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Second Amendment Limitations and Criminological Considerations

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"[Self-defense is the] primary Canon of the Law of Nature."

—John Adams, 1770

“A people who would stand fast in their liberty, should furnish themselves with weapons proper for their defence . . . .”

—Rev. Simeon Howard’s sermon to the Ancient and Honorable Artillery Company, Boston 1773

"[In free governments] there is not the least difficulty or jealousy about putting arms into the hands of every man in the country.”

—Daniel Dulany Jr., 1774

INTRODUCTION

A. THE “STANDARD MODEL” OF THE SECOND AMENDMENT

In District of Columbia v. Heller, the United States Supreme Court struck down the Washington, D.C. gun bans and endorsed the “Standard Model” view of the Second Amendment. That view interprets the Amendment as a guarantee that law-abiding, responsible adults may acquire and possess firearms. The term “Standard Model” was coined by University of Tennessee constitutional law professor Glenn H. Reynolds

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* Yale, LL.B., 1966.

The Authors gratefully acknowledge the helpful advice of Nicholas Johnson, C.B. Kates, Michael A. Lawrence, Nelson Lund, and George A. Mocsary. For errors the Authors alone are responsible.

1. JAMES GRANT, JOHN ADAMS: PARTY OF ONE 95 (2005).
2. REV. SIMEON HOWARD, A SERMON PREACHED TO ANCIENT AND HONORABLE ARTILLERY COMPANY IN BOSTON (1773), IN ON FAITH AND FREE GOVERNMENT 99, 108 (DANIEL C. PALM ED., 1997).
6. Id. at 463.
to reflect two facts: first, an individual right is clearly what the Amendment's rights clause ("the right of the people to keep and bear Arms, shall not be infringed") guarantees, at least in the context of a Bill of Rights in which "right of the people" is repeatedly used to denote individual rights; and, second, the overwhelming majority of scholarly treatments are in agreement that that is what the Second Amendment guarantees. This remains the consensus among scholars despite the antigun lobby's generous financing of three minor law reviews to publish symposia in which only pieces opposing the Standard Model were allowed." Indeed, the term "Standard Model" has now been accepted even by vigorous opponents of that model.

B. UNELABORATED EXCEPTIONS

The slip opinion of the Heller majority devotes sixty-four pages to extended discussion of the text, legislative history, and historical background of the Second Amendment. Understandably, it omits any lengthy analysis of extraneous issues, stating:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .

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7. U.S. CONST. amend. II.
8. See U.S. CONST. amend. I ("right of the people peaceably to assemble"); id. amend. IV ("right of the people to be secure . . . against unreasonable searches"); id. amend. IX (reserving the rights of the people to the people themselves); cf. id. amend. X (reserving the "powers" of the states to the states themselves or to the people). It has been observed that "as used throughout the Constitution, 'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority', never 'rights.'" Emerson v. United States, 270 F.3d 203, 228 (5th Cir. 2001) (emphasis added).
9. The most recent assessment of which we are aware is: "Suffice it to say that the historical evidence so heavily favors a non-State-centric—either an individual-rights or standard-model—approach, as reflected in the recent scholarship, that courts and others cannot help but conclude that the Second Amendment protects a right of the people . . . ." Michael A. Lawrence, Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses, 72 Mo. L. REV. 1, 57–58 (2007) (footnote omitted).
11. See, e.g., Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment and the Problem of History in Contemporary Constitutional Theory, 16 CONST. COMMENT. 221, 229 (1999); John Randolph Prince, The Naked Emperor: The Second Amendment and the Failure of Originalism, 40 BRANDeE'S L.J. 659, 694 (2002); Garry Wills, To Keep and Bear Arms, N.Y. REV. BOOKS, Sept. 21, 1995, at 62.
Justice Breyer chides us for ... not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.... There will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.  

The purpose of this Article is to elaborate on the two most important exceptions which Heller intimated but did not address in detail: (1) that the scope of the Second Amendment is limited to a right to possess ordinary small arms for self-defense, not super-destructive military weaponry that is too indiscriminate to use in legitimate self-defense; and (2) that the Amendment right extends only to responsible, law-abiding adults but not to criminals, the insane, or juveniles. (The majority opinion also implies that the law could punish obtaining or carrying a gun with the intent to use it for wrongful purposes.)

But before elaborating on those issues, we treat another point which will undoubtedly be a major subject of discussion vis-à-vis the case's result: that guaranteeing the right to arms of law-abiding, responsible adults is fully consistent with the findings of modern criminological research.

I. CRIMINOLOGICAL DISCUSSION

A. THE CANARD THAT ORDINARY PEOPLE MURDER

Though it doubtless will be so assailed, Heller's embrace of the Standard Model cannot be deemed criminologically unsound in recognizing a right of law-abiding, responsible adults to possess firearms. For decades gun control advocates have blamed murder on ordinary people, claiming that most homicides are not committed by the "hardened" criminal who would seek out a gun or other lethal weapon, whether or not it was legal, but rather by ordinary, "law-abiding" citizens who kill on impulse rather than by intent [because a firearm was available in a moment of un governable anger].

13. Id. at 2822.
14. Id. at 2816–17.
15. See id. at 2799.
16. AMITAI ETZIONI & RICHARD REMP, TECHNOLOGICAL SHORTCUTS TO SOCIAL CHANGE 107 (1973); see, e.g., Frank J. Vandall, A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill, 38 AKRON L. REV. 113, 118–19 n.28 (2005) (citing as authoritative such unsupported claims by Dr. Katherine Christoffel, who heads a gun-ban advocacy group, that "most shootings are not committed by felons . . . but are acts of passion that are committed using a handgun that is owned for home protection" (alteration in original) (quoting Katherine Kaufer Christoffel, Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course, 88 PEDIATRICS 294, 300 (1991)); see also GREGG LEE CARTER & MILDRED VASAN, GUN CONTROL IN THE UNITED STATES: A
It bears emphasis that the passage thus quoted appeared naked of any supporting criminological reference. That is a peculiarity of such claims whenever and wherever they appear. Claims that—unlike burglars, rapists, and robbers—most murderers are ordinary, previously law-abiding people routinely appear in purportedly scholarly articles which never supply supporting references—for there are none!

Perpetrator data dating back to the nineteenth century invariably shows that murderers were not previously law-abiding, responsible adults; rather, “most murderers differ little from other major criminals.”\(^7\) Perpetrator studies dating back to the nineteenth century invariably find that the overwhelming majority of murderers have prior crime records; this so well recognized by criminologists that it is now counted among the “criminological axioms.”\(^8\) But given the wide dissemination and political importance of the ordinary-citizen-as-murderer canard, we briefly review some of the more recent contributions to the vast corpus of contrary criminological study conclusions:

- “[T]he vast majority of persons involved in life-threatening violence have a long criminal record with many prior contacts with the justice system.”\(^9\)
- Homicide is usually part of a “pattern of violence,” engaged in by people who are known as violence prone.\(^{10}\)
- Psychological studies summarized as finding that 80% to 100% of juvenile murderers are psychotic or have psychotic symptoms.\(^{11}\)
- Though only 15% of Americans have criminal records, roughly 90% of adult murderers have adult records (exclusive of their often extensive juvenile records), with an average adult crime career of six or more years, including four major felonies.\(^{12}\)
- A *New York Times* study of the 1662 murders in that city in the years 2003 through 2005 found that “[m]ore than ninety percent of the killers had criminal records.”\(^{13}\)

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- "Some 95% of homicide offenders...[in a Kennedy School study had been] arraigned at least once in Massachusetts courts before they [murdered]....On average...homicide offenders had been arraigned for 9 prior offenses...." 24
- "A history of domestic violence was present in 95.8%" of the intrafamily homicides studied. 25
- Of Illinois murderers in 1991 through 2000, the great majority had prior felony records. 26
- Eighty percent of 1997 Atlanta murder arrestees had previously been arrested at least once for a drug offense, and 70% had three or more prior drug arrests, in addition to all their arrests for other crimes. 27
- Baltimore police records show that 92% of 2006 murder suspects had criminal records. 28
- From a Milwaukee police compilation of data on 2007 and past years' murders: "Most suspects had criminal records, and a quarter of them were on probation or parole." 29

To reiterate, those who claim that many or most murderers are ordinary, law-abiding, responsible adults never cite supporting evidence, at least not evidence that is relevant and valid. 30 The closest they come is noting the bare facts that murders often involve people who knew each other and arise from arguments and/or occur in homes. 31 Those who present these bare facts as proving that murderers are ordinary people are apparently laboring under the delusion that criminals do not have

30. The one exception to this dearth of supporting references appeared in a pamphlet by the then-Mayor of New York, a vehement anti-gun advocate, which asserted, without specifying any particular documents, that 1972 FBI data showed that "most murders (73% in 1972) are committed by previously law-abiding citizens." See JOHN V. LINDSAY, THE CASE FOR FEDERAL FIREARMS CONTROL 22 (1973).

