explanation. The delegation of the authority to create such standards to the local authorities would be the delegation of an inherently legislative power to determine public policy.[132] However, the legislature did not attempt to delegate any power to the licensing officials to create rules or regulations regarding licenses for guns. Thus, by creating rules and policy, administrative officials have violated ultra vires. Accordingly, any determination made pursuant to such standards is invalid under the New York State Constitution.

The formulation of standards by each licensing officer creates serious practical problems aside from the constitutional ones. Yet, different officials in different parts of the state set up their own standards, leading to anomalous results depending on the applicant's county of residence.[133] The existence of the state promulgated "proper cause" standard indicates that all New York State applicants must be governed by the same standard.[134] Moreover, under the current system, a licensing officer could decide to limit

128. 135 A.D.2d 293, 525 N.Y.S.2d 367.

129. *Id.* at 295-96.

130. *See Cordero*, 80 N.Y.2d at 772 (holding that "the Saratoga policy could not be applied it was not formally promulgated by respondent pursuant to the rule-making procedures set forth in State Administrative Procedure Act § 202"); *Sunrise Manor*, 135 A.D.2d at 295-96 (noting that the rule was not published by the Department of Health—a requirement of all administrative rules).

131. *See, e.g.*, City of New York Pistol License Applications (referring only to applicants needing a pistol in connection with a business or profession); *see supra* notes 10-25 and accompanying text.

132. *See supra* text accompanying notes 119-122.

133. *See, e.g.*, Telephone Interview with Sergeant Louis LaPietra, New York City Police Dep't Licensing Div. (Mar. 4, 1997) [hereinafter LaPietra Interview] ("New York City has the most restrictive policy in the state towards issuing carry licenses.").

134. *Cf.* Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1980) (reasoning that "anomalous results" that would result from imposition of additional local requirements to state imposed requirements for obtaining license to carry concealed weapon indicates that legislature intended to preempt local regulation).

the number of licenses granted to a predetermined number, or choose to grant no licenses at all as a matter of his own policy. The New York Court of Appeals, however, has declared such policies an invalid abuse of discretion. Most notably, in *Picone v. Commissioner of Licenses*,[135] an administrative official had authority to grant licenses.[136] Logically, little difference exists between a licensing officer independently setting a pre-determined number of licenses or deciding not to grant any licenses, and one deciding to grant very few licenses—a policy employed in some counties for carry licenses.[137] Moreover, such standards would be subject to the turn of the administration.[138] An administrative system in which the notion of "proper cause" changes every four years, without notice, cannot be considered fair or democratic.

### B. The System Violates Due Process for Lack of Fair Procedures

The New York State Constitution provides that a person may not be deprived of life, liberty, or property, without due process of law.[139] The Court of Appeals, when deciding a case under the New York Constitution, identified "due process" as a flexible concept that "embraces fundamental rights and immutable principles of justice."[140] One of the principles that due process encompasses is a "guarantee of fair procedure."[141] In dealings between citizens and administrative agencies, this notion is a vital component of an administrative law system.[142] Agencies must comport with fair procedures to avoid "arbitrary and capricious decision[ ] [making]

135. Picone v. Comm'r of Licenses of New York City, 241 N.Y. 157, 149 N.E. 336 (1925).

136. *Id.* at 338 (finding no difference between an administrative officer limiting the number of junk boat licenses granted and the officer adopting a policy that no licenses whatsoever should be granted, and stating that both are matters of public policy that cannot be made by administrative officers).

137. *See* LaPietra Interview, *supra* note 133 (New York City grants far fewer carry licenses than other counties, and that the policy soon will become even stricter).

138. *See supra* note 27 and accompanying text.

139. See N.Y. Const. art. I, § 6.

140. People v. Isaacson, 44 N.Y.2d 511, 520, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 718 (1978) (citing People v. Terra, 303 N.Y. 332, 334, 102 N.E.2d 576, 578 (1951)).

141. Zinermon v. Burch, 494 U.S. 113, 125 (1990); *see also* Amsden v. Moran, 904 F.2d 748, 753 (1st Cir. 1990) (quoting Zinermon, 494 U.S. at 125); Miller v. J.W. Fairman, 872 F. Supp. 498, 502 (N.D. Ill. 1994); Poe v. Charlotte Mem'l Hosp., Inc., 374 F. Supp. 1302, 1311 (W.D.N.C. 1974); Levine v. Maverick County Water Control & Improvement Dist. No. 1, 884 S.W.2d 790, 795 (Tex. Ct. App. 1994).

142. *See* Schwartz, *Fashioning supra* note 46, at 62, 67-69 (1988).

violative of due process."[143] The legislative intent of the New York State Administrative Procedure Act acknowledges the necessity of fair procedure, stating: "[t]his act guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law. It insures that equitable practices will be provided to meet the public interest."[144] The New York system for obtaining a carry license, however, fails to meet the State Administrative Procedure Act guarantee and the state constitution's requirements of due process.

### 1. *Pre-Determination Hearing Requirement*

Both the federal and New York courts have ascribed two different standards toward the requirements of fair procedure, depending upon which function of an administrative agency,[145] adjudication or rule-making, is at issue.[146] Conformity with the basic judicial standards of preceding notice and opportunity to be heard are usually considered essential to administrative adjudications,[147] but are not an inherent part of administrative rule making.[148] Due process requires such safeguards for administrative rulemaking only in certain situations.[149] Yet, the delineation of ad-

143. Illinois v. United States, 371 F. Supp 1136, 1138 (N.D. Ill. 1976). Although the requirement of fundamental fairness in administrative actions is the theory behind due process, the necessity of this component does not need to be based on a constitutional provision. *See* Schwartz, *Fashioning*, *supra* note 46, at 67-69.

144. N.Y. A.P.A. § 100 (McKinney 1996).

145. *See* Bernard Schwartz, *Procedural Due Process in Federal Administrative Law*, 25 N.Y.U. L. REV. 552, 556-57 (1950) [hereinafter Schwartz, *Procedural Due Process*].

146. *See* SCHWARTZ, ADMIN. LAW *supra* note 1.

147. *See* Schwartz, *Procedural Due Process supra* note 145, at 554.

148. *See id.* at 558; *see also* Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915); Villani v. Berle, 91 Misc.2d 603, 606, 398 N.Y.S.2d 796, 800 (Sup. Ct. 1977) (stating that "I am not persuaded, however, that the Act in question, [the Administrative Procedure Act] . . . creates an absolute right to a public hearing in all actions by administrative agencies").

149. Bernard Schwartz has articulated that due process normally requires the procedural safeguards of notice and a hearing when a rule applies to particular, defined parties, regardless of its label as legislative action. *See* Schwartz, *Procedural Due Process supra* note 145, at 563.

Regardless of whether an administrative action requires a hearing, other procedures are held to be fundamental to agency decision making. Agency "decisions" affecting specific parties must be established by evidence. *See* Guida v. Dier, 54 A.D.2d 86, 87, 387 N.Y.S.2d 720, 721 (1976). An agency must make and express both "basic" and "ultimate" findings (fact determinations and conclusions drawn therefrom). *See* Falk v. City of New York, 41 A.D.2d 530, 340 N.Y.S.2d 127 (1973); *see also* Florida v. United States, 282 U.S. 194 (1931); Witchita R.R. & Light Co. v. Public Utils. Commn., 260 U.S. 48, 58-9 (1922) ("When . . . an administative agency is re-

ministrative actions into two distinct categories is insufficient for determining whether a particular administrative action requires a hearing. Administrative agencies also perform ministerial acts[150] which do not require hearings.[151] Moreover, certain administrative actions, such as licensing, do not clearly fall into either an adjudicatory or rule-making category but rather fall in between.[152]

There are conflicting definitions and case law regarding whether licensing determinations should be considered adjudicatory (judicial or quasi-judicial in nature), and also whether such a label should be the only factor considered in determining whether due process requires a pre-determination hearing opportunity. Moreover, no New York State court has specifically commented on the nature of a determination for the issuance of a carry license. Whether licensing is adjudicatory, however, must be determined in order to assess which procedures due process requires in applying for a carry license. If licensing is adjudicatory, then a hearing is required. If it is not, then one must consider whether other factors require procedures for a carry license application to include an opportunity for a hearing.

