Chapter 17

Firearms Policy and Status

This is online Chapter 17 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsregulation.org. These chapters are:

17. *This chapter.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, case studies of individual nations.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *Arms Rights, Arms Duties, and Arms Control in the United Kingdom. Detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. A more in-depth examination of the English history from Chapter 2.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century. The development of the technology of firearms, accessories, and other personal arms developed from early modern England to the present.*

Firearms policy debates involve the special concerns of diverse groups in American society. This Chapter examines disparate views about the costs and benefits of firearms in the context of race (Part A), gender (Part B), age and disability (Part C), sexual orientation (Part D), categories of prohibited persons, such as mental illness, marijuana users, and military service (Part E), and Indian tribes (Part F).

Previous chapters have primarily focused on judicial decisions, and legislative and historical material. The content here is different. For the first five groups in the above list, their views are presented through amicus briefs, most of them pro/con briefs from *District of Columbia v. Heller*. Pedagogically, the briefs are the opportunity to study how policy advocates serve as genuine "friends of the court," by presenting the Supreme Court with specialized expertise and information. As you will see, there is quite a diversity of writing styles in high-quality amicus briefs. The complete briefs are available at Scotusblog's *Heller* Case Page. For beginning lawyers with an interest in public affairs, helping with an amicus brief is an excellent and educational pro bono project.

Readers interested in past and present arms issues involving lawful or unlawful aliens will find the topic covered extensively in the printed textbook. *See* Chs. 8.A, 13.D.

A. FIREARMS POLICY AND THE BLACK COMMUNITY

This section presents diverging views about the costs and utilities of firearms from the perspective of different representatives of the Black community. It proceeds in three parts. Part 1 presents two examples from amicus briefs filed in *Heller*. Part 2 presents divergent views from an amicus brief filed by Black Public Defenders et al. in *New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, No. 20-843 (U.S. filed Dec. 17, 2020), which is pending in the United States Supreme Court at the time this chapter is being prepared. Part 3 presents an annotated review of Carol Anderson's book *The Second: Race and Guns in a Fatally Unequal America*.

1. Divergent Views on Race and Firearms Policy Presented by Amici in Heller

Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Petitioner

District of Columbia v. Heller, 554 U.S. 570 (2008)

. . . In densely populated urban centers like the District of Columbia . . . gun violence deprives many residents of an equal opportunity to live, much less succeed.

SUMMARY OF ARGUMENT

. . . Although the type, use, cultural significance and regulations on the purchase, possession, and use of firearms vary from community to community, handguns — because they are portable and easy to conceal — are uniquely lethal

instruments, which are involved in the vast majority of firearm violence in America. Handgun violence in the District exacts a particularly high toll on the District's African-American residents. Multiple municipalities, including the District, have placed significant restrictions on the possession and use of handguns, while permitting the registration of other weapons such as shotguns and rifles. . . .

ARGUMENT . . .

B. The Clear and Established Understanding of the Second Amendment Should Not Be Disturbed

2. Abandoning the Clear and Established Understanding of the Second Amendment Unduly Limits the Ability of States and Municipalities Struggling to Address the Problem of Gun Violence, a Problem of Particular Interest to This Nation's African-American Community

Legislatures enact firearm regulations to reduce crime and save lives threatened by the vexing problem of gun violence. African Americans, especially those who are young, are at a much greater risk of sustaining injuries or dying from gunshot wounds. The number of African-American children and teenagers killed by gunfire since 1979 is more than ten times the number of African-American citizens of all ages lynched throughout American history. *See* Children's Defense Fund, *Protect Children, Not Guns* 1 (2007). . . . Firearm homicide is the leading cause of death for fifteen to thirty-four year-old African Americans. *See* The Centers for Disease Control and Prevention & Prevention, *Leading Causes of Death Reports (1999-2004).* Although African Americans comprise only thirteen percent of the United States population, African Americans suffered almost twenty-five percent of all firearm deaths and fifty-three percent of all firearm homicides during the years 1999 to 2004. *See* Centers for Disease Control & Prevention, *Injury Mortality Reports (1999-2004)* [hereinafter CDC, *Injury Mortality Reports*].

With respect to handguns specifically, African Americans again suffer disproportionately. From 1987 to 1992, African-American males were victims of handgun crimes at a rate of 14.2 per 1,000 persons compared to a rate of 3.7 per 1,000 for white males. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Crime Data Brief, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft* (Apr. 1994). . . . During the same period, African-American women were victims of gun violence at a rate nearly four times higher than white women. *See id.* Overall, African-American males between sixteen and nineteen years old had the highest rate of handgun crime victimization, at a rate of forty per 1,000 persons, or four times that of their white counterparts. *See id.*

Gun violence also adds significant direct and indirect costs to America's criminal justice and health care systems, while reducing the nation's overall life expectancy. *See generally* Philip Cook & Jens Ludwig, *Gun Violence: The Real Costs* (Oxford Univ. Press 2002) (estimating medical expenditures relating to gun violence, with costs borne by the American public because many gun victims are uninsured and cannot pay for their medical care); Linda Gunderson, *The Financial Costs of Gun Violence*, 131 Annals of Internal Med. 483 (1999) (noting that the American public paid about eighty-five percent of the medical costs relating to gun violence); Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs* (2005).

Although African Americans suffer from a disproportionate share of gun violence nationally, these disparities are significantly larger in the District. In 2004 alone, all but two of the 137 firearm homicide victims in the District were African-American, most of them between the ages of fifteen and twenty-nine years old. *See* CDC, *Injury Mortality Reports (2004)*, *supra*[.] African Americans make up approximately sixty percent of the District's population, but comprise ninety-four percent of its homicide victims. *See* D.C. Dep't of Health, Center for Policy, Planning, and Epidemiology, State Center for Health Statistics, Research and Analysis Division, *Homicide in the District of Columbia, 1995-2004*, at 5 (Feb. 1, 2007). Between 1999 and 2004, African Americans in the District died from firearm use at a rate 10.6 times higher than did whites, and suffered from firearm homicide at a rate 16.7 times higher than did whites. *See* CDC, *Injury Mortality Reports (1999-2004)*, *supra*. The vast majority of these deaths were the result of handgun violence. *See* Nat'l Public Radio (NPR), *D.C. Mayor Addresses Blow to Handgun Ban* (Mar. 13, 2007).

Given the prevalence of gun violence in the District and the devastating impact on its residents, the District Council had sound reasons to conclude that its handgun regulations would constitute a wise policy. Ultimately, the overall effectiveness of the District's handgun prohibition is not relevant to the Court, given the applicable legal standard as discussed above. However, we submit that, although the District's prohibition may not be a complete solution, especially because the absence of regional regulations permits guns to continue to flow into the District from neighboring jurisdictions, local efforts to reduce the number of handguns on the District's streets should be considered one piece of a larger solution. Indeed, the enactment of the handgun ban in the District thirty years ago was accompanied by an abrupt decline in firearm-caused homicides in the District, but not elsewhere in the Metropolitan area. . . . These trends underscore the importance of the District's efforts and certainly do not counsel in favor of an unwarranted jurisprudential break that could drastically limit or foreclose such efforts. This Court's settled precedents provide the necessary latitude for the District to best protect its citizens by making the policy decision that fewer handguns, not more, promote public health and safety. . . .

3. Abandoning the Clear and Established Understanding of the Second Amendment Would Not Address Racial Discrimination in the Administration of Criminal Justice in General or the Administration of Firearm Restrictions in Particular

Concerns about this nation's past or present-day problems with racial discrimination do not provide a basis for invalidating the District's handgun regulations. The solution to discriminatory enforcement of firearm laws is not to reinterpret the Second Amendment to protect an individual right to "keep and bear Arms" for purely private purposes, but rather to employ, as necessary, this Court's traditional vehicle for rooting out racial discrimination: the Equal Protection Clause of the Fourteenth Amendment, or, where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment. *See United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (administration of a criminal law may be "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of enforcement and prosecution amounts to "a practical

denial" of equal protection of the laws) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)); *see also Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in the selection of the grand jury violates Equal Protection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (invalidating the use of race as a factor in the exercise of peremptory challenges). To the extent the history surrounding the adoption of early gun control laws, or even the Second Amendment itself, is tainted by racial discrimination, *see* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998) (arguing that a major function of the "well regulated militia" of the Second Amendment during colonial and post-revolutionary times was the maintenance of slavery in the South and the suppression of slave rebellion); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991) (tracing the discriminatory intent of early firearms restrictions), then the Fourteenth Amendment is the appropriate vehicle for that bias to be ferreted out and eliminated.

Contrary to the assertions of some, the modern firearm regulations at issue in this case should not be confused with the Black Codes, other discriminatory laws that the Fourteenth Amendment invalidated, or more recent cases where Fourteenth Amendment protections have been implicated. The Fourteenth Amendment's protections rightly extend in the face of a colorable assertion that the District's firearm regulations (or those of any other jurisdiction) are racially discriminatory in origin or application, but such a showing has not been made here or even alleged by Respondents.

Brief for Congress of Racial Equality as Amicus Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

. . . The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit corporation founded in 1942, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations, which is primarily interested in the welfare of the black community, and the protection of the civil rights of all citizens.

SUMMARY OF ARGUMENT

The history of gun control in America has been one of discrimination, disenfranchisement and oppression of racial and ethnic minorities, immigrants, and other "undesirable" groups. Robert Cottrol and Raymond Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity-The Redeemed South's Legacy to a National Jurisprudence?*, 70 Chi. Kent L. Rev. 1307-1335 (1995); Robert Cottrol and Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Georgetown L.J. 309-361 (1991); Raymond Kessler, *Gun Control and Political Power*, 5 Law & Pol'y Q. 381 (1983); Stefan Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L.J. 67. Gun control laws were often specifically enacted to disarm and facilitate repressive action against these groups. *Id.*

More recently, facially neutral gun control laws have been enacted for the alleged purpose of controlling crime. Often, however, the actual purpose or the actual effect of such laws has been to discriminate or oppress certain groups. *Id.*; *Ex Parte Lavinder*, 88 W. Va. 713, 108 S.E. 428 (1921) (striking down martial law regulation inhibiting possession and carrying of arms). As Justice Buford of the Florida Supreme Court noted in his concurring opinion narrowly construing a Florida gun control statute:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers. . . . The statute was never intended to be applied to the white population and in practice has never been so applied. . . . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and nonenforceable if contested.

Watson v. Stone, 4 So. 2d 700, 703 (1941) (Buford, J., concurring).

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor and other minorities. Present day enforcement of gun laws frequently targets minorities and the poor, and often results in illegal searches and seizures.

ARGUMENT

I. Gun Control Measures Have Been and Are Used to Disarm and Oppress Blacks and Other Minorities . . .

E. Gun Control in the Twentieth Century . . .

Most of the American handgun ownership restrictions adopted between 1901 and 1934 followed on the heels of highly publicized incidents involving the incipient black civil rights movement, foreign-born radicals, or labor agitators. In 1934, Hawaii, and in 1930, Oregon, passed gun control statutes in response to labor organizing efforts in the Port of Honolulu and the Oregon lumber mills.

In its opening statement, in the NAACP's lawsuit against the firearms industry, the NAACP admitted the importance of the constitutional right:

> Certainly the NAACP of all organizations in this country understands and respects the constitutional right to bear arms. Upon the NAACP's founding in 1909 in New York City, soon thereafter it took up its first criminal law case [i]n Ossien, Michigan, where a black male, Mr. Sweet, was charged with killing a white supremacist along with several accomplices. The court, to rule out Mr. Sweet and his family to be pushed out of their home in Michigan, it was in that case that the presiding judge, to uphold Mr. Sweet's right to be with his family, coined the popular phrase "a man's home is his castle."

NAACP et al. v. Acusport, Inc. et al., Trial Tr. at 103. (The incident actually occurred in Detroit—not "Ossien"—Michigan in 1926. The NAACP and Clarence Darrow came to the defense of Dr. Ossian Sweet who had fatally shot a person in a white mob which was attacking his home because Dr. Sweet had moved into an all-white neighborhood. Furthermore, the phrase "a man's home is his castle," while certainly relevant to the Sweet case, first appears in an English 1499 case.)

After World War I, a generation of young blacks, often led by veterans familiar with firearms and willing to fight for the equal treatment that they had received in other lands, began to assert their civil rights. In response, the Klan again became a major force in the South in the 1910s and 1920s. Often public authorities stood by while murders, beatings, and lynchings were openly perpetrated upon helpless black citizens. And once again, gun control laws made sure that the victims of the Klan's violence were unarmed and did not possess the ability to defend themselves, while at the same time cloaking the often specially deputized Klansmen in the safety of their monopoly of arms. [Don Kates, *Toward a History of Handgun Prohibition in the United States*, in Restricting Handguns: The Liberal Skeptics Speak Out 19. (D. Kates ed. 1979).]

The Klan was also present in force in southern New Jersey, Illinois, Indiana, Michigan and Oregon. Between 1913 and 1934, these states enacted either handgun permit laws or laws barring alien handgun possession. The Klan targeted not only blacks, but also Catholics, Jews, labor radicals, and the foreign born; and these people also ran the risk of falling victim to lynch mobs or other more clandestine attacks, often after the victims had been disarmed by state or local authorities. *Id.* at 19-20.

II. Current Gun Control Efforts: A Legacy of Racism

Behind current gun control efforts often lurks the remnant of an old prejudice, that the lower classes and minorities, especially blacks, are not to be trusted with firearms. Today, the thought remains among gun control advocates; if the poor or blacks are allowed to have firearms, they will commit crimes with them. Even noted gun control activists have admitted this. Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control Blacks." Robert Sherrill, *The Saturday Night Special* 280 (1972). "It is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence—the reference is to 'nigger-town Saturday night.'" Barry Bruce-Briggs, *The Great American Gun War*, The Public Interest, Fall 1976, at 37.

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor, and other minorities. In many jurisdictions which require a discretionary gun permit, licensing authorities have wide discretion in issuing a permit, and those jurisdictions unfavorable to gun ownership, or to the race, politics, or appearance of a particular applicant frequently maximize obstructions to such persons while favored individuals and groups experience no difficulty in the granting of a permit. Hardy and Chotiner,

"The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibitions" in *Restricting Handguns: The Liberal Skeptics Speak Out*, *supra*, at 209-10; William Tonso, *Gun Control: White Man's Law*, Reason, Dec. 1985, at 24. In St. Louis,

> permits are automatically denied . . . to wives who don't have their husband's permission, homosexuals, and non-voters. . . . As one of my students recently learned, a personal "interview" is now required for every St. Louis application. After many delays, he finally got to see the sheriff who looked at him only long enough to see that he wasn't black, yelled "he's alright" to the permit secretary, and left.

Don Kates, *On Reducing Violence or Liberty*, 1976 Civ. Liberties Rev. 44, 56.

New York's infamous Sullivan Law, originally enacted to disarm Southern and Eastern European immigrants who were considered racially inferior and religiously and ideologically suspect, continues to be enforced in a racist and elitist fashion "as the police seldom grant hand gun permits to any but the wealthy or politically influential." Tonso, *supra*, at 24.

> New York City permits are issued only to the very wealthy, the politically powerful, and the socially elite. Permits are also issued to: private guard services employed by the very wealthy, the banks, and the great corporations; to ward heelers[1] and political influence peddlers; . . .

Kates, "Introduction," in *Restricting Handguns: The Liberal Skeptics Speak Out*, *supra*, at 5.

A. By Prohibiting the Possession of Firearms, the State Discriminates Against Minority and Poor Citizens

The obvious effect of gun prohibitions is to deny law-abiding citizens access to firearms for the defense of themselves and their families. That effect is doubly discriminatory because the poor, and especially the black poor, are the primary victims of crime and in many areas lack the necessary police protection.

African Americans, especially poor blacks, are disproportionately the victims of crime, and the situation for households headed by black women is particularly difficult. In 1977, more than half of black families had a woman head of household. A 1983 report by the U.S. Department of Labor states that:

> among families maintained by a woman, the poverty rate for blacks was 51%, compared with 24% for their white counterparts in 1977. . . . Families maintained by a woman with no husband present have compromised an increasing proportion of both black families and white families in poverty; however, families maintained by a woman have become an overwhelming majority only among poor black families. . . . About 60% of the 7.7 million blacks below the poverty line in 1977 were living in families maintained by a black woman.

U.S. Dept. of Labor, *Time of Change: 1983 Handbook on Women Workers*, 118 Bull. 298 (1983).

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1. [A "ward heeler" is a political operative who works for a political machine or party boss in a ward or other local area.—Eds.]

The problems of these women are far more than merely economic. National figures indicate that a black female in the median female age range of 25-34 is about twice as likely to be robbed or raped as her white counterpart. She is also three times as likely to be the victim of an aggravated assault. *Id.* at 90. *See* United States Census Bureau, *U.S. Statistical Abstract* (1983). A 1991 DOJ study concluded that "[b]lack women were significantly more likely to be raped than white women." Caroline Wolf Harlow, U.S. Dept. of Justice, *Female Victims of Violent Crime* 8 (1991). "Blacks are eight times more likely to be victims of homicide and two and one-half times more likely to be rape victims. For robbery, the black victimization rate is three times that for whites. . . ." Paula McClain, *Firearms Ownership, Gun Control Attitudes, and Neighborhood Environments*, 5 Law & Pol'y Q. 299, 301 (1983).

The need for the ability to defend oneself, family, and property is much more critical in the poor and minority neighborhoods ravaged by crime and without adequate police protection. *Id.*; Don Kates, *Handgun Control: Prohibition Revisited*, Inquiry, Dec. 1977, at 21. However, citizens have no right to demand or even expect police protection. Courts have consistently ruled "that there is no constitutional right to be protected by the state against being murdered by criminals or madmen."*Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Furthermore, courts have ruled that the police have no duty to protect the individual citizen. *DeShaney v. Winnebago County Dep't of Social Serv.*, 109 S. Ct. 998, 1004 (1989); *South v. Maryland*, 59 U.S. 396 (1855); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. App. 1983) (en banc); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981) (en banc); *Ashburn v. Anne Arundel County*, 360 Md. 617 (1986).

The fundamental civil rights regarding the enjoyment of life, liberty and property, the right of self-defense and the right to keep and bear arms, are merely empty promises if a legislature is allowed to restrict the means by which one can protect oneself and one's family. This constitutional deprivation discriminates against the poor and minority citizen who is more exposed to the acts of criminal violence and who is less protected by the state.

Reducing gun ownership among law-abiding citizens may significantly reduce the proven deterrent effect of widespread civilian gun ownership on criminals, particularly in regard to such crimes as residential burglaries and commercial robberies. Of course, this effect will be most widely felt among the poor and minority citizens who live in crime-ridden areas without adequate police protection.

B. The Enforcement of Gun Prohibitions Spur Increased Civil Liberties Violations, Especially in Regard to Minorities and the Poor

Constitutional protections, other than those afforded by the right to keep and bear arms, have been and are threatened by the enforcement of restrictive firearms laws. The enforcement of present firearms controls account for a large number of citizen and police interactions, particularly in those jurisdictions in which the purchase or possession of certain firearms are prohibited. Between 1989 and 1998, arrests for weapons carrying and possession numbered between 136,049 and 224,395 annually. FBI Uniform Crime Reports, *Crime in the United States Annual Reports (1989-1998)* Table: Total Arrests, Distribution by Age.

The most common and, perhaps, the primary means of enforcing present firearms laws are illegal searches by the police. A former Ohio prosecutor has stated that in his opinion 50% to 75% of all weapon arrests resulted from questionable, if

not clearly illegal, searches. *Federal Firearms Legislation: Hearings Before the Subcomm. on Crime of the House Judiciary Committee*, 94th Cong. 1589 (1975) [hereinafter House Hearings]. A study of Detroit criminal cases found that 85% of concealed weapons carrying cases that were dismissed, were dismissed due to the illegality of the search. This number far exceeded even the 57% percent for narcotics dismissals, in which illegal searches are frequent. Note, *Some Observations on the Disposition of CCW Cases in Detroit*, 74 Mich. L. Rev. 614, 620-21 (1976). A study of Chicago criminal cases found that motions to suppress for illegal evidence were filed in 36% of all weapons charges; 62% of such motions were granted by the court. Critique, *On the Limitations of Empirical Evaluation of the Exclusionary Rule*, 69 N.W. U. L. Rev. 740, 750 (1974). A Chicago judge presiding over a court devoted solely to gun law violations has stated:

> The primary area of contest in most gun cases is in the area of search and seizure. . . . Constitutional search and seizure issues are probably more regularly argued in this court than anywhere in America. . . . More than half these contested cases begin with the motion to suppress . . . these arguments dispose of more contested matters than any other.

House Hearings, *supra*, at 508 (testimony of Judge D. Shields).

These suppression hearing figures represent only a tiny fraction of the actual number of illegal searches that take place in the enforcement of current gun laws, as they do not include the statistics for illegal searches that do not produce a firearm or in which the citizen is not charged with an offense. The ACLU has noted that the St. Louis police department, in the mid-1970s, made more than 25,000 illegal searches "on the theory that any black, driving a late model car has an illegal gun." However, these searches produced only 117 firearms. Kates, *Handgun Control: Prohibition Revisited*, *supra*, at 23.

In light of these facts, many of the proponents of gun control have commented on the need to restrict other constitutionally-guaranteed rights in order to enforce gun control or prohibition laws. A federal appellate judge urged the abandonment of the exclusionary rule in order to better enforce gun control laws. Malcolm Wilkey, *Why Suppress Valid Evidence?*, Wall Street J., Oct. 7, 1977, at 14. A police inspector called for a "reinterpretation" of the Fourth Amendment to allow police to assault strategically located streets, round up pedestrians en masse, and herd them through portable, airport-type gun detection machines. Detroit Free Press, Jan. 26, 1977, at 4. Prominent gun control advocates have flatly stated that "there can be no right to privacy in regard to armament." Norville Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* 69 (1970).

Florida v. J.L. involved a defendant who had been stopped, searched, and arrested by Miami police after an anonymous telephone caller claimed that one of three black males fitting the defendant's description was in possession of a firearm. Amongst other arguments, the State asked the Court to carve out a gun exception to the Fourth Amendment. The Supreme Court unanimously declined to create such an exception to the Fourth Amendment. *Florida v. J.L.*, 120 S. Ct. 1375 (2000).

Statistics and past history show that many millions of otherwise law-abiding Americans would not heed any gun ban. One should consider America's past experience with liquor prohibition. Furthermore, in many urban neighborhoods,

especially those of poor blacks and other minorities, the possession of a firearm for self-defense is often viewed as a necessity in light of inadequate police protection.

Federal and state authorities in 1975 estimated that there were two million illegal handguns among the population of New York City. Selwyn Raab, *2 Million Illegal Pistols Believed Within the City*, N.Y. Times, Mar. 2, 1975, at 1 (estimate by BATF); N.Y. Post, Oct. 7, 1975, at 5, col. 3 (estimate by Manhattan District Attorney). In a 1975 national poll, some 92% of the respondents estimated that 50% or more of handgun owners would defy a confiscation law. 121 Cong. Rec. S189, 1 (daily ed. Dec. 19, 1975).

Even registration laws, as opposed to outright bans, measure a high percentage of non-compliance among the citizenry. In regard to Illinois' firearm owner registration law, Chicago Police estimated the rate of non-compliance at over two thirds, while statewide non-compliance was estimated at three fourths. In 1976, Cleveland city authorities estimated the rate of compliance with Cleveland's handgun registration law at less than 12%. Kates, *supra*, *Handgun Control: Prohibition Revisited*, at 20 n.1. In regard to citizens' compliance with Cleveland's "assault gun" ban, a Cleveland Police Lieutenant stated: "To the best of our knowledge, no assault weapon was voluntarily turned over to the Cleveland Police Department. . . . [C]onsidering the value that these weapons have, it certainly was doubtful individuals would willingly relinquish one." Associated Press, *Cleveland Reports No Assault Guns Turned In*, Gun Week, Aug. 10, 1990, at 2.

In response to New Jersey's "assault weapon" ban, as of the required registration date, only 88 of the 300,000 or more affected weapons in New Jersey had been registered, none had been surrendered to the police and only 7 had been rendered inoperable. Masters, *Assault Gun Compliance Law*, Asbury Park Press, Dec. 1, 1990, at 1. As of November 28, 1990, only 5,150 guns of the estimated 300,000 semiautomatic firearms banned by the May 1989 California "Assault Gun" law had been registered as required. Jill Walker, *Few Californians Register Assault Guns*, Washington Post, Nov. 29, 1990, at A27.

These results suggest that the majority of otherwise law-abiding citizens will not obey a gun prohibition law; much less criminals, who will disregard such laws anyway. It is ludicrous to believe that those who will rob, rape and murder will turn in their firearms or any other weapons they may possess to the police, or that they would be deterred from possessing them or using them by the addition of yet another gun control law to the more than twenty thousand gun laws that are already on the books in the U.S. James Wright, Peter Rossi and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 244 (1983).

A serious attempt to enforce a gun prohibition would require an immense number of searches of residential premises. Furthermore, the bulk of these intrusions will, no doubt, be directed against racial minorities, whose possession of arms the enforcing authorities may view as far more dangerous than illegal arms possession by other groups.

> As civil liberties attorney Kates has observed, when laws are difficult to enforce, "enforcement becomes progressively haphazard until at last the laws are used only against those who are unpopular with the police." Of course minorities, especially minorities who don't "know their place,"

> aren't likely to be popular with the police, and those very minorities, in the face of police indifference or perhaps even antagonism, may be the most inclined to look to guns for protection—guns that they can't acquire legally and that place them in jeopardy if possessed illegally. While the intent of such laws may not be racist, their effect most certainly is.

Tonso, *supra*, at 25. . . .

NOTES & QUESTIONS

1. Do you find the NAACP's or CORE's arguments more convincing?

2. Imagine you are a legislator and have just reviewed the arguments and empirical claims in these two briefs. What questions would you ask representatives of CORE and the NAACP?

3. Do the two briefs reveal any common ground?

4. As a matter of policy, which view seems to offer the most practical pathway to public safety? What about individual safety? Are public safety measures and individual safety measures compatible?

5. The *Heller* (Ch.11.A) and *McDonald* (Ch.11.B) decisions affirm a right of legal gun ownership for people who are not disqualified by reason of criminal activity or mental incapacity and who satisfy reasonable local and state requirements. What is the threat posed by legal handguns in the possession of such people?

6. Michael de Leeuw, who headed the NAACP's amicus submission in *Heller*, argues that the modern civil rights agenda should include weakening *Heller* so as to permit local governments to ban handguns. Such exceptions would permit revival of Washington, D.C.'s overturned gun ban, which de Leeuw argues should be respected as an exercise of Black community autonomy. *See* Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 Harv. BlackLetter L.J. 133 (2009). Professor Nicholas Johnson takes a different view, arguing that (1) stringent gun control requires a level of trust in the competence and benevolence of government that is difficult to square with the Black experience in America; (2) historically, armed self-defense in the face of state failure has been a crucial private resource for Blacks; (3) as a matter of practice and philosophy, Blacks from the leadership to the grass roots have supported armed self-defense by maintaining a distinction between counterproductive political violence and indispensable self-defense against imminent threats; and (4) isolated gun bans cannot work in a nation already saturated with guns. *See* Nicholas J. Johnson, *Firearms and the Black Community: An Assessment of the Modern Orthodoxy*, 45 Conn. L. Rev. 1491 (2013).

2. *Divergent Views on Race and Firearms Policy Presented by Amici in* New York State Rifle and Pistol Ass'n v. Bruen *and Responsive Commentary.*

The briefings in *Heller* and *McDonald* addressed municipal gun ban legislation through the lens of race. Following *Heller* and *McDonald*, lower courts have ruled on a variety of challenges to various gun laws including permit requirements for owing

firearms and carrying them in public. Those laws also can be critiqued through the lens of race. As demonstrated by the Amicus Brief of the Black Attorneys of Legal Aid et al., the regulations challenged in *New York State Rifle and Pistol Ass'n v. Bruen*, No. 20-843 (U.S. filed Dec. 17, 2020), present a good opportunity to evaluate an expensive and demanding discretionary permitting scheme from the perspective of race. The brief makes the case for racial equity in the administration of New York's permitting scheme.

Brief for Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae Supporting Petitioners

New York State Rifle & Pistol Ass'n, v. Bruen, No. 20-843 (U.S. July 20, 2021)

I. NEW YORK'S LICENSING REGIME CRIMINALIZES THE EXERCISE OF THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

New York violates our clients' rights to keep and bear arms by arresting, jailing, and prosecuting them for possessing a firearm—anywhere—unless they have applied to and survived the state's expensive and onerous discretionary licensing process. New York's appellate courts believe that structure to be constitutional, *Heller* and *McDonald* notwithstanding. *See, e.g., People v. Tucker*, 117 N.Y.S.3d 401 (N.Y. App. Div. 2020).

When someone in New York City is prosecuted for exercising their right to keep and bear arms—either at home or outside—they are almost always charged with second-degree criminal possession of a weapon, a "violent felony" punishable by 3.5 to 15 years in prison. N.Y. Penal Law §§ 265.03; 70.02(1)(b). That statute criminalizes possessing a loaded firearm outside of the home or possessing a loaded firearm anywhere with the intent to use it unlawfully. N.Y. Penal Law §§ 265.03(3), 265.03(1)(b). It is a more severe charge than possession of an unloaded firearm, which is a lower level, "non-violent" felony. N.Y. Penal Law § 265.01- B(1).