The citation was fraudulent. The FBI never found any such thing either in that year or in any other. What the FBI's 1972 Uniform Crime Report section titled "Careers in Crime" actually found was that 74.7% of murder arrestees that year had one or more prior arrests for a violent felony or burglary, exclusive of their arrests for other offenses. FBI, CRIME IN THE UNITED STATES 1972, at 35-38 (1973).
homes or acquaintances or arguments. It is only by deduction from this delusion that anyone could conclude that since murders involve these things, the killers must be noncriminals. Of the many studies belying this, the broadest analyzed a year's national data on gun murders that occurred in homes between acquaintances, and concluded that "the most common victim-offender relationship" was "where both parties knew one another because of prior illegal transactions."  

In sum, guns or no guns, neither most murderers nor many murderers—nor virtually any murderers—are ordinary, law-abiding, responsible adults. To reiterate, this is so invariably established in perpetrator studies that it is now recognized as among the standard "criminological axioms." The policy implications are obvious: since ordinary people neither rob nor murder, nor commit other gun crimes, there is no point in disarming them. Rather, doing so is counterproductive since it leaves the innocent defenseless against violent predators.

B. THE CRIMINOLOGY OF HELLER

The foregoing is amply borne out by Washington, D.C. data on the years preceding and following enactment of the gun bans voided in Heller. Over the five preban years, D.C.'s murder rate had fallen from thirty-seven to twenty-seven deaths per 100,000 people. After fifteen years under the bans, it had tripled to 80.22 deaths per 100,000 people.  

Compare D.C. to neighboring Baltimore, which for years before the D.C. bans had experienced closely similar murder rates. Fifteen years after the D.C. bans Baltimore's murder rate had increased somewhat but D.C.'s had so drastically increased as to be almost double Baltimore's. Now, compare D.C. to all other large American cities. Before the bans D.C. ranked fifteenth in large city murder rates. Since 1976, D.C. ranked first or second in murder rates among large American cities in fifteen years and fourth in four years. Far from the gun bans succeeding, not once did D.C.'s murder ranking fall below what it had been before the ban.

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33. See Kennedy & Braga, supra note 18.
35. Id.
37. Id.
38. Id. (manuscript at 53).
39. Id.
We do not insist that D.C.'s catastrophic postban murder history proves that disarming victims promotes murder. But, as the latest analysis puts it, "Thirty years after passage, there is no proof that the D.C. gun ban has reduced violent crime, and no evidence that it has reduced criminals' access to firearms. If the D.C. gun ban has benefited D.C., it is unclear how." No greater testament to the bans' catastrophic failure can be seen than the current assertions of the D.C. legislators who enacted the ban: that the bans were not enacted to reduce violence, but rather to spur an expected national or regional handgun ban.

II. LIMITING THE SECOND AMENDMENT'S SCOPE

A. MODERN THEORISTS' INADEQUATE ATTEMPTS AT LIMITING THE SCOPE OF THE SECOND AMENDMENT

The scope of the Second Amendment, and its limitations, can only be understood by reference to its underlying rationale. That rationale is personal self-defense, which the Founding Fathers and the liberal political philosophers they revered held to be the first of all natural rights. "Who," Montesquieu asked, "does not see that self-protection is a duty superior to every precept?" This was a rhetorical question in his time; it is no longer so today when so many intellectuals passionately condemn the idea of personal self-defense. By contrast, the Founding Fathers and the natural-rights philosophers they followed (Hobbes, Locke, Blackstone, and Montesquieu, among others) enthusiastically embraced the right of personal self-defense. It bears emphasis that self-defense had a broader meaning than it is usually conceived of having today. Self-defense included not only defense against apolitical crime but also against assassination, genocide, and other politically-motivated oppressions—what Algernon Sidney called "the violence of a wicked magistrate who, ha[ving] armed a crew of lewd villains," subjects the people to murder, pillage, and rape.

42. 2 MONTESQUIEU, THE SPIRIT OF LAWS 60 (Thomas Nugent trans., rev. ed. 1900).
43. For a review of the anti-self-defense ideology that motivates the primary gun control groups and advocates, see Randy E. Barnett & Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 EMORY L.J. 1139, 1254–59 (1996).
45. 2 ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 246 (N.Y., Dear & Andrews 1805). Rape, robbery and murder by individual soldiers (who were, in fact, largely criminals recruited by jail-sweepings), particularly when billeted upon the king's enemies, was an aspect of English and French history of which the Founders were all too well aware. Kates, supra note 44, at 99–101. And it
The Second Amendment guarantees a collateral principle, which the Founders followed the natural-rights philosophers in deeming indispensable to this primary right of self-defense: what Blackstone termed the “auxiliary” right to possess arms.46 Illustrative of the interrelationship the Founders saw between the right of self-defense and the right to possess arms is a 1790 lecture by Justice James Wilson. Here is how Justice Wilson, a law professor, member of the Constitutional Convention, and the primary author of the Pennsylvania Constitution, explained the right to use deadly force to repel a homicidal attacker:

[I]t is the great natural law of self preservation, which, as we have seen, cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognised in the constitution of Pennsylvania. “The right of the citizens to bear arms in the defence of themselves shall not be questioned.”47

The Heller majority opinion also cites various nineteenth-century American writings in which the right to arms was equated to the right to self-defense from which it was derived.48 Interestingly, insofar as modern philosophers address such issues, almost all concur that the right of self-defense necessarily implies a right to have a gun.49

Given their background in natural-rights philosophy, the understanding that the Amendment guarantees a right to possess the means of self-defense was universal among its authors, their contemporaries, and later commentators down to the twentieth century.50 Only when gun control became a political issue in the twentieth century did anyone suggest the Second Amendment’s purpose had been other or was an aspect of their own history, the Crown having attempted to enforce the Stamp Tax and other exactions by soldiers whose invasions of homes and businesses the Founders deemed criminal and believed had been accompanied by robbery, assault, and rape—wherefore Samuel Adams had called upon the populace to arm themselves individually for their own defense. Id.

46. See Kates, supra note 44.
50. See Randy E. Barnett, Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?, 83 TEX. L. REV. 237, 260, 263 (2004) (noting that, in contrast to Standard Model, advocates of the various states’ right/collective rights theories have been unable to produce even a single example of those theories being mentioned by any eighteenth-century American); David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. REV. 1359 (1998) (providing a comprehensive review of a century of post-1789 references to the Amendment which finds none stating the states’ right theory).
less than guaranteeing law-abiding, responsible adults a right to arms for
the defense of self, home, and family.51

In the twentieth century, intellectuals and academics whose attitudes
toward self-defense are diametrically opposite to those of the Founders
felt the need to invent some other purpose for the Amendment. Aware
that its words had to mean something, they desperately strove to concoct
any theory, no matter how baseless, other than the Standard Model. The
resulting theories can be boiled down to three slightly differing ones,
each being equally ahistorical and even absurd.

