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RED FLAG LAWS, CIVILIAN FIREARMS OWNERSHIP AND MEASURES OF FREEDOM

*Royce Barondes**

ABSTRACT

This Essay provides context for an assessment of a part of the recently-enacted Bipartisan Safer Communities Act¹—federal legislation funding state red flag procedures, which allow for seizures of firearms from persons who have not committed crimes.

First, it assesses Maryland’s experience during the first year of implementing these procedures. This Essay details computations, extrapolating from Maryland’s first-year experience, showing that adoption of these statutes causes blameless persons to be subject to being killed by the government at a rate comparable to or in excess of the murder rate.

Second, this Essay identifies an overlooked impact of this federal legislation. The legislation’s adoption will require courts to consider more favorably firearms rights reinstatement petitions filed by criminals with old convictions. That is because congressional adoption of this legislation is inconsistent with the strongest premise on which courts have heretofore rejected those claims—that courts are not competent to assess whether individuals have a heightened propensity to commit firearms crimes.

Third, politicians admit adoption of the federal statute was a response to calls to “just do something.”² As this Essay reveals, the resulting legislative spasm arose in the context of public discourse that selectively deemphasizes events highlighting the harms arising from adoption of red flag laws. Ultimately, of course, the constitutionality of the legislative response will be subject to judicial review. Yet, concerns that constitutional principles will yield to public pressure are as old as the country

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¹ Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

² Emily Cochrane & Zolan Kanno-Youngs, *Biden Signs Bipartisan Gun Bill Into Law, Ending Years of Stalemate*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/us/politics/gun-control-bill-biden.html>.

itself. James Madison, in fact, expressed some equivocation as to the desirability of a bill of rights on that basis.³

In a paragraph of *McDonald v. City of Chicago*⁴ that was referenced in *New York State Rifle & Pistol Ass'n v. Bruen*,⁵ the Supreme Court noted an absence of authority in which the Court has “refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.”⁶ Indeed, living in a society that respects civil rights involves risks that are eliminated by a police state.

Because federal funding of red flag laws has been triggered by selective public discourse, it is desirable to illuminate, as a counterweight, the salient benefits of the constitutional provision that has been duly adopted and ought to obtain. This Essay turns to one approach that may increase the salience of information relevant to contextualizing the judicial inquiry: that the benefits are capable of quantification. This Essay expands on the empirical evidence in law review literature finding a statistically significant relationship between civilian firearms ownership and indices of freedom—higher civilian firearms ownership in a country is associated with greater freedom.

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³ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON, 1787–1790, 269, 271–72 (Gaillard Hunt ed., 1904).

⁴ 561 U.S. 742 (2010).

⁵ 142 S. Ct. 2111, 2126 n.3 (2022).

⁶ *McDonald*, 561 U.S. at 783.

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INTRODUCTION

Blackstone wrote, “[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer.”⁷ Similar sentiments have been expressed by others, with different ratios, e.g., ninety-nine to one.⁸ What, then, is the analogous ratio for accuracy in pre-crime⁹ fortunetelling, where the stakes of an erroneous decision include death of the blameless?

Congress recently adopted legislation, the Bipartisan Safer Communities Act,¹⁰ which would fund state implementation of statutes described as “red flag” laws.¹¹ That is a colloquial term for statutes that provide that a court may, on application, temporarily suspend a person’s firearms rights, which typically is accompanied by confiscation after an ex parte process.¹² Adoption of these laws, and federal funding of them,

⁷ 2 WILLIAM BLACKSTONE, COMMENTARIES *358.

⁸ Vidar Halvorsen, *Is It Better That Ten Guilty Persons Go Free than That One Innocent Person Be Convicted?*, 23 CRIM. JUST. ETHICS, Winter/Spring 2004, at 3, 3 (2004) (referencing ratios of ninety-nine to one or higher).

⁹ David French references red flag statutes as implementation of a “pre-crime” measure. David French, *Red-Flag Laws—Yes, We Limit Liberty When There’s Evidence of a Threat*, NAT’L REV. (Aug. 7, 2019, 2:50 PM), <https://www.nationalreview.com/corner/red-flag-laws-yes-we-limit-liberty-when-theres-evidence-of-a-threat/>.

¹⁰ Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

¹¹ See *id.* § 12003(a) (codified at 34 U.S.C. § 10152(a)(1)) (designating federal funding for the implementation of state crisis intervention programs, which are required to assure due process rights).

¹² Matthew Larosiére & Joseph G.S. Greenlee, *Red Flag Laws Raise Red Flags of Their Own*, 45 L. & PSYCH. REV. 155, 156 (2020–2021); see also Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1296–97 (2020) (discussing the adoption of red flag laws which allow the issuing of ex parte orders to confiscate firearms without consent of the subject).

precisely present this issue. This Essay focuses on two aspects of the adoption of these laws:

First, do these statutes designate one for inclusion in a group subject to being killed by the government at a rate on par with the criminal murder rate? Extrapolating from Maryland's first-year experience: Being included in the set of persons designated by these procedures puts one in a group subject to being killed by the government at a rate twenty times greater than the country's annual criminal murder rate.