Second-degree criminal possession of a weapon applies to virtually all firearm possession cases—both at home and outside—because of broad provisions within the Penal Law. First, the Penal Law considers a firearm "loaded" if a person possesses it "at the same time" they possess ammunition, regardless of whether the firearm is, in fact, loaded. N.Y. Penal Law § 265.00(15); *People v. Gordian*, 952 N.Y.S.2d 46, 47 (N.Y. App. Div. 2012) (finding it "legally irrelevant" whether cartridges were in a firearm at the time of the arrest). As a result, New York prosecutors rarely charge firearm-possession cases as a lower level offense alleging an "unloaded" firearm. Second, the Penal Law dictates that unlicensed "possession" of a firearm is, on its own, "presumptive evidence of intent to use the same unlawfully against another." N.Y. Penal Law § 265.15(4). As a result, unlicensed possession, on its own, is legally sufficient evidence to establish the heightened violent felony of second-degree criminal possession of a weapon. *People v. Galindo*, 17 N.E.3d 1121, 1124 (N.Y. 2014). Together, these two provisions allow New York prosecutors to charge almost every firearm possession case as the violent felony of second-degree criminal possession of a weapon.

It is a defense to a pure possession charge if one has a firearm license, but securing such a license is no easy feat—especially for those who are indigent. For example, the New York City Police Department ("NYPD") maintains control of firearm licensing in New York City. It requires that applicants submit more than $400 in fees, pricing out indigent people, like those living in the most impoverished Congressional district in the country, which is in the Bronx. It administratively adjudicates, on its own, the "moral character" of applicants, and it retains ultimate and broad discretion in determining to whom to grant or deny licenses.

New York's firearm licensing requirement originated with the 1911 Sullivan Law. That law made it unlawful to possess any firearm, anywhere, without a license, and gave local police broad discretion to decide who could obtain one. 1911 Laws of N.Y., ch. 195, § 1, at 443. The bill was one of the "early Northern controls" that was passed in response to post Reconstruction "concerns about organized labor, the huge number of immigrants, and race riots in which some blacks defended themselves with firearms." David B. Kopel, *The Great Gun Control War of the Twentieth Century—And its Lessons for Gun Laws Today*, 39 Fordham Urb. L.J. 1527, 1529 (2012). It also responded to years of hysteria over violence that the media and the establishment attributed to racial and ethnic minorities—particularly Black people and Italian immigrants. In a 1909 New York Times interview, Police Chief Douglas I. McKay, who was overseeing the working-class men brought up from New York City to build the Catskill Aqueduct, summarized the views of law enforcement at the time:

> Another thing that we consider essential to the safety of the [upstate] residents is to prevent the workmen from carrying concealed weapons. This is a strong habit with both negroes and Italians.

Along the Line with the Aqueduct Police, N.Y. Times (Apr. 4, 1909). A few years later, Chief McKay became Deputy Police Commissioner, and then Police Commissioner, of the NYPD, the authority in charge of the Sullivan Law's discretionary licensing in New York City. *See Kline Ousts Waldo*, N.Y. Times (Jan. 1, 1914). Meanwhile, the Times implored the police to begin "frisking" hundreds of people in the city—a practice that, at the time, it believed was "less common, perhaps, than it ought to be." *The Rossi Pistol Case*, N.Y. Times (Sept. 29, 1911).

Throughout the twentieth century, racial fear continued to drive New York's firearm regulation scheme, which consciously excluded people of color in continued violation of the Fourteenth Amendment. This was particularly glaring in the wake of movements calling for racial equality and Black liberation in the 1960s, when New York concurrently implemented increasingly restrictive firearm policies. *See, e.g.*, Thomas Buckley, *12,000 Rifle Cartridges Seized from Harlem Gun Club Officers*, N.Y. Times (May 13, 1964); Martin Tolchin, *Police Say Thousands in Bedford-Stuyvesant Possess Guns*, N.Y. Times (July 28, 1964); Emanuel Perlmutter, *Wider State Control Over Pistols Sought*, N.Y. Times (Nov. 23, 1964). During the summer of 1967, major firearm retailers such as Sears suspended the sale of firearms "in 11 racially troubled neighborhoods," a policy that then New York City Mayor John Lindsay attempted to codify into law. Homer Bigart, *Sears Suspends Gun Sales Here*, N.Y. Times (Aug. 8, 1967); Will Lissner, *Mayor Asks Curb on Sale of Rifles Under a City Law*, N.Y. Times (Aug. 21, 1967); Charles G. Bennett, *Mayor Asks Curb of Guns in Riots*, N.Y. Times (Apr. 23, 1968).

In the 1970s, New York's officials focused on the proliferation of "Saturday Night Specials," cheap handguns that were associated with Black communities. Robert Sherrill, *The Saturday Night Special and Other Hardware*, N.Y. Times (Oct. 10, 1971). The term itself has racist origins; it evolved from the racist phrase "[n****r]-town Saturday night." B. Bruce-Briggs, *The Great American Gun War*, 45 Pub. Interest 37, 50 (1976). Meanwhile, police officers were secretly accepting bribes from prominent businesspeople to help them secure firearm permits. Marcia Chambers, *Nadjari Studying Pistol Licensing*, N.Y. Times (Jan. 28, 1975).

Today, the NYPD's licensing process favors former NYPD officers. It explicitly waives their license application fee. See N.Y. Penal Law § 400.00(14). And upon leaving the force, the NYPD also issues its officers a special certification so they can more easily obtain a firearm license—what the NYPD's licensing division calls a "Good Guy letter." See Murray Weiss, *NYPD 'Good Guy' Note Let Suspect Pack Heat*, N.Y. Post (May 18, 2006) ("The letter—which is given virtually automatically to all retiring full-duty cops—is . . . basically all a former cop needs to get a permit as a civilian.").

The result of this system is that the NYPD unilaterally decides whose firearm possession is an unlicensed crime and whose is a licensed right. It thus "leaves the right to keep and bear arms up to the discretion" of local police. See *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) (criticizing a statute for leaving the right up to the discretion of federal, state, and local prosecutors). And because the licensing requirement empowers the NYPD to make these decisions, there are disparities in the results. In 1969, for instance, working-class Black and Hispanic families marched through their Bronx neighborhoods, calling for the NYPD to grant them firearm licenses so they could protect their families. In response, the NYPD scoffed, telling them that "[i]t's the policy of this department not to give out permits for people who want to protect themselves." *40 in Bronx Seek Gun Permits*, N.Y. Times (Sept. 26, 1969). Yet the NYPD routinely grants licenses to well-guarded and well-resourced celebrities, like Howard Stern and Robert De Niro. Brad Hamilton, *NYC's '1 Percent' Totally 'Gun'-Ho*, N.Y. Post (Apr. 22, 2012).

New York City also aggressively sends its police onto the streets with a strict directive: take firearms away from minority men and deter them from carrying. As former Mayor Michael Bloomberg explained when justifying the practice:

> 95% of your murders, murderers and murder victims, fit one M.O. You can just take the description and Xerox it and pass it out to all the cops. They are male minorities 15 to 25. . . . [T]he way you should get the guns out of the kids' hands is throw them against the wall and frisk them.

Bobby Allyn, '*Throw Them Against the Wall and Frisk Them*', NPR (Feb. 11, 2020). Stop-and-frisk continued after Mayor Bloomberg's term ended. Between 2014 and 2017—despite allegedly ending the practice after a federal court found it to be unconstitutional—New York City conducted 92,383 stops and 60,583 frisks of people on the street. Christopher Dunn et al., *Stop and-Frisk in the de Blasio Era*, NYCLU, 1, 14 (Mar. 14, 2019). During that time, 81% of stops were of Black or Latino people, as were 84% of frisks. *Id.* at 9, 17. Black and Latino men between the ages of 14 and 24 accounted for 38% of the stops, even though they only made up 5% of the city's population. *Id.* at 2. Still, Black and Latino people were "less likely to be found with a weapon" than others. *Id.*

Stop-and-frisk, motivated by New York's furor to criminalize its people's firearm possession, is a driving reason why, in New York City, "[f]or generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J. dissenting).

Further downstream, the penal consequences of New York's licensing requirements are reflected in today's data from the criminal legal system. In 2020, while Black people made up 18% of New York's population, they accounted for 78% of the state's felony gun possession cases. Non-Latino white people, who made up 70% of New York's population, accounted for only 7% of such prosecutions. Black people were also more likely to have monetary bail set, as opposed to release on their own recognizance or under supervision, even when comparing individuals with no criminal record. When looking at only N.Y. Penal Law § 265.03(3)—which alleges only possession of a loaded firearm—80% of people in New York who are arraigned are Black while 5% are non-Hispanic white. Furthermore, according to NYPD arrest data, in 2020, 96% of arrests made for gun possession under N.Y. Penal Law § 265.03(3) in New York City were of Black or Latino people. This percentage has been above 90% for 13 consecutive years.

II. OUR CLIENTS ARE PROSECUTED FOR EXERCISING THEIR SECOND AMENDMENT RIGHTS.

Below, we illustrate representative cases of what we see every day to show this Court the real-life consequences of New York's firearm licensing requirements on ordinary people. In New York City alone, prosecutors charge thousands of people with unlicensed firearm possession every year. The Bronx District Attorney's Office—in lockstep with other New York district attorneys—explicitly defines "the least restrictive disposition for carrying a loaded gun in the Bronx as two years in prison and two years of post release supervision." Our clients' conduct would not be a crime in states that already properly recognize the Second Amendment.

The stories we include here are but a small sample of the devastation we witness. *First*, we include cases where New York's licensing requirement undermined a person's right to keep and bear arms outside of the home. *Second*, we also include cases where New York's licensing requirement undermined a person's right to keep and bear firearms within the home. Notably, our cases where clients are charged with home possession illustrate that New York uses its license requirement to "resist[] this Court's decisions in *Heller* and *McDonald*"—decisions that clearly intended to protect the right to keep and bear a firearm in the home.

a. Our Clients Are Prosecuted for Exercising Their Second Amendment Rights Outside of the Home

We routinely see people charged with a violent felony for simply possessing a firearm outside of the home, a crime only because they had not gotten a license beforehand.

i. Ms. Jasmine Phillips, a Texan Who Lawfully Owned a Gun There, Was Prosecuted for Unlicensed Possession While Visiting Family in New York.

Ms. Jasmine Phillips is a combat-decorated military veteran who served in Iraq. She had never been convicted of a crime. She legally possessed a pistol in Texas for self-defense. After she and her husband separated, her husband moved to New York. To have their children spend some time with their father, Ms. Phillips and her children drove to New York.

While Ms. Phillips was parked in her car in New York, police officers surrounded the vehicle. One officer knocked on the passenger side window. Another opened the driver side car door, put her in a chokehold, dragged her out of the car, threw her on the pavement, flipped her over, and handcuffed her. She heard officers search the car and find her pistol. The prosecution later justified these acts because of a "tip."

"The arrest was traumatizing," she recounts. "Being separated from my two baby boys, who were three and four years old, broke my heart." After the arrest, she was held at the precinct, and then the courthouse, without food, water, a phone call, or even access to a bathroom. After hours and hours of pre-arraignment detention and processing, she finally saw a judge. Like virtually everyone else accused of possessing a firearm, she was charged with violating N.Y. Penal Law § 265.03(3), a violent felony.

The judge set high monetary bail. "I felt completely hopeless," she says. "I thought about my kids, wracked with guilt and worry about what they were going through—were they scared? Confused? I was taken away from them so suddenly. I was crushed. I also thought about my job and the home I was renting, realizing that I was going to lose both. I felt broken."

Ms. Phillips was jailed on Rikers Island for weeks before she made bail. Because of her arrest, the Administration for Children Services ("ACS") 19 intervened and filed a child-neglect proceeding against her. "I lost everything: my job, my car, my home, and my kids." She couldn't see her children again for a full year, missing her son's fifth birthday. She recalls:

> Through my attorneys, I petitioned the family court to allow ACS to let me see my child, but ACS was too slow to respond. I spent my son's fifth birthday in an Airbnb, alone, surrounded by the gifts that I had bought for him. When I was finally allowed to see my children while I was in New York, ACS required that I meet with them during supervised visits in an ACS facility. It was so humiliating to have someone stand there while I tried to have some semblance of a normal, loving interaction with my kids. During one visit, my older son told me that he loved going to school. I was absolutely devastated. No one had told me that he had started pre-K. I missed his first day of school. I missed the chance to ask how his first day of school went. I can never undo that.

After extensive advocacy, Ms. Phillips' case was diverted and eventually dismissed. Still, the case had lasting effects: a Texas judge ruled against her in a child-custody case because of her "felony arrest." For Ms. Phillips, that was "the lowest moment of [her] life and the most hopeless [she] ever felt." "There are no words to fully reach the depth of that emotion I was feeling," she explains.

But the effects of the case did not stop there, either. ACS failed to properly close Ms. Phillips' case and, four years after the arrest, they called the local sheriff in Texas to do a "welfare check." She was not at home when the police came by, but her landlord was. The police repeated inaccurate information about the dismissed case, provided by ACS, and the landlord then terminated the lease. In addition, to this day, Ms. Phillips reports that her younger son continues to suffer severe separation anxiety.

. . .

In sum, Ms. Phillips' arrest for gun possession outside of the home continues to affect her, her family, and their lives today.

ii. Mr. Benjamin Prosser Was Prosecuted for Carrying a Gun for Self-Defense After He Was the Victim of Multiple Violent Stranger Assaults and Street Robberies.

Mr. Benjamin Prosser is a young man who graduated from high school with honors. He was distinguished by a national foundation. And because of New York's carry licensing requirement, he is now a "violent felon," solely because he carried a firearm for self-defense without a license.

At the police precinct after his arrest, Mr. Prosser confessed to possessing the gun for self-defense. He had repeatedly been the victim of violent stranger assaults and robberies on the street. When he started a job that required that he travel two hours for work every day, he decided to carry a firearm. He did not possess it with any intent to engage in violence, but his experiences taught him that he needed a weapon to be safe.

In response, the prosecution charged him, like so many others, with N.Y. Penal Law § 265.03(3), a violent felony. After lengthy plea negotiations, the prosecution offered him a "deal" to a probation sentence on a plea to a lesser charge—also a violent felony—because he had previously been a victim of violence. Afraid of the 3.5-to-15-year mandatory sentencing range on the top count, Mr. Prosser accepted the offer. See generally Richard A. Oppel Jr., Sentencing Shift Gives New Leverage to Prosecutors, N.Y. Times (Sept. 25, 2011).

Because of New York's carry licensing requirement, Mr. Prosser's once-bright future will forever be marked with the scarlet letter of "violent felon." He is barred from serving on a jury. N.Y. Jud. Law § 510(3). He is prohibited by federal law from possessing a firearm, 18 U.S.C. § 922(g), and is forever ineligible for a firearm license under New York's law, N.Y. Penal Law § 400.00(1)(c). And he will face the worst kind of "'civil death' of discrimination by employers, landlords, and whoever else conducts a background check." *See Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

Mr. Prosser is grateful not to be incarcerated. However, he is also deeply disheartened, struggling with the idea of being another nameless casualty in a licensing system that was designed to preclude him from exercising his rights.

iii. Mr. Sam Little, Who Had Survived a Face Slashing and Lost Multiple Friends to Gun Violence, Was Prosecuted After Carrying a Gun to Defend Himself and His Young Son

Mr. Sam Little is a loving father in his 30s who was balancing school, a job, and parenting. He was enrolled in college, and he planned to get his associate's degree

in child psychology. He dreamed of eventually working with children with disabilities or in group homes. That dream stemmed from his own experience as a single father, raising a son with neurological and physical disabilities.

Like many young people in New York City, Mr. Little had repeatedly witnessed and been victimized by violence. He had friends who had been shot and murdered, and he himself had been shot—both when he was a teenager and then several years later. Once, Mr. Little was slashed across the face with a knife. He still bears the scar.

One night, Mr. Little left his home to go a friend's birthday party, which was in the same neighborhood where he had previously been slashed. To ensure his safety, Mr. Little brought a firearm. As a father, he felt that he owed it to his son to maintain his safety: who would take care of his son if something happened to him?

While walking down the sidewalk, police jumped out of a car, stopping and immediately frisking him. Police found the gun and arrested him. Prosecutors charged him with N.Y. Penal Law § 265.03, a violent felony.

Overcome with the stress of an open felony case, Mr. Little dropped out of his classes and did not obtain his associate's degree. Although he had recently been offered a new job with the Department of Education, the open case made him ineligible to take the position.

Mr. Little was eventually convicted of attempted second-degree criminal possession of a weapon. He served eight months in jail. Mr. Little served his sentence at the Vernon C. Bain Center—colloquially called "the Boat"—a floating jail in the East River. See Jon Schuppe, Prisoners in New York City Jails Sound Alarm as Coronavirus Spreads: "I Fear for My Life," NBC News (Mar. 30, 2020) (describing the Boat as "like a slave ship," where men are laid "back-to-back" with others and then later bunked only three feet apart). In addition to the trauma of incarceration, he describes his experience there as "absolutely devastating" to his relationship with his son. While he was incarcerated, he did not want his son to undergo invasive searches or witness him in a jail, so during that period, he did not see his son at all. "These were eight months that I will never be able to get back. Eight months where I could have raised my son and taught him things. Eight months of missed holidays like Thanksgiving and his grandmother's birthday."

After he was released, the conviction derailed his dreams for an education and employment. Due to this conviction, he will never be able to work for the Department of Education. He has only been able to gain employment through post-conviction programs.

Despite these challenges, Mr. Little continues to provide for his family and contribute to his community by volunteering for extracurriculars with children. He is grateful for what he does have: family who support him and a stable place to continue living. However, he reminds us that many people who have been incarcerated have few support systems and are not as fortunate. He hopes that New Yorkers in the future will never have to experience the trauma and hardship he endured simply for exercising their right to keep and bear arms in self-defense.

b. Our Clients Are Prosecuted for Exercising Their Second Amendment Rights at Home, Despite *Heller* and *McDonald*.

We also regularly witness New York undermining the core of *Heller* and *McDonald* by prosecuting people for gun possession in the home. New York's licensing

requirement is the mechanism that allows the state to do so. The following stories illustrate this problem, and the need for this Court to answer the question presented in a way that will clearly protect the Second Amendment for all the people.

i. Ms. Sophia Johnson, a Survivor of Domestic Violence and Sexual Assault, Was Prosecuted for Possessing a Firearm in Her Home.

When Ms. Sophia Johnson lived in the Midwest, she legally purchased a firearm for her and her daughter's safety. As a single parent and a survivor of domestic violence and sexual assault, she found that possessing a gun in her home, even unloaded and in a lockbox, gave her peace of mind.

She eventually moved to New York, and she brought her gun with her. Unaware of New York's stringent laws, Ms. Johnson thought it was enough that her gun was legally purchased and registered in the state of purchase.

A few years later, she found herself in an abusive relationship. When she tried to leave, her abuser stole some of her belongings, including the gun. Ms. Johnson had never interacted with the police before, and she trusted them, so she did what she thought was right: she immediately reported the gun missing to the police. She cooperated with the police and even signed a search warrant.

Police found the gun—and then arrested her. The prosecution charged her with a felony for owning the gun. They prosecuted her using her own statement to the police, where she affirmed that the gun was hers and that she had bought it out-of-state for her own protection.

Ms. Johnson spent a night incarcerated in the criminal courthouse. The felony case hung over her head for a year and a half. *See Barker v. Wingo*, 407 U.S. 514, 537 (1972) (White, J., concurring) (noting that open cases "disrupt [one's] employment, drain [their] financial resources, curtail [their] associations, subject [them] to public obloquy, and create anxiety in [them], [their] family and [their] friends").

The open case depleted her. It stalled her education and her plans for a master's degree. It caused her constant stress and anxiety about the possibility of becoming a convicted criminal and losing her job. *See id.* She recalls that she could not sleep, always thinking about who would support her daughter if she went to prison.

ii. Mr. Gary Smith Was Prosecuted for Possessing a "Loaded Gun" in His Home Because He Had a Gun and Ammunition Under His Bed.

Mr. Gary Smith is an elderly man who worked his whole life as a city employee. He retired after he was diagnosed with cancer. After several rounds of chemotherapy, his cancer was finally in remission.

A few weeks after his last treatment, while his friend was staying at his house, police barged through Mr. Smith's front gate. They demanded that the friend "consent" to a search of Mr. Smith's apartment or they would "bust the door down." His friend—more terrified than she had ever been in her life—acquiesced. When Mr. Smith returned to the apartment, the officers arrested him. They had found a small handgun inside a closed pouch under his bed. They alleged they found ammunition in a separate pouch, also under the bed.

The police processed Mr. Smith for court. He awaited arraignment for over twenty-four hours. He remembers sitting in the arraignment cell, worried about

his health, anxious that it would not be able to withstand the obviously filthy conditions. *See* Molly Crane-Newman, *NYC Courthouses Are in Decrepit and 'Historically Unsanitary' Condition, Photos Show*, N.Y. Daily News (July 11, 2021) ("Multiple courthouse workers said the sections that prisoners are moved through are notoriously disgusting.").

At his arraignment, Mr. Smith was charged with violating both N.Y. Penal Law § 265.03(1)(b) and N.Y. Penal Law § 265.03(3)—each a violent felony. As a result, he faced a mandatory sentence of 3.5 to 15 years in prison. The prosecutors accused him of possessing a loaded firearm with intent to use it unlawfully because New York presumes that intent from unlicensed possession alone. N.Y. Penal Law § 265.15(4). New York's law considered the firearm "loaded" because the ammunition was in the same area as the firearm. N.Y. Penal Law § 265.00(15). And the "home" exception in N.Y. Penal Law § 265.03(3)—which is virtually always rendered academic because the law presumes that any unlicensed possession is already legally sufficient to establish a violation of § 265.03(1)(b)—did not apply to him because he had previously been convicted of a class A misdemeanor for jumping a subway turnstile.

After extensive negotiation and the defense's investigation of the unlawful police entry into the home, the prosecution agreed it could not sustain its burden at the suppression hearing and dismissed the case. Still, the psychological effects of the case have lasted. Regarding his friend, Mr. Smith says, "She's just not the same anymore."

iii. Mr. Andre Thomas Was Charged with Possessing His Roommate's Gun After Police Found It in Their Shared Kitchen.

New York's Penal Law provisions are so broad that they even affect people who are merely proximate to those who exercise their Second Amendment rights. Mr. Andre Thomas is one such example.

Mr. Thomas had recently moved to a new home to be closer to his mother, for whom he was caring after she had a stroke. At the break of dawn, Mr. Thomas awoke to the sound of his door being violently smashed in. At first, he thought he was being attacked. Then he realized his attackers were the police. The police charged into his kitchen, tearing his home apart along the way. They found a safe in the kitchen, broke it open, and discovered a firearm inside. This was not Mr. Thomas' gun, but his roommate's—an old friend he was trying to help by renting him a room at an affordable price.

Police arrested Mr. Thomas for the gun and prosecutors charged him with N.Y. Penal Law § 265.03, a violent felony. At arraignment, the judge set monetary bail. In New York, monetary bail is usually synonymous with extended pretrial detention: like thousands of people in New York City, neither Mr. Thomas nor his ill mother could afford the amount set. *See, e.g.*, Bernadette Rabuy & Daniel Kopf, Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time, Prison Policy Initiative (May 10, 2016). He was sent to Rikers Island.

Mr. Thomas had grown up in the foster care system, but he had never experienced the trauma that he did at Rikers. He did not have a criminal record, and the criminal legal system was alien to him. His mother was heartbroken when she saw him in a jumpsuit. Helplessly incarcerated, he soon became depressed. He had a

felony firearm charge hanging over his head. He worried he would lose his home, and if released, would have to live on the streets. And he worried his mother might succumb to her illness before he would ever be released.

Eventually, a friend bailed Mr. Thomas out, but escaping the trauma of Rikers was only the beginning. Because of the gun possession charge, Mr. Thomas lost his security guard license and his job of over four years as a security guard supervisor.

Even after his release, his mental health continued to decline: he became increasingly paranoid and fearful of another breach into his home. Every time the elevator doors opened on his floor—just like they did right before the raid—he felt waves of crushing anxiety wash over him. He could not sleep or eat. He turned inward and stopped talking much to other people. When he did sleep, he dreamt of the police breaking into his home and of being at Rikers again. He rapidly lost weight. Eventually, an insightful judge pressured the prosecutors to dismiss the case. But the damage was already done.

Today, Mr. Thomas is still trying to recover. He has a new job, he has gained his weight back, and he is trying to follow his mother's advice and maintain his trusting and good heart. But he cannot shake feeling resentful towards the legal system and jaded about the police. When reflecting on what happened, Mr. Thomas repeats: "It wasn't fair. It just wasn't fair."

* * *

The Second Amendment is a right held by all the people. *McDonald*, 561 U.S. at 773. However, we regularly see New York charging those who exercise their Second Amendment rights with a "violent felony" offense. Our experience illustrates that New York effectively deprives its people of the Second Amendment right by requiring that they successfully obtain a license from the police before exercising it. As a result, we urge this Court to enforce the Second Amendment by issuing a clear and durable rule. The Court should hold that Petitioners' denials violated the Second Amendment because New York cannot condition Second Amendment rights on a person first obtaining a license.

In asking that the Court resolve the question presented in this way, we are mindful that the right to keep and bear arms has "controversial public safety implications." *McDonald*, 561 U.S. at 783. "As surely as water is wet, as where there is smoke there is fire," there are those who will "take[] for granted" that criminalizing gun possession "is the antidote to killing." *See Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, No. 20-1495, 2021 WL 2584408, at *14 (4th Cir. June 24, 2021) (Gregory, C.J., concurring) (criticizing the logic of policing and prosecution as the only tool for preventing violence). It is tempting, "if the only tool you have is a hammer, to treat everything as if it were a nail." *Id.* (internal quotation marks and citations omitted).

But what these stories and our experience illustrate is that New York's licensing requirements—which cause criminal penalties for unlicensed possession—themselves have controversial public safety implications. It is not safe to be approached by police on suspicion that you possess a gun without a license. *See, e.g.*, Michael Cooper, *Officers in the Bronx Fire 41 Shots, And an Unarmed Man Is Killed*,

N.Y. Times (Feb. 5, 1999) (reporting the murder of Amadou Diallo). It is not safe to have a search warrant executed on your home. *See, e.g.*, Richard A. Oppel et al., *What to Know About Breonna Taylor's Death*, N.Y. Times (Apr. 26, 2021). It is not safe to be caged pretrial at Rikers Island. *See, e.g.*, Michael Schwirtz et al., *Rikers Deemed Too Dangerous for Transferred Inmates*, N.Y. Times (May 5, 2017). It is not safe to lose your job. Margaret W. Linn et al., *Effects of Unemployment on Mental and Physical Health*, 75 Am. J. Pub. Health 502 (1985). It is not safe to lose your children. Bruce Golding, *Lawsuit Says NYC Has One of the Worst Foster Care Systems in US*, N.Y. Post (July 8, 2015). It is not safe to be sentenced to prison. Jean Casella et al., *New York's State Prisons Are Brutal and Deadly. That's Something We Can Change*, Gothamist (Feb. 21, 2019). And it is not safe to forever be branded as a "criminal," or worse, as a "violent felon." *See Strieff*, 136 S. Ct. at 2069-70 (Sotomayor, J., dissenting) (describing the "civil death" that accompanies criminal convictions). In sum, New York's licensing requirements are not safe.

And these licensing requirements also violate the Constitution. They allow New York to deny Second Amendment rights to thousands of people, and to instead police and criminalize them for exercising those rights. Such a policy is the type that "the enshrinement of constitutional rights necessarily takes. . . . off the table." *Heller*, 554 U.S. at 636.

The Court must not "stand by idly" while New York denies its people the right to keep and bear arms, "particularly when their very lives may depend on it." *Peruta v. California*, 137 S. Ct. 1995, 2000 (2017) (Thomas, J., dissenting from the denial of certiorari). It must create a rule that will in fact protect the Second Amendment rights of "all" the people. *See McDonald*, 561 U.S. at 773. Achieving that goal requires that the Court answer the question presented by holding for the Petitioners and reasoning that New York's licensing regime violates the right to keep and bear arms.

COMMENT

Writing for the *Nation* magazine, commentator Elie Mystal argues that it is possible to agree with the Black Legal Aid Attorneys brief in its condemnation of racial bias in the New York system, but still disagree with the goal of liberalizing New York's gun laws. Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control? In The Name of Black Gun Owners, A Coalition of Progressive Attorneys Has Thrown Its Weight Behind an Explosive Attempt to Eviscerate Gun Regulations*, The Nation (July 26, 2021).

Mystal concedes that the public defenders make an "excellent case" that the challenged New York law unconstitutionally deprives poor people of a constitutional right and gives police an excuse to "harass and incarcerate" otherwise law-abiding minorities for conduct that "white people routinely get away with."

Mystal rejects the idea that private gun ownership is a constitutional right. But granting the current reality, he argues that "gating access to that right behind a $400 fee and an enormous time sink is not something we do for other constitutional

principles." Indeed, Mystal acknowledges that the Black Public Defenders arguments about New York's gun laws are the same ones he has made against drug laws: "Law enforcement over-punishes Black and Latinx gun owners, and uses the mere suspicion that gun laws are being violated to instigate stops, frisks, harassment, brutality, and murder." Mystal decries the results of putting the NYPD in charge of judging the proper cause requirement for a permit, noting that the NYPD has "scoffed" at the idea of Black and Brown citizens being licensed to carry firearms, but has taken a far less restrictive view with celebrities, the well-connected, and former cops.

While he finds many of the arguments in the brief compelling, Mystal disagrees with the Public Defenders' conclusion that the remedy should be to "do away" with the permitting system:

> It is, frankly, ass-backwards to reform the regulations on when Black and brown people can have a gun *without first* reforming when cops are allowed to shoot Black and brown people suspected of having a gun. Right now, in this country, it is functionally impossible to convict a cop who shoots an armed Black person. It doesn't matter what that person was doing, doesn't matter whether the person had a gun license.