1. States' Right

The single most popular theory from the middle of the last century
has been that the Amendment was a disavowal of, and retrenchment on,
the military and militia clauses of the original Constitution, intended to
safeguard the states' power over the militia.52 This has been solemnly asserted despite—and without ever addressing!—the following problems:
(1) far from wanting to enhance state powers, the Amendment's author,
James Madison, was an extreme exponent of federal power vis-à-vis the
states who deemed the Constitutional Convention a failure for having
rejected his proposals for more sweeping federal sovereignty;53 (2) Madison expressly informed Congress that his proposal exclusively concerned individual rights rather than restoring any "powers of the State Governments;"54 (3) the Amendment declares a "right of the people," a phrase used throughout the Constitution and Bill of Rights to
describe individual rights;55 (4) the Amendment nowhere uses the words

51. As William Van Alstyne jocularly wrote, quoting a preeminent expert on the history of the Amendment,
In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.


55. See United States v. Emerson, 270 F.3d 203, 228 & n.24 (5th Cir. 2001). ("[A]s used
"power" or "authority," which the Constitution invariably uses when describing government powers;\(^5\) (5) Anti-Federalists did desire to reduce federal control over the militia and reinstate state control—for which purpose they offered the First Congress other constitutional amendments that the Federalist-majority Senate rejected;\(^6\) and (6) from early in its history, the Supreme Court has held that federal power over the militia is plenary, with state authority existing only insofar as consistent with federal authority.\(^7\) It is little wonder then that, though fervent opposition to guns and their ownership produced four dissenting votes in *Heller*, not one of the Justices deemed the states' right theory credible enough to be worth espousing.\(^8\)

2. **Collective Right**

This theory asserts that the Amendment grants a "collective right" in the sense (read: nonsense) of a "right" that cannot be enforced by anyone either for herself or for the group.\(^9\) Contrast the "collective" rights the Constitution does recognize, such as the First Amendment right to assemble and the Fifteenth and Nineteenth Amendment rights of particular groups to vote. All these rights can be enforced by people deprived of them seeking enforcement on their own behalf and/or for the group.\(^10\)

3. **"Sophisticated" Collective Right**

This theory concedes that the Amendment does create an individual right to arms but says that right can only be exercised in the context of military service.\(^11\) Justice Stevens's dissent purports to find support for throughout the Constitution, 'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority', never 'rights.'" (emphasis added).

\(^5\) Id.

\(^6\) Perpich v. Dep't of Def., 496 U.S. 334, 349-50 (1990) (holding that state militias may be called into federal service over state objection, and that federal authority over the militia is paramount); Selective Draft Law Cases, 245 U.S. 366, 383 (1918) (holding that Congress has authority to abolish state militias by bodily incorporating them into federal army); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 33 (1827) (noting president's power to call militia from state control into federal service); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 24 (1820) (holding that federal militia legislation preempts state).


\(^8\) See Prince, supra note 11, at 694-95 (espousing the collective-right view, which he pithily describes as asserting that the right to arms the Amendment guarantees applies not to individual people, but "to the whole people as body politic" (i.e., to no one)).


\(^10\) See, for example, Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Deregulation of Dialogic Responsibility*, 75 B.U. L. Rev. 57, 64, 66-77, 103-10, 133-45 (1995), which endlessly stresses that the right the Amendment guarantees is "narrow," a "narrow individual right," and is "narrow[ly] focus[ed] on the militia in defining the right to bear arms." This is as close as the
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this by reference to the supposed eighteenth-century meaning of the Amendment’s “keep and bear” phraseology.63 The majority opinion pithily disposes of this: “No dictionary has ever adopted that definition [of ‘keep and bear’] and we have been apprised of no source that indicates that it carried that meaning at the time of the founding.”64 Moreover, to demolish the entire line of argument, it is unnecessary to do more than inquire what it is supposed to mean—something no proponent of this theory has ever felt it worthwhile to explain. Consider, for instance, the belief of many gun-knowledgeable persons that the military erred in replacing the venerable 1911 A1 .45 pistol with the lower caliber Beretta M-9 pistol and in adopting the low caliber .223 rifle instead of its roughly .30 caliber predecessors.65 Does the “sophisticated” collective-right theory mean that service members have a right to choose which guns the state or federal governments procure and issue, regardless of what their superiors think?66 And if that is not what it means, then what does it mean to say that the Amendment creates a “right” to arms that can only be exercised in the context of military service? (Note that it cannot mean that gays or others currently excluded from militia or military service have a right to be included therein. For the whole point of the sophisticated collective right theory is to claim that the Amendment does not create a meaningful right, and it does not give any right to anyone who is not actually serving in the militia or the military.)

Where would one look to determine the content of this supposed “right”? Nothing further is required to show that these theories are not honest or serious attempts to understand the Amendment than that none of the theories’ numerous advocates has ever sought to explore their meaning or implications beyond just barely enunciating them. Significantly, the only attempt ever made to analyze what the state- and collective-right theories might mean is by Standard Model exponents.67

author gets to explaining what the Amendment does in his view. He offers no example or discussion of what kind of law might violate this negligible “right.” See id. For description of this as the “sophisticated collective right” view, see United States v. Emerson, 270 F.3d 203, 236 (5th Cir. 2001).

63. See Heller, 128 S. Ct. at 2822 (Stevens, J. dissenting).

64. Id. at 2794 (majority opinion). For further discussion of the absurdity of considering “keep and bear” to be a “unitary phrase,” see George A. Mocsary, Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right, 76 FORDHAM L. REV. 2113, 2173–74 (2008).


66. Let it be understood that we are raising this issue for the sake of argument, without any intention of either endorsing or condemning the Armed Forces weaponry choices we have mentioned.

To reiterate, these theories are just desperate attempts to concoct any explanation, no matter how fanciful, as an alternative to the Standard Model. 68

Having outlined the various theories, we may now proceed to discuss what, if anything, they imply about limitations on the Second Amendment right to arms.

B. DOES THE SECOND AMENDMENT COVER POSSESSION OF THE SUPER-DESTRUCTIVE WEAPONS OF MODERN WARFARE? 69

Only obliviousness to their own theory explains the claims by champions of the states' right view that the Standard Model entails the view that individuals have a right to possess cannons, tanks, warships, weapons of mass destruction, etc. To briefly summarize the matter, of course a right to arms for personal defense 70 does not imply a right to possess the kinds of weapons that are suitable only for warfare, not self-defense. 71 The Standard Model implies no more than that the Second Amendment guarantees law-abiding, responsible adults the right to possess ordinary, small arms—handguns, rifles, and shotguns. As the

68. The baselessness and ahistorical absurdity can be illustrated by the heroic obliviousness opponents of the Standard Model have had to the Amendment's phrase "right of the people." If that phrase stood alone it would be possible, though very strained, to construe it as creating some kind of unique collective, non-individual, never-enforceable right. But the phrase appears in both the First and Fourth Amendments, where it is used to denote individual rights; and "the people" is used in the Ninth and Tenth Amendments to differentiate the rights of individuals from the rights of the states.

Moreover, the slightest research into how late-eighteenth century Americans described individual rights shows the phrase "right of the people" being routinely used to describe individual rights. An early Madison draft of the First Amendment read: "The people shall not be deprived or abridged of their right to speak." Halbrook, supra note 3, at 252 (quoting 4 Documentary History of the First Federal Congress of the United States of America 9–10 (Charlene Bangs Bickford ed., 1986)). Professor Halbrook cites numerous such examples. See, e.g., id. at 221 ("[T]he People have a Right peaceably to assemble... the People have a Right to Freedom of Speech... the People have a Right to keep and bear Arms...." (quoting 9 The Documentary History of the Ratification of the Constitution 821 (1990))); id. at 231 ("[T]he people have a right to freedom of speech...." (quoting 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 658–59 (Jonathan Elliot ed., 1836) [hereinafter Debates])); id. at 239 ("[T]he people have an equal, natural, and unalienable right freely and peaceably to exercise their religion...." (quoting 1 Debates, supra, at 328)); id. at 257 ("[The Bill of Rights] are calculated to secure the personal rights of the people...." (quoting Creating the Bill of Rights: The Documentary Record from the First Federal Congress 249 (Helen E. Veit et al. eds., 1991))).