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quired as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding."); Carolina Power Co. v. FERC, 716 F.2d 52, 55 (D.C. Cir. 1983) (stating that "[i]t is hornbook law that an agency must set forth clearly the basis of reaching its decision"). Those parties must then be notified of the decision and premises on which it was based. *See Guida*, 54 A.D.2d at 87. Accordingly, the New York State Penal Law states that a pistol license shall either be issued, or the licensing officer shall deny the application and state the reasons therefore in writing. *See* N.Y. PENAL LAW § 400.00(4-a) (McKinney 1996). In addition, agency action that affects the public must notify the citizenry by publication. *See* N.Y. A.P.A. § 202 (McKinney 1996).

150. A ministerial act is "[t]hat which is done under the authority of a superior; opposed to *judicial.* That which involves obedience to instructions, but demands no special discretion, judgment or skill . . . ." A ministerial act is also "[o]ne which a person or board performs under a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done." BLACK'S LAW DICTIONARY 996 (6th ed. 1990).

151. See *In Re* Sabrina Corp. v. Jones, 199 A.D.2d 396, 397, 605 N.Y.S.2d 320, 321 (1993) (holding that the adoption of a resolution was a ministerial function, authorized by statute and therefore no hearing was required); *see also* Jewett v. Luau-Nyack Corp., 31 N.Y.2d 298, 306, 291 N.E.2d 123, 128 (1972) (declaring "a resolution deals with matters of a temporary or special nature, where the action taken generally involves findings of fact and may be characterized as administrative); Tropp v. Knickerbocker Village, 205 Misc. 200, 213, 122 N.Y.S.2d 350, 362-63 (1953), *aff'd*, 284 A.D. 935, 135 N.Y.S.2d 618 (1954) (finding that no hearing on the question of a rent increase was not a violation of plaintiff's due process rights because the issue was reduced to a ministerial function).

152. *See* Bernard Schwartz, *Procedural Due Process supra* note 145, at 557.

There is no strict formula for determining whether an act is adjudicatory in nature. The New York courts have identified certain characteristics of judicial acts which support classifying carry licensing determinations as adjudicatory. The New York Court of Appeals has stated that the "[e]ssence of a judicial proceeding is that it decides something, and that its decision is conclusive on the parties."[153] In *Nash v. Brooks*,[154] an appellate court determined that a medical board that passes upon medical examinations, and investigates and reports its conclusions and recommendations, is performing at least a quasi-judicial act.[155] That court stated, "[t]o adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the law, is . . . in its nature a judicial act."[156] The New York Court of Appeals has stated that the important criteria in ascertaining whether a proceeding is judicial are: "(1) the presence of parties, (2) the trial and determination of issues, and (3) a final order of judgment of rights, duties or liabilities."[157] Another court explained that "[t]o pass upon and make findings of fact, to exercise discretion in relation to them and to direct the entry of judgment are powers characteristic of judicial conduct."[158] Courts have asserted that the opposite is also true—that the lack of an investigation, trial, opportunity for a hearing, an opportunity to present witnesses or evidence, and an adjudication of rights or liabilities is indicative of nonjudicial behavior.[159]

Other theories further support the characterization of licensing as adjudicatory. Many commentators, and one New York court, have found the element of applicability to be determinative of

153. Metz v. Maddox, 189 N.Y. 460, 472, 82 N.E. 507, 512 (1907).

154. 251 A.D. 616, 297 N.Y.S. 853, *order modified*, 11 N.E.2d 545 (1937).

155. *See id.* at 617; *see also* BLACK'S LAW DICTIONARY 1245 (6th ed. 1990) (defining quasi-judicial act as "[a] judicial act performed by one not a judge").

156. *See Nash*, 251 A.D. at 618 (quoting 1 THOMAS COOLEY, COOLEY'S CONSTITUTIONAL LIMITATIONS 183-85 (8th ed.)).

157. *In Re* Klein, 309 N.Y. 474, 481, 131 N.E.2d 888, 891-92 (1956).

158. Copacabana v. Portfolio, 182 Misc. 976, 979, 50 N.Y.S.2d 243, 246 (Sup. Ct. 1944).

159. *See In Re Klein*, 309 N.Y. at 480-84 ("'[A] judicial inquiry investigates, declares and enforces liability as they stand on past facts and under laws as supposed to exists.'" (quoting Prentis v. Atlantic Coast Line, Co., 211 U.S. 210, 226 (1908))); Schau v. McWilliams, 185 N.Y. 92, 97, 77 N.E. 785, 786 (1906) (noting that the lack of witness testimony evinces non-judicial behavior); City of New York v. Maltbie, 53 N.Y.S.2d 234, 240, *aff'd*, 269 A.D. 662, 53 N.Y.S.2d 953, *aff'd*, 294 N.Y. 931, 63 N.E.2d 119 (1945) (noting that notice and hearing requirements evince a judicial proceeding).

whether an administrative action is legislative or judicial.[160] This theory has been explained as follows: "a rule is a determination of *general* applicability, addressed to indicated but unnamed and unspecified persons or situations; a decision, on the other hand, applies to *specific* individuals or situations."[161] Under that definition, licensing would be considered judicial in nature because it applies to a specific individual.[162] Other aspects of licensing that have led some New York courts to characterize licensing as judicial in nature are the ascertainment of past or present facts and the *discretion* in relation to them to direct a final order or judgment of rights, duties or liabilities.[163]

Justice Holmes' description of the difference between legislative and judicial functions in *Prentis v. Atlantic Coast Line Company*,[164] however, supports the non-judicial classification of licensing. Holmes declared:

> [a] judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[165]

By that definition, licensing, which has a future effect, is not judicial in nature; rather it should be considered a rule.[166]

Some courts have characterized certain licensing determinations as administrative[167] or ministerial,[168] rather than as adjudicatory or rule-making in nature. These courts have concluded that such acts

160. Schwartz, *Procedural Due Process*, *supra* note 145, at 557 (quoting Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 265 (1938)) (emphasis in original); *see also* Van Allen v. McCleary, 211 N.Y.S.2d 501, 509 (Sup. Ct. 1961).

161. *See* Schwartz, *Procedural Due Process*, *supra* note 145 at 557.

162. *Id.* at 557-58; *see also* Hecht v. Monaghan, 307 N.Y. 461, 467, 121 N.E.2d 421, 424-25 (1954) (finding "[a] license to operate an automobile is of great value to the individual and may not be taken away except by due process").

163. *See Hecht*, 307 N.Y. at 467; *see also Copacabana*, 182 Misc. at 979.

164. 211 U.S. 210 (1908).

165. *Id.* at 226.

166. *See* Schwartz, *Procedural Due Process*, *supra* note 145, at 557; *In Re Klein*, 309 N.Y. at 480-84 (1956).

167. "Those acts which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body or such as are devolved upon it by the organic law of its existence." BLACK'S LAW DICTIONARY 45 (6th ed. 1990).