Mystal thinks that guns offer a false promise of security. He cites a recent study he says indicates that a loosening of permit laws leads to increased Black homicide rates, not lower ones. "The solution," says Mystal, "self-evidently, is not more guns but fewer," along with providing both the opportunities that "make crime less lucrative" and the "early intervention needed to keep crime from escalating and mental health problems from spiraling."

Note that Mystal and the Black Legal Aid Attorneys view the same facts, make many of the same arguments, but come to different ultimate conclusions. How do you explain this broad agreement about the inputs but ultimate disagreement about the conclusion? As you consider this question, it may be helpful to review the material in Chapter 1. For a critique of the viability of implementing the sorts of supply controls that Mystal urges as the better solution than equal access to firearms, consider Nicholas Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 Wake Forest L. Rev. 837 (2008).

3. Divergent Views on Race and Firearms Policy from a Long-Term Historical Perspective

The disagreement about how race impacts assessments of firearms policy that is evident surrounding *Heller* and *Bruen* extends to the broader debate about the right to arms and firearms policy. This is illustrated again in the overlapping work and divergent conclusions of Professor Carol Anderson and Professor Nicholas Johnson. Professor Anderson's book *The Second: Race and Guns in a Fatally Unequal America* offers a broad critique of the right to arms from the perspective of race. Professor Johnson's review of *The Second*, excerpted below, explains that he and Anderson have examined much of the same material, but come to very different views about the currency and utility of the right to arms for Blacks in modern America.

Nicholas J. Johnson

Carol Anderson, *The Second: Race and Guns in a Fatally Unequal America*

Reason Magazine 2021) (Jan. 2022) (book review)

Carol Anderson's book, *The Second: Race and Guns in a Fatally Unequal America*, is a bold addition to the literature surrounding the intersection of the right to arms and race.

Anderson makes damning claims that the Second Amendment is rooted in the goal of suppressing slave insurrection and is thus uniquely and irredeemably compromised by American racism. Yes, racism infects other constitutional provisions. Bias in administration of the Fourth Amendment is legend. But for the Second Amendment, Anderson claims, the affliction is uniquely fatal. "The Second Amendment is so inherently structurally flawed, so based on Black exclusion and debasement, that, unlike the other amendments, it can never be a pathway to civil and human rights for 47.5 million African Americans."

Even the end of slavery, Anderson argues, "was not transformative because the core of white supremacy was not chattel slavery but anti-blackness. . . . And this is the foundational root of the Second Amendment." This racist lineage also condemns the modern right to arms. "The current-day veneration of the Second Amendment," she says, "is frankly akin to holding the three-fifths clause sacrosanct. They were both designed to deny African Americans humanity and rights while carrying the aura of constitutional legitimacy."

These claims are sufficiently provocative that I expected a full-frontal attack on contrary ideas that I have developed in my own scholarship. Moving to the footnotes I was surprised to find my own work liberally cited.

It turns out that Anderson and I have worked through much of the same material but reached dramatically different conclusions about the utility, legitimacy and importance of the right to arms generally and for Black folk particularly. My commentary here will focus on some of the things that I think account for that difference, with the aim of advancing the conversation about race and the right to arms

Anderson presents the Second Amendment as a proxy for the much more textured American right to arms. This allows her to focus on a narrow slice of the eighteenth-century federal constitution story and extrapolate forward to argue that the broader American right to arms is irretrievably infected by racism. The initial concern here is what she omits — namely the lessons from the American revolution, including British attempts to disarm colonists as the rebellion came to a boil. Those conflicts provided plenty of incentives for the framing generation to think about and embrace a robust private right to arms, separate from concerns about slavery.

The Second also does not acknowledge the right to arms dynamic in the places where most government action on guns has always occurred, places with actual police powers — the states. The first federal gun control law did not appear until the 1920s. Gun regulation prior to that point was a function of state and local law.

The Second does not engage the independent protections of the right to arms established in 44 of 50 state constitutions. Integrating that information seriously compromises the claim that the American right to arms was all about slavery. Anderson slices the history of the federal right to facilitate a damning dismissal of

the Second Amendment as rooted in slave control. But the broader right to arms enshrined in the state constitutions defies that technique.

Many of the state arms guarantees were first enacted in the twentieth century. Wisconsin's 1998 constitutional amendment was a direct response to municipal efforts to ban handguns. Another cohort consists of twentieth century amendments designed to underscore the individual nature of earlier provisions. Louisiana, Missouri, and Kansas strengthened their guarantees in the twenty-first century. For Kansas, the effect was to reinstitute an original individual right that had been nullified by judicial interpretation. *See Salina v. Kansas* (Ch. 7). These had nothing to do with slave control. Fourteen arms guarantees appear in states that were admitted to the Union after the Civil War. These also were not motivated by the fear of slave insurrections. For an evaluation of the state arms provisions (as of 2005), see Nicholas Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 Brooklyn L. Rev. 715 (2005).[2]

Drawing from mid nineteenth century conflicts, Anderson argues that, armed self-defense for black people" is "ephemeral and white-dependent." She uses an episode of failed self-defense in Cincinnati to assert "the irrelevance of being armed or unarmed, because the key variable in the way that the Second Amendment operates is not guns but anti-blackness."

This assessment rests on an overly glib view of the self-defense dynamic. Effective self-defense presents at least one and sometimes two core problems. First, it requires the victim to prevail physically against a deadly threat. Second, it *might* require navigation of a subsequent process to have the violence deemed legitimate by some government authority.

No doubt racism can and has infected after the fact government determinations of legitimacy. By contrast, the efficacy of the initial physical act of self-defense is far less contingent on racist variables. Armed self-defenders will survive threats or not depending on the physical circumstances they encounter. Contrary to Anderson's claim, it is indeed the gun (not race) and the other physical factors of the conflict that dictate the initial effectiveness of self-defense.

Many armed self-defenders will avoid the racist *ex post* assessments of legitimacy altogether. The empirical assessments of Defensive Gun Uses (DGUs) in the modern era illustrate the point. In the vast majority of DGUs (a number that multiple surveys say is in the millions and dissenting sources say is between 100k and 650k) no shots are fired. Many of these DGUs are not reported to authorities. Rather the self-defender simply escapes the threat after brandishing or pointing. Encounters involving actual shooting are a thin slice of total DGUs. And deadly shootings are a fraction of that thin slice.

Even in cases where black self-defenders actually shoot someone, the violence is likely to be intraracial. While interracial violence strikes the most fear, the threats to modern self-defenders of all races are mostly from members of their own race. For Blacks, much of this self-defense activity will occur in jurisdictions with large Black populations, where the mayors, police chiefs and much of the law enforcement bureaucracy are Black. Government determinations of legitimacy of Black self-defense claims in these places would seem less "white dependent" than Anderson's example from Cincinnati.

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2. [For a current list, see Chapter 10 App'x.—Eds.]

Modern examples are suggestive. Several years ago, I had an assistant gather media reports of defensive gun uses. That work included stories reported at this link. These reports include Black people for whom the right to self-defense seemed to work. These examples hint at the complexity of the self-defense calculation. That complexity helps explain the millions of lawful Black gun owners who have a manifestly different view about armed self-defense than Anderson urges in *The Second*. This divergence suggests not only that racism impacts different Black people differently, but also that many other factors beyond race — e.g., gender, age, disability, relationship status, living situation, geographical location, occupation — may affect decisions about owning and carrying guns for self-defense.

The Second *gives relatively short shrift to the monumentally important and transformative right to arms conversation surrounding the Fourteenth Amendment.* The post-civil war effort to extend the right to arms as a limitation on the states was a direct response to racist gun control in the former confederacy. The debate surrounding Fourteenth Amendment demonstrates an explicit aim to extend the right to arms along with other federal constitutional guarantees to Black people. And there is rich evidence that Freedmen considered the right to arms to be a crucial private resource.

Anderson concludes that the right to arms as developed in the post war period was still structurally infected by racism, and was as a practical matter ultimately useless to Blacks. Even if Blacks used guns to survive racist attacks, she argues, racist whites ultimately controlled the legitimacy of Black self-defense claims.

The rebuttal to this claim is in the words and actions of black folk who actually lived through the nightmares. Contrary to Anderson's claims the history of the freedom movement spills over with black folk using arms to fight off deadly threats and embracing arms as a crucial private resource in the face of state failure, neglect and overt hostility.

The considerable body of thought and writing from black people who lived through the terror that Anderson recounts is conspicuously absent from The Second. That body of work overwhelmingly embraces armed self-defense and seems entirely at odds with Anderson's prescription that Blacks abjure armed self-defense.

Fighters in the freedom movement developed a considered philosophy and practice of arms rooted in the sort of critique that Ida B. Wells presented in support of her famous advice about the utility of the Winchester Rifle.

> Of the many inhuman outrages of this present year, the only case where the proposed lynching did not occur, was where the men armed themselves in Jacksonville, Fla., and Paducah, Ky, and prevented it. The only times an Afro-American who was assaulted got away has been when he had a gun and used it in self-defense.
>
> The lesson this teaches and which every Afro-American should ponder well, is that a Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give. When the white man who is always the aggressor knows he runs as great risk of biting the dust every time his Afro-American victim does, he will have greater respect for Afro-American life. The more the Afro-American yields and cringes and begs, the more he has to do so, the more he is insulted, outraged and lynched.

Ida B. Wells, Southern Horrors: Lynch Law in All Its Phases (1892).

W.E.B. DuBois not only described armed self-defense as a practical deterrent, he pressed it as a moral imperative. As editor of the NAACP flagship *Crisis* magazine, DuBois argued that even failed acts of self-defense established a cultural norm of resistance that discouraged attacks on the race. *See* Nicholas James Johnson, *Private Arms and Civil Unrest: Lessons from the Black Freedom Movement*, Law and Liberty Research Paper No. 20-09 (Nov. 1, 2020).

The NAACP cut its teeth as an organization, defending blacks who used guns in self-defense, and to different degrees vindicated men like Pink Franklin, Steve Green and Ossian Sweet. The Sweet case is particularly evocative. NAACP hired Clarence Darrow who won an acquittal. Sweet went on a hero's tour of NAACP branches and the resulting fundraising seeded the storied NAACP legal defense fund. *See* Nicholas Johnson, Negroes and the Gun: The Black Tradition of Arms (2014).

The list of freedom fighters who used guns, carried guns, were protected by guns and philosophically embraced and advocated armed self-defense as an important resource for blacks could fill volumes. (Like these: Nicholas J. Johnson, Negroes and the Gun: The Black Tradition of Arms (2014); Charles E. Cobb, Jr., This Nonviolent Stuff'll Get You Killed: How Guns Made the Civil Rights Movement Possible (2015); Akinyele Omowale Umoja, We Will Shoot Back: Armed Resistance in the Mississippi Freedom Movement (2014)). Some of the familiar names include Fredrick Douglass, Henry Highland Garnett, T. Thomas Fortune, Bishop Henry Turner, Edwin McCabe, Roy Wilkins, Walter White, James Weldon Johnson, Medgar Evers, Rosa Parks, Roy Innis, Fred Shuttlesworth, Daisy Bates, A. Philip Randolph, Marcus Garvey, John Hope Franklin, TRM Howard, Fannie Lou Hamer, Hartman Turnbow, Winson Hudson, E.W. Steptoe, Vernon Dahmer, Robert Williams, James Farmer, Bob Hicks, and yes, Martin Luther King. *See* Negroes and the Gun (and Chapter 9.A).

Much of my critique here is about things that Anderson omitted. These sorts of framing decisions influence everyone's work. Disagreements about framing can be large scale—like my criticism about the state arms provisions—or small scale, which is the nature of my next quibble.

The Second deploys the notorious *Dred Scott* decision to advance the theme that racist decision-making in early America renders the Second Amendment uniquely and fatally compromised. *Dred Scott* infamously ruled that even free blacks were not citizens and had no rights that a white man is bound to respect. Among other arguments, Chief Justice Taney offered a parade of horribles of potential black citizenship—things like the right to arms that Blacks simply could not be allowed to exercise.

Dred Scott is an important marker in the right to arms story. I and others have used it as an example of the early understanding that the constitutional right to arms was individual in nature. Anderson deploys it to argue that the racism infecting the Second Amendment is so uniquely pernicious that we moderns (or some of us) should eschew the right to arms. She writes:

> If Blacks were citizens, he [Taney] wrote they would have the right to "enter every other state whenever they pleased. . . . hold meetings on political affairs, *or worse*, [italics mine] to 'keep and carry arms where ever they went.'"

This treatment subtly bolsters the claim that the concern about armed blacks stands out as *especially* troubling to nineteenth century racists like Chief Justice Taney. But the quotation presented, is not what Taney wrote. Taney does not highlight the right to arms by saying "*or worse.*" Taney simply lists the right to arms as one of the privileges and immunities of citizenship after freedom of travel, speech and assembly.

Initially I thought this might just be the sort of editing snafu that horrifies all scholars and that coincidentally aids the claim that the Second Amendment was peculiarly infected by American racism. A closer look revealed that the quote, which the text attributes to Taney, is footnoted to Kellie Jackson's book *Force and Freedom*. The phrase "or worse" is sourced to Jackson. The punctuation and footnoting accurately present the passage as a quote from *Force and Freedom*, with a subquote to *Dred Scott*.[3]

The ostensible misquote of *Dred Scott* stood out to me because I am familiar with the passage. Most readers will breeze through this paragraph nodding yes, subtly influenced by the damning illustration that the Second Amendment is uniquely infected by early American racism. The reality, it is not quite as damning as the treatment suggests.

My ultimate disagreement with the broad proposition of The Second is twofold. The first is methodological. The book is not structured to prove the core proposition that the Second Amendment, unlike other constitutional rights, is fatally infected by racism. Why for example is the Second Amendment more infected by racism than administration of the Fourth Amendment, where racist bias is legendary and ongoing? Answering that question requires a detailed, critical analysis of both provisions. One cannot answer it simply by talking about the Second Amendment in isolation.

My second broad disagreement surrounds the conclusion that Blacks today should view the Second Amendment with the same disdain as the three-fifths clause. I am unconvinced that the sordid history of racist government infringement of the right to arms is reason for blacks to abjure the right rather than insist upon it.

As a practical matter my criticisms of *The Second* are less important than the things about which Anderson and I agree. The history that fuels our overlapping work is fodder for decision-making by people who will make their own choices about the salience of the American right to arms.

Of course, those decisions are only partly a function of history. They are also bets about future risks, and calculations about whether and how to plan for those risks. Some people will bet on themselves. Others, despite the history of government malevolence described in *The Second*, will rely on the idea that government makes self-help unnecessary. The right to arms ensures that Americans have a choice.

NOTES AND QUESTIONS

1. As you consider what might account for the sorts of differences between Black lawyers, scholars, and commentators that are illustrated in the questions above, it may be useful to view the webinar discussion Race and Guns, available at this link: https://www.youtube.com/watch?v=YCDMpZ8_m70.

3. Anderson at 83.

B. GENDER

Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Petitioner

District of Columbia v. Heller, 554 U.S. 570 (2008)

SUMMARY OF ARGUMENT

Domestic violence is a pervasive societal problem that affects a significant number of women and children each year. Correctly recognized as a national crisis, domestic violence accounts for a significant portion of all violence against women and children. The effect of such violence on the lives of its victims shocks the conscience. Domestic violence victims are battered and killed. They are terrorized and traumatized. They are unable to function as normal citizens because they live under the constant threat of harassment, injury, and violence. And these are just the more obvious effects. Other wounds exist beneath the surface—injuries that are not so easily recognizable as a bruise or a broken bone, but that affect victims' lives just the same. For example, victims often miss work due to their injuries, and must struggle with the prospect of losing their jobs, resulting in significant financial and emotional burdens. Lacking safe outlets for escape or legal recourse, these victims persevere.

One particularly ominous statistic stands out in its relevance here: domestic violence accounts for between one-third and almost one-half of the female murders in the United States. These murders are most often committed by intimate partners with handguns. And while murder is the most serious crime that an abuser with a gun can commit, it is not the only crime; short of murder, batterers also use handguns to threaten, intimidate, and coerce victims. Handguns empower batterers and provide them with deadly capabilities, exacerbating an already pervasive problem.

This crisis has not gone unaddressed; Congress and numerous states have attempted to limit the access that batterers have to handguns. Chief among the Congressional statutes is 18 U.S.C. 9 §22(g)(9), which addresses the lethal and widespread connection between domestic violence and access to firearms by prohibiting those convicted of domestic violence crimes from possessing guns. Many states also have laws addressing the nexus between domestic violence and firearms. For example, faced with a record of handgun violence in its urban environment, including domestic gun violence, the District of Columbia ("the District") enacted comprehensive legislation regulating handgun possession. . . . The D.C. Council had ample empirical justifications for determining that such laws were the best method for reducing gun violence in the District. Important government interests support statutes and regulations intended to reduce the number of domestic violence incidents that turn deadly; such statutes should be given substantial deference. . . .

ARGUMENT

Women are killed by intimate partners—husbands, lovers, ex-husbands, or ex-lovers—more often than by any other category of killer. It is the leading cause

of death for African-American women aged 15-45 and the seventh leading cause of premature death for U.S. women overall. Intimate partner homicides make up 40 to 50 percent of all murders of women in the United States, [and that number excludes ex-lovers, which account for as much as 11 percent of intimate partner homicides of women]. . . . When a gun [is] in the house, an abused woman [is] 6 times more likely than other abused women to be killed. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Journal, Nov. 2003, at 15, 16, 18 [hereinafter *Risk Factors*].

I. Domestic Violence Is a Serious Crime That Leaves Millions of Women and Children Nationwide Scarred Both Physically and Emotionally

. . . Experts in the field of domestic violence have come to understand domestic violence as a pattern of coercive controls broader than the acts recognized by the legal definition, including a range of emotional, psychological, and financial tactics and harms batterers perpetrate against victims. Regardless of the definition applied, domestic violence is a profound social problem with far-reaching consequences throughout the United States. Between 2001 and 2005, intimate partner violence constituted, on average, 22% of violent crime against women. In the United States, intimate partner violence results each year in almost two million injuries and over half a million hospital emergency room visits. About 22% of women, and seven percent of men, report having been physically assaulted by an intimate partner. According to one study of crimes reported by police in 18 states and the District, family violence accounted for 33% of all violent crimes; 53% of those crimes were between spouses.

Domestic violence has severe and devastating effects. Injuries such as broken bones, bruises, burns, and death, are physical manifestations of its consequences. But there are also emotional and societal impacts. Domestic violence is characterized by a pattern of terror, domination, and control—it thus obstructs victims' efforts to escape abuse and achieve safety. Victims of domestic violence often have difficulty establishing independent lives due to poor credit, rental, and employment histories resulting from their abuse. Similarly, victims often miss work due to their injuries and can ultimately lose their jobs as a result of the violence against them. Moreover, the injuries that domestic violence causes go beyond the immediate injury. Chronic domestic violence is associated with poor health, and can manifest itself as stress-related mental and physical health problems for as long as a year after the abuse.

Above all, incidents of abuse often turn deadly. American women who die by homicide are most often killed by their intimate partners—according to various studies, at least one-third, Callie Marie Rennison, Bureau of Justice Stat., *Intimate Partner Violence, 1993-2001*, NCJ 197838, at 1 (Feb. 2003) and perhaps up to one-half of female murder victims, are killed by an intimate partner. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Journal, Nov. 2003, at 18. A study based on the Federal Bureau of Investigation's Supplementary Homicide Report found that female murder victims were more than 12 times as likely to have been killed by a man they knew than by a male stranger. Violence Policy Center, *When Men Murder Women: An Analysis of 2005 Homicide Data*, at 3 (Sept. 2007) [hereinafter *When Men Murder Women*]. Of murder victims who knew their offenders, 62% were killed by their husband or intimate acquaintance. *Id.*

Although victims bear the primary physical and emotional brunt of domestic violence, society pays an economic price. Victims require significant medical attention. The Centers for Disease Control and Prevention reports that the health-related costs of domestic violence approach $4.1 billion every year. Gun-related injuries account for a large portion of that cost. Combined increased healthcare costs and lost productivity cost the United States over $5.8 billion each year. Domestic violence also accounts for a substantial portion of criminal justice system activity. For example, according to a study assessing the economic impact of domestic violence in Tennessee, the state of Tennessee spends about $49.9 million annually in domestic violence court processing fees. . . .

II. Firearms Exacerbate an Already Deadly Crisis

Domestic violence perpetrators use firearms in their attacks with alarming frequency. Of every 1,000 U.S. women, 16 have been threatened with a gun, and seven have had a gun used against them by an intimate partner. *See* [Kathleen A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely to Be Issued When Applications Mention Firearms?*, 30 Evaluation Rev. 266, 277 (2006)] (one in six victims of domestic violence who filed for a restraining order at the Los Angeles County Bar Association's Barrister's Domestic Violence Project clinic between May 2003 and January 2004 reported being threatened or harmed by a firearm). "American women who are killed by their intimate partners are more likely to be killed with guns than by all other methods combined. In fact, each year from 1980 to 2000, 60% to 70% of batterers who killed their female intimate partners used firearms to do so." Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. Am. Med. Women's Ass'n 62, 62 (2005) (noting also that "[f]our percent to 5% of women who have experienced nonlethal intimate partner violence . . . have reported that partners threatened them with guns at some point in their lives"). *See* [Susan B. Sorenson, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Rev. 229, 232 (2006)] ("Women are more than twice as likely to be shot by their male intimates as they are to be shot, stabbed, strangled, bludgeoned, or killed in any other way by a stranger.") (citation omitted); Susan B. Sorenson, *Taking Guns From Batterers*, 30 Evaluation Rev. 361, 362 (2006) (between 1976 to 2002, women in the United States were 2.2 times more likely to die of a gunshot wound inflicted by a male intimate partner than from any form of assault by a stranger); *When Men Murder Women*, *supra*, at 3 (in 2005, "more female homicides were committed with firearms (52 percent) than with any other weapon"); Vittes & Sorenson, *supra*, at 267 (55% of intimate partner homicides in 2002 were committed with a firearm).

Thus, every year, 700-800 women are shot and killed by their spouses or intimate partners, and handguns are the weapon of choice. For example, according to the Violence Policy Center, "[i]n 2000, in homicides where the weapon was known, 50 percent (1,342 of 2,701) of female homicide victims were killed with a firearm. Of those female firearm homicides, 1,009 women (75 percent) were killed with a handgun." The number remains relatively consistent. In 2004, 72% of women killed by firearms were killed by handguns. *When Men Murder Women*, *supra*, at 3.

The mere presence of or access to a firearm increases fatality rates in instances of abuse. A person intent on committing violence will naturally reach for the

deadliest weapon available. Accordingly, the presence of a gun in an already violent home acts as a catalyst, increasing the likelihood that domestic violence will result in severe injury or death. *See, e.g.*, [Kathryn E. Moracco et al., *Preventing Firearm Violence Among Victims of Intimate Partner Violence: An Evaluation of a New North Carolina Law* 1 (2006)]; Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1090 (2003) (the intimate partner's access to a gun is strongly associated with intimate partner homicide). Estimates of the increased likelihood of death when a firearm is present vary. *Compare When Men Murder Women*, *supra*, at 2 (three times more likely), *with Risk Factors*, *supra*, at 16 (six times more likely). When domestic violence incidents involve a firearm, the victim is 12 times more likely to die as compared to incidents not involving a firearm. Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns*, 30 Evaluation Rev. 296, 297 (2006).

Even when he does not actually fire his weapon, a batterer may use a gun as a tool to "threaten, intimidate, and coerce." Vittes & Sorenson, *supra*, at 267. For example, batterers make threats with their firearm by pointing it at the victim; cleaning it; shooting it outside; threatening to harm people, pets, or others about whom the victim cares; or threatening suicide. Such threats do not leave physical marks, but they can result in emotional problems, such as post-traumatic stress disorder. Thus, a firearm is a constant lethal threat, and its presence may inhibit a victim of abuse from seeking help or from attempting to leave the relationship.

The statistics reveal a stark reality—guns exacerbate the already pervasive problem of domestic violence. The use of firearms intensifies the severity of the violence and increases the likelihood that domestic violence victims will be killed by their intimate partners.

Brief for 126 Women State Legislators and Academics as Amici Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

SUMMARY OF ARGUMENT

This case provides the Court an opportunity to advance the ability of women to free themselves from being subject to another's ill will and to counter the commonly-held prejudice that women are "easier targets" simply because of their gender characteristics. Violence against women in the United States is endemic, often deadly, and most frequently committed by men superior in physical strength to their female victims.

The District's current prohibition against handguns and immediately serviceable firearms in the home effectively eliminates a woman's ability to defend her very life and those of her children against violent attack. Women are simply less likely to be able to thwart violence using means currently permitted under D.C. law. Women are generally less physically strong, making it less likely that most physical confrontations will end favorably for women. Women with access to immediately disabling means, however, have been proven to benefit from the equalization of

strength differential a handgun provides. Women's ability to own such serviceable firearms is indeed of even greater importance given the holdings of both federal and state courts that there is no individual right to police protection.

Washington, D.C.'s current firearms regulations are facially gender-neutral, and according to Petitioners, were intended to decrease the incidents of firearms violence equally among both men and women. . . . What the District's current firearms laws do is manifest "gross indifference" to the self-defense needs of women. Effectively banning the possession of handguns ignores biological differences between men and women, and in fact allows gender-inspired violence free rein. . . .

ARGUMENT

I. The Time Has Long Passed When Social Conditions Mandated That All Women Equally Depend Upon the Protection of Men for Their Physical Security

For centuries the concept of women's self-defense was as nonexistent as the idea that women were to, and could, provide their own means of financial support. That women themselves could possibly have some responsibility for their own fates was not only not a topic for debate, but would have been deemed a foolish absurdity.

A. The Defense of Women as Men's Sole Prerogative and Responsibility

Such paternalism reflected widely-accepted views of men's physical prowess vis-à-vis women generally and the roles women were expected to play in society. Few women expected to leave the confines of their families before marriage. . . .

B. Changing Demographics Heighten the Need for Many Women to Provide Their Own Physical Security

Throughout history, family and household demographics reinforced the expectation that men would be available to provide protection to women and children. Extended families were the norm across all cultural backgrounds, providing women the immediately available support of fathers, brothers, and husbands. In 1900, only 5% of households in the United States consisted of people living alone, while nearly half the population lived in households of six or more individuals.

Widespread demographic changes now make it far less likely that women will live in households with an adult male present to provide the traditionally-expected protection. In 2000, slightly more than 25 percent of individuals lived in households consisting only of themselves. Between 1970 and 2000, the proportion of women aged 20 to 24 who had never married increased from 36 to 73 percent; for women aged 30 to 34, that proportion tripled from 6 to 22 percent. While these statistics do not reflect the increasing percentage of women who choose to cohabit without marriage, it should be noted that these percentages of women living alone are likely higher in metropolitan areas of the Northeast and Mid-Atlantic.

These statistics do not emphasize the rapidly increasing number of single mothers in the District. According to a 2005 survey, there are over 46,000 single mothers living within Washington, D.C. Of those single mothers, almost half live in poverty. These women are the most immediate and often sole source of protection

of their children against abusive ex-husbands, ex-boyfriends, or unknown criminals who prey on the District's most vulnerable households. Many do not have the resources to choose neighborhoods in which their children face few threats or to install expensive monitoring systems and alarms. Moreover, many will not have the knowledge or social network to access those violence prevention services available. An inexpensive handgun, properly stored to prevent access to children, could therefore very well be the sole means available for these women to protect themselves and their children. *See also* Brief of *Amici Curiae* International Law Enforcement Educators and Trainers Association, *et al.*, in Support of Respondent ("Int'l L. Enf. Educ. & Trainers Assoc. Br.") at section II.D. (discussing the increasingly rare incidents of gun accidents).

In addition to young women and those who are single mothers, there is an increasing number of elderly women who live alone and feel highly vulnerable to violent crime. Greater improvements in female than in male mortality rates have increased the percentage of women aged 65 and older who live alone. From 1960 to 2000, women aged 65 and over accounted for a single digit percentage of the total population but more than 30 percent of households consisting of only one person. This population of older women living alone will only increase as baby boomers age and fewer children are capable of caring for aging parents. Some 40 percent of elderly and mid-life women have below-median incomes, leaving them with little or no choice of neighborhoods and expensive security measures. Edward R. Roybal, *The Quality of Life for Older Women: Older Women Living Alone*, H.R. Rep. No. 100-693, at 1 (2d Sess. 1989). . . .

II. Equal Protection in Washington, D.C. Now Means That Women Are Equally Free to Defend Themselves from Physical Assault Without the Most Effective Means to Truly Equalize Gender-Based Physical Differences

. . . Violence against women is predominately gender-based, most often perpetrated by men against the women in their lives. Men who react with violence against women in the domestic sphere often seek to reassert their control over those whom the men believe should be held as subordinates. Since 1976, approximately 30% of all U.S. female murder victims have been killed by their male, intimate partners. . . .

A. Violence Against Women in the District of Columbia and the District's Response

In 2005, the Metropolitan Police Department (MPD) received over 11,000 calls reporting a domestic violence crime or about 30 calls per day. There were 51 murders attributed to domestic violence between 2001 and 2004, counting only those cases in which the so-called victim-offender relation could be proven. These statistics of course cannot convey the number of women who live in perpetual fear that an abuser will return and escalate the violence already experienced. As to those women who are able to report domestic violence-related crimes or who choose to do so, the MPD is often simply unable to take any proactive measures to protect their safety. In 2004, the MPD's Civil Protection and Temporary Protection Unit was able to locate and serve only 49.6% of those against whom a protection order had been issued.

Such statistics are even more alarming when it is understood that domestic batterers who ultimately take the lives of women are repeat offenders, most likely those with both a criminal background and repeated assaults against the women they eventually murder. Murray A. Straus, Ph.D., *Domestic Violence and Homicide Antecedents*, 62 Bull. N.Y. Acad. Med. 457 (No. 5 June 1986). These are not men who inexplicably react violently one day and then never again present a threat. One study found that a history of domestic violence was present in 95.8% of the intra-family homicides studied. In 2004, the District's Police Department reported that of the 7,449 homes from which domestic violence was reported, almost 13% had three or more calls that year alone. These numbers cannot account for the violence that is never reported, or for which only some incidents are reported.