69. See Brief for the United States as Amicus Curiae at 9, Heller, 128 S. Ct. 2783 (No. 07-290), which raised the issue of whether the Amendment invalidates the federal ban on machine guns. It answered that question in the negative based on the claim that the ban is a reasonable regulation permitted by the Amendment. Id. Whether or not that position could be sustained, we here present far more direct and persuasive reasons why the Amendment permits the banning of the super-destructive weaponry of modern war.

70. For the proposition that personal defense is the rationale of the Amendment, see supra notes 44–50 and accompanying text, especially Kates, supra note 44.

71. Reynolds & Kates, supra note 67.
principal exponent of even the NRA's militant version of the Standard Model puts it:

Since "arms" under the second amendment are those which an individual is capable of bearing, artillery pieces, tanks, nuclear devices, and other heavy ordnances are not constitutionally protected. Nor are other dangerous and unusual weapons, such as grenades, bombs, bazookas, and other devices which, while capable of being carried by hand, have never been commonly possessed for self-defense.72

Ironically, this claim by partisans of the states' right view recoils on their own view.73 If, as they theorize, "the Second Amendment sought to keep state militias as a viable force in opposing the federal government,"74 that necessarily implies that states have a Second Amendment right to possess all the same weapons that the federal government has. That would include the states' rights to possess— independent of any kind of federal regulation—nuclear and biological mass-death weapons and nuclear missile submarines, as well as the right to raise armies without the consent of Congress. Note that it is irrelevant under the states'/collective right theories that the original Constitution forbids states having warships or raising armies.75 After all, insofar as these theories have any genuine rationale (as opposed to just being a pretextual alternative to the Standard Model), it is that the Second Amendment was an Anti-Federalist revision of the original Constitution's provision for federal military supremacy. In contrast, the Standard Model says not that the Amendment sought to correct anything in the Constitution, but only that it guarantees the personal right to arms that was universally endorsed by late-eighteenth century Americans.76

Yet, two questions might be asked: First, does the Standard Model not accept that the Amendment's purposes extend to self-defense not only against apolitical criminals but against terrorism and genocide by government as well? And so, second, does that not imply that individuals may possess at least tanks, artillery, and bombers with which to defend themselves?

To the first of these questions, the answer is yes; but to the second, the answer is no. Once again, the arms protected by the Second

75. U.S. CONST. art. I, § 10, cl. 3.
76. Reynolds & Kates, supra note 67, at 1744, 1748-49.
Amendment are ones akin to those which ordinary people can "keep and bear" (i.e., small arms, not cannons or tanks). Nor need the citizenry have the ultradestructive weaponry of modern warfare. Such weaponry is unnecessary to deter—and, if necessary, defeat—a tyrannical overthrow of our government. A quarter century ago one of the current Authors wrote:

The argument that an armed citizenry cannot hope to overthrow a modern military machine flies directly in the face of the history of partisan guerrilla and civil wars in the twentieth century. To make this argument (which is invariably supported, if at all, by reference only to the American military experience in non-revolutionary struggles like the two World Wars), one must indulge in the assumption that a handgun-armed citizenry will eschew guerrilla tactics in favor of throwing themselves headlong under the tracks of advancing tanks. Far from proving invincible, in the vast majority of cases in this century in which they have confronted popular insurgencies, modern armies have been unable to suppress the insurgents. This is why the British no longer rule in Israel and Ireland, the French in Indo-China, Algeria and Madagascar, the Portuguese in Angola, the whites in Rhodesia, or General Somoza, General Battista, or the Shah in Nicaragua, Cuba and Iran respectively—not to mention the examples of the United States in Vietnam and the Soviet Union in Afghanistan. It is, of course, quite irrelevant for present purposes whether each of the struggles just mentioned is or was justified or whether the people benefited there from. However one may appraise those victories, the fact remains that they were achieved against regimes equipped with all the military technology which, it is asserted, inevitably dooms popular revolt.

Perhaps more important, in a free country like our own, the issue is not overthowing a tyranny but deterring its institution in the first place. To persuade his officers and men to support a coup, a potential military despot must convince them that his rule will succeed where our current civilian leadership and policies are failing. In a country whose widely divergent citizenry possesses upwards of 160 million firearms [as of 2005 upwards of 280 million firearms], however, the most likely outcome of usurpation (no matter how initially successful) is not benevolent dictatorship, but prolonged internecine civil war . . . . Even if the general's ambition does not recoil from the prospect of victory at such a cost, will his officers and men accept it?77

Nothing which has occurred in the world in the quarter century since this was written has undercut its truth.

Moreover, the fact that the Amendment's guarantee does not extend to super-destructive military weaponry is evident from its text. Its right is

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to "keep and bear" arms. Furthermore, the eighteenth-century understanding of the word "arms" was limited to weapons one could take in hand. So the Amendment does not extend to the superdestructive military weapons the eighteenth century knew: cannons which Americans could not pick up and carry in their hands. By parity of reasoning, the Amendment right does not apply to bazookas, stinger missiles, or other military weapons which resemble cannons in their indiscriminate destructiveness.

This point is approached by the majority opinion's respectful observation that from "Blackstone through 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry whatsoever in any manner whatsoever and for whatever purpose."  

III. ARE HANDGUNS AMONG THE ARMS THE AMENDMENT GUARANTEES?

A. THE CRIMINOLOGY OF HANDGUNS

In Heller, the District of Columbia, seeking to defend its handgun ban, argued that widespread possession of handguns represents an especially serious public safety hazard. So even if the Amendment protects an individual right (which the District denied), it would not extend to handguns, which it characterized as "uniquely dangerous weapons" that present "unique dangers to innocent persons." In support of all this, the District offered two dubious assertions about modern handguns: that they are both more concealable and far more deadly than the weaponry that the Founders knew.

Before treating those points, it may be useful to review some criminological evidence:

- Annually, several times as many victims use handguns to defend against criminals as criminals use handguns to commit crimes and "[r]esistance with a gun appears to be most effective in

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78. The 1828 edition of Webster's Dictionary defined arms as "any thing which a man takes in his hand in anger, to strike or assault another." 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (N.Y., S. Converse 1828). The Oxford English Dictionary ("OED") definitions for "arms" are more specific than Webster's. See 15 OXFORD ENGLISH DICTIONARY 634 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). But all OED-cited examples of the usage of the word "arms," from 1300 to 1870, conform to the Webster's definition—things which can be taken in the hand. Id. To the same effect, see the discussion and examples given in District of Columbia v. Heller, 128 S. Ct. 2783, 2791 (2008).


80. Id.


82. See id. at 24–26.

preventing serious injury [to victims, and]... the data strongly indicate that armed resistance is the most effective tactic for preventing property loss.\(^{84}\)

- The most charitable criminological appraisal of the District’s 1976 handgun ban would be that it has achieved nothing by way of reducing murder and violence. This is charitable in treating as a mere coincidence the fact that since D.C. banned the only arms which place victims (the weak) on a par with aggressors, murder rates catastrophically increased not only in absolute terms but also in comparison to neighboring Baltimore and all other large American cities that did not ban handguns.\(^{85}\)

- Russia has banned handguns since the 1920s, and, given Russian methods of law enforcement, the ban has succeeded in largely eliminating handgun murders.\(^{86}\) So murderers just use different instruments, and Russia’s murder rate has always been higher than ours.\(^{87}\) In recent years it has been almost four times higher.\(^{88}\)

- Almost eighty years of increasingly restrictive laws having failed to prevent increasing violent crime rates, England banned handguns in 1997, confiscating more than 150,000 previously legally-permitted handguns.\(^{89}\) As of the year 2000, England had the highest violent-crime rate among industrialized nations.\(^{90}\)

**B. THE SUPPOSED DEADLINESNESS OF MODERN HANDGUNs**

One argument for disregarding the Second Amendment as obsolete is that the technology of firearms has advanced so dramatically since 1791 that a modern pistol provides so much destructive potential that the Framers, were they present today, would recognize the absurdity of allowing ordinary law-abiding persons to possess or carry such a weapon. (Alternatively, it might be argued “that only those arms in existence in the eighteenth century are protected by the Second Amendment”—a claim that the *Heller* majority considered but dismissed as “bordering on the frivolous.”\(^{\text{91}}\)"

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85. *See supra* notes 34–39 and accompanying text for statistics.