168. *See* Tropp v. Knickerbocker Village, 205 Misc. 200, 213-14, 122 N.Y.S.2d 350, 363 (1953), *aff'd*,, 284 A.D. 935, 135 N.Y.S.2d 618 (1954). *See supra* note 150 for the definition of "ministerial."

do not require a pre-determination hearing.[169] In *Gimprich v. Board of Education of New York*,[170] the New York Court of Appeals surveyed several New York cases concluding that an agency's exercise of discretion was not determinative of whether an action was ministerial or quasi-judicial.[171] A New York appellate division court stated that an application for a license to practice a profession is not considered judicial in nature, "but rather executive, administrative or ministerial."[172] One commentator on New York law referred to the initial denial of a license as administrative and the revocation of an existing license as quasi-judicial, thereby concluding that the former does not require a hearing, while the latter does.[173] Although no New York court has commented specifically on the nature of a determination regarding the issuance of a carry license, the Colorado Court of Appeals recently held that such a determination is more administrative than judicial in nature.[174]

Regardless of whether particular administrative actions are adjudicatory or legislative in nature, some courts have looked to other criteria to determine whether due process requires an opportunity for a pre-determinative hearing. Several decades ago, courts stated that due process requires a pre-determination hearing only when a liberty or property "right," rather than a "privilege," was at issue.[175] Under this approach, New York courts concluded that because citizens had a property right in their occupations, due process required notice and a hearing for a licensing determination concerning an occupation.[176]

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169. *See Tropp*, 122 N.Y.S.2d at 363.

170. 306 N.Y. 401, 118 N.E.2d 578 (1954).

171. *See id.* at 406 (citing Whitten v. Gaynor, 152 A.D. 506, 511, 137 N.Y.S. 360, 363 (1912); People *ex rel.* McNulty v. Maxwell, 108 N.Y.S. 49, 52 (1908); *In Re* Walker, 74 N.Y.S. 94, 96 (1902)).

172. Siegel v. Mangan, 16 N.Y.S.2d 1000, 1002, 258 A.D. 448, 449-50, *aff'd*, 283 N.Y. 557, 27 N.E.2d 280 (1940).

173. N.Y. C.P.L.R. § 7803, cmt. C7803:1 (McKinney 1994).

174. *See* Miller v. Collier, 878 P.2d 141, 145 (Colo. 1994) (affirming trial court's decision when it held that denial of permit to carry concealed weapon was appropriate because the decision was administrative and not quasi judicial as plaintiff alleged).

175. *See* Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961) (noting that even if a civilian had no constitutional right to be on a military establishment in the first place, she nonetheless could be deprived of liberty or property in violation of the due process clause of the Fifth Amendment by withdrawal of permission for her to enter the establishment).

176. *See Hecht*, 307 N.Y. at 469; *see also* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (stating that "complaintants's business . . . is a property right, entitled to protection against unlawful injury or interference"). *See also* Truax v. Corrigan, 257 U.S. 312 (1921) (observing that "plaintiff's business is a property right" and that

However, since the Supreme Court rejected the right-privilege distinction as determinative of due process rights in 1972,[177] New York courts have either cursorily described an issue as pertaining to a "right" without engaging in detailed analysis, or have looked to other factors to determine the necessity of a due process hearing without mentioning the right-privilege distinction. When discussing an application for a trailer permit in *Calhoun v. Town Board of Saugerties*,[178] a New York supreme court stated that "there is no question but that the . . . Town Board's decision . . . affected a property right of petitioners Calhoun, and that minimal due process requirements require that some notice and opportunity to be heard before the Town Board should have been given to petitioners before a decision was rendered."[179] However, in *Sedutto v. City of New York, Dep't of Personnel*,[180] another New York supreme court rejected the right-privilege doctrine in light of the Supreme Court's rejection of it.[181]

Other courts have not even attempted to delineate objective criteria for determining whether an administrative action requires a pre-determination hearing, but rather have delved considerably into the factual circumstances of the case. While discussing due process requirements, the D.C. Court of Appeals stated that "procedures due one person in one situation are not mechanically the same as those due another in a different context."[182] The court further stated that in order to determine the parameters of the procedures required by due process, it must balance the governmental interests with the individual's interests, making inquiries such as: "How was the individual likely to be hurt?; What governmental interest was to be protected?; and, How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?"[183] The New York Court of Appeals has stated that while certain procedural rights, such as a pre-deter-

deprivation of that right without due process is "wholly at variance" with the Fourteenth Amendment).

177. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972) (stating that the Court has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a "right" or as a "privilege").

178. 94 Misc.2d 78, 404 N.Y.S.2d 61 (Sup. Ct. 1978).

179. *Id.* at 80.

180. 106 Misc. 2d 304, 304, 431 N.Y.S.2d 654, 654 (Sup. Ct. 1980).

181. *See id.* at 309 (citing Board of Regents v. Roth, 408 U.S. 564 (1972) and Graham v. Richardson, 403 U.S. 365 (1971)).

182. Gonzalez v. Freeman, 334 F.2d 570, 579 (D.C. Cir. 1964).

183. *Id.* at 579-80.

mination hearing, may be available to a party who has lost a pre-existing right or privilege, they may not be available to a person first applying for the right or privilege.[184]

Some New York State courts have determined that a hearing was constitutionally required before a licensing decision was made. In *Sedutto*,[185] the court determined that because of the sharp factual questions the situation raised, a hearing was constitutionally necessary before petitioner's application for a boiler engineer license could be denied.[186] In *Augat v. Dowling*,[187] a New York supreme court determined that due process required a hearing before petitioner's license to operate an adult care facility could be revoked because of the nature of the allegations and their surrounding circumstances.[188] In those two cases, however, the courts stated that due process would not require a hearing in all such applications and revocations, but that its necessity was dependent on the individual circumstances of each case.[189] When considering the revocation of a cash payroll guard's license to carry a pistol in *Wrona v. Donovan*,[190] an appellate division court stated that "[b]y virtue of the fact that petitioner's employment requires him to carry a gun . . . due process requires a hearing on whether his pistol permit should be revoked."[191]

One commentator on the New York State Administrative Procedure Act stated that the act "is a major dissent from the trend towards excessive judicialization."[192] Based on legislative reports, he stated that "the Act avoided imposing a judicial model on decision making where it has not previously been employed, where the public has a large stake in preserving or fostering a high quality of technically complex decision making,"[193] where there is an absence of an accusation of wrongdoing, and "where no demonstration has been made either that preexisting procedures have been widely re-

184. *See* Sumpter v. White Plains Hous. Auth., 29 N.Y.2d 420, 425, 278 N.E.2d 892, 894 (1972) (rejecting housing applicant's contention of entitlement to a hearing on eligibility).

185. 106 Misc.2d 304, 431 N.Y.S.2d 654 (Sup. Ct. 1980).

186. *Id.* at 309-10.

187. 161 Misc.2d 225, 225, 613 N.Y.S.2d 527, 527 (Sup. Ct. 1994).

188. *Id.* at 230.

189. *See id.*; *see also Sedutto*, 106 Misc.2d at 309-10.

190. 88 A.D.2d 998, 998, 451 N.Y.S.2d 834, 834 (1982).

191. *Id.* at 998.

192. Daniel J. Gifford, *The New York State Administrative Procedure Act: Some Reflections Upon its Structure and Legislative History*, 26 BUFF. L. REV. 589, 590 & n.8 (1977).

193. *Id.* at 620.

sented as unjust by private parties, or that further judicialization would be likely to improve the quality of the substantive decisions."[194] The foregoing cases and comments highlight the notion that the nature of the license at issue, as well as an individual's circumstances, are often considered when determining the fairness and constitutionality of an administrative licensing procedure when no opportunity for a hearing is provided.

Although they do not fall neatly into any one discrete classification, licensing proceedings are much more quasi-judicial than legislative or administrative in nature.[195] Therefore, the notions of fundamental fairness inherent in the due process requirements of the New York State Constitution require that an opportunity for a pre-determination hearing be given to carry license applicants. Although licensing proceedings are not full judiciary determinations made in a court of law, they are adjudicatory in the sense that they are final orders applicable to specific individuals after the ascertainment of past and present facts.[196] Although the determinations are applicable in the future, they are not legislative, as they do not apply generally to others seeking a carry license.[197] Moreover, because the licensing official has wide discretion in deciding whether an applicant has shown proper cause for the issuance of a carry license[198] such determinations should not be considered administrative or ministerial.