Women who eventually face life-threatening dangers from a domestic abuser or stalker are therefore well aware of the specific threat presented. In fact, Petitioners' *Amici* may well be correct in their claim that "female murder victims were more than 12 times as likely to have been killed by a man they knew than by a male stranger" and that "[o]f murder victims who their knew their offenders, 62% were killed by their husband or intimate acquaintance." Brief of *Amici Curiae* National Network to End Domestic Violence, *et al.*, in Support of Petitioners at 23 ("Pets' Network Br."). Such knowledge of an individualized threat should allow women to more easily prepare the best defenses they can employ, using their ability to weigh the threat against their ability to protect themselves should the threat ever become one of serious bodily injury or death. Current D.C. gun restrictions on handguns and serviceable firearms in the home simply eliminate that option for women altogether.

Those women who are attacked by strangers or whose children are in danger should also be provided the option of choosing a firearm if they would feel safer having one in their home. Other women who live alone, particularly the elderly who are more likely to be of lower incomes, may not have choices as to where they must live, nor the ability to relocate if stalked. These women too should be able to weigh the threat of an unknown assailant against their ability to defend themselves should they ever be attacked in the privacy of their own homes.

Without the freedom to have a readily available firearm in the home, a woman is at a tremendous disadvantage when attempting to deter or stop an assailant should her attacker allow her no other option. Reflecting upon one of the most notorious tragedies of domestic abuse turned murder, Andrea Dworkin stated directly the stakes involved:

> Though the legal system has mostly consoled and protected batterers, when a woman is being beaten, it's the batterer who has to be stopped; as Malcolm X used to say, "by any means necessary"—a principle women, all women, had better learn. A woman has a right to her own bed, a home she can't be thrown out of, and for her body not to be ransacked and broken into. She has a right to safe refuge, to expect her family and friends to stop the batterer—by law or force—before she's dead. She has a constitutional right to a gun and a legal right to kill if she believes she's going to be killed. And a batterer's repeated assaults should lawfully be taken as intent to kill.

Andrea Dworkin, In Memory of Nicole Brown Simpson, in Life and Death: Unapologetic Writings on the Continuing War Against Women 41, 50 (Free Press 1997).

It must be added, however, that it is not just the physical cost of violence against women that must be considered. A woman who feels helpless in her own home is simply not an autonomous individual, controlling her own fate and able to "participate fully in political life." While possessing a handgun or a serviceable long gun in the home will of course not erase all incidents of sex-based violence against women, denying women the right to choose such an option for themselves does nothing but prevent the independent governance women must be afforded.

Self-defense classes, particularly those involving training women to use handguns, often help to provide women the sense of self-worth necessary for them to feel equals in civil society. *See* Martha McCaughey, Real Knockouts: The Physical Feminism of Women's Self-Defense (N.Y. Univ. Press 1997). Women who take such classes no longer see themselves as powerless potential victims, but as individuals who may demand that their rights be respected. There is some evidence that men recognize this transformation and alter their conduct toward those women. As one study noted, "[t]he knowledge that one can defend oneself—and that the self is valuable enough to merit defending—changes everything." Jocelyn A. Hollander, *"I Can Take Care of Myself": The Impact of Self-Defense Training on Women's Lives*, 10 Violence Against Women 205, at 226-27 (2004). Therefore, even if women are never placed in a position to defend themselves with a firearm or their own bodies, there are less material but no less compelling justifications for allowing them that ability. *E.g.*, Mary Zeiss Stange, *From Domestic Terrorism to Armed Revolution: Women's Right to Self-Defense as an Essential Human Right*, 2 J. L. Econ. & Pol'y 385-91 (2006).

B. The Benefits of Handguns for Women Facing Grave Threat

For years women were advised not to fight back and to attempt to sympathize with their attackers while looking for the first opportunity to escape. Well-meaning women's advocates counseled that such passivity would result in fewer and less serious injuries than if a woman attempted to defend herself and angered the perpetrator. More recent, empirical studies indicate, however, that owning a firearm is one of the best means a woman can have for preventing crime against her. The National Crime Victimization Survey ("NCVS") indicates that allowing a woman to have a gun has a "much greater effect" on her ability to defend herself against crime than providing that same gun to a man. In fact, the NCVS and researchers have concluded that women who offer no resistance are 2.5 times more likely to be seriously injured than women who resist their attackers with a gun. While the overall injury rate for both men and women was 30.2%, only 12.8% of those using a firearm for self-protection were injured. Subjective data from the 1994 NCVS reveals that 65 percent of victims felt that self-defense improved their situation, while only 9 percent thought that fighting back caused them greater harm.

Given relative size disparities, men who threaten women and children can easily cause serious bodily injury or death using another type of weapon or no weapon at all. Between 1990 and 2005, 10% of wives and 14% of girlfriends who fell victim to homicide were murdered by men using only the men's "force" and no weapon of any type. It should also be noted that a violent man turning a gun on a woman or child announces his intent to do them harm. A woman using a gun in self-defense does so rarely with the intent to cause death to her attacker. Instead, a woman in such a situation has the intent only to sufficiently stop the assault and to gain control of the situation in order to summon assistance. This simple brandishing of a

weapon often results in the assailant choosing to discontinue the crime without a shot having been fired. *See also* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Crimin. 150 (1995); Gary Kleck, *Policy Lessons From Recent Gun Control Research*, 49 Law and Contemporary Problems 35, 44 (No. 1 Winter 1986) (noting that only a small minority, 8.3% of defensive gun uses, resulted in the assailant's injury or death).

The value of widespread handgun ownership lies not only in the individual instances in which a violent criminal is thwarted while attempting to harm someone, but in the general deterrent effects created by criminals' knowledge of firearms ownership among potential victims. Women alarmed by a series of savage rapes in Orlando, Florida in 1966 rushed local gun stores to arm themselves in self-defense. In a widely publicized campaign, the Orlando Police Department trained approximately 3,000 in firearms safety. According to the FBI Uniform Crime Report for 1967, the city then experienced over an 88% reduction in rapes, while rape throughout Florida continued to increase by 5% and nationwide by 7%. Similar crime reduction efforts involving well-publicized firearms ownership in other U.S. cities saw comparable reductions in the rates of armed robbery and residential burglaries. *See also* Don B. Kates, Jr., *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 Am. J. of Crim. L. 113, 153-56 (1991) (describing the deterrent effects handguns create for crimes requiring direct confrontation with a victim such as rape and robbery and for non-confrontational crime such as car theft and the burglary of unoccupied locations); Int'l L. Enf. Educ. & Trainers Assoc. Br. at sections I.B., I.G. (discussing the crime deterrence value of victim armament).

Violent criminals who may view women as easy targets find their jobs far less taxing in communities such as Washington, D.C. Researchers conducting the [National] Institute of Justice Felon Survey confirm the common-sense notion that those wishing to do harm often think closely before confronting an individual who may be armed. According to this survey, some 56% of the felons agreed that "[a] criminal is not going to mess around with a victim he knows is armed with a gun." Over 80% agreed that "[a] smart criminal always tries to find out if his potential victim is armed," while 57% admitted that "[m]ost criminals are more worried about meeting an armed victim than they are about running into the police." Some 39% said they personally had been deterred from committing at least one crime because they believed the intended victim was armed, and 8% said they had done so "many" times. Almost three-quarters stated that "[o]ne reason burglars avoid houses when people are at home is that they fear being shot during the crime." James D. Wright and Peter H. Rossi, 145 *Armed and Considered Dangerous, a Survey of Felons and Their Firearms* (Aldine de Gruyter, 1986). Some 34% said they had been "scared off, shot at, wounded, or captured by an armed victim" at some point in their criminal careers, while almost 70% had at least one acquaintance who had a similar previous experience. *Id.* at 154-55.

Stalkers and abusive boyfriends, spouses, or ex-spouses may be even more significantly deterred than the hardened, career felons participating in this survey. Under current Washington, D.C. gun regulations, stalkers and violent intimate partners may be confident that their female victims have not armed themselves since the threats or violence began. Many of these men have already been emboldened by women's failure to report such threats and previous violence, or by the

oftentimes inadequate resources available to help such women. Allowing women the option to purchase a serviceable handgun will not deter all stalkers and abusive intimate partners willing to sacrifice their own lives. However, the fact that men inclined toward violence will know that women have that choice and may well have exercised it will no doubt inhibit those less willing to pay that price.

The District would like to restrict women's choice of firearm to those it gauges most appropriate rather than to allow rational women the ability to decide whether a handgun is more suited to their needs. Petitioner's Brief cites two articles from firearms magazines in which a shotgun is mentioned as appropriate for home defense. . . . An assembled shotgun is certainly better than nothing and could provide deterrence benefits provided it is accessible to a woman. However, most women are best served by a handgun, lighter in weight, lighter in recoil, far less unwieldy for women with shorter arm spans, and far more easily carried around the home than a shotgun or rifle. Moreover, women who are holding a handgun are able to phone for assistance, while any type of long gun requires two hands to keep the firearm pointed at an assailant. *See also* Int'l L. Enf. Educ. & Trainers Assoc. Br. at section III. The fact that two articles in firearms magazines suggest a long gun for home defense should not impinge upon the constitutional right for a woman to select the firearm she feels most meets her needs.

Petitioner's *Amici* claims that allowing firearms in the home will only increase women's risk of being murdered. In fact, Petitioners' *Amici Curiae* opens its argument by stating that, when a gun is in the home, an abused woman is "6 times more likely" to be killed than other abused women. Pets' Network Br. at 20. However, this statistic has some verifiable basis only when particular adjustments for other risk factors are weighed. Most importantly, any validity that statistic holds is only for battered women who live with abusers who have guns. The odds for an abused woman living apart from her abuser, when she herself has a firearm, are only 0.22, far below the 2.0 level required for statistical significance. The presence of a firearm is simply negligible compared to obvious forewarnings such as the man's previous rape of the woman, previous threats with a weapon, and threats to kill the woman. Moreover, the "most important demographic risk factor for acts of intimate partner femicide" is the male's unemployment. Jacquelyn C. Campbell, Ph.D., RN, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1090-92 (No. 7 July 2003). Programs that help women leave an already terribly violent situation and that decrease unemployment should therefore be keys to the abatement of femicide, not laws that serve only to disarm potential victims.

It must also be noted that allowing women handguns will not increase the type of random, violent crime that causes such uneasiness among District residents. Women are far less likely to commit murder than are men. Despite being roughly half of the U.S. population, women comprised only 10% of murder offenders in 2006 and 2004, only 7% in 2005. Even more important to note are the circumstances under which women kill. Some estimates indicate that between 85% and 90% of women who commit homicides do so against men who have battered them for years. Allison Bass, *Women Far Less Likely to Kill than Men; No One Sure Why*, Boston Globe, February 24, 1992, at 27. *See also* Int'l L. Enf. Educ. & Trainers Assoc. Br. at Section II.A. One 1992 study by the Georgia Department of Corrections reported that of the 235 women serving jail time for murder or manslaughter in

Georgia, 102 were deemed domestic killings. Almost half those women claimed that their male partners had regularly beaten them. The vast majority of those who claimed previous beatings had repeatedly reported the domestic violence to law enforcement. Kathleen O'Shea, *Women on Death Row* in *Women Prisoners: A Forgotten Population* 85 (Beverly Fletcher *et al.* eds., Praeger, 1993). *See also* Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, *in* 3 Advances in Applied Soc. Psych. 61 (Michael Saks & Leonard Saxe, eds., 1986) (including FBI data that 4.8% of all U.S. homicides are women who have killed an intimate partner in self-defense.) While these deaths are of course tragic, their occurrences do not indicate that women with access to handguns will commit the random acts of violence law-abiding residents most fear.

Men and women with a history of aggression, domestic violence, and mental disturbance are already prohibited from possessing firearms under both federal and District of Columbia law. Federal law bars possession to any individual who has been convicted of a "crime punishable by imprisonment for a term exceeding one year," who is an "unlawful user of or addicted to any controlled substance," who has been "adjudicated as a mental defective or who has been committed to a mental institution," who is under an active restraining order, or who has been "convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. 9 §§22(g)(1), (3), (4), (8), (9)[.] Washington, D.C. law contains similar provisions, but adds as prohibited persons chronic alcoholics and those who have been "adjudicated negligent in a firearm mishap causing death or serious injury to another human being." D.C. Code 7 §§-2502.03(a)(5), (a)(8). Rigorous enforcement of existing law should therefore minimize the risk that both men and women with histories of violence, mental instability, or negligence with a firearm will have a firearm in their homes.

C. Women May Not Depend upon the District's Law Enforcement Services

The situation now in Washington, D.C. is that women can no longer depend upon the men in their lives to provide protection against violent crime, nor do women themselves have access to handguns that equalize the inherent biological differences between a woman victim and her most likely male attacker. The traditional emphasis of men's duty to protect women not only increases this defenselessness, but in fact has proved of less worth as increasingly more women live alone. Women in the District have therefore been compelled to rely upon the protections of a government-provided police force.

Courts have found that such reliance is unfounded. *See* Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R.5th 273 (2001). Despite women's expectations, courts across the nation have ruled that the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Soc. Servs.*, 489 U.S. 189, 194 (1989). Women simply have no legal right to law enforcement protection unless they are able to prove special and highly narrow circumstances. Just how special and highly narrow those circumstances are were proven in this Court's *Castle Rock v. Gonzales* decision. 545 U.S. 748 (2005). In *Castle Rock*, the Court found that a temporary restraining order, a mandatory arrest statute passed with the clear legislative intent

of ensuring enforcement of domestic abuse restraining orders, and Jessica Gonzalez's repeated pleas for help were insufficient for her to demand protection. *Castle Rock* therefore left open the question of just what a woman and a well-meaning legislature would have to do to create such a right to expect police protection from a known and specific threat.

There is no case that better illustrates both how little individual citizens may demand of their local police forces and the utility of a serviceable firearm than Washington, D.C.'s own *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981). One morning two men broke down the door and climbed to the second floor of a home where a mother and her four-year-old daughter were sleeping. The men raped and sodomized the mother. Her screams awoke two women living upstairs, who phoned 911 and were assured that help would soon arrive. The neighbors then waited upon an adjoining roof while one policeman simply drove past the residence and another departed after receiving no response to his knock on the door. Believing the two men had fled, the women climbed back into the home and again heard their neighbor's screams. Again they called the police. This second call was never even dispatched to officers.

After hearing no further screams, the two women trusted that police had indeed arrived and called down to their neighbor. Then alerted to the presence of two other victims nearby, the men proceeded to rape, beat, and compel all three women to sodomize each other for the next fourteen hours. Upon their seeking some compensation from the District for its indifference, the women were reminded that a government providing law enforcement services "assumes a duty only to the public at large and not to individual members of the community."*Id.* at 4. The District thus simultaneously makes it impossible for women to protect themselves with a firearm while refusing to accept responsibility for their protection.

III. Gender Characteristics Should at Least Be Considered Before Barring Law-Abiding Women Handguns, the Most Suitable Means for Their Self-Protection

Women are at a severe disadvantage when confronting a likely stronger male assailant. In general, women simply do not have the upper body strength and testosterone-driven speed to effectively defend themselves without help. A firearm, particularly an easily manipulable handgun, equalizes this strength differential and thereby provides women the best chance they have of thwarting an attacker. Even more statistically likely, a firearm in the hands of a threatened woman offers the deterrence empty hands and an often unavailing 911 call do not. *E.g.*, Int'l L. Enf. Educ. & Trainers Assoc. Br. at section I.E. (noting that in 2003, Washington, D.C.'s average police response time for the highest-priority emergency calls was almost 8 and a half minutes). Even in cases in which a 911 response would be effective, an attacker in control of the situation will not allow a woman to pick up the phone to make that call.

Women have made such advances in equality under the law that it is altogether too easy to disregard the innate gender-based biological inequality when it comes to self-defense. Television provides countless examples of strong women standing toe-to-toe against male evildoers and emerging with only minor cuts and bruises. Our invariably gorgeous heroines manage to successfully defend themselves without so

much as smudging their make-up or breaking a heel off their stilettos. Women with children are commonly depicted imploring their children to be silent until a caravan of police cars arrives with sirens blaring to finally arrest the assailant. Such images do not conform with most people's experiences and do nothing to decrease the level of violence actual women often suffer.

Advocates of women's reproductive choice commonly argue that pregnancy disproportionately affects women due to their innate gender-based characteristics. Thus, they argue, courts failing to recognize the right to terminate a pregnancy therefore discriminate against women and bar their ability to participate as equal and full members of civil society. While choices about pregnancy no doubt impact a woman's ability to determine the course of part of her life, it is not clear why such a right should be due greater protection than a woman's ability to defend her very existence. A woman who is murdered, a woman who is so badly injured that she may never recover emotionally and/or physically, and a woman who feels constantly helpless faces even greater barriers to her ability to function as an equal member of society.

Amicae therefore contend that depriving women of the right to possess a handgun in the privacy of their own homes reflects at best an insensitivity to women's unique needs created by their inherent gender characteristics. A handgun simply is the best means of self-defense for those who generally lack the upper body strength to successfully wield a shotgun or other long gun. To therefore deny half the population a handgun, as the District and the Office of the Solicitor General urge, evinces the "blindness or indifference" to women that only perpetuates women's vulnerability to physical subordination. . . .

NOTES & QUESTIONS

1. Although there is considerable overlap between the two assessments of the risks and dangers faced by women in our society, the briefs take very different views about how to combat those dangers. What explains the different assessments? Do these competing assessments simply reflect different estimates about the risks and utilities of firearms? If so, can this disagreement be resolved empirically?

2. Assume that the empirical case was convincing one way or the other. Is there a difference between measurements of the past and expectations about future events? Do you generally find empirical evidence convincing when making decisions about the future?

3. Assume you are a woman living in a high-crime neighborhood and are considering obtaining a firearm for self-protection. How much of your decision will be based on data about the risks and utilities of firearms? What other factors might influence your decision? What are the factors that *should* influence a personal decision to obtain a firearm? Are those the same factors that should influence public officials who set firearms policy?

4. Robin West argues that the failure of state and social institutions to protect women justifies the right to abortion. "To whatever degree we fail to create the minimal conditions for a just society, we also have a right, individually and fundamentally to be shielded from the most dire or simply the most damaging consequences of that failure. . . . We must have the right to opt out of an unjust patriarchal world

that visits unequal but unparalleled harms upon women . . . with unwanted pregnancies." Robin L. West, *The Nature of the Right to an Abortion*, 45 Hastings L.J. 961, 964, 965 (1994). Does that argument also support a woman's claim of right to own a firearm for self-defense?

5. There is no doubt that an abused woman is at substantially greater risk if her abuser has a gun, as pointed out in the National Network brief. However, as noted in the Women State Legislators and Academics brief, research shows no statistically significant heightened risk to an abuse victim who both lives apart from her abuser and has her own gun. Living with armed abuser results in 7.59 odds ratio for increased risk of femicide, an odds ratio so high as to almost certainly be statistically valid. (In other words, a woman who lives with an armed abuser is about 750 percent more likely to be murdered than is a woman who lives with an unarmed abuser.) Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 Am. J. Pub. Health 1089, 1090-92 (2003).

6. The brief of the Women State Legislators and Academics disclaims the position that *only* women should have a constitutional right to a handgun. However, could you construct an argument for such a position, using the data in the two briefs above? Laws that discriminate on the basis of sex are generally subject to intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment. (This review sometimes comes close to strict scrutiny in practice. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (striking down a state military college's single-sex admissions policy, and holding that an "exceedingly persuasive justification" was required before "gender-based government action" could be upheld).) If *Heller* had not recognized a right of individuals to own handguns, would it be constitutional for a city or state to enact a law prohibiting men, but not women, from owning handguns? Are there any circumstances today where gender-based firearms legislation might be upheld against Second Amendment challenge, Fourteenth Amendment challenge, or both? Where might it be appropriate?

7. Does *Heller* represent a masculine or paternalistic view of guns and home defense? Jennifer Carlson and Kristin A. Goss argue that

> [t]his centering of the Second Amendment on the home and the family provides a ripe context for men to stake their status as men. Contemporary gun culture often follows a familial prerogative that locates men's rights and obligations to own, carry, and use guns in their social roles as fathers and husbands. This citizen-protector model of gun-oriented masculinity makes the political personal: Men's obligations, rights, and duties associated with firearms are focused on their respective households and, to a lesser extent, on their communities. As men, particularly but not exclusively white conservative men, face socioeconomic insecurity and political and social threat, guns provide a means to a version of masculinity marked by dutiful protection and justified violence. As the New Right emphasizes a narrative about the state's inadequacy in the public sphere and its illegitimacy in the private sphere, guns provide a space for men to practice and affirm their role in community and family protection.

Jennifer Carlson & Kristin A. Goss, *Gendering the Second Amendment*, 80 Law & Contemp. Probs. 103, 124-25 (2017); *see also* Jennifer Carlson, Citizen-Protectors: The Everyday Politics of Guns in an Age of Decline (2015) (study of Michigan

concealed carry licensees, arguing that adult males embrace the protector role when statewide economic decline prevents them from fulfilling the provider role); C.D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 Wm. & Mary J. Women & L. 477 (2017) (arguing that "a peculiarly American conception of masculinity underpins the judicial construction of the Second Amendment's core purpose as guaranteeing the right to armed defense of one's self and one's home"); *cf.* George A. Mocsary, *Are There Guns in Mayberry?*, Libr. L. & Liberty (Oct. 17, 2016) (reviewing Carlson, Citizen-Protectors: The Everyday Politics of Guns in an Age of Decline *supra*). Do you agree?

8. For a discussion of the Second Amendment through the lens of "social justice feminism," see Verna L. Williams, *Guns, Sex, and Race: The Second Amendment Through a Feminist Lens*, 83 Tenn. L. Rev. 983 (2016) (arguing that congressional and judicial protection of arms rights reinforces "white patriarchy").

9. Wicca is a modern religion based in part on nature religions of the past. It has a strongly feminist orientation. For analysis of Wiccan attitudes and practices involving arms, see A.M. Wilson, *Witches and Guns: The Intersection between Wicca and the Second Amendment*, 12 J.L. & Soc. Deviance 43 (2016).

C. AGE AND PHYSICAL DISABILITY

People who are physically weaker than average may have heightened concerns about their physical security. The two briefs that follow reflect that concern but take different views about the effectiveness of gun control and the utility of private firearms.

Brief for American Academy of Pediatrics et al. as Amici Curiae Supporting the Petition for Writ of Certiorari

District of Columbia v. Heller, 554 U.S. 570 (2008)

ARGUMENT

I. Handguns Pose a Unique Danger to Children and Youth

Handguns pose a danger to all citizens. Handguns are more likely than any other type of gun to be used in interpersonal violence and crime, as well as self-directed injury. Firearm & Inj. Ctr. at Penn, *Firearm Injury in the U.S.*, at 7 (Oct. 2006). Indeed, handguns are used in nearly 70 percent of firearm suicides and 75 percent of firearm homicides in the United States. *See* Garen J. Wintemute et al., *The Choice of Weapons in Firearm Suicides*, 78 Am. J. Pub. Health 824 (1988); Stephen W. Hargarten et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42 (1996). Handguns account for 77 percent of all traced guns used in crime. Firearm & Inj. Ctr. at Penn, *supra*, at 8.

Handguns, however, pose a particular risk to children and adolescents. When a gun is carried outside the home by a high school-aged youth, it is most likely to be a semiautomatic handgun (50 percent) and next most likely to be a revolver

(30 percent). Josh Sugarmann, Every Handgun Is Aimed at You: The Case for Banning Handguns 113 (2001) (citing Joseph F. Sheley & James D. Wright, Nat'l Inst. of Justice, High School Youths, Weapons, and Violence: A National Survey 6 (1998)). Further, there is no way to make guns "safe" for children — gun safety programs have little effect in reducing firearms death and injury. *Id.* at 125. Death and injury to America's children and youth is undeniably linked to the presence and availability of handguns, as discussed further below.

A. The District of Columbia Handgun Law Is a Reasonable Restriction Because Handguns Make Suicide More Likely and Suicide-Attempts More Injurious to Children and Adolescents

Access to firearms, and handguns in particular, increases the risk that children will die in a firearm-related suicide. In 1997, 1,262 children committed suicide using a firearm, and 63 percent of all suicides in adolescents 15 through 19 years of age were committed with a firearm. Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, [*Firearm-Related Injuries Affecting the Pediatric Population*, 105 Pediatrics 888,] 889-90 Fig. 1 [(Apr. 2000)]. In 1996, handguns were involved in 70 percent of teenage suicides in which a firearm was used. *Id.* at 889.

Case studies reveal that suicide by firearm is strongly associated with the presence of a gun in the home of the victim. *See generally* David A. Brent et al., *Firearms and Adolescent Suicide*, 147 Am. J. of Diseases of Child. 1066 (1993); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467 (1992). In fact, the risk of suicide is five times greater in households with guns. Brent, *supra*, at 1068. A study on adolescent suicide and firearms found that while 87.8 percent of suicide victims who lived in a home with a gun died by firearms, only 18.8 percent of suicide victims that did not have a gun died by firearms. *Id.* Even more telling is that homes with handguns have a risk of suicide almost twice as high as that in homes containing only long guns. Kellermann, *supra*, at 470.

Moreover, statistics reveal that restrictions on access to handguns in the District of Columbia significantly reduced the incidence of suicide by firearms and resulted in a substantial reduction in the number of deaths by suicide. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615, 1617 (1991). A study by the Institute of Criminal Justice and Criminology at the University of Maryland showed a decline of 23 percent in the number of suicides by firearms in the District of Columbia from 1968 to 1987. *Id.* at 1616 tbl. 1. Tellingly, the number of non-firearm-related suicides in the District of Columbia during that same time frame did not decline; nor did the number of firearm-related suicides in neighboring communities that were not subject to a similar ban on handguns. *Id.* at 1617-18. Additionally, the reduction in the number of suicides by firearms in the District during this time did not result in a corresponding increase in the incidents of suicides by other means. *See id.* at 1619. Thus, researchers concluded from the study that "restrictions on access to guns in the District of Columbia prevented an average of 47 deaths each year after the law was implemented." *Id.*

In addition, between 2000 and 2002, no child under the age of 16 died from suicide by firearm in the District of Columbia. In contrast, states without handgun bans (and less restrictive guns laws generally), such as Alaska, Montana and Idaho, led the country with 14, 15, and 15, respectively, firearm suicide deaths, respectively, in the same population in the same time period. Violence Pol'y Ctr., Press Release,

New Study Shows District of Columbia's Tough Gun Laws Work to Prevent Youth Suicide—No Child 16 Years of Age or Younger in DC Was the Victim of Firearm Suicide According to Most Recent Federal Data (July 12, 2005). Given that in 2003, the third leading cause of death nationwide among youth aged ten to twenty-four was suicide and that the risk of suicide is five times greater in homes with guns, invalidation of the law will almost certainly increase the number of children that die from a suicide. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Vital Statistics Sys., Nat'l Ctr. for Health Statistics, *10 Leading Causes of Death by Age Group, United States–2003.*

B. The District of Columbia's Handgun Law Is a Reasonable Restriction Because Handguns Increase the Likelihood and Deadliness of Accidents Involving Children

The increased accessibility to handguns that will result if the District of Columbia handgun ban is struck down will increase the number of children who will be harmed in accidents involving firearms. Studies have shown that fewer than half of United States families with both firearms and children secure firearms separate from ammunition. *See, e.g.*, Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes with Children*, 90 Am. J. of Pub. Health 588, 590-91 (2000). This practice is especially troubling because children as young as three are able to pull the trigger of most handguns. Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, *supra*, at 890. Approximately 70 percent of all unintentional firearm injuries and deaths are a result of handguns. *Id.* at 888.

Unintentional firearm death disproportionately affects children: In 2004, firearms accounted for 27 percent of the unintentional deaths in 2004 among youth aged 10-19, while accounting for only 22 percent of unintentional deaths among the population as a whole. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, WISQARS database. Additionally, each year nearly 90 children are killed and approximately 1,400 are treated in hospital emergency rooms for unintentional firearm-related injuries. SAFE KIDS USA, Press Release, *Unintentional Shooting Prompts SAFE KIDS to Issue Warning About Dangers of Guns in the Home* (2003). Most of these deaths occur in or around the home, and most involve guns that are loaded and accessible to children. *Id.*

The more guns a jurisdiction has, the more likely children in that jurisdiction will die from a firearm accident. In a study of accidental firearm deaths that occurred between 1979 and 1999, children aged four and under were 17 times more likely to die from a gun accident in the four states with the most guns versus the four states with the fewest guns. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 333 Accident Analysis & Prevention 477, 481 Table 3 (2001). Thus, if the decision to strike the handgun ban in the District of Columbia is not reversed, the number of children who will die or be injured by handguns accidentally will increase significantly.

C. The District of Columbia Handgun Law Is a Reasonable Restriction Because Firearms and Especially Handguns Increase Homicide and Nonfatal Assault Rates Among America's Youth

Firearm-related homicides and assaults affect children, adolescents, and young adults in staggering measure. Between 1987 and 1992, adolescents aged 16

to 19 had the highest rate of handgun crime victimization, nearly three times the average rate. Michael R. Rand, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, NCJ 147003 (Apr. 1994, rev. Sept. 2002). Between 1993 and 1997, those aged 19 and younger accounted for 20 percent of firearm homicide victims and 29 percent of victims of nonfatal firearm injury from assault. Marianne W. Zavitz & Kevin J. Strom, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearm Injury and Death from Crime, 1993-1997*, at 3, NCJ 182993 (Oct. 2000). For the period 1993-2001, of the average 847,000 violent victimizations committed with firearms each year, 87 percent were committed with handguns. Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *Nat'l Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime*, at 3, NCJ 194820 (Sept. 2003). In 2005, 25 percent of the nation's 10,100 firearm homicide victims were under the age of 22. U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States, 2005*, at Table 8 (Murder Victims by Age by Weapon, 2005) (2006). Handguns were responsible for 75 percent of those homicides. *Id.* at Table 7 (Murder Victims by Weapon, 2001-2005). Indeed, the number of juvenile handgun homicides is directly correlated to the overall number of juvenile homicides. Sugarmann, *supra*, at 116 Fig. 7-7.