87. *Id.*

88. *Id.*

89. *Id.* at 655.

90. *Id.*

As an old adage has it, "a little knowledge is a dangerous thing." Among the more problematic aspects of the debate over guns is that people in general, and particularly gun-control advocates, have both little accurate information about guns and much misinformation. This is the only way to account for claims that modern firearms are far more deadly than the firearms of the eighteenth century.92

While the power of firearms has expanded substantially since the eighteenth century, this is not the only technology that has changed. Medical care, policing, and communications technology have far more than kept pace with firearms technology. This leads to the counterintuitive result that at least in a civil society, firearms are substantially less deadly today than in the Founders' era. To understand this, consider the following:

Suppose that in 1791 a lunatic on a balcony in a crowded mall had fired both barrels of a 10-gauge shotgun into the shoppers below. If the ninety missiles thus dispatched had struck ninety shoppers, 60% or more of those who received a substantial wound in the head or torso would have died, given eighteenth-century medical technology.93 Now suppose the same scenario today but with the killer using the 15-shot 9mm semiautomatic handgun standardized by the U.S. Armed Forces as the Beretta M-994 and reloading with five extra 15-shot magazines. First of all, before the killer had emptied even his first magazine, most of his targets would have fled for cover. But let us assume that the crowd instead obligingly stood still so he could change magazines five times and shoot ninety of them. Of those ninety wounded, fewer than fourteen would die, given modern medical technology.95

The example is macabre, but the lesson is clear. Our Founding Fathers, fervently believing self-defense to be the first human right, were willing to tolerate weaponry far more deadly in the eighteenth century than are handguns in the twenty-first century.

C. The Size and Cartridge Capacity of Modern Handguns

Firearms technology has certainly advanced since 1791—but not as much as some seem to think. The concept of a repeating handgun was

92. See Jack N. Rakove, The Second Amendment: The Highest Stage of Originalism, 76 CHI.-KENT L. REV. 103, 110 (2001) ("[E]ighteenth-century firearms were not nearly as threatening or lethal as those available today . . . .").
93. Telephone Interview with Martin Fackler, M.D., Colonol, U.S. Armed Forces (July 26, 2008).
95. Telephone Interview with Martin Fackler, supra note 93. Colonel Fackler is an experienced battle surgeon, coauthor of the NATO Wound Manual, and directed the U.S. Armed Forces Wound Ballistics Laboratory until his retirement. Id. As of the late twentieth century, handgun wounds killed roughly 15% of those wounded. See Don B. Kates, Jr., The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime, 18 AM. J. CRIM. L. 113, 136 n.72 (1991).
already more than a century old in 1791, if still unrefined. Even with respect to single-shot pistols, the technological advance since the late eighteenth century is less dramatic than it first appears. Pocket pistols of the Revolutionary era were often surprisingly compact, such as this example owned by Paul Revere:

FIGURE 1: PAUL REVERE’S POCKET PISTOL

[Image of a pocket pistol]

Being so compact, those who were expecting trouble might carry two, four, or even six single-shot pistols on their belt. This was a sufficiently common practice that pistols were often sold (or stolen) in pairs—and sometimes as a case of pistols or a brace of pistols. The phrase “brace of pistols” frequently appears in eighteenth-century documents to describe this solution to the single-shot problem.

97. Photograph by Author at Massachusetts Historical Society.
100. See Robert Bisset, Douglas, or, The Highlander 189 (T. Crowder ed., 1800); 1 Matthew
A criminal carrying six single-shot pistols in his pockets and on his belt in 1791 would admittedly not be as quick to fire those six shots as his 2007 counterpart using a revolver or semiautomatic pistol. A reasonably skilled wielder of a modern pistol could expect to accurately shoot perhaps twenty to forty bullets in about sixty to ninety seconds (assuming that the shooter reloads without being shot by a bystander). The 1791 equivalent might fire six bullets in about ten seconds. This is an order of magnitude enhancement in the ability to wound.

On the other side of the equation, advances in medical, communication, and protective technology have more than kept pace with the improvement in handgun technology. As we have seen, in 1791 a torso or abdominal wound guaranteed death in the majority of cases. Improvements in surgical technique and the ability to rapidly move victims to a hospital have also dramatically improved the chances of surviving gunshots. The development of full-time, professional police departments and the ubiquity of cell phones means that criminal misuse of firearms today is often met by an organized and effective response far more rapidly than in 1791. The improvements in firearms technology also means that civilians carrying concealed handguns have commensurately escalated their ability to respond to a criminal attack.

D. AMERICAN PISTOL REGULATION BEFORE THE SECOND AMENDMENT

Reviewing colonial laws and contemporary utterances, historian Robert Churchill concludes that late-eighteenth-century Americans had a right to keep arms which they saw as a vital and inviolable incident of their citizenship. But what about pistols? Did the Framers mean to include pistols in “the right of the people to keep and bear arms”? What were their attitudes toward what the District of Columbia’s brief in Heller characterized as such “uniquely dangerous” weapons? Could it perhaps be that pistols were so scarce that the Framers simply overlooked the supposedly unique public safety hazard they represented?

Gregory Lewis, The Monk: A Romance 203 (1796); Jasper Sprange, The Tunbridge Wells Guide, or an Account of the Ancient and Present State of That Place 251 (1797); Account of the Disaster That Befell His Majesty’s Ship Guardian, Lieutenant Riou, Commander, in The Annual Register, or a View of the History, Politics, and Literature, for the Year 1790, at 254, 260 (J. Dodsley ed., 1793); Some Account of the Loss of the Hartwell East-Indiaman, in The Annual Register, or a View of the History, Politics, and Literature, for the Year 1787, at 252, 253 (J. Dodsley ed., 1789); Pa. Gazette, May 20, 1756.

101. See supra note 93 and accompanying text.


There are almost no regulatory distinctions between pistols and long guns in statutes before 1791. The only examples of laws that treat pistols differently from other arms suggest that pistols were regarded as either less dangerous than long guns or, perhaps, that they enjoyed some protected status as weapons of self-defense. In January of 1776, the Maryland Revolutionary government ordered those not prepared to associate with the Revolutionary cause to turn over their firearms for the use of the militia—with one notable exception. The counties were told to order all freemen to “deliver to the committee of observation for this county, all his fire-arms, if he hath any, except pistols.” Even with all the concerns about Loyalists who might take advantage of the arrival of British troops to cause mischief, there was apparently no perceived need to disarm them of pistols. A similar exception allowing those not entirely trusted with long guns—but trusted with pistols—occurred in Maryland as late as 1781.

Why were pistols not more heavily regulated? As one of the Authors has demonstrated in another forum, the evidence from advertising, probate inventories, and official records shows that pistols were widely owned before, during, and after the Revolution, and that they were commonly used in self-defense, in violent crime, and for suicide. While less common, gun accidents appear repeatedly in this period. None of these uses, either intentional or accidental, seems to have been treated as startling or shocking, although the consequences were often tragic.

In sum, the Amendment’s wording (“arms”) seems to embrace handguns no more or less than any other kind, and there is simply no evidence to suggest any contrary intent.