An examination of the procedures presently used in licensing determinations should not be determinative of whether an administrative act is adjudicatory. The purpose of determining whether or not such an administrative act is adjudicatory is to accurately and fairly conclude which procedures should be afforded based on that characterization, and to ensure the implementation of such procedures. However, New York law sometimes uses the existence or absence of the procedures as the basis of determining whether a proceeding is adjudicatory. According to the New York State Administrative Procedure Act, the provisions of the chapter concerning adjudicatory proceedings are applicable only "[w]hen licensing is required by law to be preceded by notice and opportunity for [a] hearing."[199] That implies that the State legislature does not con-

194. *Id.*
195. *See Hecht*, 307 N.Y. at 469.
196. *See supra* notes 158-163 and accompanying text.
197. *See infra* Part II.B.
198. *See supra* note 167 and accompanying text. *See also Hecht*, 307 N.Y. at 469; *Copacabana*, 182 Misc. at 979.
199. *See* N.Y. A.P.A. § 401(1) (McKinney 1996).

sider licensing to carry concealed weapons to be adjudicatory because the law does not require an opportunity for a predetermination hearing. The New York courts have used the absence of other criteria, such as an investigation, trial, opportunity for a hearing, and an opportunity to present witnesses or evidence, as indicative that licensing is not adjudicatory in nature.[200] This type of circular reasoning—using the existence or absence of procedures to determine whether an act is adjudicatory—should be avoided; for the purpose of ascertaining whether an act is adjudicatory is to determine which procedures must be instituted.

Even if carry license determinations are not considered to be adjudicatory proceedings, their nature mandates that the opportunity for a pre-determination hearing be provided. Although there is no right to carry a concealed weapon in New York,[201] the courts have indicated that the right to a hearing should not be based on whether the issue concerns a right or a privilege.[202] Yet, courts have continued to consider the nature of the matter at issue. When courts initially decided that fairness mandated a pre-determination hearing for licensing considerations, they usually based such a conclusion on the fact that individuals had a "property right" in occu-

200. *See* Klein v. Larner, 309 N.Y. 474, 480-82, 131 N.E.2d 888, 891-93 (1956) (holding that "[t]he important criteria are (1) the presence of the parties, (2) the trial and determination of issues, and (3) a final order or judgment of rights, duties, or liabilities"); Schau v. McWilliams, 185 N.Y. 92, 96-97, 77 N.E. 785, 786 (1906) (holding that "[t]he realtor was not entitled to be sworn or to introduce witnesses"); City of New York v. Maltbie, 53 N.Y.S.2d 234, 240, *aff'd*, 269 A.D. 662, 53 N.Y.S.2d 953, *aff'd*, 294 N.Y. 931, 63 N.E.2d. 119 (1945) ("The test seems to be that action is judicial or quasi-judicial when, and only when, the body or officer is authorized and required to take evidence and all the parties are entitled to notice and a hearing.")

201. *See* Moore v. Gallup, 267 A.D. 64, 67-68, 45 N.Y.S.2d 63, 66-67 (1943), *aff'd*, 293 N.Y. 846, 59 N.E.2d 439 (1944) (noting that although the Second Admendment limits Congress' power, it has no bearing on the States); Klapper v. Codd, 78 Misc.2d 377, 378, 356 N.Y.S.2d 431, 432 (1974) (holding that the right to carry a concealed weapon is the exception rather than the rule).

202. *See* Board of Regents v. Roth, 408 U.S. 564, 571, n.9 (1972) (stating that "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'") (citing Graham v. Richardson, 403 U.S. 365, 374); Goldberg v. Kelly, 397 U.S. 254 (1970) (stating that in order for the government to take any administrative action that affects a right or a privilege, the full panopoly of procedural safeguards typically imposed in court proceedings was required); *Sedutto*, 106 Misc.2d 304, 431 N.Y.S.2d 654 (1980) (stating that in light of the current Supreme Court cases, they reject "the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights); *Calhoun*, 94 Misc.2d 78, 404 N.Y.S.2d 61 (1978) (holding that absent an overriding state interest, a prior hearing is required "before taking any property or liberty").

pation.[203] The reasoning behind labeling an occupation as a right, however, was the importance that society places on one's chosen profession. Similar reasoning led courts to conclude that pre-determination hearings were required when interests such as reputation, acquiring useful knowledge, and establishing a home were at stake.[204] It would be difficult to refute the assertion that the ability to protect one's own life is at least as important as those other interests. Therefore, the application for a carry license should be treated no differently than the revocation of such a license. A lost life is not something that can be remedied after-the-fact. People with serious concerns for their lives should not be forced to wait until after administrative decisions are made to have the opportunity to present their cases at a hearing.

Moreover, carry license determinations have characteristics that suggest that the traditional judicial model should be applied.[205] Private parties have demonstrated that the existing procedures are unjust,[206] and the lack of guidance and standards strongly suggests that further judicialization would improve the quality of the decisions.[207] Hearings would provide for better judicial review, which would in turn improve the administrative process overall.[208] Because carry license determinations do not require complex decision making, the costs for providing hearings should not be severe.[209] Furthermore, when balancing the relevant individual and government interests at stake,[210] the previously mentioned interest in protecting one's life far outweighs a governmental interest in the costs of such procedures. Finally, to reduce costs, the State could implement a hearing-on-request system, rather than requiring one for every carry license determination.

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203. *See Roth*, 408 U.S. at 571-72 (noting that "[t]he Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money").

204. *See Roth*, 408 U.S. at 571-72.

205. *See* Gifford, *supra* note 192, at 590 & n.9, 620 & n.174 (1977).

206. *See supra* notes 29, 33 and accompanying text.

207. *See* N.Y. EXEC. LAW § 102 (McKinney 1997) (stating that codes, rules, regulations must be published and made available for public inspection and copying).

208. *See* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (stating that discretionary decisions should more often be supported by findings of facts and reasoned opinions which will improve quality of judicial review and administrative process overall).

209. *See* Gifford, *supra* note 192 and accompanying text.

210. *See* Gonzalez v. Freeman, 334 F.2d 570, 579-80 (D.C. Cir. 1964); *see also* Gifford, *supra* note 192, at 580, n. 20.

### 2. *Public Information and the Right to Know*

The public's "right to know," although not a traditional maxim of due process, is another policy critical to fundamental fairness with respect to interaction between citizens and their government. This concept traditionally requires that laws, rules and regulations, and judicial decisions be published. Fundamental fairness requires that all state promulgations of rules and regulations be published and made available to the public.[211] In respect for this principle, cities and towns also have their own ordinances requiring notification and publication of government rules and regulations.[212] Moreover, procedural safeguards, such as the right to a hearing and a statement of reasons behind a decision, are rendered meaningless if the criteria governing an administrative agency's decisions are not made public.[213] As one New York supreme court commented, "[t]he presence of written published reasonable standards in an ordinance where a use is qualified by the local legislature is of the highest importance because they inform the public of the law while they minimize favoritism."[214]

It is this concern for fairness to both the individual litigants and to the public at large that requires all state and federal judicial decisions be published. In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,[215] the Supreme Court confirmed that obligation stating that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely property of the private litigants . . . ."[216] On the same token, the Manual of Federal Practice requires the publishing of federal court opinions and states that not doing so would "would injure . . . the right of the public to know what all branches of its government are doing, and access to vital information needed for public debate protected under the First Amendment."[217]

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211. *See* Avard v. Dupuis, 376 F.Supp. 479, 483 (D.N.H. 1974) (stating that individuals cannot know what material to present, nor can they evaluate reasons for decisions without public standards).

212. Little v. Young, 82 N.Y.S.2d 909, 913 (1948), *aff'd*, 274 A.D. 1005, 85 N.Y.S.2d 41 (1948), *aff'd*, 299 N.Y. 699, 87 N.E.2d 74 (1949).