Moreover, nationally, children and young adults are killed by firearms more frequently than almost any other cause of death. In 2004, firearm homicide was the second leading cause of injury death for persons 10 to 24 years of age, second only to motor vehicle crashes. Brady Campaign Publication, *Firearm Facts* (Apr. 2007). Incredibly, in that same year, firearm homicide—not car accidents—was the leading cause of death for African American males between the ages of 15 and 34. *Id.* Children and youth are murdered with handguns more often than all other weapons combined. Violence Pol'y Ctr., *Kids in the Line of Fire: Children, Handguns, and Homicide*. And, for every child killed by a gun, four are wounded. Diane [sic] Degette, *When the Unthinkable Becomes Routine*, 77 Denv. U. L. Rev. 615, 615 n.5 (2000).

Finally, firearms (particularly handguns) represent the leading weapon utilized by both children and adults in the commission of homicide. *See* Fox Butterfield, *Guns Blamed for Rise in Homicides by Youths in the 80's*, N.Y. Times, Dec. 10, 1998, at 29. Between 1985 and 2002, the firearm homicide death rate increased 36 percent for teens aged 15 to 19 nationwide. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, WISQARS database. Not coincidentally, in each year after 1985, handguns have been the most used homicide weapon by juveniles (those age 17 and under) nationwide. Alfred Blumstein, *Youth, Guns, and Violent Crime*, 12 The Future of Children 39, at Fig. 5 (2002). Scholars note that the dramatic increases in the rate of homicide committed by juveniles are attributable largely to the increases in homicides in which a firearm is used. Alan Lizotte, *Guns & Violence: Patterns of Illegal Gun Carrying Among Young Urban Males*, 31 Val. U. L. Rev. 375, 375 (1998). University of California, Berkeley law professor Frank Zimring has observed, "the most important reason for the sharp escalation in homicide [among offenders 13 to 17] was an escalating volume of fatal attacks with firearms." Franklin E. Zimring, American Youth Violence 35-36 (1998).

Handgun bans alleviate the problem of firearm homicide. Researchers at the Institute of Criminal Justice and Criminology at the University of Maryland found that gun-related homicides in the District of Columbia dropped 25 percent after

the enactment of the ban. Loftin et al., *supra*, at 1616 Table 1. In addition, the relatively low incidence of gun-related violence in America's schools proves that gun bans work. Thanks to the absolute prohibition of guns on the nation's elementary and secondary school campuses, fewer than one percent of school-aged homicide victims are killed on or around school grounds or on the way to and from school. Jill F. DeVoe et al., U.S. Dep't of Justice, Bureau of Justice Statistics and U.S. Dep't of Education, Nat'l Ctr. for Ed. Statistics, *Indicators of School Crime and Safety: 2004*, at iii, NCES 2005-002/NCJ 205290 (2005). In each year between 1992 and 2000, children and youth aged five to 19 were at least 70 times more likely to be murdered away from school than at school. *Id.* at 1. College campuses also reflect similarly lower rates for on-campus as compared to off-campus violence, Katrina Baum & Patsy Klaus, U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Victimization of College Students 1995-2002*, at 1, NCJ 206836 (2005).

II. The District's Handgun Law Is a Reasonable Restriction Because of the Economic, Societal, and Psychological Costs of Handgun Violence upon Children

As discussed above, handguns are directly responsible for increasing the number of deaths and injuries to children and families from violent crime, suicide and accidents. The most serious harm resulting from youth violence is caused by firearms; most firearm-related injuries, in turn, involve handguns.

The economic, societal and psychological costs of youth violence also are well established. According to Centers for Disease Control and Prevention statistics, the consequences of youth violence include:

> Direct and indirect costs of youth violence (e.g., medical, lost productivity, quality of life) in excess of $158 billion every year. . . .
>
> In a nationwide survey of high school students, about six percent reported not going to school on one or more days in the 30 days preceding the survey because they felt unsafe at school or on their way to and from school. . . .
>
> In addition to causing injury and death, youth violence affects communities by increasing the cost of health care, reducing productivity, decreasing property values, and disrupting social services. . . .

The public bears the majority of these costs. A recent study found that, in 2000, the average cost for each: (i) homicide was $4,906 in medical costs, and $1.3 million in lost productivity; (ii) non-fatal assault resulting in hospitalization was $24,353 in medical costs and $57,209 in lost productivity; (iii) suicide was $2,596 in medical costs and $1 million lost productivity; and (iv) non-fatal self inflicted injury was $7,234 in medical costs and $9,726 in lost productivity. Phaedra S. Corso et al., *Medical Costs and Productivity Losses Due to Interpersonal Violence and Self-Directed Violence*, 32 Am. J. of Preventive Med. 474 (2007). . . .

Economic costs provide, at best, an incomplete measure of the toll of violence and injuries caused by handguns. Children, like all victims of violence, are more likely to experience a broad range of mental and physical health problems not reflected in these estimates from post-traumatic stress disorder to depression, cardiovascular disease, and diabetes. *See generally* Corso et al., *supra;* Carole Goguen,

The Effects of Community Violence on Children and Adolescents, U.S. Dep't of Veterans Affairs, Nat'l Ctr. for Posttraumatic Stress Disorder.

Brief for Southeastern Legal Foundation, Inc. et al. as Amici Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

. . . Advocating on behalf of women, the elderly and the physically disabled, the *amici* herein argue the actions of the District of Columbia have harmed the members of society most physically vulnerable to criminal attack. . . .

ARGUMENT

I. The Brief's Structure . . .

One anomaly uncovered in approaching this issue from the viewpoint of women, the elderly and the physically disabled is that not all of these groups are equally represented in the literature. Studies referencing women are more prevalent. However, what is apparent from the anecdotal examples presented with this brief are the groups' members' characteristics for this discussion overlap to a great degree. Arguments asserted on behalf of women can be made, by analogy, on behalf of the members of the other two groups. This reinforces the main theme that all three groups' members occupy a physically inferior position relative to their potential attackers and benefit from defensive use of handguns.

II. Empirical Research Illustrates the Use of the Individual Right of Armed Self-Defense Embodied in the Second Amendment for the Benefit of Women, the Elderly and the Physically Disabled

A. Empirical Research Supports the Common Sense Argument That the Use of Handguns Protects Women, the Elderly and the Physically Disabled from Greater Physical Threat

It is well-recognized that the disparity in size and strength between men and women generally provides men with an advantage during physical combat. In her note *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, Inge Anna Larish supported this general statement with the following:

> On average women are weaker than men of comparable height. Muscles form a lower proportion of female body weight than of male body weight (36% and 43%, respectively). Kenneth F. Dyer, *Challenging the Men: The Social Biology of Female Sporting Achievement* 71-72 (1982). Women can develop arm muscles only 75% to 85% the strength of men's muscles. Generally, actual differences in average strength tend to be greater because women do not exercise their upper bodies adequately to develop their potential strength while men are more likely to engage in vigorous exercise to develop strength closer to their potential. *Id.* Men also have more power available for explosive events than women. *Id.* at 74.

> Women are on average smaller than men. The average height of men in the United States ranges from 5′ 7.4″ to 5′ 9.7″ and from 163 to 178 pounds; the average height for women ranges from 5′ 2.2″ to 5′ 4.3″ and from 134 to 150 pounds. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 108 (107th ed. 1987).

Larish, Inge Anna, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. Ill. L. Rev. 467, 494, fn. 213 (1996).

In light of the differences, Larish concludes the possession of a gun not only serves to "equalize the differences between men . . . ," but also serves to "eliminate the disparity in physical power between the sexes." *Id.* Furthermore, she posits, *"The available information on civilian restriction of gun ownership indicates that one of the groups most harmed by restrictions on private gun ownership will be women." Id.* (emphasis added). Larish further states, "Analysts repeatedly find that guns are the surest and safest method of protection for those who are most vulnerable to 'vicious male predators.' Guns are thus the most effective self-defense tools for women, the elderly, the weak, the infirm and the physically handicapped."*Id.* 498 (citing Edgar A. Suter, *Guns in the Medical Literature—A Failure of Peer Review*, 83 J. Med. Ass'n Ga. 133, 140 (1994)). . . .

According to Dr. Kleck's findings, firearms are used defensively 2.2 to 2.5 million times a year, with *handguns accounting for 1.5 to 1.9 million of the instances.* Kleck and Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self Defense with a Gun*, J. Crim. L. and Criminology, Vol. 86, No. 1, 164 (1995) (emphasis added). Of the sample used to calculate the number of times a gun was used defensively during a year, women made up 46 percent. *Id.* at 178. Of the 2 million defensive gun uses each year, 8.2 percent involved sexual assault. This translates to approximately 205,000 occurrences each year. *Id.* at 185. In addition, overall, with a handgun, the odds in favor of reducing serious injury to the victim increase. Tark and Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, Criminology, Vol. 42, No. 4, 861-909, 902 (November 2004).

The empirical literature is unanimous in portraying defensive handgun use as effective, in the sense that gun-wielding victims are less likely to be injured, lose property, or otherwise have crimes completed against them than victims who either do nothing, resist or who resist without weapons. Kleck and Gertz, *Carrying Guns for Protection: Results from the National Self-Defense Survey*, J. Research in Crime and Delinquency, Vol. 35, No. 2, 193, 194 (May 1998). . . .

B. The *Amici Curiae* Brief Filed by Violence Policy Center in Support of Appellants Incorrectly Characterizes the Value of the Handgun as an Effective Means of Self-Defense

On pages 29-31 of the brief submitted in this case by Violence Policy Center [hereinafter VPC], it argues that handgun use is the least effective method for self-defense and that shotguns and rifles are better suited for this purpose. Brief for Violence Policy Center, *et al.* as *Amici Curiae* Supporting Petitioners at 29-31, *District of Columbia, et al. v. Dick Anthony Heller*, No. 07-290 (January 11, 2008). VPC further states that this argument is supported by a "wealth of evidence."*Id.* at 30.

The problem with this contention is VPC fails to cite *any* evidence supporting its proposition. Moreover, for women, the elderly and the physically disabled, VPC's

"one-size-fits-all" approach ignores the physical requirements necessary to use shotguns or other long guns. Finally, the argument disregards the obvious: a handgun's compact nature lends itself to easier use by individuals with lesser physical ability, including but not limited to persons who are unable to brandish a shotgun when threatened.

VPC cites to "[f]irearms expert" Chris Bird, quoting from his book *The Concealed Handgun Manual, How to Choose, Carry and Shoot a Gun in Self Defense* in support of its assertion that the "handgun is the least effective firearm for self defense." The absurdity of pretending a book advocating the use of handguns *really* contains the opposite conclusion does not go unnoticed. The quote used by VPC, "a handgun 'is the least effective firearm for self defense' and in almost all situations 'shotguns and rifles are much more effective in stopping a [criminal],'" however will be examined. The quote is drawn from *Chapter 5, Choosing a Handgun: Semi-automatics and Revolvers* and reads in its entirety:

> Like many things in life, a handgun is a compromise. It is the least effective firearm for self-defense. Except at very close quarters — at arm's length — shotguns and rifles are much more effective in stopping a drug-hyped robber or rapist intent on making you pay for his lack of social skills. A handgun is the hardest firearm to shoot accurately, and, even when you hit what you are shooting at, your target does not vaporize in a red mist like on television.

Id. at 114.

Contrary to VPC's assertion, Bird's point is not that handguns are ineffective, but their effectiveness depends on the ammunition's stopping power. He states in the same section:

> In choosing a handgun for self defense, remember that the gun has two functions. In some cases, presentation of the gun, coupled with a shouted order to "STOP, GO AWAY, BACK UP," will be enough, to diffuse the threat. It reminds the potential robber or rapist he has urgent business in another county. . . . While any handgun will do, a large gun with a hole in the business end as big as a howitzer reinforces the seriousness of your intentions.
>
> In cases where the threat is not enough, the gun is a delivery system for those little missiles, scarcely bigger than a cigarette filter, that rip and tear your attacker's anatomy. It is the bullet that stops the attack, not the gun. The size and weight of the bullet depend mostly on the caliber of the gun from which it is fired. So one of your first decisions on picking a gun is deciding on a caliber.

Id. at 115.

None of this material, nor the balance of Bird's book, supports VPC's assertion that handguns are ineffective to deter crime or as a means of self-defense.

Moreover, VPC fails to support its additional argument that handguns are hard to shoot accurately because when characterized correctly, the cited work by noted firearms instructor Massad Ayoob, *In the Gravest Extreme, The Role of the Firearm in Personal Protection*, is contrary to VPC's contention. First, the section of Ayoob's

book to which VPC refers has nothing to do with personal defense of the individual or the homeowner; instead, the quote comes from *Chapter 6, How and When to Use Firearms in Your Store. Id.* at 43. Thus, this section is concerned with the proficiency of handgun use to avoid "wild shots" in order to avoid endangering customers or other persons. *Id.* at 47. Individual defense of the person and deterrence are treated in other chapters. *Id.* at 51, 75.

Second, the "accuracy" argument ignores that a criminal encounter is not a target shoot or practice. Moreover, it ignores a handgun's deterrent effect. Ayoob corrects, qualifies and explains VPC's mischaracterization of his statements in his declaration. He attests that:

> The statements in question in the VPC brief glaringly ignore the well-established fact that the great majority of times when a private citizen draws a gun on a criminal suspect, the very presence of the gun suffices to end hostilities with no shots fired. This simple fact makes marksmanship skill under stress a moot point in the majority of instances when defensive firearms are brought into action by private citizens acting in defense of themselves or others.

See Declaration of Massad F. Ayoob *infra* p. App. 4.

Further, Ayoob observes, from a practical standpoint the use of a handgun, as opposed to a long gun, is superior in that long guns are more easily taken away during defensive use. He states:

> The VPC brief falsely attributes its imputation that rifles and shotguns are superior to handguns for defensive purposes, to me among others. Yet in going through "In the Gravest Extreme" carefully enough to cherry-pick the misleading out-of-context quotes, that brief pointedly ignores my flat statements on Page 100 of the book in question: "High powered rifles are not recommended for self-defense. . . . A major problem with any rifle or shotgun is that it is too awkward to get into action quickly, or to handle in close quarters. A burglar will find it much easier to get a 3 foot weapon away from you, than a pistol you can hold and fire with one hand." This is especially true with regard to any person who may be at a physical disadvantage when contrasted with the physical ability of their attacker, such as a woman, an elderly person or someone who is physically disabled.

Id. at pp. App. 4-5.

In addition, VPC's argument fails to acknowledge the logical proposition that one may dial 911 when holding a handgun, but it is difficult to do so with two hands occupied with a long gun. . . .

IV. Anecdotal Evidence and Declarations Illustrate the Critical Importance of the Individual Right of Armed Self-Defense Embodied in the Second Amendment for Women, the Elderly and the Physically Disabled

Although statistics and empirical data are critical to understanding the broad spectrum of what defensive gun use means to society, the actual flesh-and-blood people, who have had to defend themselves or their families with handguns or other firearms, stand behind the data.

A printed compilation of the instances when women, the elderly or physically disabled defensively used guns in the United States would be unwieldy (though compelling), so the efficacy of statistics is obvious. Behind the rows and columns of data analyzed as statistics, however, are the faces of real, frightened and vulnerable people who have reached for their handguns after hearing the sounds of intruders in the night. These individuals, discussed below, avoided injury or death because they resisted their attackers with handguns. But, sadly, the same may not have been true if their homes were in the District of Columbia.

A. Recent Anecdotes Effectively Illustrate the Importance of the Personal Right of Armed Self-Defense for Women, the Elderly and the Physically Disabled

The following includes instances where women, the elderly and the physically disabled defended themselves during home invasions as well as attacks outside the home. The attacks were perpetrated by younger, stronger assailants. Moreover, the victims in some instances protected not only themselves, but also loved ones.

The anecdotes are arranged in reverse chronological order and by type. The home invasions come first, followed by parking lot incidents.

1. Home Invasions

On January 25, 2008 in Atlanta, Georgia, an intruder assaulted a wheelchair-bound homeowner at the homeowner's front door. During the struggle, the homeowner was able to use his handgun to shoot the attacker.

In December 2007, there were numerous instances of home invasion attacks on women and the elderly. On December 14, 2007 in Lexington, Kentucky, two women were inside their home when they heard a man trying to break in. They dialed 911, keeping the dispatcher on the phone while they warned the man to stop. When he would not stop, one of the women shot him. Investigators ruled the shooting self-defense.

On December 8, 2007 at Hialeah Gardens, Florida, four armed men attacked a 74-year-old heart patient, Jorge Leonton, in his driveway. After he withdrew money from an ATM, the four followed him home and choked him after he got out of the car, demanding money. While being choked by one of the attackers, Leonton took out his gun, for which he had a concealed weapon permit, and told the attacker three times he had a heart condition, could not breathe and the assailant was killing him. When the attacker would not let go, Leonton shot him. The other three men fled. Leonton's wife said, "If he wouldn't have been armed, I think he would have been killed.". . .

In November 2007, there were several attacks against all groups' members. On November 27, 2007 in Carthage, Missouri, a 63-year-old grandmother brandishing a handgun caused two burglars to run away after they broke down her back door. Her grandchild was in the house at the time.

Two weeks earlier, on November 16, 2007 in Waynesville, Missouri, a disabled man chased one intruder away and took one prisoner for the police with his handgun. Before breaking into the disabled man's trailer, the two male assailants had broken into a local motel room where they had beaten two people with a baseball bat so severely that one had to be taken by "life flight" to the hospital. Later, the two intruders entered the trailer and confronted the disabled man and his wife. One intruder pulled a pellet gun, but the homeowner pulled a "real gun." The pellet gun-wielding intruder fled while the other was held until the police arrived.

Two days earlier, on November 14, 2007 in Hessville, Indiana, a woman who was being stalked had her door kicked in by a former date. Later, when he returned to her home, she called 911 and was told to lock herself in the bedroom. When she retreated to the bedroom, she found a pistol which had been given to her for protection. She hid in a closet, the stalker opened the door, she told him to stop, but when he advanced toward her, she fired three times. She struck the stalker in the abdomen and he died from his wounds.

On November 5, 2007 in Bartlett, Tennessee, Dorothy "Bobbi" Lovell's charges were dropped after a review of the evidence indicated self-defense in the shooting of her husband. Mrs. Lovell shot her husband with a .357-caliber magnum handgun after he held Mrs. Lovell and her 21-year-old son hostage, threatening their lives.

October 2007 was replete with the defensive use of handguns. On October 27, 2007 in Gainesville, Florida, a 28-year-old male tried to kick down the door of a home owned by Arthur Williams, a 75-year-old, legally blind, retired taxi dispatcher. The homeowner fired on the intruder, striking him in the neck. Local officials praised Williams for defending himself. On October 24, 2007 in Wichita, Kansas, a 76-year-old man shot his 52-year-old live-in girlfriend after she poured bleach on him, sprayed him with mace and beat him with a frying pan. The police called the use of the weapon self-defense. On October 15, 2007 in Kansas City, Missouri, a 69-year-old man thwarted a home invasion by firing a shot from his .40-caliber handgun at his bedroom door when he heard an intruder approaching after his front door had been pried open. The intruder fled without apparent injury.

In July 2007, there were several reported attacks against the elderly and the disabled. On July 30, 2007 in Limestone County, Alabama, a disabled man who collected aluminum cans to supplement his income confronted two men, ages 20 and 24, stealing his cans. He immediately called the sheriff's office. The men thought he had left, walked back onto the property and, when they discovered him in his truck, one of them came toward the homeowner and threatened him. The homeowner told him to stop. When he did not, the homeowner showed his gun and demanded the two men lie on the ground to wait for the sheriff. On July 27, 2007 in El Dorado, Arkansas, a 24-year-old intruder beat 93-year-old Mr. Hill with a soda can, striking him 50 times before he passed out. Covered with blood, the elderly man awoke and retrieved a .38-caliber handgun. The assailant charged at him, forcing Hill to shoot him in the throat. Police arrived and took both Hill and the intruder to the hospital. On July 4, 2007 in Hickory, North Carolina, a 79-year-old man shot a 23-year-old intruder in his bedroom. After the intruder broke into the house, the homeowner's wife escaped to the neighbors and the homeowner shot the intruder. The intruder was expected to survive.

On April 26, 2007 in Augusta, Georgia, an assailant awakened his 57-year-old neighbor, Theresa Wachowiak, putting a knife to her throat. She resisted and managed to grab her .357-caliber handgun, and she shot the intruder in the stomach. The intruder survived. . . .

2006 saw notable examples of defensive gun use. On December 2, 2006 in Zion, Illinois, a 55-year-old wife heard her kitchen doorjamb shatter. She grabbed her pistol and shot the intruder in the chest after he forced his way into her house. The intruder was wearing a black ski mask and gloves.

On October 18, 2006 in Santa Clarita, California, an intruder broke the lock on Nadine Teter's back door and barged into her home. She fled to her backyard with a gun, but he followed and charged at her. She shot him. The intruder fell, got back up and advanced again, requiring her to shoot him two more times. The attacker then jumped over a fence and ran away. He was later apprehended when the intruder's mother, who was driving the "get-away" car, flagged down law enforcement for medical attention. The intruder survived, and he and his mother were convicted in December 2007 of charges arising out of the attack. With regard to the use of the firearm, Teter said she thinks every woman should carry a gun. She also said:

> Never in a million years, did I think I would use (the gun) — never. And whatever higher power, whatever gave me the strength to pull that trigger. . . . You're looking at him or me. My life or his life. I was not going to get raped. I was not going to get murdered. There was no way — and I didn't.

On April 27, 2006 in Red Bank, Tennessee, at 1:30 A.M., a disabled man saw a masked man crawling through his bedroom window. After he was awakened by the window breaking, David McCutcheon, the disabled homeowner, reached for his .32-caliber revolver and fired four times, forcing the masked man to flee. The intruder was arrested.

2005 saw attacks on the elderly thwarted by defensive handgun use. On May 31, 2005 in Indialantic, Florida, Ms. Judith Kuntz, a 64-year-old widow armed with a .38-caliber revolver shot an intruder in the chest after he broke into her home. She fired at him as he entered her bedroom with a flashlight. She stated, "I'm doing fine under the circumstances. . . . I don't take any joy in somebody being dead. My self-preservation instinct took over." *See* Declaration of Judith Kuntz *infra* pp. App. 19-20. On March 30, 2005 in Kingsport, Tennessee, an 83-year-old woman wrestled with a home intruder. Although he left with her purse, she was able to fire her handgun at him during the struggle, causing him to flee.

Women and the elderly used handguns to stave off assailants in 2004. On March 22, 2004 in Springfield, Ohio, 49-year-old Melanie Yancey shot and killed a 21-year-old intruder when he and an accomplice broke into her home after kicking in her door. She sealed herself in her bedroom, but the two tried to break in. She then fired a shot at them from her .40-caliber handgun and they returned fire. When she heard them go into another unoccupied bedroom, she ran out of the room and fired at them as she ran out of the house. Later, one of the intruders was found lying on a nearby driveway.

On November 4, 2004 in Pensacola, Florida, a 77-year-old retired oil worker, James Workman, shot an intruder who entered the trailer where Workman and his wife, Kathryn, were at home. The intruder advanced toward the trailer despite a warning shot, and Workman struggled with the intruder inside the trailer, shooting him in the process.

2. Parking Lot Incidents

On December 27, 2007 in Orlando, Florida, a 65-year-old man fought off five thugs with a handgun. He was collecting money for parking at a church when a man, accompanied by four other men, put a gun to his head. The victim reached

inside his jacket as if to pull out money, but instead, pulled out a handgun and started firing. The men ran away. The elderly man reported he obtained a concealed weapon permit after he was previously attacked by eight teens who tried to rob him with a pipe.

On July 1, 2007 in Dallas, Texas, a 31-year-old man stopped Amor Kerboua, a 79-year-old man, in Kerboua's apartment parking lot. The man put a gun in Kerboua's face and demanded money. Thinking the attacker was joking, Kerboua pushed the gun away. Again, the man put the gun in his face and Kerboua handed him a cup containing $242.50. The assailant then told Kerboua he was going to kill him, pointing the gun at his stomach. Instead, Kerboua, who had a concealed weapon permit, drew his .38-caliber revolver and shot the assailant in the throat. The assailant fell, but maintained his gun aim at Kerboua, forcing Kerboua to fire two more times. The police determined Kerboua acted in self-defense. The assailant survived.

A. Nancy Hart and Minnie Lee Faulkner: Historical and Present Day Illustrations of How Firearms Deter Assailants . . .

2. Minnie Lee Faulkner: A Modern Illustration That the Use of a Firearm Deters an Attacker

. . . Mrs. Minnie Lee Faulkner, 88, lives alone in her home in Elbert County, Georgia near the Savannah River. Elbert County is still rural though settled early in the State's history. Faulkner purchased a handgun for personal defense and home protection after the death of her husband in 1993. Faulkner chose a handgun over a rifle or shotgun because it was small, maneuverable and easy to use for home defense by someone of her age, size and strength.

On October 10, 2004, Faulkner's doorbell rang at one o'clock in the morning. From the porch, a voice called, "Minnie Lee, I've got car trouble—open the door." Faulkner replied that she was not going to open the door, and the man on her porch started kicking the door. He split the door and Faulkner called 911.

Faulkner told the man that she had called 911 and he stopped kicking. With pistol in hand, Faulkner then peered out the window and she saw a young man's face with a clear complexion. Faulkner said in a stout voice, "I have my gun and I have it trained right on you." The intruder left. Later, when the front door was examined, it was determined that one more kick would have broken the door. Later that night, the intruder broke into a nearby trailer and attacked an elderly woman while she was in bed. Faulkner believes that the intruder would have tried to kill her had he entered.

Faulkner spoke with the local sheriff's office and was able to provide information for a composite drawing, identifying the intruder as the son of a deceased neighbor. Faulkner specifically noted his clear eyes and good complexion. Using this information and other evidence, the sheriff's office was able to apprehend the intruder. He was convicted of burglary and aggravated assault with intent to rape.

Faulkner was badly frightened by the attack. She believes that her handgun is her only protection, and she is glad she had it the night of the attack. She did not have to shoot the intruder because the mere presence of the weapon scared him away. Faulkner believes people have a right to have a gun for protection and self-defense.

Faulkner's experience poignantly illustrates why the individual right of self-defense through the use of a handgun is so vital to women, the elderly and the physically disabled. Faulkner is from the same county where Nancy Hart stood against the Tories during the War for Independence. As Hart used her intelligence, courage and the Tories' own rifles against them, Faulkner used her courage, fortitude and handgun against an intruder in the night. These women, though separated by two hundred thirty years, have in common the necessity of firearms to deter their bigger, stronger or more numerous assailants. Without firearms, both Nancy Hart and Minnie Lee Faulkner, living on the same land but separated by time, would have been victims. With firearms, they became more than equal to the imminent danger they faced. . . .

APPENDIX

DECLARATION OF JUDITH KUNTZ . . .

2. I am a 67-year-old widow and live in Indialantic, Florida.
3. I own a .38-caliber handgun for personal defense. I believe my ownership of the gun and the use of it for personal defense saved my life. I chose a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home.
4. On May 31, 2005, I shot an intruder who unlawfully entered my home. I attempted to hide from the intruder in my bedroom, but the intruder proceeded to enter my bedroom while I was in it. I shot the intruder in order to protect myself and my property.
5. I am glad I had my handgun during the incident and that I was able to defend myself and my property, I believe people have a right to own and use a gun for personal defense. . . .

DECLARATION OF THERESA WACHOWIAK . . .

2. I am 57-years-old, and I live in Augusta, Georgia.
3. I own a .357-caliber handgun for personal defense. I believe my ownership of this gun and the use of it for personal defense saved my life. I defer to a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home if an intruder actually entered.
4. On April 26, 2007, an intruder gained entrance into my house, in the early morning hours, woke me up, and put a knife to my throat with the intent of doing me bodily harm. He was in my bed and unaware of the handgun I kept in my bed stand. I protested against his covering my mouth with his hand as he pressed his knife to my throat repeatedly, threatening to kill me as I was struggling to remove his hand. This interaction provided me an opportunity to keep his focus on my resistance while I secured my handgun with his being unaware of my other activities. I appeared to comply finally with his "being in control" and ceased struggling upon securing my weapon. I asked him what did he want. Simultaneously, he realized there

were dogs in the room and demanded I "get the dogs out." With him at my back and his knife still ready, we moved off of my bed to the bedroom door. When at the dog gate he demanded the dogs be removed from the room, I unfastened the dog gate and with him preoccupied with their imminent release I pivoted and shot him in the right side of his chest. I did not randomly exercise force, only sufficient force to remove him as a personal threat. He was still mobile and anxious to get away through the now opened dog gate. I called the police and secured medical help for him as I did not expect he could get very far. He did survive his single wound. I was saddened and shocked to find out that the man was a neighbor and a relative of a family I cared about and had known for decades.

5. I am glad I had my handgun that morning and was able to defend myself and my property. I would be no match in a physical contest of strength with my assailant and would have just been another sad statistic. My handgun was the tool I used to preserve my life. . . .

DECLARATION OF JAMES H. WORKMAN, JR. . . .