105. Cramer & Olson, supra note 96, at 704.
106. Id.
110. Id. at 712.
111. Id. at 711.
IV. THE SPECTER OF GUNS FOR CRIMINALS, CHILDREN, AND THE IRRESPONSIBLE

A. AMERICAN VERSUS FOREIGN LAWS BARRING GUN OWNERSHIP

An endlessly repeated truism has it that American gun laws are far less restrictive than those of Europe. But it is a truism that simply is not true. Consider the issue of firearms ownership by persons who have previously been convicted of a serious crime. Under German law they are barred from possessing a firearm for ten years. But only those who have been convicted of gun crimes, or crimes in which a victim was seriously injured, are banned for life from possessing a firearm.

In contrast, American federal law imposes a lifetime bar to firearms ownership on those convicted of any of the countless state or federal felonies including nonviolent ones such as tax evasion, antitrust violations, and violations of various record-keeping laws. Persons who have been involuntarily committed to mental institutions also are barred for life, and juveniles are barred from purchasing guns until they reach the age of majority.

These prohibitions raise at least an apparent problem given the wording of the Amendment: “the right of the people to keep and bear arms.” Obviously criminals, the mentally ill, and children are “people.” Does Heller lead to the conclusion that they have a right to arms?

B. DO CRIMINALS, THE MENTALLY ILL, OR CHILDREN HAVE A RIGHT TO ARMS?

To this question it might at first blush seem possible to respond with an unqualified negative. In classical republican thought, the right to arms was inextricably and multifariously linked to that of civic virtu (i.e., the virtuous citizenry).
One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.\(^2\)

Moreover, from time immemorial, various jurisdictions recognizing a right to arms have nevertheless taken the step of forbidding suspect groups from having arms.\(^3\) American legislators at the time of the Bill of Rights seem to have been aware of this tradition of excluding criminals and other suspect persons from the right to arms. Thus, during the Massachusetts debate on ratifying the original Constitution, Samuel Adams proposed a bill of rights including a provision stating that Congress could not “prevent the people of the United States, who are peaceable citizens, from keeping their own arms.”\(^4\)

Accordingly, there is every reason to believe that the Founding Fathers would have deemed persons convicted of any of the common law felonies not to be among “the [virtuous] people” to whom they were guaranteeing the right to arms.\(^5\) At common law, felons were essentially stripped of property and other rights: “A felon who had broken the social contract no longer had any right to social advantages, including transfer of defense of self, liberty, and property”).

121. See State v. Hirsch, 34 P.3d 1209, 1212 (Or. Ct. App. 2001) (“Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death.”) (quoting Kates, Handgun Prohibition, supra note 77, at 266); cf. Reynolds, supra note 5, at 480 (noting that felons did not historically have a right to possess arms).


123. The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 181 (Neil H. Cogan ed., 1997) (emphasis added). Likewise, the Anti-Federalist minority in the Pennsylvania ratifying convention urged that the Constitution be amended to provide “no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.” Id. at 182. See also the exclusion from the right to arms in the language proposed by the New Hampshire ratifying convention. Id. at 181.

124. United States v. Emerson, 270 F.3d 203, 226–27 n.21 (5th Cir. 2001) (quoting Stephen P. Halbrook, What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,” 49 Law & Contemp. Probs. 151, 161 (1986)) (citing numerous authorities to the fact that “violent criminals, children, and those of unsound mind” were never seen as having a right to arms).

property...” A felon “could not own any property himself, nor could [his heirs] claim through him.”

From the foregoing, it seems that neither Congress nor state legislatures are precluded from treating dangerous criminals, the mentally unbalanced, and juveniles as differing from the virtuous citizenry to whom the Amendment guarantees the right to arms. Indeed, Congress and various state legislatures have effectively done that. Federal law prohibits selling a firearm to anyone who has been convicted of any felony whatsoever, or of a misdemeanor of domestic violence, or involuntarily committed to a mental institution; persons in those categories are barred for life from firearm possession, as are persons dishonorably discharged from the military. While there are some differences, almost all states have roughly the same prohibitions.

Insofar as such exclusions from the right to arms have been litigated, they have been upheld. Over forty state constitutions now guarantee individuals the right to arms and these have uniformly been held to allow bans on gun ownership by suspect groups. Akhil Amar observes that the Founders viewed the right to arms as inextricably linked with the right to vote as incidents of full citizenship: those who were armed were entitled to vote and those who voted were entitled to bear arms. Thus it is particularly relevant to note that the right to vote may constitutionally be denied to convicted criminals and the insane. By parity of reasoning it

126. 3 WILLIAM S. HOLDsworth, A HISTORY OF ENGLISH LAW 69 (3d ed. 1923).
128. Id. § 922(g)(9).
129. Id. § 922(g)(4).
130. Id. § 922(g)(6).
132. See, e.g., Posey v. Commonwealth, 185 S.W.3d 170, 181 (Ky. 2006).
133. See, e.g., id. at 177–78; State v. Hirsch, 34 P.3d 1209, 1212 (Or. Ct. App. 2001) (felons, children, and the insane are not part of the virtuous citizenry to whom the right to arms is limited).
136. See JOHN PARRY & ERIC Y. DROGIN, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY 154 (2007). The Framers seem to have been remarkably unconcerned about the mentally ill having access to firearms. Some of this may have been because commitment procedures were quite informal in the Colonial period, and those who were perceived as dangerous (the “furiously insane”) could be, and were, locked up without benefit of hearing. ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 39–43 (2d ed. 1949); GERALD N. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875, at 39–47 (1973).

A second factor that may explain the lack of concern is that Colonial America’s population was overwhelmingly located in small towns or on farms. See ALBERT BUSHNELL HART, ACTUAL GOVERNMENT AS APPLIED UNDER AMERICAN CONDITIONS 181 (3d ed. 1910). In a small town, everyone knew everyone else, and if Mr. Jones or Mrs. Smith occasionally acted oddly, it was not a surprise.
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seems clear that persons convicted of serious criminal offenses may be prohibited from possessing guns.

C. TRIVIAL FELONY AS A BASIS FOR EXCLUSION FROM THE RIGHT TO ARMS

At early common law, the term “felony” applied only to a few very serious, very dangerous offenses such as murder, rape, arson, and robbery. As centuries went by, Parliament legislated more and more capital offenses, some involving trivial thefts. While capital punishment is no longer involved, American state and federal law continues to criminalize many trivial matters as felonies.

Indeed some things are classified as felonies that should not be punished at all and constitutionally cannot be so. Scores of civilian offenses, many of them posing no physical danger to others, are felonies. For instance, income tax evasion, antitrust law violations, and, in California at least, knowingly marrying a person who is already married, are felonies. Acts deemed crimes by the Uniform Code of Military Justice (“UCMJ”) include adultery, sodomy, and, for officers, fraternizing with enlisted personnel. Expressing contempt for a superior (including the President), disrespect, malingering (calling in sick when you are not), desertion, insubordination, and disobedience to orders are also crimes. All of these are either felonies or penalized by dishonorable

Everyone in town knew Mr. Jones or Mrs. Smith well enough to know what they might do—and would probably keep deadly implements away from someone regarded as dangerous. A mentally ill person who was violent or suicidal might be locked up; those whose behavior was abnormal but peaceful would create no fear. Grob, supra, at 37.

A third factor is that mental illness was relatively scarce in Colonial America. E. Fuller Torrey & Judy Miller, The Invisible Plague: The Rise of Mental Illness from 1750 to the Present 194 (2001). A recent study of mental illness data shows that psychosis rates rose quite dramatically between 1807 and 1961 in the United States, England and Wales, Ireland, and the Canadian Atlantic provinces. Id. A study of Buckinghamshire, England, shows that there was more than a ten-fold increase in psychosis rates from the beginning of the seventeenth century to 1986. Id. at 121–23, 298–99.


140. Id. § 925.


142. 10 U.S.C. § 888.