Second, is there not empirical evidence that illuminates whether freedom indeed comes at a cost and that bears on whether civilian firearms ownership is associated with increased freedom? If so—and that is the case—are not assessments of red flag laws that simply focus on a subset of the public safety implications fundamentally ill-structured?

This Essay expands on the existing empirical evidence, in the law review literature, on the relationship between indices of freedom and civilian firearms ownership in the following ways: The relationships hold and are statistically significant at the one-percent level (well above the customary threshold for a required level of significance), when one controls for variables previously omitted.

A noted scholar, Gary Kleck, has identified concerns with the reliability of the international firearms ownership data typically used in empirical research, the Small Arms Survey.¹³ One concern is that the data are subject to adjustments that are not transparently detailed.¹⁴ Gary Kleck proposes that, in empirical investigations examining international civilian firearms ownership rates, one should reference the fraction of a country's suicides that are committed with firearms, instead of the Small Arms Survey Data.¹⁵ This Essay also uses a more intricate modeling technique, incorporating this statistic Gary Kleck proposes to use, to confirm that the observed relationship between freedom and firearms ownership is not a spurious artifact of the unspecified adjustments made in the Small Arms Survey by that survey's authors. That technique finds a positive relationship, statistically significant at the one-percent level, between the indices of freedom and the predicted value of registered civilian firearms.

¹³ Gary Kleck, *The Small Arms Survey Estimates of National Civilian Firearms Ownership: An Assessment 1* (Mar. 24, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4065962>.

¹⁴ See *infra* notes 146–51 and accompanying text.

¹⁵ *Id.* at 8, 10–11.

I. RED FLAG LAWS GENERALLY

A. *Content of the Laws*

Red flag statutes authorize a court to suspend, temporarily, an individual's firearms rights. There are a number of salient components as to which the statutes may vary. A number of the variations are discussed in detail in an excellent, recent article by David Kopel, who suggests a more accurate term would be "gun confiscation orders."¹⁶ They may allow seizure before any contested proceeding.¹⁷ The statutes vary as to who can initiate the proceedings. In some jurisdictions, participation of law enforcement is required, but not so in others.¹⁸ The extent of any right of confrontation also varies. David Kopel notes that Colorado allows telephonic testimony in an ex parte proceeding where the petitioner's evidence in a follow-on proceeding is in writing and thus not subject to cross-examination.¹⁹ Unsurprisingly, the extent to which these statutes comport with due process requirements is unsettled.²⁰

B. *Status of the Laws Following Bruen*

*New York State Rifle & Pistol Ass'n v. Bruen*²¹ reiterates that the scope of impingements on firearms rights allowed by the Second Amendment is linked to the types of restrictions that were contemplated at the time the relevant organic document was adopted, the Second Amendment or the Fourteenth Amendment.²² The analysis articulated in *Bruen* focuses on the following:

¹⁶ David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 L. & PSYCH. REV. 39, 41 (2020–2021).

¹⁷ *See, e.g., id.* at 43 (discussing red flag laws in Indiana, which allow law enforcement officers to seize firearms before filing a petition to retain and giving notice to the owner); MD. CODE ANN., PUB. SAFETY § 5-603 (LexisNexis, LEXIS through 2022 Reg. Sess. of Gen. Assemb.) (allowing the seizure of firearms to take place prior to interim extreme risk protective order hearings).

¹⁸ Discussion of assorted relevant statutes is contained in Kopel, *supra* note 16, at 60–61. These statutes are in flux, and no attempt is made in this Essay to endeavor to provide a catalogue of the landscape as of this precise moment in time.

¹⁹ *See id.* at 70–71 (citing COLO. REV. STAT. § 13-145-105 (LEXIS through 2022 Reg. Sess.)).

²⁰ *Caniglia v. Strom*, 141 S. Ct. 1596, 1601 (2021) (Alito, J., concurring) ("This case also implicates another body of law that petitioner glossed over: the so-called 'red flag' laws that some States are now enacting. . . . Provisions of red flag laws may be challenged under the Fourth Amendment, and those cases may come before us. Our decision today does not address those issues.").

²¹ 142 S. Ct. 2111 (2022).

²² The Court notes existence of "an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." *Id.* at 2137–38. It concludes, "We need not address this

[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.²³

Although *Bruen* does not directly address red flag laws, it does refer to the relevant historical analogy: surety statutes that did not wholly disarm a class of persons but, rather, would allow imposition of a surety requirement were a judicial proceeding to find that there was “reasonable cause to fear an injury, or breach of the peace.”²⁴

Commentators have asserted that the relevant analogy is instead to disarmament of Native Americans (as well as vague reference to those who had allegiance to the King).²⁵ This view is debunked by four considerations. First, *Bruen* references, as the relevant analogy for broad disarmament of groups of persons, those surety statutes²⁶ and an old English statute that allowed disarmament of persons whose conduct would “terrify” members of the public “with evil intent or malice.”²⁷ That is the relevant precedent articulated by the Court—not disarmament of groups not fully benefitting from civil rights.