2. I am 80-years-old, a retired oil industry worker and I live with my wife Kathryn in Pensacola, Florida.
3. I own a .38-caliber handgun for personal defense. I believe my ownership of the gun and the use of it for personal defense saved my wife Kathryn's life and mine. I chose a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home if an intruder actually entered.
4. On November 4, 2004, I shot an intruder who entered the trailer where my wife and I were staying. We were living in a trailer in front of our home that was damaged by Hurricane Ivan. When the intruder entered our yard at 2:20 A.M., I confronted him. Despite my firing a warning shot into the ground, the intruder advanced toward the trailer. I struggled with him inside the trailer, shooting him in the process.
5. I am glad I had my handgun that night and was able to defend my wife, myself and our property. I believe people have a right to own and use a gun for personal defense. . . .

NOTES & QUESTIONS

1. Were you surprised by the data about firearms suicide in the American Academy of Pediatrics brief? In general, suicide attempts with firearms are more likely to succeed than attempts involving most other common methods such as drowning, cutting, or asphyxiation. Suicide rates differ widely from state to state. The demographic group most likely to commit suicide, particularly with firearms, is elderly White men. While rural states such as Alaska and Montana tend to have high suicide rates, the District of Columbia has traditionally had one of the lowest suicide rates in the nation. Scholars are nearly unanimous that greater firearms prevalence is associated with greater percentage of suicides being committed with

firearms. Indeed, the "percent of suicide with guns" (PSG) is perhaps the best proxy for total gun ownership in a community. However, scholars disagree about whether firearms density increases the overall suicide rate, or merely changes the method, since some other forms of self-inflicted harm (e.g., hanging, jumping from a height) are nearly as lethal. *Compare* Harvard School of Public Health, *Firearm Access Is a Risk Factor for Suicide*, *with* Gary Kleck, *The Effect of Firearms in Suicide*, *in* Gun Studies: Interdisciplinary Approaches to Politics, Policy, and Practice 309 (Jennifer Carlson, Kristin A. Goss & Harel Shapira eds. 2019).

2. International data further complicate the picture. The age-standardized U.S. suicide rate in 2016 was 13.7 per 100,000 population (21.1 male and 6.4 female). The global average was 10.5. Since no country matches the gun density of the United States, there are many examples of nations that have fewer guns and a suicide rate that is higher than the United States, about the same as the United States, or lower. *See* World Health Organization, Suicide rates (per 100,000 population). If gun prevalence does make suicide more common among all or some groups, then how should this be taken into account in debates about gun policy? Is suicide as harmful or immoral as unlawful homicide? Are all suicides wrong? Are some worse than others? What public policy distinctions are appropriate in this area?

3. Does advocacy of firearms bans give sufficient attention to beneficial gun use like those described in the Southeastern Legal Foundation amicus brief?

4. What type of laws and regulatory system would eliminate the need for guns in cases like those described in the "Declarations" of Southeastern Legal Foundation brief?

5. Are the stories in the amicus "Declarations" examples of good results? Would disarming people like Judith Kuntz be an acceptable cost of strict gun laws with the expectation of a net benefit to the community overall?

6. Do these personal episodes affect your view of optimal firearms policy? Do they affect your view about whether to own a firearm? Does the answer to one question influence the other?

7. As detailed in the American Academy of Pediatrics amicus brief, an article in the *New England Journal of Medicine* concluded that the D.C. handgun ban had significantly reduced homicide and suicide. The conclusion was strongly disputed in an amicus brief of Criminologists and the Claremont Institute:

> Over the five pre-ban years the murder rate fell from 37 to 27 per 100,000 population. . . . In the five post-ban years the murder rate rose to 35. . . . Averaging the rates over the 40 years surrounding the bans yields a pre-ban DC rate (1960-76) of 24.6 murders. The average for the post-ban years is nearly double: 47.4 murders per 100,000 population. The year before the bans (1976), the District's murder rate was 27 per 100,000 population; after 15 years under the bans it had tripled to 80.22 per 100,000 (1991). . . .
>
> After the gun prohibitions, the District became known as the "murder capital" of America. Before the challenged prohibitions, the District's murder rate was declining, and by 1976 had fallen to the 15th highest among the 50 largest American cities. . . . After the ban, the District's murder rate fell below what it was in 1976 only one time. . . . In half of the post-ban years, the District was ranked the worst or the second-worst; in four years it was the fourth worst. . . .

Brief for Criminologists et al. as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 554 U.S. 570, at 7-8 (2008).

The brief also quoted from a National Academies of Sciences meta-study that surveyed the social science literature on gun control. The National Academies decided that the evidence was not strong enough to support the hypothesis that gun control is beneficial, or the hypothesis that gun ownership is beneficial. Regarding the *New England Journal of Medicine* study of D.C., the National Academies concluded:

> Thus, if Baltimore is used as a control group rather than the suburban areas surrounding DC, the conclusion that the handgun law lowered homicide and suicide rates does not hold. Britt et al. (1996) also found that extending the sample frame an additional two years (1968-1989) eliminated any measured impact of the handgun ban in the District of Columbia. Furthermore, Jones (1981) discusses a number of contemporaneous policy interventions that took place around the time of the Washington, DC, gun ban, which further call into question a causal interpretation of the results. In summary, the District of Columbia handgun ban yields no conclusive evidence with respect to the impact of such bans on crime and violence. The nature of the intervention—limited to a single city, nonexperimental, and accompanied by other changes that could also affect handgun homicide—make it a weak experimental design. Given the sensitivity of the results to alternative specifications, it is difficult to draw any causal inferences.

Charles F. Wellford, John V. Pepper & Carol V. Petrie (eds.), Firearms and Violence: A Critical Review 98 (2005).

For the academic debate on the NEJM study, see Chester L. Britt, Gary Kleck & David J. Bordua, *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 Law & Soc'y Rev. 361 (1996); David McDowall, Colin Loftin & Brian Wiersema, *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.'s Reassessment of the DC Gun Law*, 30 Law & Soc'y Rev. 381 (1996); Chester L. Britt et al., *Avoidance and Misunderstanding: A Rejoinder to McDowall et al.*, 30 Law & Soc'y Rev. 393 (1996).[4]

In *Heller*, a collection of 24 professors conducted a new study of the D.C. ban, and reported the results in an amicus brief. Brief for Academics as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 554 U.S. 570 (2008). That study compared the post-ban changes in D.C. homicide rates to the rate in the other 49 largest cities, to Maryland and Virginia, and to the United States as a whole. The data showed that D.C. grew substantially worse in comparison to all of them. *Id.* at 7-10.

Two criminology professors, including David McDowall, who had been a co-author of the NEJM study, filed their own amicus brief. Brief for Professors of Criminal Justice as Amici Curiae Supporting Petitioner, District of Columbia v. Heller,

4. The hyperlinks go to versions of the articles on ResearchGate, JSTOR, and Academia.edu. None of these are public Internet, but your institution may have access. JSTOR is comprehensive for the journals it covers, whereas ResearchGate and Academia.edu depend on scholars to upload individual articles. JSTOR is available to anyone who will pay; ResearchGate is reasonably open to students; and Academia.edu is professors-only.

554 U.S. 570 (2008). That brief argued that post-ban increases in D.C. homicide were the result of a national trend caused by the spread of crack cocaine. *Id.* at 9-11.

Justice Breyer's dissenting *Heller* opinion summarized the D.C. debate, and also the conflicting empirical evidence about gun ownership in general that had been offered by various amici. Because there was supporting evidence on each side, he concluded that the Court should defer to the D.C. City Council's empirical judgment. Do you agree with his position that as long as there is *some* social science research that supports a particular gun control law, then courts should not rule the law unconstitutional? Or should courts try to evaluate the evidence on each side? Should they attempt to evaluate the evidence at all? Does it matter whether the original legislative body, such as the D.C. City Council, carefully considered empirical evidence before enacting the law? Although exceptions can be found, legislative fact-finding often consists of little more than a collection of talking points and factoids assembled by lobbyists for one side or the other. The legislator who has actually read a study that he or she cites is unusual — rarer even than legislators who read the full text of bills before voting on them.

D. SEXUAL ORIENTATION

People with unconventional sexual orientations have a variety of concerns about unequal treatment in our society and under the law. In the firearms context, that concern manifests as a special worry about violence rooted in bigotry.

Brief for Pink Pistols et al. as Amici Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

Pink Pistols is an unincorporated association established in 2000 to advocate on behalf of lesbian, gay, bisexual and transgendered (hereinafter LGBT) firearms owners, with specific emphasis on self-defense issues. There are 51 chapters in 33 states and 3 countries. Membership is open to any person, regardless of sexual orientation, who supports the rights of LGBT firearm owners. Pink Pistols is aware of the long history of hate crimes and violence directed at the LGBT community. More anti-gay hate crimes occur in the home than in any other location, and there are significant practical limitations on the ability of the police to protect individuals against such violence. Thus, the right to keep and bear arms for self-defense in one's home is of paramount importance to Pink Pistols and members of the LGBT community. . . .

ARGUMENT

I. The Second Amendment Guarantees LGBT Individuals the Right to Keep and Bear Arms to Protect Themselves in Their Homes

Almost five years ago this Court held that the Due Process Clause protects the right of gay men and lesbians to engage in consensual sexual acts within the privacy of their own homes, "without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The exercise of that right, or even the non-sexual act of

having a certain "appearance," however, continues to put members of the LGBT community at risk of anti-gay hate violence and even death. Since *Lawrence* was decided, at least 58 members of the LGBT community have been murdered and thousands of others have been assaulted, many in their own homes (the most common site of anti-gay hate crimes), because of their sexual orientation. The question now presented is whether LGBT individuals have a right to keep firearms in their homes to protect themselves from such violence. Because LGBT individuals cannot count on the police to protect them from such violence, their safety depends upon this Court's recognition of their right to possess firearms for self-protection in the home.

A. Recognition of an Individual Right to Keep and Bear Arms Is Literally a Matter of Life or Death for Members of the LGBT Community

The need for individual self-protection remains and is felt perhaps most pointedly by members of minority groups, such as the LGBT community. Minority and other marginalized groups are disproportionately targeted by violence, and have an enhanced need for personal protection. In 2005 alone, law enforcement agencies reported the occurrence of 7,163 hate crime incidents. Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006). Members of the LGBT community are frequent targets of such violence. Indeed, for the years 1995-2005, law enforcement agencies reported more than 13,000 incidents of hate violence resulting from sexual-orientation bias. *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics (1995-2005). The individual stories of brutality underlying those statistics are horrific:

- On April 19, 2005, Adam Bishop was bludgeoned to death with a claw hammer in his home because he was gay. He was hit at least eighteen times in the head and then left face down in a bathtub with the shower running.
- On May 13, 1988, Claudia Brenner and Rebecca Wight were shot eight times—in the neck, the head and the back—and left for dead while hiking the Appalachian Trail, because they were lesbians. Rebecca died.
- On December 31, 1993, Brandon Teena, Lisa Lambert and Philip De Vine were murdered in a farmhouse in rural Richardson County, Nebraska in an act of anti-LGBT violence. Brandon and Lisa were both shot execution style, and Brandon was cut open with a knife.
- On the night of October 6-7, 1998, Matthew Shepard was pistol-whipped, tortured, tied to a fence in a remote area and left to die. He was discovered eighteen hours later, still tied to the fence and in a coma. Matthew suffered a fracture from the back of his head to the front of his right ear. He had severe brain stem damage and multiple lacerations on his head, face and neck. He died days later.
- On February 19, 1999, Billy Jack Gaither was set on fire after having his throat slit and being brutally beaten to death with an ax handle. In his initial police confession, Gaither's murderer explained "I had to 'cause he was a faggot."
- On November 19, 2006, Thalia Sandoval, a 27-year-old transgender Latina woman, was stabbed to death in her home in Antioch, California. The death was reported as a hate crime.

In fact, anti-gay violence is even more prevalent than the FBI statistics indicate. "Extensive empirical evidence shows that, for a number of reasons, anti-lesbian/gay violence is vastly under-reported and largely undocumented." LAMBDA Services Anti-Violence Project (March 7, 1995) at ii. The U.S. Department of Justice estimates that only 49% of violent crimes (rape, robbery, aggravated assault, and simple assault) are reported to the police. Many incidents of anti-lesbian/gay violence are not reported to police because victims fear secondary victimization, hostile police response, public disclosure of their sexual orientation, or physical abuse by police. Further, investigative bias and lack of police training also contribute to underreporting of anti-LGBT hate crimes. For these reasons, incidents of anti-gay violence reported by the FBI represent a small fraction of those reported to LGBT community antiviolence programs. During 1994, for example, "for every incident classified as anti-lesbian/gay by local law enforcement, community agencies classified 4.67 incidents as such." Similarly, while the FBI reported only 26 anti-gay homicides in the ten-year period 1995-2005, the National Coalition of Anti-Violence Programs reported three times that number in half that time (78 anti-gay homicides in the five year period 2002-2006). *See* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence (2003-2006). Studies have shown that approximately 25% of gay males have experienced an anti-gay physical assault. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard [Mary E. Swigorski et al. eds., 2001].

Hate crimes based on sexual orientation are the most violent bias crimes. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard, *supra*, at 2 ("Anti-LGBT crimes are characterized as the most violent bias crimes."). *See also* LAMBDA Services Anti-Violence Project (March 7, 1995) at 20 ("The reported [anti-gay] homicides were marked by an extraordinary and horrific level of violence with 49, or 70%, involving "overkill," including dismemberment, bodily and genital mutilation, multiple weapons, repeated blows from a blunt object, or numerous stab wounds."); Gregory M. Herek & Kevin T. Berrill, Hate Crimes: Confronting Violence Against Lesbians and Gay Men 25 (Diane S. Foster ed., 1992) ("A striking feature . . . is their gruesome, often vicious nature.").

Anti-gay hate crimes are also the most likely to involve multiple assailants. LAMBDA Services Anti-Violence Project (March 7, 1995) at 7 ("[A]nti-lesbian/gay offenses involve a higher number of offenders per incident than other forms of hate crime."). In 1994 "[n]ationally, 38% of the incidents involved two or more perpetrators." *Id.* "One-quarter involved between two and three offenders, and 12% involved four or more offenders. Nationally, there were at least 1.47 offenders for each victim." *Id.*

While the District of Columbia's gun laws preclude LGBT residents from possessing in their homes firearms that can be used for self-protection, *see* D.C. Code 7 §-2507.02, the laws do not protect LGBT residents from gun violence. To the contrary, "when a weapon was involved [in an anti-gay attack] in the D.C. area, that weapon was three times more likely to be a gun" than elsewhere in the nation. Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997.* "Firearms accounted for 33% of all D.C.-area [anti-gay] assaults involving weapons, compared to 9% nationally." *Id.*

Laws, such as D.C. Code 7 §-2507.02, that prevent the use of firearms for self-protection in the home are of particular concern to members of the LGBT

community, because historically hate crimes based on sexual-orientation bias have most commonly occurred in the home or residence. *See, e.g.*, Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2002 Edition (2003) at 7 ("Incidents associated with a sexual-orientation bias (1,244) most often took place at homes or residences—30.8 percent. . . ."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2003 Edition (2004) at 8 ("Incidents involving bias against a sexual orientation also occurred most often in homes or residences—30.3 percent of the 1,239 incidents reported in 2003."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2001 Edition (2002) at 7 ("The data indicated that of the 1,393 hate crime incidents motivated by sexual-orientation bias, 33.4 percent of the incidents occurred at residences or homes."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006) at Table 10 (reporting more anti-gay incidents in a home or residence than in any other location). Thus, members of the LGBT community have an acute need for this Court to recognize their right to possess firearms to protect themselves from hate violence in their homes.

B. The Police Have No Duty to Protect and Do Not Adequately Protect LGBT Individuals from Hate Violence That Occurs in Their Homes

Members of the LGBT community often must rely upon themselves for protection against hate violence in their homes. Police are seldom able to respond quickly enough to prevent in-home crimes. Worse, as this Court has held, the police have no mandatory legal duty to provide protection to individuals. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 760-61 (2005). To the contrary, police officers are granted discretion in determining when and where to exercise their authority:

> A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.
>
> "In each and every state there are longstanding statutes that, by their terms, seem to preclude nonenforcement by the police. . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. . . . [T]hey clearly do not mean that a police officer may not lawfully decline to . . . make an arrest. . . ."
>
> . . . It is, the [*Chicago v. Morales*, 527 U.S. 41 (1999)] Court proclaimed, simply "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.". . .

Moreover, police have historically exercised their discretion in a manner that disfavored the protection of members of the LGBT community. *See* Lillian Faderman, Odd Girls Out and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America 194-95 (Richard D. Mohr, et al., eds. 1991). In fact, in 1997 the National Coalition of Anti-Violence Programs reported that, in anti-gay violence "[t]he number of reported *offenders who were law enforcement officers* increased by 76% nationally, from 266 in 1996 to 468 in 1997." *See* Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997*. *See also* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence

in 1998 (April 6, 1999) at 24 ("[T]here were very dramatic increases in 1998 in reports of verbal and/or physical abuse by police in response to victim's attempts to report a bias crime. . . . [O]ne in five victims of an anti-gay bias incident in 1998 who attempted to report it to police were treated to more of the same. Almost one in 14 became victims of actual (and in some cases, further) physical abuse."). As a consequence, members of the LGBT community have a heightened need for this Court to recognize their individual right to possess firearms to protect themselves.

The triple-murder of Brandon Teena and two others in a rural farmhouse in 1993 starkly illustrates this need. Brandon, his girlfriend and a male friend were murdered in an anti-LGBT hate crime, after police failed to arrest the two men who had previously kidnapped, raped and assaulted Brandon:

> On December 31, 1993, John Lotter and Marvin Thomas Nissen murdered Brandon, Lisa Lambert and Philip De Vine in a farmhouse in rural Richardson County, Nebraska. These multiple murders occurred one week after Lotter and Nissen forcibly removed Brandon's pants and made Lana Tisdel, whom Brandon had been dating since moving to Falls City from Lincoln three weeks earlier, look to prove that her boyfriend was "really a woman." Later in the evening of this assault, Lotter and Nissen kidnapped, raped, and assaulted Brandon. Despite threats of reprisal should these crimes be reported, Brandon filed charges with the Falls City Police Department and the Richardson County Sheriff, however, Lotter and Nissen remained free. Lotter and Nissen have [since] both been convicted. . . .

Brandon, Lisa and Philip were home when their anti-gay attackers broke in and shot them execution-style. In D.C. they would have been prevented by law from possessing a firearm in the house that they could have used in self-defense to save their own lives. This Court should not adopt a reading of the Second Amendment that would leave LGBT individuals helpless targets for gay-bashers. *See United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) ("The right to defend oneself from a deadly attack is fundamental."); *United States v. Henry*, 865 F.2d 1260 (4th Cir. 1988) (same). . . .

Brief for The DC Project Foundation, Operation Blazing Sword — Pink Pistols, and Jews for the Preservation of Firearms Ownership as Amici Curiae Supporting Petitioner

New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 20, 2021)

ARGUMENT

I. Marginalized Groups' Interest in The Second Amendment Right to Bear Arms Is a Key Factor in Determining the Scope of That Right.

In *D.C. v. Heller*, this Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation" and recognized that the "core lawful purpose" of this right is "self defense." 554 U.S. 570, 592, 630 (2008). Two years later, the Court held that states may not infringe

this right any more than the federal government. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010). Critically, the interests of marginalized groups played an essential role in defining the Second Amendment in both decisions.

Heller expressly focused on marginalized groups in embracing the need for practical and realistic Second Amendment protections. The Court observed that "[b]lacks were routinely disarmed by Southern States after the Civil War," leading "[t]hose who opposed these injustices [to] frequently state[ ] that they infringed blacks' constitutional right to keep and bear arms." 554 U.S. at 614. The newly freed slaves had "shown by their peaceful and orderly conduct that they [could] safely be trusted with fire-arms," and they needed these weapons "to defend their homes, families or themselves" from violence in the newly emancipated South. *Id.* at 615. This view "was apparently widely held" during this period, and although it did "not provide as much insight into [the Second Amendment's] original meaning as earlier sources," this "understanding of the origins and continuing significance of the Amendment [was still] instructive." *Id.* at 614.

Marginalized groups' interests were even more explicitly important in *McDonald*. In addition to expanding upon Heller's historical analysis, see 561 U.S. at 770-71, the Court emphasized the current importance of the Second Amendment right to the protection of minorities and women specifically, *id.* at 789-90. In addressing the dissent's concern that the Second Amendment "does not protect minorities or persons neglected by those holding political power," the Court explained:

> [P]etitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City's streets. The legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black. Amici supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime. If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

Id. at 789-90 (footnotes omitted).

Heller's and *McDonald's* attention to minority rights accords with bedrock principles of constitutional law. The Founders adopted the Bill of Rights to prevent majorities from trampling the rights of minorities, a point this Court made clear in a seminal First Amendment opinion:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, *to place them beyond the reach of majorities* and officials and to establish them as legal principles to be applied

> by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

To respect the Bill of Rights' fundamental purpose, this Court has long used suspicious scrutiny against any legislation that undermines explicit constitutional guarantees or targets "discrete and insular minorities." *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). That is, "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," or when it reflects "prejudice against discrete and insular minorities," the Court will engage in "a correspondingly more searching judicial inquiry." *Id.* New York's "proper cause" law warrants considerable skepticism in both respects. The Second Amendment is plainly "within a specific prohibition of the Constitution," as it is included within "the first ten Amendments," *id.*; and *Heller* confirms that it belongs on the list of "fundamental rights [that] may not be submitted to a vote," *Barnette*, 319 U.S. at 638:

> [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.

Heller, 554 U.S. at 636 (citation omitted); accord *McDonald*, 561 U.S. at 790.

Furthermore, as outlined below, the right to bear arms outside the home serves to "protect minorities and those lacking political clout" just as much as the right to keep arms within the home. *McDonald*, 561 U.S. at 790. Indeed, this right "is especially important for women and members of other groups that may be especially vulnerable to violent crime." *Id.* As in *McDonald*, because the "the safety of. . . . law-abiding members of the community [here] would be enhanced by the [carrying] of handguns [outside] the home for self-defense," "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *Id.* The protection of these rights warrants extension of the Second Amendment beyond the home.

II. Marginalized Groups Need Guns Outside the Home for Self-Protection.

As a practical matter, the right to carry a firearm outside the home for self-defense is an extraordinarily important right for the LGBT community, religious and racial minorities, and women. All of these groups face a heightened risk of violence outside the home and cannot rely on the police for protection. For them, the right to bear arms in public is nothing short of essential.

A. Members of the LGBT Community Are Disproportionately Victims of Violent Crime.

An estimated 5.6% of the population identifies as LGBT, with only 0.6% identifying as transgender. These people are disproportionately likely to be victims of both hate crimes and violence. The hate crime statistics against LGBT people are unsettling. In 2019, there were over 1,378 reported hate crimes committed against

lesbian, gay, and bisexual people and another 224 against the much smaller population of transgendered people. This constituted nearly 20% of all hate crimes for that year, a number consistent with previous years.

These figures reflect only a fraction of the true number of crimes against LGBT people, as "only about half of [LGBT] victimizations are reported to police." Violent crime numbers are worse. LGBT people are nearly four times more likely than non-LGBT people to be victims of such crimes in general. And homicides in particular are increasing. In 2017, the incidents of hate-related homicides against LGBT people rose to a staggering 52—one homicide per week—representing "an 86% increase in the single incident reports compared to 2016" and "the highest number ever recorded" in the 21 years this data has been collected. This number may be much higher. The Human Rights Campaign documented 44 murders of transgender people alone in 2020, to say nothing of the murder rate for lesbian, gay, bisexual, and other queer people.

Violence against the LGBT community, moreover, is not limited to the home. Quite the opposite. Seventy-one percent of anti-LGBT violent crime in 2017 occurred in places other than private residences. LGBT people were attacked on school and college campuses, in shelters, at work, and on the street. And 2017 was no outlier. Hate-related violence against LGBT people has routinely occurred in public spaces for years. This is consistent with statistics on hate crimes against LGBT people more generally, which show that around 70% of these crimes occur outside the home.

The streets that New York is supposed to protect are an especially unwelcoming place for LGBT people. Historically, this has been one of the most common locations for violence and hate crimes against them, with between 20 and 25% of hate crimes occurring there annually. Transgender women are particularly at risk. They are "nearly three times more likely to experience violence on the street compared to survivors who did not identify as transgender women." No wonder people in this group overwhelmingly fear for their safety. Public spaces are not safe for them. . . .

D. None of These Groups Can Rely on Law Enforcement for Protection.

Because they face such a heightened risk of violence, LGBT people, religious minorities, and women have a pronounced need for some form of protection outside their homes. New York likes to pretend that law enforcement can meet this need. This is a fantasy. The police simply cannot provide these groups the protection they so desperately require in public spaces. Law enforcement lacks the resources necessary to prevent crimes from occurring. Criminals rarely engage in violence when officers are already present at the scene, in a position where they can prevent the harm. And if a victim or bystander does manage to call 911 before then, the police usually cannot respond quickly enough. Even in New York City, with an officer on every corner, the average response time to a 911 call for a violent crime in progress—like robbery or assault with a deadly weapon—is still over seven minutes.

For other serious crimes—like automobile theft or simple assault—that number climbs to over nine minutes. A lot can happen in the time it takes the police to arrive on the scene. All too often, it is too little too late.

Even if police could respond quickly enough to stop most crimes before they happen, they have no legal duty to do so. This Court has long held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989). Accordingly, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197; *see also Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("[T]here is no constitutional right to be protected by the state against being murdered by criminals."). For this reason, law enforcement officials have no constitutional duty to protect individuals from the violent acts of third parties. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 766-68 (2005).

Instead, the police enjoy ample discretion in determining when and where to exercise their authority, even when a statute purports to require arrests:

> A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes. In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police. However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. They clearly do not mean that a police officer may not lawfully decline to make an arrest. . . . It is. . . . simply common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.

Id. at 760-61 (cleaned up).

The vast majority of police officers exercise this discretion admirably and to the best of their ability, often in dangerous situations and with little thanks from the public. Shamefully, however, a small minority of officers choose to exercise their discretion in a manner that harms marginalized groups. LGBT people, for example, experience significant levels of violence and discrimination at the hands of these bad apples, an injustice that has been well documented.

In one study, 48% of LGBT hate violence survivors who interacted with the police indicated that they "experienced police misconduct," including "unjustified arrest," "use of excessive force," "entrapment," and "police raid[s]." Worse, some "respondents reported that they had experienced verbal abuse, physical violence, and sexual violence perpetrated by police officers," with rogue officers accounting for "6% of known offenders" and a stunning 23% of "offenders who were personally unknown to the victim." Most disturbing of all, "[i]n three out of 52 or 6% of the hate violence homicides recorded in 2017, the victims were killed by police responding to incidents.". . .

As with hate crimes more generally, the reported instances represent only a fraction of the abuse that marginalized groups suffer at the hands of the few law enforcement officers who exploit their power. As explained in the context of violence against women:

> Cases of sex-related misconduct and crime have been described as hidden offenses that are likely to go unreported and, hence, difficult to document and study. Victims may not report instances of police sexual

> misconduct to authorities because they feel humiliated or they may fear retaliation. Victims may also encounter barriers to filing a complaint since that process can be unnecessarily difficult and/or intimidating. Researchers are also hard-pressed for data on cases that do get officially reported because of the reluctance of officers and organizations to expose cases of sex-related police misconduct to outside scrutiny. . . . [T]he obstacles to acquiring official data on the phenomenon cannot be overstated and. . . . it is almost impossible to obtain information without a court order or a covert and perhaps ethically problematic research design.

The same logic extends to police crimes against LGBT people and religious minorities.

Further, the nature of police work affords the small number of rogue officers opportunities "to engage in acts of sexual deviance and crimes against citizens." Officers "routinely operate alone and largely free from any direct supervision, either from administrators or fellow officers." They commonly encounter "citizens who are vulnerable, usually because they are victims, criminal suspects, or perceived as 'suspicious' and subject to the power and coercive authority granted to police." Compounding the problem, "[p]olice-citizen interactions often occur in the late-night hours that provide low public visibility and ample opportunities to those officers who are able and willing to take advantage of citizens." These acts of rogue officers provide further reason why marginalized groups cannot rely on the police for protection.

E. The Right to Bear Arms in Public Is a Necessary, Effective Tool That People in Marginalized Groups Can Use to Defend Themselves.

The ineffectiveness of the police in protecting the LGBT community, religious minorities, and women from violence makes the right to bear arms in public critically important for these groups to defend themselves against frequent attacks. And where honored, that right has proven effective.

Research has shown that the "[d]efensive use of guns by crime victims is a common occurrence." In fact, "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million in the context of about 300,000 violent crimes involving firearms in 2008." Even the "radically lower estimate of only 108,000 annual defensive uses" per year still outweighs all firearm homicides in a given year.

The defensive use of firearms to ward off an attacker has also proven effective. Studies on "incidents in which a gun was 'used' by the crime victim in the sense of attacking or threatening an offender have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies." Indeed, research consistently "indicate[s] that victims who resist by using guns or other weapons are less likely to be injured compared to victims who do not resist or to those who resist without weapons."

This benefit is particularly pronounced for women. The usually-male attackers often threaten women with weapons other than firearms, such as knives, blunt objects, or even just their fists. But a readily available firearm can help a woman even the odds against these larger, stronger assailants. In fact, studies show that women who do not resist an attacker are over twice as likely to sustain serious injuries than women who resist with a firearm. Other research has shown that, for

each additional woman carrying a concealed handgun, the women's murder rate declines between three and four times more than the male murder rate for each additional man carrying a firearm.

The statistics only tell part of the story. Again and again, members of marginalized groups have successfully defended themselves against aggressors through the use of a firearm.