213. *See* N.Y. EXEC. LAW § 102 (McKinney 1997).

214. *See, e.g.*, NEW YORK CITY CHARTER § 1043(e) (1997); *see also* TOWN OF HEMPSTEAD, N.Y. CODE, div. 1, ch. 4, § 4-3 (1998).

215. 513 U.S. 18 (1994).

216. *Id.* at 26 (refusing to extend the power of vacatur of judgment under review to cases mooted by reason of settlement (quoting Izumi Seimitsu Kogyo Kabushki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 40 (1993)) (Stevens, J. dissenting)).

217. 2 RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE Ch. 8 (4th ed. Supp. 1995).

In the past few decades, both the federal and New York State governments have enacted laws to make available to the public as much information as possible regarding governmental processes without thwarting other governmental interests.[218] The legislative intent incorporated into the New York Freedom of Information Law ("FOIL") provides:

> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions . . . [t]he People's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.[219]

FOIL mandates public access to all government records, with a few delineated exceptions.[220] The relevant exceptions include certain records or portions thereof that are specifically exempted from disclosure by federal or state statute, those records that would constitute an unwarranted invasion of personal privacy if disclosed,[221] and some records compiled for law enforcement purposes.[222] An assertion that the collection of requested material would be too burdensome or cumbersome for the government is not a valid "defense" to the necessity of disclosing the requested information.[223] To allow such a defense "would thwart the very purpose of [FOIL] and make possible the circumvention of the public policy embodied in the Act."[224]

New York courts have construed the legislative intent of FOIL liberally, granting maximum public access, and have articulated that any exceptions to FOIL should be highly scrutinized.[225] The

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218. *See* United States Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989) (ordering the Department of Justice to furnish copies of district court tax decisions in its files to magazine publisher); *see also* N.Y. PUB. OFF. LAW § 84 (McKinney 1996).

219. N.Y. PUB. OFF. LAW § 84 (McKinney 1996).

220. *See id.*

221. *See* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989). Privacy involves two kinds of interests; an interest in avoiding disclosure of personal matters, and an interest in independence in making certain kinds of important decisions. The former is the kind pertinent to this discussion.

222. *See* N.Y. PUB. OFF. LAW § 87(2) (McKinney 1996).

223. *See* United Fed'n of Teachers v. New York City Health and Hosps. Corp., 104 Misc.2d 623, 625, 428 N.Y.S.2d 823, 825 (Sup. Ct. 1980) (stating that the HHC's "shortage of manpower" is not a defense to mandatory disclosure).

224. *Id.*

225. *See* Grossman v. Schwarz, 125 F.R.D. 376, 380 (S.D.N.Y. 1989) (noting that "the purpose of the statute is to 'maximize accessibility of government documents to the public'" (quoting In re Schwartz, 130 Misc.2d 786, 787, 497 N.Y.S.2d 834, 836

courts have emphasized that if a statutory exemption from FOIL exists, the government agency asserting the exception has the burden of justifying it as furthering a legitimate public interest or recognizable private right.[226] Even when a statutory exemption exists, courts have not hesitated to order the disclosure of information if the intent underlying the exemption is perverted.[227] Moreover, even when a FOIL exemption is applicable, courts balance the competing governmental and "public's right to know" interests by reading the exemption's purpose in the most narrow way possible. Instead of approving governmental refusals to reveal any part of an information request, courts often suggest redacting the specific information that would frustrate the exemption's purpose, such as names and addresses, while demanding the release of the remaining information to the public.[228]

People need to be aware of the relevant law in order to follow it. This basic notion is imperative with respect to carry licenses because the State has made no effort to articulate the meaning of "proper cause," the only standard offered as guidance to an applicant.[229] Therefore, even if licensing officials were authorized to create regulations, it would violate basic democratic principles not

(Sur. Ct. Nassau Co. 1986) explaining that the purpose is "in order to ensure government accountability")); Lucas v. Pastor, 117 A.D.2d 736, 498 N.Y.S.2d 461 (1986) ("FOIL was enacted to promote the people's right to know the process of governmental decision making and it is to be liberally construed to grant maximum public access to governmental records."); American Broad. Cos., Inc. v. Sievert, 110 Misc.2d 744, 442 N.Y.S.2d 855 (Sup. Ct. 1981) ("FOIL was enacted to enhance to the fullest permissible extent the access of the public and the news media to records and information in the possession of state and local governmental agencies . . . .").

226. *See* M. Farbman & Sons, Inc. v. New York Health and Hosps. Corp., 62 N.Y.2d 75, 83, 464 N.E.2d 437, 441 (1984) (no justification because records were not interagency or intra-agency materials, or even if so, they were not statistical or factual tabulations, or instructions to staff, or final agency policy or determinations); *see also* New York Teachers Pension Ass'n, Inc. v. Teachers' Retirement Sys. of New York, 98 Misc.2d 1118, 415 N.Y.S.2d 561, *aff'd*, 71 A.D.2d 250, 422 N.Y.S.2d 389 (1979).

227. *See* Capital Newspapers Div. of Hearst Corp. v. Burns, 109 A.D.2d 92, 96, 490 N.Y.S.2d 651, 654 (1985), *aff'd*, 67 N.Y.2d 562, 496 N.E.2d 665 (1986) (stating that "in enacting this statute, the legislature did not intend to create a blanket exception from disclosure for personnel records of police officers"); *see also* Miracle Mile Assocs. v. Yudelson, 68 A.D.2d 176, 417 N.Y.S.2d 142 (1979); American Broad. Cos., Inc. v. Sievert, 110 Misc.2d 744, 442 N.Y.S.2d 855 (1981).

228. *See United Fed'n of Teachers*, 104 Misc.2d at 623, 428 N.Y.S.2d at 823; *see generally* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 765-66 (1989).

229. *See* N.Y. PENAL LAW § 400.00(2)(f) (McKinney 1996) (requiring only that an administrative agent determine whether proper cause exists when determining whether to issue a carry license).

to publish such standards.[230] Regardless of whether standards created by administrative officials are deemed "rules," they still need to be published in order to inform the public and minimize favoritism.[231]

Furthermore, the public's "right to know" dictates that granted carry license applications be a matter of public record. The characterization of a document as a "public record" generally means that it is officially filed and made available for public inspection.[232] In order for a person desiring a carry license to assess the chance of obtaining the license, she must be able to compare her situation to that of others, so as to ascertain if she has "proper cause" for the license. But, because granted licenses are not part of the public record, an applicant applies with limited knowledge of her chance of approval. That process requires her to spend several hundred dollars and have her fingerprints taken.[233] Because a denied applicant has no way of knowing if that determination is "arbitrary or capricious,"[234] her choice to appeal the decision into the state court system also would be made blindly. That choice would require her to spend money for an appeal without any basis for determining her chances for success.

Because granted applications are not part of the public record, judicial review is meaningless.[235] By definition, it is impossible to determine whether a decision is arbitrary or capricious without comparing the decision to others of its kind.[236] Moreover, if licensing determinations are to be treated as final determinations subject only to limited judicial review, the public interest requires those determinations to be made public like all other final determinations.[237] Meaningful judicial review is even more imperative with

230. *See supra* notes 210-213 and accompanying text.

231. *See supra* notes 210-213 and accompanying text.

232. *See* N.Y. COMP. CODES R. & REGS. tits. 6-13, §§ 23-201 (1994); 92 N.Y. JUR.2D RECORDS AND RECORDING § 1 (1991).

233. Having one's fingerprints taken and recorded in government files might be seen by some as an invasion of privacy.

234. A court will provide relief for a carry license applicant only if the administrator's denial was arbitrary or capricious. *See supra* note 39 and accompanying text; *see also infra* note 254 and accompanying text.

235. *See supra* notes 210-212 and accompanying text.