143. Id. § 889.

144. Id. § 915.

145. Id. § 885.

146. Id. § 891.

147. Id. § 890.
discharge, which in itself bars the discharged person from acquiring or possessing a firearm.\textsuperscript{148}

For civilians, \textit{Lawrence v. Texas} pretty well settles that consensual sex of any kind between spouses, or between consenting adults of any marital status, is a constitutionally protected activity.\textsuperscript{149} But even were a prohibition on such activity valid,\textsuperscript{150} it would be next to absurd to suggest that conviction of a "felony" in which untold millions of Americans routinely engage could disqualify them from the right to arms now that the constitutional status of that right has been recognized. Equally absurd would be any claim that income tax evasion, antitrust law violations, or (however appropriately punishable it might be in a military situation), calling George W. Bush a jackass should disqualify anyone from owning a firearm. Insofar as federal or state statutes would seek to bar arms possession by such "felons," those laws would seem to be invalid on their face.

Yet, just as clearly, some kinds of prior felonious activity indicate a proclivity to dangerous lawlessness and so should disqualify one from possessing firearms for a number of years or even life. The commission of crimes like rape, robbery, burglary, arson, or other felonies of violence to the person or which endanger persons—kidnapping, maiming, attempted murder, and aggravated assault suggest themselves—should disqualify the offender from firearms ownership, probably for life. Moreover there are felonies which, though nonviolent, are so grossly aberrant to responsible behavior that conviction for them may indicate propensities rendering the offender not trustworthy to have a firearm. One such felony might be driving while under the influence of inebriants (including even lawfully possessed drugs). Embezzlement and grand larceny are two other examples that readily come to mind.

Thus, it would seem appropriate for Congress or state legislatures to enact statutes specifically enumerating a variety of serious crimes from whose commission it is reasonably deducible that a person who has been convicted of them should not possess arms. Perhaps there should be a permit process that would limit the duration of the firearms disability for some offenses. A teetotaler who at age twenty had been convicted of reckless or inebriated driving might nevertheless be issued a permit at age

\textsuperscript{148} See 18 U.S.C. § 922(g)(6). The UCMJ does not divide crimes into felonies and misdemeanors, but convictions may be treated as either, based on civilian definitions. These include the standard that any crime for which one year or more confinement is a possible punishment is a felony. See 18 U.S.C. § 3559(a); U.S. COAST GUARD ACADEMY, COMMAND AND OPERATIONS SCHOOL LEGAL DESK REFERENCE \textit{172} (2003) (quoting U.S. Coast Guard Commandant Instruction 5520.5E), available at http://www.cga.edu/uploadedFiles/LDC/POXO-Course_Materials/Legal\%20Desk\%20Reference\%20.pdf.

\textsuperscript{149} 539 U.S. 558, 578 (2003).

\textsuperscript{150} Military courts have held that consensual sexual "crimes" are still crimes and thus subject to punishment. Cox, \textit{supra} note 141, at 798–99.
forty after two decades of blameless conduct and complete abstention from drink.

V. DISARMING GROUPS BASED ON RACE OR RELIGION

The tradition whereby suspect groups can be denied the right to arms includes arms bans directed against groups defined by race or religion. Thus, the English Bill of Rights’ right-to-arms guarantee was expressly limited to Protestants.\(^5\) Does this suggest that Congress or a state legislature could similarly ban firearms ownership? For example, in responding to extremist riots and terrorist activity such as have recently occurred in England, France, Denmark, and elsewhere,\(^5\) could Congress or a state legislature ban firearms ownership by Muslims?

Before addressing the legal implications, it is useful to point out that such a ban would be counterproductive. Our knowledge of terrorist intentions has come in large part from information volunteered to the FBI and local authorities by law-abiding, moderate Muslims.\(^5\) Not only would a discriminatory ban on firearms ownership by Muslims anger the Muslim community in general, it would leave law-abiding, moderate Muslims, who reported extremist plots, defenseless against retaliation by the extremists. At the same time it would do nothing to disarm the extremists. Even ardent gun-control advocates concede that gun laws cannot disarm terrorists and professional criminals.\(^5\)^

151. Kates, Limited Importance, supra note 77, at 239. Throughout the pre-Civil War period, Southern states prohibited the possession of arms by black people, whether slave or free. See, e.g., Cooper v. Mayor of Savannah, 1 Ga. 68, 72 (Ga. 1848) (“Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office.”)


153. The following partial list is from the website Muslims for a Safe America:

- A White Muslim informant, William 'Jamaal' Chrisman, helped convict an African-American Muslim, Derrick Shareef, who pled guilty to plotting to attack a Rockford, IL shopping mall with hand grenades. “What brought me to the government was after 9-11 Muslim scholars in Saudi Arabia and Morocco said it was incumbent on Muslims to stop terrorists,” Chrisman testified. “Anyone involved in terrorism was deemed the brother of the devil.”

- Muslims for a Safe America, Should American Muslims Work as Government Informants? (Nov. 11, 2008), http://muslimsforasafeamerica.org/?p=71. “An Egyptian-American Muslim informant, Osama Eldawoody, helped convict an Egyptian-American Muslim in NY, James Elshafay, and a Pakistani Muslim immigrant, Shahawar Matin Siraj, of conspiring to blow up a NY subway station.” Id. “A Yemeni Muslim informant, Mohamed Alanssi, helped convict an African-American Muslim in NY, Tariq Shah, of pledging allegiance to Al Qaeda and offering to train Al Qaeda members in martial arts and hand-to-hand combat.” Id.

154. Editorial, Controlling Guns, NAT'L L.J., Apr. 13, 1981, at 14 (antigun editorial nevertheless conceding that “no amount of control will stop a determined assassin—or a determined street
Indeed, three recent general studies confirm that gun bans simply do not control or reduce criminal behavior. In 2004, the National Academy of Sciences released an evaluation based on its review of 253 journal articles, ninety-nine books, forty-three government publications, and some empirical research of its own. It could not identify any gun control that had reduced violent crime, suicide, or gun accidents. Neither could a 2003 evaluation of then-extant studies by the Centers for Disease Control ("CDC").

In 2007, Canadian criminologist Gary Mauser and one of the Authors of this Article published a study that included a comparison of firearms ownership and murder rates for all European nations for which the data were available. It turned out that the average murder rate for the nine nations with very low gun ownership (less than 5000 guns per 100,000 population) was three times higher than the average murder rate of the seven nations with high gun ownership (more than 15,000 guns per 100,000 population). Although this result might seem anomalous, the anomaly is easily explained. Nations faced with sharply-rising criminal violence enact gun bans as a quick-fix solution. But because (by definition) gun bans disarm only the law-abiding, the violent crime rates just keep rising. Violent crime comes to be disproportionately associated with nations which have few guns overall. These nations have drastically decreased the overall number of guns because the law-abiding disarm in response to the ban. But violent crime remains unaffected because those inclined to engage in it illegally retain their guns. Consider in this respect patterns of African-American homicide. Per capita, African-American murder rates are [six to eight times] higher than the murder rate for whites. If more guns equal more death, and fewer guns equal less, one might assume gun ownership is higher among African-Americans than robber—from getting a gun"; Richard Harding, Firearms Ownership and Accidental Misuse in South Australia, 6 ADEL. L. REV. 271, 272 (1978) (political criminals cannot be disarmed); Franklin Zimring, Is Gun Control Likely to Reduce Violent Killings?, 35 U. CHI. L. REV. 721, 722 (1968) (professional criminals cannot be disarmed).


156. Id. at 6.

157. CTRS. FOR DISEASE CONTROL & PREVENTION, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS (2003), available at http://cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm. Predictably, given the CDC's ardent support for gun control, it explained the result by asserting that the scores of studies it evaluated were inadequate. See id.

158. See Kates & Mauser, supra note 88, at 652 tbl.1, 675 tbl.3.

159. For instance, in 1997 rising violence despite ever-more-restrictive gun laws prompted England to ban and confiscate all legally owned handguns. Don B. Kates, The Hopelessness of Trying to Disarm the Kinds of People Who Murder, 12 BRIDGES 313, 317–18 (2005). In the ensuing years English violence rose to double American rates; the English police intelligence appraisal is that "[A]nyone who wishes to obtain a firearm [illegally] will have little difficulty in doing so." Id. at 318–19 (alteration in original) (quoting Guns, Crack, and Child Porn—UK's Growing Crimes, REUTERS, July 22, 2002).
among whites, but in fact African-American gun ownership is markedly lower than white gun ownership.