Austin Fulk, a gay man from Arkansas, is one of many who owes his life to a firearm that someone was lawfully carrying in public. One night in 1987, he was chatting with another man in a parking lot when four gay bashers charged them with baseball bats and tire irons. Fulk's companion drew his pistol from under the seat of his car, brandished it at the attackers, and fired a single shot over their heads, causing them to flee and saving the would-be victims from serious harm.

Mr. Fulk is not alone. Headlines are replete with other stories of guns saving the lives of victims across the country. In Tennessee, a good guy with a gun stopped a criminal strangling a woman outside a fast food restaurant. In North Carolina, a woman shot a man who was charging at her with an axe before he could reach her. And in Texas, a woman shot one of five men after they surrounded her car and tried to rob her.

These are just a handful of the real-life stories in which a gun saved women and minorities from death or serious bodily injury in public. Calling 911 does not now and never will suffice. The only thing standing between these Americans and the people who would do them harm is a gun. Countless lives have been saved as a result.

III. New York's "Proper Cause" Law Denies Women, LGBT People, Religious Minorities, and People of Color Access to Guns Outside the Home.

Despite their effectiveness in stopping violence before it occurs, New York does not permit the average citizen to carry firearms in public. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). Instead, it requires citizens to obtain a license, which in turn requires "proper cause" to carry a firearm outside the home. *Id.* If the applicant wishes to obtain a license "without any restrictions," he must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Id.*

This is an extraordinarily high burden. It cannot be met based on "[a] generalized desire to carry a concealed weapon to protect one's person and property." *Id.* "Nor is living or being employed in a high crime area"—a problem that plagues many minority groups—sufficient to procure a license. *Id.* Indeed, "[e]ven the fact that one carries large amounts of cash. . . . in areas noted for criminal activity does not demonstrate per se a special need for self protection distinguishable from that of the general community of the person engaged in the same business or profession." *In re Bastiani*, 23 Misc. 3d 235, 236, 881 N.Y.S.2d 591, 592 (Co. Ct. 2008).

Rather, the "special need for self-protection" standard "require[s] a showing of extraordinary personal danger, documented by proof of recurrent threats to life or safety." *Kaplan v. Bratton*, 249 A.D.2d 199, 201, 673 N.Y.S.2d 66, 68 (1998). This is consistent with other "proper cause" licensing regimes that exist across the country, which also impose heightened, individualized standards to justify carrying a firearm.

Critically, membership in a group that faces a disproportionate risk of violence *does not* meet this standard. In *Kachalsky*, for example, one of the plaintiffs

"attempted to show a special need for self protection by asserting that as a transgender female, she [was] more likely to be the victim of violence." 701 F.3d at 88. The licensing official nevertheless denied her application because the plaintiff "did not report any type of threat to her own safety anywhere." *Id.* (ellipsis omitted). To the official, "her status as a transgender" did not "put[ ] her at [a sufficient] risk of violence" to establish the "proper cause" necessary for a permit. *Id.*

The implications of this rule cannot be understated. As outlined above, transgender people likely face the greatest risk of violence in public compared to other members of the population. If they cannot meet the "special need for self-protection" standard, other LGBT people, religious minorities, and women certainly cannot either, despite the disproportionate risk of violence they all face when they leave their homes.

Without the tools of meaningful self-defense, there are no gay rights, there are no religious-minority rights, and there are no women's rights. By stripping these groups of their right to bear arms, New York has left millions of the most vulnerable citizens powerless to defend themselves against the all-too-common threats of violence they may face at any given moment.

Nothing but politics motivates this. New York has apparently decided that the supposed evil of allowing its citizens to carry guns for self-defense is worse than the loss of thousands of LGBT, Jewish, Muslim, and women's lives. The state's politicians may consider this an acceptable price to pay for the gun control lobby's favor. But the Constitution does not allow them to pay it because the right to bear arms belongs not to the rulers but to the people. *See Heller*, 554 U.S. at 636.

NOTES & QUESTIONS

1. Do the concerns about hate crimes inevitably lead to the position advocated by the Pink Pistols? Do these episodes just as easily support arguments for strict gun control or gun prohibition? Which response promises to be more effective for those concerned about being victims of hate crimes? If, as the Pink Pistols argue, there is a natural law right of self-defense (*see* Ch. 2.K, online Chs. 18, 21), should it matter whether other people think the exercise of the right is wise or not?

2. Do the arguments made by The Pink Pistols in its *Heller* brief differ from the arguments made by Operation Blazing Sword–Pink Pistols and others in their *NYSRPA* brief? If so, how? What has changed?

3. *Contrasting solutions.* The Pink Pistols advocate a response to hate crimes that depends on individual initiative. For example, after the mass murder at the Pulse nightclub in Orlando, Florida, in June 2016, firearms trainers around the nation reached out to offer free training to LGBT persons. *See* David Kopel, *The History of LGBT Gun-Rights Litigation*, Wash. Post, June 17, 2016. Indeed, one of the original six plaintiffs in the *Heller* case was Tom Palmer, who when walking with a male friend one day in San Jose, California, had drawn a handgun to deter a large gang of would-be gay bashers. *See* Spencer S. Hsu, *Self-Described "Peacenik" Challenged D.C. Gun Law and Won*, Wash. Post, Aug. 8, 2014; Tom G. Palmer, *In Wake of Orlando, Gays Should Arm Themselves: Otherwise, in Gun-Free Zones Like the Pulse Nightclub, We're Sitting Ducks to Maniacs and Terrorists*, N.Y. Daily News, June 13, 2016. In contrast, other LGBT advocates argue that the response to hate crimes should

be government-centric, based on tough criminal laws, gun control, and education. For example, George Takei (famous for playing Lt. Sulu in the original *Star Trek* TV series, 1966-69) has founded the group One Pulse for America, to advocate for gun control. What are the strengths and weaknesses of each approach? Are the private and public responses incompatible? Is either response, standing alone, sufficient?

4. Now that *Heller* has taken gun prohibition off the table, what would be your policy advice to groups concerned about hate crimes against the LGBT community?

5. Some leading advocates of gun control have urged victims to eschew self-defense. Pete Shields, the chair of Handgun Control, Inc. (now known as Brady) advised: "[P]ut up no defense—give them what they want." Pete Shields with John Greenya, Guns Don't Die—People Do 125 (1981). This advice assumed that robbery was the main goal of physical attacks, but a similar approach has sometimes been used by victims of hate crimes. For example, in Czarist Russia, Jews developed a tradition of not resisting mob violence. They learned from experience that an anti-Jewish pogrom was likely to be a temporary outburst of fury rather than a systematic destruction of an entire community. If the Jews allowed the attackers to kill a few victims, the attackers would usually be appeased and would depart. The Jewish attitude began to change in the latter nineteenth and early twentieth centuries, as the pogroms grew worse. Is Shields's advice helpful for victims of hate crimes?

6. Do the targets of hate crimes face different problems than people who are physically weak, such as the elderly, the disabled, or small-statured women?

7. The Pink Pistols brief also argued that the Second Amendment must be interpreted as an individual right of all Americans, rather than a right conditioned upon military service (the *Heller* dissenters' view), because at the time *Heller* was decided, openly gay and lesbian citizens were not permitted to serve in the military. That policy was reversed in 2011. For a historical summary of United States military LGBT policy, see Naval Institute Staff, Key Dates in U.S. Military LGBT Policy, The Naval History Blog (Mar. 26, 2018). *See also* Part E.3 (discussing the federal gun prohibition for persons dishonorably discharged from the military and its effect on LGBT individuals). What other persons might be denied the right to keep and bear arms if *Heller* were reversed and the dissenting view is adopted?

8. For the argument that the Supreme Court's gay-marriage decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), means that traditional and longstanding state restrictions on the right to keep and bear arms are no longer justifiable (at least if the right to arms is considered as fundamental as the right to same-sex marriage), see Marc A. Greendorfer, *After* Obergefell: *Dignity for the Second Amendment*, 35 Miss. C. L. Rev. 128 (2016).

E. CATEGORIES OF PROHIBITED PERSONS: MENTAL ILLNESS, MARIJUANA, AND THE MILITARY

1. Mental Illness

Heller says it should not be read to "cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill." 554 U.S. 570, 626 (2008). Federal law prohibits anyone adjudicated as a "mental defective" or committed to

a mental institution from possessing or purchasing firearms. 18 U.S.C. § 922(g)(4). Social science is very clear that most persons suffering from mental illness do not pose a danger to themselves or to others. The science is equally clear that persons with mental illness are at greater risk of criminal victimization. Evidence is mixed about whether persons with mental illness, as a class, are more likely to commit crimes, and, if so, what other factors affect the likelihood. Schizophrenia is clearly associated with a higher risk of perpetrating homicide—although the vast majority of people suffering from schizophrenia are peaceable and nonviolent. *See* David B. Kopel & Clayton E. Cramer, *Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill*, 58 How. L.J. 715 (2015). *See generally* Clayton E. Cramer, My Brother Ron: A Personal and Social History of the Deinstitutionalization of the Mentally Ill (2012). Accordingly, a lifetime firearms ban based on an adjudication or commitment for mental illness may be overinclusive if the objective is to disarm people who are unusually dangerous.

The printed textbook excerpts *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 679 (6th Cir. 2016) (en banc) (Ch. 13.E). The facts in the case were clear: in 1986, a court had committed Mr. Tyler to a mental institution for up to 30 days, having found by clear and convincing evidence that he was mentally ill. He was successfully discharged; in 2011, he applied for a permit to buy a handgun and was denied. It was undisputed that Mr. Tyler was mentally healthy and had been so since 1986. It was also undisputed that Mr. Tyler was a prohibited person under the 1968 Gun Control Act, which covers anyone "who has been adjudicated has a mental defective or who has been committed to a mental institution." 18 U.S.C. § 922(g)(4). Mr. Tyler acknowledged that his due process rights had been respected at the committal hearing. The question before the Sixth Circuit was whether section 922(g)(4) could constitutionally operate as a lifetime ban for a person with a long-past mental illness.

The brief below addresses a different issue: whether a lifetime Second Amendment ban may be based on a short-term involuntary civil commitment with almost no due process, and no meaningful remedy for relief. In Pennsylvania, an emergency involuntary commitment for examination and treatment is allowed when a physician or state administrator has a reasonable belief that a person is severely mentally disabled and requires immediate treatment. The commitment can be effected without a formal hearing, court order, or judicial findings of fact. The commitment period may not exceed 120 hours. 50 P.S. § 7302.

Brief for Autistic Self Advocacy Network (ASAN) et al. as Amici Curiae Supporting Petition for Writ of Certiorari

Vencil v. Pennsylvania State Police, 137 S. Ct. 2298 (2017)

. . . [S]ignificant adverse collateral consequences befall an individual with a record of a Section 302 Commitment, including the permanent loss of Second Amendment rights. Fundamental precepts of due process require that individuals should have a full and fair opportunity to expunge their records where the evidence supporting their commitment was insufficient under Pennsylvania law. . . .

ARGUMENT

I. A Section 302 Commitment Has Profound Due Process Implications

A. An Individual Suffers Many Collateral Consequences Due to a Section 302 Commitment

The many severe and lasting consequences of a Section 302 Commitment include (but are by no means limited to) social stigma, reputational harm, diminished employment, permanent deprivation of certain civil rights, and loss of associational opportunities. If Petitioner and other individuals cannot obtain expungement of an improper Section 302 Commitment, they are faced with disclosing that involuntary commitment for most educational, employment, and associational opportunities for the remainder of their lives, subjecting them to a lifetime of discrimination, if not outright disqualification. . . .

[T]he Pennsylvania Supreme Court has allowed redress of such reputational injuries from a mental health commitment (through the destruction of mental health records) only after a commitment has been found to be unlawful. *Wolfe v. Beal*, 384 A.2d 1187 (Pa. 1978). An individual cannot obtain relief from permanent collateral consequences without a full and adequate Section 302 Commitment expungement proceeding, which would allow her the opportunity to demonstrate the commitment was unlawful. Pennsylvania law provides no other avenue of relief. . . .

[A] Section 302 Commitment can be issued with as little as a brief evaluation of an individual by a physician—any physician—with minimal explanation or reasoning to support the commitment. None of the additional due process protections that attach in other deprivation of rights contexts are observed in a Section 302 Commitment.

Now the Pennsylvania Supreme Court has held that an individual does not have the right to present evidence after a Section 302 Commitment that may impeach the certifying physician's initial limited evaluation, which must be upheld if supported by a preponderance of the evidence before the physician at the time. This allows an improper Section 302 Commitment to persist as a permanent black mark upon an individual's social standing and reputation, significantly impacting educational, employment, and other associational opportunities. By unfairly constraining the only available post-deprivation remedy for an improper commitment, the Pennsylvania Supreme Court has denied Petitioner due process of law.

B. There Is No Meaningful Pre-Commitment Process Nor Adequate Post-Commitment Relief for Collateral Consequences Caused by a Section 302 Commitment

As demonstrated by Petitioner's case, an individual is not provided even the most basic due process protections in advance of an involuntary temporary commitment under Section 302. Petitioner received no pre-deprivation notice of the potential consequences of the Section 302 Commitment; she received no right to review by a neutral arbiter; she received no opportunity to make an oral presentation; she was provided no means of presenting evidence; she received no opportunity to cross-examine witnesses and respond to evidence; she received no right to

counsel; she received no decision based upon a written record; and, perhaps most importantly, she received no pre-commitment review by a judicial officer. . . .

Even if the Commonwealth can satisfy this Court that exigent circumstances surrounding a Section 302 Commitment require denial of due process protections in advance of that commitment, the Commonwealth cannot justify the lack of adequate post-commitment relief. Petitioner's case demonstrates that the post-deprivation remedies available are inadequate to meet the constitutionally required minimums when severe and permanent collateral consequences attach as a result of the commitment. The Pennsylvania Supreme Court's holding constrains the statutory expungement process to provide only a scant review of a Section 302 Commitment, with complete deference to the original fact-finding physician's certification, under a preponderance of the evidence standard, and without the benefit of additional evidence. *See* Petition at p. 46. An individual seeking expungement of a Section 302 Commitment is left with only a dramatically one-sided and incomplete record upon which to dispute that the Commonwealth met its burden for a proper commitment.

Should the holding of the Pennsylvania Supreme Court be allowed to stand, individuals like Petitioner will not be afforded an adequate post-deprivation remedy for an improper commitment.

II. A Section 302 Commitment Permanently Deprives an Individual from Exercising the Fundamental and Individual Right to Keep and Bear Arms Guaranteed by the Second Amendment

A. The Second Amendment Enshrined a Fundamental Individual Right to Keep and Bear Arms

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) [Ch. 11.A], this Court confirmed that there was "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The Second Amendment is incorporated through the substantive Due Process Clause of the Fourteenth Amendment and restricts state as well as federal government action. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) [Ch. 11.B]. This Court has further declared that the rights protected by the Second Amendment are among those fundamental rights necessary to our system of ordered liberty. *See McDonald*, 561 U.S. at 778. The ability to keep and bear arms is a hallmark of uniquely American liberties.

The Pennsylvania Supreme Court cannot allow an individual liberty interest as important as the Second Amendment right to be cast aside without due process protections and expect to comport with this Court's holdings in *Heller* and *McDonald*. This would be like holding that an individual who has been subjected to a Section 302 Commitment cannot exercise free speech, or cannot be protected against unreasonable search and seizure. This Court specifically rejected the invitation "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees. . . ." *McDonald*, 561 U.S. at 780.

As it stands, the decision by the Pennsylvania Supreme Court significantly constrains Petitioner's procedural rights at an expungement hearing . . . and will effectuate a permanent unconstitutional deprivation of her Second Amendment rights.

B. A Section 302 Commitment Deprives an Individual of Second Amendment Rights

A Section 302 Commitment immediately and permanently disqualifies an individual from keeping and bearing arms under Pennsylvania law in accordance with 18 Pa. C.S. § 6105(c)(4), as well as under federal law, 18 U.S.C. § 922(g)(4). The Pennsylvania Supreme Court's determination that the only liberty interest affected by Petitioner's Section 302 Commitment was the temporary suspension of her physical freedom is plainly wrong in the face of this Court's holdings in both *Heller* and *McDonald*.

Moreover, the Pennsylvania Supreme Court failed to consider that a Section 302 Commitment has the same drastic impact on Second Amendment rights as does an involuntary commitment for a much longer period, or even a felony conviction. And that, unlike a Section 302 Commitment, these other disqualifying events provide an individual significantly more due process protections before and after deprivation.

For example, involuntary commitments under 50 P.S. § 7303 ("Section 303 Commitment") and 50 P.S. § 7304 ("Section 304 Commitment") for periods of up to twenty or ninety days, respectively, require additional pre-commitment procedures that include a hearing and a right to counsel, and in the case of a Section 304 Commitment, the determination must be supported by clear and convincing evidence. 50 P.S. § 7304(f). *Amici Curiae* do not agree that the aforementioned procedures are sufficient to satisfy due process, but present them as evidence that additional procedures are feasible in advance of a permanent deprivation of rights. Even though a Section 302 Commitment does not offer any such pre-deprivation protections, the consequential loss of Second. Amendment rights for a Section 302 Commitment is the same as that under a Section 303 Commitment or a Section 304 Commitment. Pennsylvania law authorizes the immediate and permanent deprivation of an individual's state firearms rights, 18 Pa. C.S. § 6105(a) and (c), as well as reporting of the commitment to the federal government, which immediately and permanently deprives an individual of federal firearms rights pursuant to 18 U.S.C. § 922(g)(4). The deprivation of Second Amendment rights also occurs upon a Section 303 or Section 304 Commitment, but only after a pre-commitment hearing involving additional due process protections.

Similarly, an individual who has been subjected to a Section 302 Commitment without such due process protections is subject to the same removal of firearms rights visited upon a convicted felon in accordance with Pennsylvania law, 18 Pa. C.S. § 6105(a) and (c), and federal law, 18 U.S.C. § 922(g)(1) and (g)(4). The critical difference, however, is that an individual convicted of a felony is afforded full due process protections *before* conviction and subsequent deprivation of Second Amendment rights. An individual committed under Section 302 is provided no meaningful pre-deprivation procedural protections.

Although there exists a mechanism for the ostensible restoration of firearms rights under state law, *see* 18 Pa. C.S. § 6105(f)(1), this "remedy" is wholly insufficient to satisfy due process because it does not restore firearms rights under federal law. See *In Re Keyes*, 83 A.3d 1016, 1026-1027 (Pa. Super. 2013). The Pennsylvania Supreme Court's constraints on an individual seeking expungement effectively eliminate any adequate post-deprivation remedy for the permanent loss of the right to keep and bear arms following a Section 302 Commitment.

A less grudging expungement process under 18 Pa. C.S. § 6111.1(g) is necessary because it is the only available avenue to restore an individual's Second Amendment rights that were forfeited without meaningful pre-deprivation due process protections, and for which no other adequate post-deprivation remedy exists. As the Petitioner demonstrates, the Supreme Court of Pennsylvania's decision reduces the expungement process to an illusory façade that does not provide an adequate remedy. . . .

NOTES & QUESTIONS

1. The Supreme Court denied the petition for writ of certiorari in *Vincil v. Pa. State Police* without comment. 137 S. Ct. 2298 (2017).

2. Should the name of everyone receiving mental health treatment be entered into the National Instant Criminal Background Check System (NICS)? If not, what types of mental illness should disqualify a person from having firearms? Should the mentally ill be deprived of firearms even if they do not pose a danger to themselves or others? Who should determine whether a person's mental illness is of the type or degree to keep them from possessing guns? For further examination of these issues, see Alyssa Dale O'Donnell, *Monsters, Myths, and Mental Illness: A Two-Step Approach to Reducing Gun Violence in the United States*, 25 S. Calif. Interdisc. L.J. 475 (2016).

3. The Gun Control Act, 18 U.S.C. § 922(g)(4), prohibits anyone adjudicated as a "mental defective" or committed to a mental institution from possessing or purchasing firearms. Is this too stringent of a standard to protect the public from mentally dangerous persons with firearms? How would you rewrite the statute to provide more protection without depriving the nondangerous mentally ill of their Second Amendment rights?

4. The scope of section 922(g)(4) is expansively interpreted by ATF regulation. According to this regulation, "adjudicated as a mental defective" means:

> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
> (1) Is a danger to himself or to others; or
> (2) Lacks the mental capacity to contract or manage his own affairs.
> (b) The term shall include—
> (1) A finding of insanity by a court in a criminal case; and
> (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

27 C.F.R. § 478.11.

"Committed to a mental institution" means: "A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution." *Id.*

5. To what extent should persons with dementia or other forms of mental illness be prevented from owning firearms? The federal criminalization of gun ownership applies to anyone adjudicated as a "mental defective" or who has been committed to a mental institution; the provision does not cover an elderly person with a cognitive disorder who has never been legally declared incompetent or involuntarily institutionalized. As described in the amicus brief above, some medical care providers can impose a lifetime firearms prohibition on an individual by ordering a short-term involuntary committal. Should medical care providers be given greater power to criminalize individuals' firearms possession? For further discussion, see Fredrick E. Vars, *Not Young Guns Anymore: Dementia and the Second Amendment*, 25 Elder L.J. 51 (2017) (arguing for voluntary surrender programs, and pointing out that "[m]any people with mild dementia can be responsible with firearms"); Abigail Forrester Jorandby, *Armed and Dangerous at 80: The Second Amendment, The Elderly, and a Nation of Aging Firearm Owners*, 29 J. Am. Acad. Matrim. Law. 85 (2016) (arguing for a variety of restrictions, including requiring guardians to seize firearms); Marshall B. Kapp, *The Physician's Responsibility Concerning Firearms and Older Patients*, 25-SPG Kan. J.L. & Pub. Pol'y 159 (2016) (opposing mandatory reporting by physicians, but favoring mandates for physicians to inquire about patient gun ownership and to counsel them about dangers).

6. *Social Security recipients.* In 2016, the Social Security Administration proposed a regulation that would require the transfer to NICS the names of mentally disabled persons who had a representative payee appointed to manage their Social Security disability benefits, thus felonizing their possession, acquisition, or use of firearms. For a comment opposing this rule, see Ilya Shapiro, Josh Blackman, E. Gregory Wallace & Randal John Meyer, *In the Matter of Implementation of the NICS Improvement Amendments Act of 2007*, Cato Institute (July 1, 2016). The SSA's final rule was overturned in February 2017 under the Congressional Review Act. Pub. L. No. 115-8; H.R.J. Res. 40, 115th Cong. (2017).

7. *Mandatory reporting.* Several people called the FBI or a local sheriff's office to warn authorities about the dangers of Nikolas Cruz, who later perpetrated a mass murder at Marjory Stoneman Douglas High School in Florida. Official follow-up was effectively nil. *See* Andrew Pollack & Max Eden, Why Meadow Died: The People and Policies That Created The Parkland Shooter and Endanger America's Students (2019); Richard A. Oppel Jr., Serge F. Kovaleski, Patricia Mazzei & Adam Goldman, *Tipster's Warning to F.B.I. on Florida Shooting Suspect: 'I Know He's Going to Explode'*, N.Y. Times, Feb. 23, 2018. The county sheriff, whose office had numerous contacts with the criminal, was later removed for "neglect of duty and incompetence." Anthony Man & Rafael Olmeda, *Gov. Ron DeSantis on Suspended Broward Sheriff: 'Scott Israel Continues to Live in Denial'*, South Florida Sun Sentinel, Apr. 5, 2019. But there were also "[m]ore than 30 people [who] knew about disturbing behavior by Nikolas Cruz, including displaying guns, threatening to murder his mother and killing animals, but never reported it until after he committed the massacre at Marjory Stoneman Douglas High School." David Fleshler & Brittany Wallman, *More than 30 People Didn't Report Disturbing Behavior by Nikolas Cruz Before Parkland Massacre*, South Florida Sun Sentinel, Nov. 13, 2018. Should reporting of such behavior be required by law?

8. *Gun confiscation orders.* Starting with Connecticut in 1999 and Indiana in 2005, several states have enacted laws to provide for the seizure of firearms from

people who are deemed to be a risk to themselves or others. Somewhat similar confiscation orders have a longer record as a part of domestic relations laws. The new laws are sometimes called "extreme risk protection orders," but that is a misnomer, because few such laws require a finding of an "extreme" risk. Another term is "red flag laws," although some persons consider this term to be stigmatizing to the mentally ill. The laws may also be called "gun violence prevention orders." The term "gun confiscation orders" is the most direct.

While laws vary, the general system is as follows: First, someone petitions a court for a temporary confiscation order. While Connecticut requires that the petitioners be either a state's attorney, or two police officers, and requires that they must have investigated the situation, some other states allow petitions from a wide variety of people—ranging from close or distant relatives to someone who once had a dating relationship with the individual. The petitioner's burden of proof at this ex parte hearing tends to be low. Some states require police to immediately confiscate all of an individual's firearms and ammunition. Others allow for the guns to be surrendered to the custody of a federal firearms licensee (e.g., a gun store, or a lawyer with an FFL who stores guns for clients in some situations), or to some other responsible person.

Within a few weeks, there will be a further hearing, for which the respondent will have the opportunity to appear, to present evidence, and be represented by counsel at his own expense (or in Colorado, the option to have court-appointed counsel, whether or not indigent). At the hearing, the court will consider whether to extend the order for a longer period, such as 180 or 364 days. At the second hearing, the burden of proof for petitioner is usually "clear and convincing evidence."

Some people would describe the system as consistent with President Trump's statement "take the guns first, go through due process second." Toluse Olorunnipa, Anna Edgerton & Greg Stohr, *President Trump's 'Take the Guns First' Remark Sparks Due Process Debate*, Time, Mar. 3, 2018. Others disagree, pointing to recent laws that immunize accusers from cross-examination, by allowing them to submit an affidavit rather than testify in court. They argue that this is never due process.

Procedures vary widely for termination or expiration of orders, and for the return of firearms once an order is no longer in effect.

Because the laws are relatively new, social science research is limited. We do know that in Connecticut, 32 percent of ex parte orders are terminated at the two-party hearing. Michael A. Norko & Madelon Baranoski, Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness, 6 Conn. L. Rev. 1609, 1619 (2014). The figure in Marion County, Indiana, is 29 percent. George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006-2013*, 33 Behav. Sci. & L. 308 (2015) (29 percent).

The only study to look at effects of gun seizure laws on crime rates found no statistically significant changes in "murder, suicide, the number of people killed in mass public shootings, robbery, aggravated assault, or burglary." John R. Lott & Carlisle E. Moody, *Do Red Flag Laws Save Lives or Reduce Crime?* (Dec. 28, 2018) (covering Connecticut Indiana, Washington, and California, and also finding no effect on suicide). Another study reported: "Whereas Indiana demonstrated an aggregate decrease in suicides, Connecticut's estimated reduction in firearm suicides was offset by increased nonfirearm suicides." Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015*, 69 Psychiatric Serv. (June 1, 2018).

Another Connecticut study did not attempt to study suicide or crime rates but did contain many informative interviews with police officers and other persons responsible for implementing the law. Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 Law & Contemp. Probs. 179 (2017). The study also produced an oft-quoted factoid: "[W]e estimated that approximately ten to twenty gun seizures were carried out for every averted suicide." *Id.* at 206. However, the methodology behind the factoid was plainly erroneous. It assumed that *every* form of self-inflicted injury (e.g., a teenager cutting his arm) was a suicide attempt. *Id.* at 201, n.86. The factoid is valid only if one assumes that a teenager who injures herself by repeatedly banging her head against the wall has the same lethal intentions as an elderly man who puts a revolver in his mouth.

Confiscation orders have been upheld in two appellate cases. In Connecticut, the plaintiff was a pro se individual who "had brought to the [lower-court] hearing two electronic devices wrapped in tin foil." *Hope v. State*, 163 Conn. App. 36, 40 (2016). The intermediate appellate court upheld the Connecticut statute against a Second Amendment challenge, because, at least for the particular plaintiff, the law "does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes."

An Indiana decision upheld the statute against a challenge based on the Indiana Constitution right to arms, because Indiana precedent allowed prohibiting "dangerous" persons from having arms. *Redington v. State*, 992 N.E.2d 823 (Ind. App. 2013). The court also rejected the argument that plaintiff was entitled to just compensation for the taking of his property. The court pointed out that the taking of dangerous property does not require compensation; for example, forfeiture laws allow uncompensated takings. *Id.* at 836-37. In 2015, Redington filed a petition for return of his 51 firearms. The hearing on the petition was held in January 2018. The State presented no evidence but instead asked the court to rely on the evidence from the 2012 hearing. The trial court denied the petition, but the intermediate appellate reversed, holding that "Redington met his burden of proving by a preponderance of the evidence that he is not dangerous by presenting the testimony of a psychiatrist that he does not present a risk in the future because there is no evidence he has a propensity for violent or emotionally unstable conduct." *Redington v. State*, 121 N.E.3d 1053, 1057 (Ind. App. 2019).

For further reading, see David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 Law & Psy. Rev (forthcoming 2021); Consortium for Risk-Based Firearm Policy, Guns, Public Health and Mental Illness: An Evidence-Based Approach for State Policy (2013) (addressing confiscation orders, short-term involuntary commitments, and other issues); U.S. Senate Judiciary Committee, Red Flag Laws: Examining Guidelines for State Action, Mar. 26, 2019; David B. Kopel, written testimony for Senate hearing.

2. Marijuana Users

Federal law prohibits the possession of a firearm by anyone "who is an unlawful user of or addicted to any controlled substance." 18 U.S.C. § 922(g)(3). Federal law also makes it unlawful to sell a firearm to any person if the seller knows or has reasonable cause to believe that such a person is an unlawful user of or addicted to

a controlled substance. 18 U.S.C. § 922 (d)(3). Marijuana is a controlled substance under federal law. 21 U.S.C. § 812. In September 2011 the ATF issued an open letter to all federal firearms licensees stating that persons who use marijuana are prohibited persons under section 922(g)(3), regardless of whether state law authorizes such use for medicinal purposes. *See* ATF, Open Letter to All Federal Firearms Licensees.