236. *See* Wnek Vending & Amusements Co., Inc. v. City of Buffalo, 107 Misc.2d 353, 364-67, 434 N.Y.S.2d 608, 617-18 (Sup. Ct. 1980) (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY for the following definition of capricious: "[g]iven to changes of interest or attitude according to whims or passing fancies; not guided by steady judgment, intent or purpose; wholly without any consistent and discriminating standards; whimsical").

237. *See supra* notes 211-213 and accompanying text.

respect to carry licenses given the loose guiding criteria of "proper cause." The court's decision in *Goldstein v. Brown*[238] effectively demonstrates a finding of an arbitrary denial of a pistol license application. The court compared the plaintiff's denied application to the applications of others who had been granted licenses, finding many similarities.[239] However, because the legislature changed Penal Law § 400 to exclude granted applications as matters of the public record soon after the decision in *Goldstein*, meaningful judicial review of this sort is less likely to continue.

Not only is the decision to exclude granted applications from the public record unfair to the individual applicants, it also undermines the very purpose of the New York State Public Information Law and is unfair to the public as a whole. FOIL was enacted on the theory that informing the public of government action is vital to the functioning of a democratic society.[240] "The legislative intent [of FOIL] . . . was to increase the understanding and participation of the public in government and to extend public accountability by giving the public unimpaired access to the records of government and its process of decision-making."[241] Because it appears to be extremely difficult to obtain carry licensees' names or applications through a FOIL request,[242] it is imperative that this information be made part of the public record. The recent scandal involving the NYPD's licensing division[243] highlights that the present system hinders, rather than furthers, informed public participation in, and accountability for, gun licensing determinations.

Furthermore, the State cannot justify its complete exclusion of granted carry license applications from the public record.[244] The State has not indicated its purpose behind the November 1994 law change which excluded granted license applications from the public record.[245] If the State were to argue that the administrative difficulty and expense of revealing such information when requested as its purpose, such a defense would be invalid.[246] The argument that

238. 189 A.D.2d 649, 592 N.Y.S.2d 343 (1993).

239. *See Goldstein*, 189 A.D.2d at 649. The other approved applications were obtained and introduced by the request of the plaintiff's lawyer.

240. *See* N.Y. PUB. OFF. LAW § 84 (McKinney 1996).

241. Westchester Rockland Newspapers, Inc. v. Mosczydlowski, 58 A.D.2d 234, 236, 396 N.Y.S.2d 857, 859 (1977).

242. *See supra* note 33 and accompanying text.

243. *See supra* notes 25-26.

244. *See supra* notes 210-212 and accompanying text.

245. *See supra* text accompanying note 31. There is no legislative history accompanying the statutory revision at issue.

246. *See supra* notes 223-224 and accompanying text.

the information is an invasion of privacy cannot be sustained as under the law only the names and addresses of license carriers are released, while the informative "need criteria" of the application is not. The correct balance between privacy and the public's right to know would be achieved by releasing the "need criteria" on a licensee's application information, but redacting the names and addresses of the applicant. By withholding the "need criteria" from the public, the State is not only invalidly authorizing administrative officials to determine important public policy without accountability, but it is also allowing them to do so behind closed doors.[247]

### C. The Availability of Judicial Review

The third, and what some may label the most important,[248] requirement of an administrative law system is the availability of judicial review. An administrative agency cannot have the last word on any action taken by it; instead, a citizen must be able to challenge the legality of such action in an independent tribunal.[249] The necessity of strict judicial review is twofold: (1) it protects against administrative arbitrariness,[250] and (2) it enhances the integrity of the administrative process by necessitating a framework of principled decision making in the agency.[251] In reality, such review can only protect the most egregious abuses.[252]

Carry license decisions are reviewed according to the procedures of Article 78 of the Civil Practice Law and Rules.[253] In New York State, Article 78 is the appropriate avenue for relief from quasi-judicial and administrative functions,[254] and the avenue through which judicial review of rules can be made.[255] Article 78 is the "procedure for judicial review of matters that were cognizable at common law under the prerogative writs of certiorari, mandamus

247. *See* N.Y. PENAL LAW § 400.00(5), cmt. (McKinney Supp. 1998) ("[L]imiting disclosure only to the name and address of the successful licensee appears too restrictive. It precludes access to information that would not endanger the safety of the applicant or others but would permit public review of the propriety of the issuance of such licenses.").

248. *See* Schwartz, *Fashioning supra* note 46, at 70 (1988).

249. *See id.* at 67-70.

250. *See* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

251. *See id.*

252. *See id.*

253. *See supra* notes 34-36 and accompanying text.

254. *See* N.Y. C.P.L.R. § 7803, cmt. 7803:1 (McKinney 1994).

255. *Id.*; *see also* N.Y. A.P.A. § 205 (McKinney 1995).

and prohibition."[256] In an Article 78 proceeding, only four questions may be raised. They are as follows:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.[257]

This limited type of review is applied to administrative functions because administrative decisions are characterized as final.[258] "[R]estraint . . . is to be exercised in permitting reconsideration even in the case of purely administrative action, to say nothing of that which is ordinarily characterized as quasijudicial. Any general relaxation of the rule of *res judicata* is inadmissible even in strictly administrative matters."[259]

Although Article 78 provides a uniform procedure for rights to relief formerly available under writs of certiorari, mandamus and prohibition, the Article did not alter the substantive law upon which the different writs were based.[260] The nature of relief available to a litigant reflects those classifications. For ministerial actions, a litigant may seek an order from a judge commanding an administrator to act.[261] However, certiorari is the standard of review for quasi-judicial proceedings that require a hearing and are made on record,[262] under which a court will uphold a determination if it is supported by "substantial evidence."[263] That review

256. N.Y. C.P.L.R. § 7801, cmt. 7801:1 (McKinney 1994).

257. *See Gimprich*, 306 N.Y. at 407-8 (referring to the availability of a "mandamus to compel" for ministerial actions).

258. N.Y. C.P.L.R. § 7803 (McKinney 1994).

259. *See* N.Y. C.P.L.R. § 7801(1) (McKinney 1994). Article 78 cannot be used to challenge a determination that is not final. *Id.*

260. Evans v. Monaghan, 306 N.Y. 312, 324, 118 N.E.2d 452, 458 (1954) (affirming department dismissal of police officers).

261. *See* N.Y. C.P.L.R. § 7801, cmt. 7801:1 (McKinney 1994).

262. *See* N.Y. C.P.L.R. § 7803, cmt. 7803:1 (McKinney 1994).

263. *Gimprich*, 306 N.Y. at 406; Holland v. Edwards, 307 N.Y. 38, 44, 119 N.E.2d 581, 584 (1954) (citation omitted); Kopec v. Buffalo Brake Beam-Acme Steel & Malleable Iron Works, 304 N.Y. 65, 67, 106 N.E.2d 12, 15 (1952) (citation omitted).

means that the determination is to be sustained if the reviewing court concludes that others might reasonably reach the same result.[264] Carry license determinations, however, are discretionary administrative decisions that neither require a hearing, nor are made on the record. Consequently, in an Article 78 proceeding such determinations are primarily reviewed under what is known as "mandamus of review"[265] to assess whether the determination was "arbitrary or capricious"[266] or affected by error of law.[267] The standards of review for certiorari and mandamus are similar, except that a court has the benefit of a full record in certiorari review.[268] Under both types of review, if the discretionary determination does not meet the relevant "substantial evidence" or "arbitrary or capricious" standard, a court may remit the matter to the relevant agency for reconsideration[269] or it may command an administrative officer or body to act.[270]

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264. *See supra* note 254.

265. *See supra* note 38.