...Whatever their race, ordinary people simply do not murder. Thus preventing law-abiding, responsible African-Americans from owning guns does nothing at all to reduce murderers [sic], because they are not the ones who are doing the killing. The murderers are a small minority of extreme anti-social aberrants who manage to obtain guns whatever the level of gun ownership in the African American community.  

By parity of reasoning, prohibition of guns to the Muslim community would disarm only the great law-abiding majority, not the few violent extremists.

Regardless of its criminological merits, would a ban on gun possession by Muslims or other racial or religious groups be constitutional? As noted, in the long tradition of the right to arms, such bans have often existed.  

On the other hand, as far as the Second Amendment goes, the preceding proposals that excluded suspect groups focused on criminals or revolutionaries and did not contemplate that the right would be denied to ordinary law-abiding, responsible adults on the basis of their religion or race. Indeed, Madison's notes on his proposal contrasted it to the English Bill of Rights, which guaranteed arms only to Protestants. Note also that in his *Dred Scott* opinion, Chief Justice Roger Taney made it clear that only by embracing the (today) abhorrent notion that black people were per se inferior to Americans of other races could laws against their possessing guns be deemed valid.


161. See *supra* note 151 and accompanying text.

162. See *supra* note 122 and accompanying text.


164. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393, 417, 451–52 (1856); see also Mocsary, *supra* note 64, at 2136 n.188 (discussing the lengths to which Chief Justice Taney went to deny arms to freed slaves by disavowing their personhood).
Moreover, the Second Amendment is to be construed in tandem with the rest of the Constitution. While those who detest firearms often seem to perceive them as legally *sui generis*, the guarantees of freedom of religion and of due process and equal protection do not contain any special "gun exception."\(^{165}\) Taking those guarantees in tandem with the Second Amendment, it would seem that no level of government could prohibit gun ownership by whole groups defined by their race or religion.\(^{166}\)

**CONCLUSION**

The Second Amendment reflects the Founding Fathers' accurate perception that banning guns to the general populace is counterproductive, indeed oxymoronic. Those who will flout such basic admonitions as "thou shalt not kill" also flout gun laws. So such laws disarm only the law-abiding, whose gun ownership is not a problem. This is doubly counterproductive: First, it deprives victims of the only means of self-defense with which the weak can defeat predation by the strong.\(^{167}\) Second, it diverts scarce law enforcement resources away from the very difficult task of trying to control the lawless to the useless task of trying to deny victims the means of self-defense.

In fact, one perception underlying the Second Amendment was that the Founders also saw gun bans as counterproductive and oxymoronic. That was the view of the liberal Italian philosopher Cesare Beccaria ("the father of criminology"\(^{168}\)), whose words Jefferson laboriously copied into his handbook of great quotations:\(^{169}\)

> It is a false idea of utility to sacrifice a thousand real advantages for the sake of one disadvantage which is either imaginary or of little consequence; this would take fire away from men because it burns and water because it drowns people; this is to have no remedy for evils except destruction. //Laws forbidding people to bear arms are of this

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\(^{165}\) See Florida v. J.L., 529 U.S. 266, 273–74 (1999) (unanimously rejecting Florida's suggestion to adopt a "gun exception" to the Fourth Amendment).

\(^{166}\) The Equal Protection Clause is nominally addressed only to the states. But *Bolling v. Sharpe*, 347 U.S. 497, 500 (1953), held that its principles are embraced by the Fifth Amendment's Due Process Clause, which is addressed to the federal government. Due Process includes "the rights to acquire, enjoy, own and dispose of property." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1971) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948)).

\(^{167}\) See Linda Gorman & David B. Kopel, *Self-Defense: The Equalizer*, 15 F. APPLIED RES. & PUB. POL’y 92, 92 (2000) ("Only a gun can allow a 110-pound woman to defend herself easily against a 200-pound man."); *Kates, Limited Importance, supra* note 77, at 70 ("A gun is the only mechanism that gives a weaker victim parity with an attacker (even if the attacker also has a gun). The next best alternative, a chemical spray, is ineffective against precisely those who are most likely to engage in violent attacks: people who are under the influence of drugs or alcohol or who are extremely angry."). As to the ineffectiveness of chemical sprays, see, for example, James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141, 143 (1990).


\(^{169}\) HALBROOK, supra note 3, at 132.
nature; they only disarm those who are neither inclined nor
determined to commit crimes. On the other hand, how can someone
who has the courage to violate the most sacred laws of humanity and
the most important ones in the statute books be expected to respect
the most trifling and purely arbitrary regulations that can be broken
with ease and impunity and that, were they enforced, would put an end
to personal liberty—so dear to each man, so dear to the enlightened
legislator—and subject the innocent to all the vexations that the guilty
deserve? Such laws place the assaulted at a disadvantage and the
assailant at an advantage, and they multiply rather than decrease the
number of murders, since an unarmed person may be attacked with
greater confidence than someone who is armed. These laws should not
be deemed preventive, but rather inspired by a fear of crime. They
originate with the tumultuous impact of a few isolated facts, not with a
rational consideration of the drawbacks and the advantages of a
universal decree.\footnote{170}

The same view was held by Jefferson's contemporaries, such as
Thomas Paine, who observed:

\[\text{[T]}\text{he peaceable part of mankind will be continually overrun by the vile}
\text{and abandoned while they neglect the means of self}
\text{defence. . . . [S]ince some \textit{will not} [disarm], others \textit{dare not} lay them
\text{aside. . . . Horrid mischief would ensue were one half the world}
\text{deprived of the use of them; for while avarice and ambition have a}
\text{place in the heart of man, the weak will become a prey to the strong.}}\footnote{171}

Yet nothing in this implies that there is a right for either criminals or
the irresponsible to possess arms, or that the state should allow them to do
so. Difficult though it may be to enforce laws against their possession of
arms, such laws may occasionally prove useful.\footnote{172}

In sum, there is no reason to doubt the validity or value of reasonable
and carefully drafted federal or state laws prohibiting previously convicted
criminals, juveniles, and the mentally unbalanced from possessing

\footnote{170. \textit{Cesare Beccaria}, \textit{On Crimes and Punishments} 73 (David Young trans., Hackett Publ'g Co.
1986) (1764) (footnote omitted). As to the widespread influence of Beccaria on late-eighteenth
century American thinkers such as Thomas Jefferson, John Adams, and Benjamin Franklin, see

\footnote{171. \textit{The Writings of Thomas Paine} 56 (Moncure Daniel Conway ed., AMS Press, Inc. 1967)
(1894).}

\footnote{172. See \textit{William J. Vizard, Shots in the Dark: The Policy, Politics, and Symbolism of Gun
Control} 166-69 (2000). Vizard is a career agent of the Bureau of Alcohol, Tobacco, Firearms and
Explosives (BATFE), turned criminologist. \textit{Id.} at ix. He provides an example from his years as a
BATFE supervising agent: Two longtime felons with prior murder and other felony convictions "were
stopped by California highway patrol officers for speeding. The officers observed blood on the
subjects' clothing . . . ." \textit{Id.} at 166. A search of the trunk revealed

\textit{clothing soaked with human blood, an assault rifle, and a pistol. Imbedded in the frame of
the pistol were bits of human flesh. Although subsequent investigation by homicide
investigators and ATF agents, working under my supervision, never located a victim, both
subjects received sentences of approximately 20 years in federal prison for firearm
possession [by a felon which is a federal crime].}

\textit{Id.}
firearms. Nor does the Amendment foreclose bans on possession of bombs, biological weapons, and the other ultradestructive weapons of modern warfare, which are not suitable for individual self-defense.