The Ninth Circuit in *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016), held that prohibiting purchase of a firearm by the holder of a state marijuana registry card does not violate the Second Amendment. Applying intermediate scrutiny, the court concluded that it is reasonable to assume that a registry cardholder is much more likely to be a marijuana user than someone who does not hold a registry card and, in turn, is more likely to be involved with firearm violence. Similarly, in *United States v. Carter*, 750 F.3d 462 (4th Cir. 2014), the court held that the government had presented sufficient social science evidence to show that illegal drug users, including marijuana users, were more likely to be violent.

NOTES & QUESTIONS

1. Should persons whose diseases or disabilities are treatable with medical marijuana be forced to choose between treatment and their Second Amendment rights? *See* Michael K. Goswami, *Guns or Ganja: Pick One and Only One*, 52 Ark. Law. 24 (Spring 2017).

2. For a comparison of three legal-reform movements—gun deregulation, same-sex marriage, and marijuana legalization—see Justin R. Long, *Guns, Gays, and Ganja*, 69 Ark. L. Rev. 453 (2016). What are some of the similarities and differences among these movements?

3. What about firearms and alcohol? Many states prohibit public carry of firearms while consuming alcohol or when visiting restaurants, bars, and other places where alcohol is served. Should persons who consume alcohol be prohibited from possessing or purchasing firearms? Are they less risky than persons who use mari juana? For research on alcohol and violence, see Kathryn Graham & Michael Livingston, *The Relationship Between Alcohol and Violence—Population, Contextual and Individual Research Approaches*, 30 Drug & Alcohol Rev. 453 (2011) (citing numerous studies).

4. The 1997 Treasury Decision from the Bureau of Alcohol, Tobacco and Firearms (ATF), determined that for purposes of enforcement, drug use "is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year." T.D. ATF-391 Definitions for the Categories of Persons Prohibited from Receiving Firearms

(Jun. 27, 1997), https://www.atf.gov/file/84311/download; *see also* 27 C.F.R. § 478.11 (2019). In 2019 ATF promulgated an expanded version of this definition, so that federal regulations now also include "persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year." 27 C.F.R. § 478.11 (2019).

5. Various individuals fall within the standards that ATF and courts have used to define "drug user." At least one commentator concludes that there is "wide spread underreporting" of these prohibited drug users to the National Instant Check System database. *See* Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 Ohio St. J. Crim. L. 211 (2020) ("The NICS system has only a tiny fraction of the drug users in their system as most of the drug courts, drug diversion programs, drug counselors, detox centers, methadone clinics, college and high school administrators (who suspend students for having drugs) and drug task forces do not bother reporting the individuals they process."); *see also* Beckei Goggins & Shauna Strickland, BJS Report: State Progress in Record Reporting for Firearm-Related Background Checks: Unlawful Drug Users (July 2017).

3. Military Personnel and Veterans

Surprisingly, persons who volunteer to serve in the United States armed forces subject themselves to certain risks of being forbidden to exercise Second Amendment arms rights.

a. Lifetime Prohibition for Dishonorable Discharge

One path to prohibition is to be dishonorably discharged from service. The Gun Control Act of 1968 prohibits firearms and ammunition possession by anyone "who has been discharged from the Armed Forces under dishonorable conditions." 18 U.S.C. § 922(g)(6). Neither in 1968 nor in the half-century thereafter has any empirical research been conducted on the prohibition.

As of December 31, 2018, there were 16,543 persons listed in the NICS database on the basis of a dishonorable discharge. FBI Criminal Justice Information Services (CJIS) Division, National Instant Criminal Background Check System (NICS) Section, Active Records in the NICS Indices as of December 31, 2018. About 5,000 of these were added after the November 2017 mass murder at a church in Sutherland Springs, Texas, when it was discovered that the Air Force had failed to report the perpetrator's dishonorable discharge to NICS. Sig Christenson, *After Killings, Pentagon Added Thousands of Dishonorable Discharge Cases to FBI Database*, San Antonio Express-News, Feb. 12, 2018.

Dishonorable discharges are imposed only after a general court martial. Except for desertion, the current reasons for dishonorable discharge overlap almost entirely with serious civilian felonies under state laws.

Only one federal circuit case has involved a serious challenge to the section 922(g)(6) prohibition. *United States v. Jimenez*, 895 F.3d 228 (2d Cir. 2018). The Second Circuit upheld the prohibition on Jimenez by analogizing his court martial convictions to civilian felony convictions: "those who, like Jimenez, have been

found guilty of felony-equivalent conduct by a military tribunal are not among those 'law-abiding and responsible' persons whose interests in possessing firearms are at the Amendment's core." *Id.* at 235. "There is no reason to think that Jimenez is more likely to handle a gun responsibly just because his conviction for dealing drugs and stolen military equipment (including firearms) occurred in a military tribunal rather than in state or federal court." *Id.* at 237.

In the past, homosexual behavior or orientation were grounds for military discharge. The typical practice was a "general" discharge for homosexual orientation, and an "undesirable" discharge for homosexual conduct. Earlier policies had sometimes imposed a dishonorable discharge for homosexual conduct. *See* Randy Shilts, Conduct Unbecoming: Gays & Lesbians in the U.S. Military, Vietnam to the Persian Gulf (1993). While less-than-honorable discharges can have major harmful effects on an individual's civilian employability, they do not affect gun rights, for which only a dishonorable discharge triggers a prohibition. In 2011, the Obama administration announced that the approximately 100,000 homosexual persons who had been discharged were eligible to petition to have their discharge status upgraded to "honorable." Dave Philipps, *Ousted as Gay, Aging Veterans Are Battling Again for Honorable Discharges*, N.Y. Times, Sept. 5, 2015, at A1.

b. Disarming the Armed Forces

In early 1992, the Clinton administration finalized a regulation that had been initiated by the first Bush administration. It forbids gun possession by all Army and related civilian personnel at U.S. bases, except for military police. U.S. Dep't of Def., Dir. 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties 3 (Feb. 25, 1992). The directive was reissued by the Obama administration in 2011. U.S. Dep't of Def., Dir. 5210.56, Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities 1 (Apr. 1, 2011). The directive was criticized for facilitating the mass murder by an Islamist extremist at the army base in Fort Hood, Texas, in November 2009.

Many base regulations allow "privately owned firearms" (POF) on base only when registered and stored in a locked armory. For example, a soldier living in barracks could store her private rifle in an armory and check it out on a day off to go hunting. U.S. Dep't of Army, III Corps & Fort Hood Reg., Commanding General's Policy Letter #7 (Aug. 23, 2017).

In the past, some bases had required registration of all family guns for military personnel living in off-base government housing. Congress outlawed such registration in 2011 and ordered the destruction of all registration records. Ike Skelton National Defense Authorization Act for 2011, P.L. 111-383 ("Prohibition on Infringing on the Individual Right to Lawfully Acquire, Possess, Own, Carry, and Otherwise Use Privately Owned Firearms, Ammunition, and Other Weapons"). The law does not forbid investigation of private gun ownership in connection with a criminal investigation. *Id.* Likewise, medical personnel may make inquiries about gun ownership in connection with mental health concerns. National Defense Authorization Act for Fiscal Year 2013, P.L. 112-239 ("Rule of Construction Relating to Prohibition on Infringing on the Individual Right to Lawfully Acquire, Possess, Own, Carry, and Otherwise Use Privately Owned Firearms, Ammunition, and Other Weapons").

Arms-bearing prohibitions for military personnel and civilian employees of the military were criticized for violating the Second Amendment and endangering safety. *See, e.g.*, Major Justin S. Davis, *The Unarmed Army: Evolving Second Amendment Rights and Today's Military Member*, 17 Tex. Tech Admin. L.J. 27 (2015). In response, a 2015 law required the Secretary of Defense to establish a process by which commanders "may authorize" armed forces members "to carry an appropriate firearm on the installation, center, or facility if the commander determines that carrying such a firearm is necessary as a personal- or force-protection measure." National Defense Authorization Act For Fiscal Year 2016, P.L. 114-92, 129 Stat. 726 § 526("Establishment of Process by Which Members of the Armed Forces May Carry an Appropriate Firearm on a Military Installation"). This partially overrode the 1992 Bush/Clinton and 2011 Obama Defense Directives, by allowing (but not requiring) commanders to authorize individual personnel to bear arms while on-base.

However, the Secretary of Defense failed to comply with the deadline to establish a system for authorized carry, and so the next year's Defense appropriation partially withheld certain funding until the system was established. National Defense Authorization Act For Fiscal Year 2017, P.L. 114-328, 130 Stat. § 348 (2000) "Limitation on Availability of Funds for Office of the Under Secretary of Defense for Intelligence"). The funding threat was so effective that a few weeks before final passage of the appropriation bill, the Department of Defense issued a new directive. It replaces the 1992 and 2011 directives and specifies the procedures for issuance of concealed carry permission for personnel. Dep't of Defense Directive 5210.56, Arming and the Use of Force (Nov. 18, 2016).

After fatal shootings in 2019 at the Pearl Harbor naval base in Hawaii and the Pensacola Naval Air Station in Florida, the United States Marine Corps issued a new rule authorizing qualified law enforcement officers to bring privately-owned firearms on bases for personal protection. The authorized group includes military police, criminal investigators, and civilian police officers working at the bases. They must have concealed carry permits for the firearms.

c. Felonizing Gun Possession by Financially Incompetent Veterans

As discussed above, in Part E.1 Note 6, Congress repealed a Social Security Administration regulation that would have criminalized gun ownership by persons who were receiving disability benefits for a mental condition *and* who designated a personal representative to manage their relations with the Social Security Administration. The Veterans Administration (VA), however, goes much further in stripping Second Amendment rights of its beneficiaries.

The VA sometimes decides, on its own initiative, that a veteran beneficiary is financially incompetent, and so appoints a representative to manage the veteran's benefits. This may be appropriate a variety of situations. For example, a veteran might have severe dementia. Or an elderly widow who formerly relied on her spouse to manage all financial affairs may not be able to navigate through the VA's labyrinthine bureaucracy. Every time the VA appoints a personnel financial representative, the VA reports to NICS that the veteran has been adjudicated as a "mental defective." As a result, if the veteran does not immediately dispose of all her firearms and ammunition, she is a prohibited person, and guilty of a federal felony. Financial

incompetence is not in itself a mental illness, although it may sometimes be a consequence of such illness. The VA's practices, and Congress's torpor in reforming them, are criticized in Stacey-Rae Simcox, *Depriving Our Veterans of Their Constitutional Rights: An Analysis of the Department of Veterans Affairs' Practice of Stripping Veterans of Their Second Amendment Rights and Our Nation's Response*, 2019 Utah L. Rev. 1.

NOTES & QUESTIONS

1. When persons are in military service, their First Amendment rights may be subject to certain limitations, but they may not be extinguished. *See Parker v. Levy*, 417 U.S. 733, 758 (1974) (the "different character of the military community and of the military mission requires a different application of [First Amendment] protections"); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding requirement that petition circulators obtain permission of the base commander). Do First Amendment precedents provide useful analogies for the Second Amendment in a military context?

2. Almost all military personnel receive some training in how to kill. Personnel in combat specialties, such as infantry or artillery, receive extensive training in how to do so. In combat deployments, some do kill. Should public policy be especially vigilant in disarming persons who have shown a willingness to kill? Does the text of the Second Amendment offer any guidance?

3. Should a person who cannot balance a checkbook be allowed to own a firearm?

F. INDIAN TRIBES

The printed textbook examined the arms culture of American Indians, and gun control laws aimed at Indians, focusing mainly on the original colonies and states in the seventeenth and eighteenth centuries. As the textbook detailed, the distinctive American arms culture that we know today was a hybrid of the English and Indian arms cultures. Like states, Indian Nations have always been recognized as sovereigns within the American legal system—although, as with states, that sovereignty is not absolute, and may under some circumstances be overridden by the federal government.

At present, the Second Amendment is not applicable to Indian tribal nations. Self-governing Indian tribes have never formally enjoyed the protections of the Constitution. *See Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-03,[5] extended certain constitutional rights to Indian tribes, including rights protected by the First, Fourth, Fifth, Sixth, and Seventh Amendments, as well as the Fourteenth Amendment's Due Process and Equal Protection Clauses; the right to keep and bear arms in the Second Amendment was omitted. The protections of ICRA have been considerably weakened

5. Section 1304, pertaining to crimes of domestic violence, was added in 2013.

with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), which held that United States federal courts could not hear ICRA claims against Indian tribes except for habeas corpus petitions. The Court reasoned that such suits are barred by tribal sovereign immunity and that tribal courts are better equipped to decide civil rights complaints within tribal communities.

Within the jurisdiction of Indian land, gun rights and regulations are determined by tribal law. The following article excerpt describes some of these provisions.

Angela R. Riley

Indians and Guns

100 Geo. L.J. 1675 (2012)

. . .

B. INDIAN NATIONS AND GUNS

The right of Indian tribes to make their own laws and be governed by them predates the formation of America. Such rights, linked to a tribe's inherent sovereignty, have been recognized for centuries and are embodied in treaties, statutes, and case law. The anomalous position of Indian tribes within the federal system affords them the unique opportunity to self-govern in a localized manner in relation to guns. In the following subsections, I examine two areas where tribes have addressed the right to bear arms and guns more generally—in tribal constitutions and in tribal codes, respectively.

1. Tribal Constitutional Law and the Right to Bear Arms

Numerous tribes operate under written constitutions, which embody a wide range of tribal governance systems. Many of these constitutions reflect the particular historical context in which a tribe's constitution was developed. They commonly set forth, much like the U.S. Constitution, separation of powers and protection of individual rights. Some tribal constitutions directly reflect ICRA's influence, mirroring the individual-rights restrictions as seen in the federal statute.

In recent years, however, many tribes have undertaken constitutional reform, departing from the broadly implemented bureaucratic constitutions of the Indian Reorganization Act era.[6] Because of a spate of recent tribal constitutional reform projects, some of these individual rights provisions have recently been drafted or modified. Today, a rather small but growing number of tribal constitutions expressly provide that the Indian nation may not infringe on the individual right to bear arms. Practically speaking, such provisions bind the tribal government to the stated protection and would, accordingly, limit the tribe's ability to infringe the right, whether the suit is brought by an Indian or a non-Indian.

6. [The Indian Reorganization Act was enacted in 1934 and was known as the "Indian New Deal." The Act provided for greater tribal autonomy and self-government. 48 Stat. 984 (1934).—Eds.]

Of those tribes identified that have provisions securing the right to bear arms, some variation can be seen, as tribal constitutions reflect tribes' particular circumstances, history, and tradition. Of particular note is that none included an analog to the Second Amendment's prefatory clause regarding the formation of a militia. In contrast, in each tribal constitution dealing with the right to bear arms, the individual right is paramount. As such, these tribes convey a common respect for the individual right to bear arms as a limit on the actions of tribal governments.

Consider, for example, the current draft of the new Mille Lacs Band of Ojibwe's Constitution, which stipulates, "[t]he government of the Band shall not make or enforce any law or take any executive action . . . prohibiting the right of the People to keep and bear arms." A similar clause is contained in the Constitution of the Zuni Pueblo:

> Subject to the limitations prescribed by this constitution, all members of the Zuni Tribe shall have equal political rights and equal opportunities to share in tribal assets, and no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to bear arms.

These can be contrasted with other tribes, whose constitutions are slightly more nuanced in the way the right is articulated. For example, the Little River Band of Ottawa Indians' Constitution states, "[t]he Little River Band in exercising the powers of self-government shall not . . . [m]ake or enforce any law unreasonably infringing the right of tribal members to keep and bear arms." The Constitution makes clear in its language that the right is not absolute but is subject to reasonable restriction. The Saint Regis Mohawk, likewise, include the clarification that the right to bear arms shall not be denied by the tribe "in exercising its powers of self-government" specifically.

. . .

[R]esearch reveals that most Indian tribes, in fact, do not expressly protect the right to bear arms in their constitutions.[328] Thus, practically speaking, tribes' extraconstitutional status means that those tribes that do not guarantee a right to bear arms are free to choose amongst a variety of gun control options. And even those that do contain an individual right guarantee will interpret their constitutional provisions according to tribal law and tradition, as they are not bound by federal law or federal court precedent. Accordingly, even if a tribe's constitution directly mirrored that of the United States, the Supreme Court's recent Second Amendment ruling—including, specifically, *Heller* and *McDonald*—would be inapplicable to tribal governments. Disputes over the scope of a right to bear arms in tribal court, then, could yield radically different results than similar cases adjudicated in the federal courts.

2. Tribal Gun Laws in Indian Country

Beyond constitutional guarantees, as seen in the following subsections, tribes may—and often do—regulate the ownership, possession, and use of guns in Indian country through both civil and criminal codes.

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328. However, an exhaustive search of published tribal court opinions does not turn up one case in which a tribal government attempted to ban guns on the reservation.

a. Criminal Codes. Perhaps not surprisingly, where tribes have criminal codes they almost always enumerate gun crimes. As previously explained, absent treaty provisions to the contrary, federal criminal laws of general applicability, including gun laws, are in effect in Indian country as they are anywhere. And, in fact, there are federal laws that might affect firearm ownership and possession in Indian country, particularly as they pertain to domestic violence convictions. But where gaps or issues of nonenforcement arise, reservation Indians will look to tribal governments to define the scope of gun regulation. As explained previously, non-Indians are not subject to tribal criminal law.

Virtually every tribe researched that has a criminal code has enacted some type of gun law. Criminal laws regarding guns in Indian country, as a general matter, map onto those seen in states and municipalities around the country. Laws banning or governing the carrying of concealed weapons are quite prevalent. Several tribes allow concealed carry where a permit has been issued by the tribe. Some tribes more tightly constrain gun ownership in general, limiting the places where weapons may be lawfully carried with no permit exceptions.

Tribes' most comprehensive gun laws are reflected in those pertaining to standard violent crimes. Because tribes retain jurisdiction over crimes by Indians and have exclusive jurisdiction over nonmajor crimes committed by Indians, tribal codes reflect the jurisdictional realities, with many codes omitting reference to crimes that would fall within the federal government's jurisdiction under the Major Crimes Act, such as murder. References to guns or weapons are most common in code provisions related to assault, robbery, intimidation, and stalking. Otherwise, tribal criminal codes are replete with gun restrictions, including laws governing ownership, carry, and use. Tribes such as the Fort Peck Assiniboine, the Eastern Band of Cherokee Indians, Oglala Sioux, the White Mountain Apache, the Chickasaw Nation, and numerous others, have comprehensive criminal gun laws.

Domestic violence, a notorious problem on Indian reservations, appears commonly in criminal codes as well, sometimes within the context of guns. Some tribes allow tribal police to take guns from the home in a domestic violence situation even if the gun was not used in the incident at issue. Others condition release of a defendant guilty of domestic violence on a guarantee of no future possession of firearms.

Tribes also employ carve outs to general gun regulations or prohibitions for activities that may be tribally distinct or connected to their, particular cultural and ceremonial practices. The Navajo Nation code, for example, includes an express exception to its general gun laws where the firearm is used in "any traditional Navajo religious practice, ceremony, or service." The San Ildefonso Pueblo Code similarly states an exception to its criminal gun code regarding "Negligent Use & Discharging of Firearms & Cannons" for those circumstances when such gun use is related to "any ceremony where traditions and customs are called for." And the Shoshone and Arapaho of the Wind River Indian Reservation set forth requirements regarding the hunting of "big game" on the reservation. The code includes preceremony permitting requirements unique to those who will be dancing in the tribes' Sundance Ceremony and using male elk or male deer in the ceremonies themselves.

Undoubtedly, the articulation of gun crimes is an essential tool for tribes in addressing public safety in Indian country and is, intuitively, at least one place where tribes may choose to legislate in regards to guns. At the most basic level, maintaining law and order, including imposing incarceration when necessary, is a key feature of sovereignty.

b. Civil Regulatory Codes. Numerous tribes have enacted comprehensive civil codes regarding guns. Unsurprisingly—given the rural nature of many reservations and the deep cultural links to a subsistence lifestyle many of these codes pertain to hunting and fishing. These codes typically set parameters for the taking of fish and game in ways similar to non-Indian country regulations. For example, such codes establish regulations regarding the types of guns that can be used in hunting, the maximum catch, and whether dogs can be used to aid in hunting. In some instances, they set forth exceptions to general criminal gun laws or articulate time, place, and manner restrictions. Such restrictions also address the use of firearms in demonstrations and regulations regarding the sale of guns on the reservation.

Other civil codes dealing with guns relate to restrictions in particular reservation locales, including casinos and tribal government buildings. Several address the issue of guns in and around schools. Curiously, some tribes also have in place regulations in the context of debtor-creditor law that guarantee debtors one firearm from being seized by a creditor.[7] Others govern the transportation of guns, addressing such questions of how and when guns can, for example, be transported on a snowmobile, or whether a gun can be shot across a public highway or from the window of a moving vehicle.

There are also tribally specific rules embodied in the codes, with the use of bows and arrows commonly addressed along with guns. In some cases, tribes set forth specific requirements for acquiring Band hunting licenses (as distinct from Indian hunting licenses generally), particular regulations governing hunting and trapping on tribal lands, and codes distinguishing between commercial and cultural hunting.

NOTES & QUESTIONS

1. Should the Indian Civil Rights Act of 1968 (ICRA) be amended to include the right to keep and bear arms?

2. *Indian citizenship.* Based on conditions in 1787 and 1866, the text of the U.S. Constitution distinguished between Indians living in American society and those who lived among the sovereign Indian nations. Apportionment for the House of Representatives excluded "Indians not taxed," since they were not part of the U.S. polity. U.S. Const. art. I, § 3; amend. XIV, § 2. Section 1 of the Fourteenth Amendment declares: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

7. [Thirteen states also have laws providing for some protections for firearms in bankruptcy, usually with limits on the total number or the total value. *See* Carol A. Pettit & Vastine D. Platte, Exemptions for Firearms in Bankruptcy, Cong. Res. Svc. (Feb. 15, 2013).—Eds.]

wherein they reside." The Supreme Court held that Section 1 did not confer citizenship on Indians born on tribal lands, even if they had left those lands; rather, they were citizens of their tribal nation. *Elk v. Wilkins*, 112 U.S. 94 (1884). But the Fourteenth Amendment is a floor, not a ceiling, on who may be a citizen; Congress may extend citizenship beyond the Fourteenth Amendment minimum. The 1887 General Allotment Act (Dawes Act) allocated certain Indian lands in severalty, in lots of 40, 80, or 160 acres. Indians who owned land were granted citizenship, but not voting rights. P.L. 49-119 (1887). Finally, all Indians were granted citizenship by the Indian Citizenship Act of 1924 (Snyder Act). P.L. 68-175 (1924) ("all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States"). Can a citizen be denied Second Amendment rights based on where she lives?

3. As Professor Riley explains elsewhere in her article, the legislative history of the 1968 Indian Civil Rights Act contains no explanation of why the Second Amendment was omitted. She finds the omission curious, given that 35 states had a constitutional right to arms, and in the previous decade, four states had amended their constitutions to regarding arms rights. Riley, *supra*, at 1704-10. Factors that might have contributed to the omission might include some of the same factors that led to the Gun Control Act of 1968: sharply rising violent crime in the previous several years; the rise of armed racial militant groups (most notably, the Black Panthers, but also including the American Indian Movement, which was founded in 1968); or the belief of some Congresspersons that the Second Amendment is not an individual right. Can you think of others?

4. *Carrying firearms on tribal lands.* A state-issued concealed handgun carry permit is not necessarily valid on tribal lands. For example, an Arizona permit is recognized by some tribes but not by others. Which Indian Tribes Recognize the Arizona Permit?, Arizona CCW Guide (Dec. 17, 2008). However, tribal courts have only limited authority to try non-Indians or Indians who are not resident on tribal land. *See Oliphant v. Suquamish Indian Tribe*, 425 U.S. 191 (1978).

5. Some tribes have procedures for issuing carry permits. Should such tribes consider entering into reciprocity agreements with other tribes and with states, so that a permit issued by the one could be used by travelers in the other's territory? Most but not all states have a system for recognizing carry permits issued by other states. Recognition of an out-of-state permit may hinge on reciprocity (states A and B agree to recognize each other's permits) or may be unilateral (the state simply recognizes all permits from other states, or all state permits that meet certain conditions). Should states recognize some or all Indian tribal carry permits? Should tribes do the same for state permits?

6. Violent crime against Indian women is very high, especially on Indian reservations and in tribal communities. For a discussion of this problem and how it might be addressed by expanding concealed carry laws in tribal jurisdictions, see Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 Kan. J.L. & Pub. Pol'y 236 (2017); Adam Crepelle, *Shooting Down Oliphant: Self-Defense as an Answer to Crime in Indian Country*, 22 Lewis & Clark L. Rev. 1283 (2019).

7. *Treaties, agreements, and hunting rights.* Before 1873, U.S. government agreements with Indian nations were styled as "treaties," requiring a two-thirds vote by

the U.S. Senate for ratification, as with a treaty with a foreign nation. An 1871 statute forbade use of the treaty process. 16 Stat. 544, 566 (codified at 25 U.S.C. § 71). Since 1871, "agreements" have been the mode for federal-Indian relations, requiring a simple majority vote for approval by the U.S. House and Senate. (The House's desire to get involved was a key motive for the 1871 act.) Although the 1871 statute might have been used to extinguish the validity of prior treaties, U.S. courts have been unwilling to cast aside the pre-1871 treaties; instead, they remain an important component of the rule of law by which the United States defines itself. Today, the United States government is the only nation in the world that has treaty relations with an interior citizen population. Since the 1960s, Indian litigants have often succeeded in asserting hunting or fishing rights that were guaranteed by treaties or agreements. *See* Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (1994); *see also* David B. Kopel, *The Right to Arms in Nineteenth Century Colorado*, 95 Denv. L. Rev. 329, 397 (2018) (Colorado Utes' hunting rights under the 1873 Brunot Agreement).

8. *Further reading:* Native American Rights Fund, Tribal Law Gateway (presenting tribal laws, organized by tribe). Handgun carry laws by tribe are excerpted at Tribal Laws and Concealed Carry, Handgunlaw.us (Apr. 1, 2019).

EXERCISE: SUBJECTIVITY IN FORMING POLICY VIEWS

The special concerns of the communities surveyed in this Chapter have generated views and policy prescriptions on both sides of the gun question. The competing views seem to turn on different assessments of the risks and utilities of firearms. But underneath different views about the strength and persuasiveness of various items of empirical evidence there are also intuitions and values that may be impervious to empirical refutation. Ask three people you know the following questions, or some of them. Once you have collected the responses, compare and discuss the results with your classmates.

1. Do you think that private ownership of firearms in America imposes more costs than benefits or more benefits than costs? Or is the answer uncertain?
2. What is the basis for your assessment of the risks and utilities of private firearms?
3. How much of your assessment is based on an individual sense of your own capabilities and temperament?
4. How much of your assessment is based on your sense of the capabilities and temperament of other people?
5. How much of your assessment is based on data you have seen about the risks and utilities of firearms in the general population? *See* Ch. 1.[8] What information specifically comes to mind?

8. When you are asking the questions, don't say "See Ch. 1." We include the chapter cross-references for your convenience in seeing data on the above questions. If your respondents' answers are wildly different from the actual data, then your respondents are quite typical.

6. How much of your assessment is based on having grown up in an environment where firearms were common or uncommon?
7. Approximately how many private firearms are there in the United States? *See* Ch. 1.B.
8. Approximately how many people die from gunshots in the United States each year? What percentages of gunshot deaths are from violent crime? From lawful self-defense? From suicide? From accidents? *See* Ch. 1.D-F.
9. Define "assault weapon." *See* Ch. 15.A.
10. Roughly what percentage of firearms homicides involve Black victims? Black perpetrators? *See* Ch. 1.H.
11. What percentage of firearms fatalities involve female victims? Female perpetrators? *See* Part B.
12. Roughly how many children (14 and under) are killed in firearms accidents each year? *See* Ch. 1.D and I.

EXERCISE: EMPIRICAL ASSESSMENTS, PERSONAL RISK ASSESSMENTS, AND PUBLIC POLICY

The gun debate often involves competing empirical claims about the costs and benefits of firearms. Consider how you use (or don't use) empirical evidence in everyday choices such as whether and where to drive, bicycle, or walk; what you eat and drink; and so on.

Now assume that you are married with two children, ages 4 and 2. You live in a town bordering a large city in the Northeast. You commute into the city from the train station that is two blocks from your house. Your spouse cares for the children at home. In the last year, your neighborhood has experienced one incident of vandalism (a swastika sprayed on a garage door) and one daytime home invasion, which included an armed robbery. Your town is facing budget constraints and has cut its police force by 15 percent. Your spouse wants to purchase a handgun for protection. You are familiar with guns and have a bolt-action deer rifle, inherited from your grandfather, stored in the attic. You and your spouse are both lawyers and always make important decisions after robust debate. What factors will affect your decision to buy a handgun or not? Does your assessment change if you are a same-sex couple? If you are an interracial couple? If your spouse has a physical disability?

Plagued by complaints about a rising crime rate and emerging gang activity, the mayor of your town has assigned his staff to develop a policy response. The mayor's chief of staff suggests an ordinance banning the sale and possession of all semi-automatic handguns but allowing possession and sale of revolvers. A junior staffer suggests that the mayor establish free firearms training courses at mobile firing ranges set up around town. What factors should influence the mayor's assessment of these proposals? What would you propose? What would you do as mayor?

Compare your decision making as mayor to your decision making as a spouse with a worried partner. Did you consider the same variables in each case? Did you weight them the same way? Is the decision making in the two contexts compatible? Incompatible? If the decision makers sincerely disagree, whose approach should be chosen?