266. Scherbyn v. Boces, 77 N.Y.2d 753, 758, 573 N.E.2d 562, 565 (1991); Hochreich v. Cudd, 68 A.D.2d 424, 426, 417 N.Y.S.2d 498, 500 (1979); Berstein v. Police Dep't of New York, 85 A.D.2d 574, 444 N.Y.S.2d 716 (1981). The Court of Appeals has construed the "arbitrary or capricious" standard to mean that the action was taken without sound basis in reason or without regard to the facts. *See* N.Y. C.P.L.R. § 7803, cmt. 7803:2 (McKinney 1994) (citing Pell v. Board of Ed. of Union Free Sch. Dist. No.1 of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974) (Capricious has also been defined as "given to changes of interest or attitude according to whims or passing fancies; not guided by steady judgment, intent or purpose; wholly without any consistent and discriminating standards, whimsical."); Wnek Vending & Amusements Co. v. City of Buffalo, 107 Misc.2d 353, 366, 434 N.Y.S.2d 608, 617-18 (Sup. Ct. 1980) (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY)).

267. *See Scherbyn*, 77 N.Y.2d at 758.

268. *See id.* at 757; *see also* N.Y. C.P.L.R. § 7803, cmt. 7803:1 (McKinney 1994).

269. *See* Rochester Colony, Inc. v. Hostetter, 19 A.D.2d 250, 254-55, 241 N.Y.S.2d 210, 215 (1963).

270. *See* N.Y. C.P.L.R. § 7806 (McKinney 1996) ("The judgment may grant the petitioner the relief to which he is entitled . . . . If the proceeding was brought to review a determination, the judgment . . . may direct or prohibit specified action by respondent."); Wyoming v. Criminal Justice, 83 A.D.2d 25, 27 443 N.Y.S.2d 898, 901 (1981) (explaining that an order to compel is appropriate remedy for discretionary action if "abused by arbitrary or illegal action"); Britton Realty Co. v. State Div. of Hous. and Community Renewal, 141 Misc.2d 683, 685, 534 N.Y.S.2d 98, 99 (Sup. Ct. 1988); Garrett v. Coughlin, 128 A.D.2d 210, 212, 516 N.Y.S.2d 796, 797 (1987). But some courts have indicated that this type of relief can only be achieved if the litigant shows that he or she has a clear legal right to the execution of that act. *See* Gimprich, 118 N.E.2d at 580 (stating that this type of relief is available to acts that involve no exercise of discretion); Hamptons Hosp. & Medical Ctr., Inc. v. Moore, 52 N.Y.2d 88, 96, 417 N.E.2d 533, 537, 436 N.Y.S.2d 239, 243 (1981); Baressi v. Biggs, 203 A.D. 2, 4, 196 N.Y.S. 376, 379-80 (1922) (citations omitted).

In order to provide a basis for judicial review, all administrative decisions should include findings and conclusions, and the reasons or basis therefore on all material issues of fact, law or discretion.[271] Proper judicial review to determine whether an act was arbitrary or capricious also "requires disclosure of the standard which the administrative agent has applied."[272] The standards must be objective and delineated in order to have meaningful judicial review.[273] In fact, the Court of Appeals has held that where rules delegate unfettered discretion with inadequate safeguards against the exercise of arbitrary power or simple unfairness, administrative denials under those rules are arbitrary and capricious as a matter of law.[274] Other courts have compared similar agency determinations in order to gauge whether a decision was arbitrary or capricious. In *Application of Fitzgerald*,[275] for example, a supreme court determined that the Public Service Commission acted "arbitrar[ily] and capricious[ly]" because "[i]t approved leases in four identical cases and then on the same proof denied Fitzgerald like relief for no reason whatever."[276]

In New York, carry license determinations reviewed in Article 78 proceedings are reviewed on mandamus, primarily to assess whether the determination was arbitrary or capricious.[277] Unless the licensing officer commits an error of law or acts arbitrarily or capriciously in some other way, the officer's judgment is final and the courts may not interfere.[278] In the rare instance that a court has sensed that a challenged carry license determination was arbitrary or capricious, however, the court remanded the case for further explanation rather than compel the issuance of the license.

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271. *See* Illinois v. United States, 371 F.Supp. 1136-38 (N.D. Ill. 1973); *see also* O'Brien v. O'Brien, 66 N.Y.2d 576, 589, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 751 (1985) (stating that no intelligent review of the broad discretion entrusted to a trial judge is possible unless the judge reveals the factors considered and the reasoning behind his decision).

272. *See In Re* Montauk Improvement, Inc., 41 N.Y.2d 913, 914, 363 N.E.2d 344, 345, 394 N.Y.S.2d 619, 620 (1977); *see also Wnek Vending*, 107 Misc.2d at 361, 434 N.Y.S.2d at 614-15.

273. *See* Nicholas v. Kahn, 47 N.Y.2d 24, 33, 389 N.E.2d 1086, 1091, 416 N.Y.S.2d 565, 570 (1979).

274. *See id.* at 34.

275. 262 Misc. 393, 29 N.Y.S.2d 9 (Sup. Ct. 1941).

276. *Id.* at 397.

277. *See, e.g.*, Hochreich v. Codd, 68 A.D.2d 424, 426, 417 N.Y.S.2d 498, 500 (1979); Bernstein v. Police Dep't of the City of New York, 85 A.D.2d 574, 445 N.Y.S.2d 716 (1981).

278. *See* Dorf v. Fielding, 20 Misc.2d 18, 20, 197 N.Y.S.2d 280, 283 (Sup. Ct. 1948).

Because Penal Law § 400 does not provide any standards, any decision under the scheme is capricious.[279] The necessity of finding such determinations capricious is not dependent on whether the officer is applying standards uniformly, but rather whether he has the discretion not to do so.[280] Therefore, when carry license applicants appeal their denials, courts should declare Penal Law § 400 unenforceable.[281] Even if administrative officers are uniformly applying predetermined criteria for the issuance of carry licenses without looking into the facts of each case (i.e., if only carrying a specific amount of money suffices to obtain a license), determinations made under that scheme would be inherently arbitrary and capricious because those criteria are not published.[282] Yet a court would not even be able to determine if licensing officers are applying established criteria because the unavailability of granted applications to the public prevents an applicant from putting forth evidence of "need criteria" previously found to constitute proper cause.

### D. Summary

The New York State Constitution mandates that if the legislature delegates any of its powers, it must provide sufficient guidelines for administration of those powers.[283] Under this mandate, Penal Law § 400, which effectively grants unfettered discretion to administrative officials over carry licenses, is unconstitutional. Moreover, even if New York State adopted the federal constitutional standard of permitting the liberal delegation of authority as long as sufficient procedural safeguards exist,[284] the statute would fail because it violates basic notions of fundamental fairness—few, if any, procedural safeguards exist. No predetermination hearings are provided and thus no information is made on record. Yet, even in the absence of a record, the standard for judicial review is a deferential one. Moreover, without sufficient justification, licensees' applications

279. *See supra* text accompanying notes 269-272; *see also Nicholas*, 47 N.Y.2d at 33.

280. See *supra* text accompanying notes 269-272.

281. *See Nicholas*, 47 N.Y.2d at 33 (stating that exemption to prohibition of employee ownership of utility stocks and bonds cannot be enforced until amended because it delegates unfettered discretion to administrative agent).

282. *See* Sunrise Manor Nursing Home v. Axelrod, 135 A.D.2d 293, 296-97, 525 N.Y.S.2d 367, 369-70 (1988) (holding that department of health's determination was arbitrary and capricious because it applied an unpublished fixed and rigid policy that predetermined application without regard to its merits).

283. *See supra* notes 47-51 and accompanying text.

284. *See supra* note 52.

are no longer part of the public record. Thus, judicial review is meaningless, since a decision regarding whether a determination is arbitrary or capricious by definition can only be made by comparing an applicant to objective standards, or other determinations, neither of which are readily available to a judge.

## III. Proposed Changes

### A. The Legislature Should Change the Current System

The New York State legislature should amend Penal Law § 400 to include defined factors that administrative officials should consider when determining whether an applicant has shown "proper cause" for the issuance of a carry license.[285] To ensure meaningful judicial review, and because an applicant's safety is often at issue, the legislature should also require the license issuing agency to grant an applicant a hearing made on the record upon request. Moreover, the legislature should make the applications of persons granted carry licenses, and the determinations on those applications, available for public review. By allowing the public to compare the determinations of various different applications, the process can cease appearing arbitrary and capricious.

### B. The Courts Should Take Action

#### 1. *Declare Penal Law § 400 Invalid*

The New York courts should declare Penal Law § 400 an unconstitutional delegation of power and violative of due process if the legislature does not make the above proposed changes to the statute.

#### 2. *Compel the Issuance of Carry Licenses*

If the Legislature does not set forth objective guidelines for the issuance of carry licenses, and determinations are not made part of the public record, courts should find all denials of carry license determinations made pursuant to Penal Law § 400 "arbitrary and capricious." Further, when they declare these determinations "arbitrary and capricious," courts should compel the issuance of a license[286] rather than remit the matter for further review.

Courts need to compare decisions to determine if objective criteria exist. Penal Law § 400 is unenforceable, however, regardless of

285. *See supra* note 115 for examples of comparable statutes from other states.
286. *See supra* note 269 and accompanying text.

whether objective criteria are discovered. If there are no objective criteria, courts should compel the administrative body issuing carry licenses to grant licenses to persons challenging denials, because decisions made without guiding criteria are inherently arbitrary and capricious. On the other hand, if the licensing official has established objective criteria, courts should also compel the issuance of licenses. Because the creation of such standards is outside the scope of licensing officials' authority, determinations made pursuant to such unpublished standards are accordingly arbitrary and capricious.[287]

### 3. *Classify Carry License Determinations and Mandate the Appropriate Requirements of Classification*

New York law has not been clear regarding whether carry license determinations should be characterized as legislative, judicial or ministerial. Yet, the not-readily-identifiable nature of carry license determinations cannot be used to mask the unconstitutional attributes of the system. Because such determinations do not fall neatly into one category, a carry license applicant receives *none* of the protections or advantages of any branch of the government. Courts should therefore classify carry license determinations within the purview of one branch so as to ensure that the requirements of that classification for fair procedure and judicial review are carried out.

This article argues that carry license determinations are of a quasi-judicial nature, and therefore should be classified as adjudicatory proceedings.[288] Accordingly, courts should mandate that applicants are afforded an opportunity for a predetermination hearing made on the record upon request.[289] Courts should also require the responsible agencies to make those determinations available to the public in order to afford potential applicants meaningful review by comparison. Courts should employ a certiorari standard of review, affirming determinations only if they are supported by substantial evidence set forth in the record.

However, even if New York courts conclude that carry license determinations do not require hearings because they are not adjudicatory, but rather legislative or administrative, then the applicable requirements of that branch must be applied consistently throughout the licensing process. For example, if licensing is con-

287. *See supra* notes 124-29 and accompanying text.
288. *See* discussion *infra* Part II.A.
289. *See* discussion *infra* Part II.B.

sidered legislative, courts should enforce the State Administrative Procedure Act requirement that such determinations be published. If licensing is considered administrative, deferential review should not be the standard of review because of the uneven results of the review process in the past. The courts should look closely into the facts of the case and the "standard" for granting a license, and mandate the issuance of a license if warranted, rather than deferring to the discretion of the licensing official.[290]

### 4. *Provide More Aggressive Review*

If courts choose not to compel the issuance of carry licenses, and if carry license determinations are not officially classified as adjudicatory, legislative, or ministerial, New York courts should at a minimum apply a qualified or a relaxed set of res judicata[291] rules to such determinations. The courts should not simply defer to the licensing officer's decision, but should look more closely at the facts of the case.

The conclusion that res judicata is applicable to administrative decisions as final decisions should be subject to the same exceptions that apply to judicial decisions, including inadequacy of opportunity to be heard.[292] Because the carry licensing decision-making process in New York State does not provide applicants with an opportunity to be heard, the traditional exceptions to res judicata require that the strict application of the doctrine to carry license determinations be abolished.[293] Furthermore, administrative decisions may require additional exceptions.[294] "Whenever the traditional rules of res judicata do not work well as applied to particular administrative action, those rules may be weakened . . . without destroying the essential service of the doctrine of res judicata in preventing the same parties or their privies from unnecessarily litigating the same question a second time . . . ."[295] One commentator on administrative law has stated that an intermediate

290. *See* discussion *infra* Part II.A.1.

291. BLACK'S LAW DICTIONARY 1305-06 (6th ed. 1990) defines "res judicata" as the "[r]ule that a final judgment . . . on the merits is conclusive . . . [and] constitutes an absolute bar to a subsequent action involving the same claim . . . . [A] matter once judicially decided is finally decided."

292. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW 565-66 (1951).

293. *See id.*

294. *See id.*

295. *Id.* at 566.

level of res judicata is fully supported in the practices of agencies and holdings of courts, although not articulated as such.[296]

The "arbitrary or capricious" standard of review, often cited for its limitations regarding judicial relief, provides another reason why courts should be more aggressive in their review. Action is not "arbitrary or capricious," even if an erroneous conclusion is reached, as long as the agency has acted honestly and upon due consideration of the facts.[297] Unlike the "clearly erroneous" standard, the "arbitrary or capricious" standard does not mandate a review of the entire record and all the evidence. Furthermore, the "arbitrary or capricious" standard does not consider public policy contained in the legislative act authorizing the decision.[298]

Courts lack the authority to change the applicable "arbitrary or capricious" standard of review.[299] Courts can, however, rectify the inadequacies of the arbitrary or capricious standard which are magnified in carry licensing by the lack of many constitutional requirements for an administrative scheme. Courts should require the government to produce detailed evidence showing both its reason for denying each application, and why such reasoning is not arbitrary or capricious.[300]

## Conclusion

Although the creation of administrative systems may have become a necessary component of modern democratic government, such systems must not compromise the ideals fundamental to a democratic state. The system for administering licenses to carry concealed weapons in New York State violates the State's constitution in that it enables elected officials to avoid difficult decision making and lacks proper procedures to ensure fair application. The sole "proper cause" standard for the issuance of a carry license is the equivalent of a standardless delegation, which, in effect,

296. *See id.*

297. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 41 (1994).

298. *Id.* at 42 (citing Norway Hill Preservation & Protection Ass'n v. King County Council, 87 Wash.2d 267, 274, 552 P.2d 674, 678-79 (1976)).

299. See Pokola v. E.I. Dupont De Nemours and Co., 963 F. Supp 1361, 1371 (D.N.J. 1997) ("Courts have not required a plan to explicitly identify the applicable standard of review before applying the arbitrary and capricious standard." (citing Firestone Tire Co. v. Bruch, 489 U.S. 101 ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion".))).

300. *See* discussion *infra* Part III.B.2.

grants unelected and unaccountable administrative officials the discretion to apply their own public policy on gun control.

Moreover, the State is exploiting the elusive character of gun licensing by denying procedural safeguards required for adjudicatory proceedings but not for ministerial ones, and then granting deferential judicial review only afforded to adjudicatory proceedings and not to ministerial ones. This lack of fairness in the procedures provided in the current administrative scheme is compounded by the undemocratic practice of keeping information from the public. Whatever criteria is being used by the licensing officials to make carry license determinations, it is revealed to neither the license applicant nor the public at large.

Both the New York legislature and courts must act to rectify the state's unconstitutional and undemocratic administrative scheme for issuing carry licenses. The legislature must express its will regarding gun control by creating more definitive standards for administrative officials to apply than the current amorphous "proper cause" standard. The quasi-judicial nature of gun licensing, as well as the safety and protection concerns predicating applications for carry licenses, mandate that carry license applicants be offered a predetermination hearing. Finally, the legislature must require that license applications be made part of the public record in order to ensure meaningful judicial review.