Second, the following discussion in *McDonald v. City of Chicago* rejects the view that firearms restrictions within the scope of restrictions imposed in the nineteenth century on the basis of race are permissible as long as the restrained persons are not classified on the basis of race:

issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.” *Id.* at 2138.

²³ *Id.* at 2131.

²⁴ *Id.* at 2148.

²⁵ See Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1586 (2022) (“One particularly compelling rebuttal to the historical pedigree argument is the forthcoming article by Joseph Blocher and Caitlan Carberry, who start with the well-documented fact that the founding generation often prohibited gun ownership for groups deemed ‘dangerous’ to society or the local community, some of whom (like Native Americans or political dissidents) would not be subject to such laws today.”). One court described the targeted populations as “law-abiding slaves, free blacks, and Loyalists.” *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012) (citing ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 103 (2011)).

²⁶ *Bruen*, 142 S. Ct. at 2148.

²⁷ *Id.* at 2140–41. The concurrence recites the slipshod, unreasoned *Heller* dicta concerning other longstanding restrictions. *Id.* at 2162 (Kavanaugh, J., concurring). But, of course, these red flag confiscation orders are not long-standing. Blocher and Charles assert the first was adopted in 1999. Blocher & Charles, *supra* note 12, at 1294–95; CONN. GEN. STAT. ANN. § 29-38c(a) (West, Westlaw through 2022 Reg. Sess.).

[M]unicipal respondents contend that Congress, in the years immediately following the Civil War, merely sought to outlaw “discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle” and that even an outright ban on the possession of firearms was regarded as acceptable, “so long as it was not done in a discriminatory manner.” They argue that Members of Congress overwhelmingly viewed § 1 of the Fourteenth Amendment “as an antidiscrimination rule,” and they cite statements to the effect that the section would outlaw discriminatory measures. This argument is implausible.²⁸

This discussion rejects the view that nineteenth century firearms restrictions imposed on the basis of race are valid as long as made broadly applicable.

Third, what is relevant is the Founding-Era treatment of persons who generally had civil rights, not Founding-Era restrictions on persons who were not conceptualized as being fully possessed of civil rights generally, whether as to bearing arms or voting or something else. Insofar as in the Founding Era persons who were not fully possessed of civil rights were deprived of one civil right, that does not mean the civil right was curtailed but, rather, that certain classes of persons did not fully benefit from civil rights. The *Bruen* opinion confirms this by referencing the historical understanding of the right to possess arms in public by “Persons of Quality.”²⁹

Fourth, in *Bruen* the Court makes an additional observation of particular relevance to this Essay. The opinion recognizes that an objective of the adoption of the Fourteenth Amendment and contemporaneous statutes was to eradicate the targeting of a group of persons who through disarmament were more generally deprived of civil rights.³⁰ That is, the Court references a historical justification of the right to bear arms that is centered on consideration of the consequential impact on civil rights generally.³¹

C. *Absence of Efficacy*

The Bipartisan Safer Communities Act expressly excludes a requirement for government-paid counsel as a requirement for federal

²⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (first quoting Brief for Municipal Respondents at 7, *McDonald*, 561 U.S. 742 (No. 08-1521); and then quoting *id.* at 64).

²⁹ *Bruen*, 142 S. Ct. at 2142 (noting that Serjeant William Hawkins used this phrase to indicate that the public was free to bear arms, even in the face of the Statute of Northampton).

³⁰ *Id.* at 2150–51.

³¹ *See id.* (discussing that a primary concern in enacting the Fourteenth Amendment was protecting the Second Amendment rights of the newly freed Americans); *see also infra* note 187.

funding.³² *District of Columbia v. Heller* has confirmed that owning a firearm is a civil right secured by the Constitution.³³ So, adoption of red flag statutes subjects the indigent to the potential deprivation of an enumerated civil right, through judicial proceedings where they will not be represented by counsel.³⁴

That circumstance may commend caution in adoption of these statutes. But there is more. Two months before enactment, a researcher who previously announced an agenda of specifying more groups to disarm—“The third thing I’d recommend is we expand the criteria we now use for denying the purchase and possession of firearms”³⁵—co-authored a work examining whether these statutes decreased murder rates.³⁶ The research does *not* find evidence supporting the view that these statutes decrease murders:

In this cross-sectional study, the gun violence restraining order law was *not* significantly associated with a reduction in firearm violence of any kind during its first 4 years of implementation, 2016 to 2019. . . . These results suggest that gun violence restraining order implementation did not reduce population-level rates of firearm violence in San Diego County, but future studies should investigate whether there were individual-level benefits to those directly affected.³⁷

³² Those extreme risk protection order programs funded by the federal government must include “the right to be represented by counsel *at no expense to the government.*” Bipartisan Safer Communities Act, Pub. L. No. 117-159, §§ 12003(a)(2)(I)(iv), (a)(2)(II), 136 Stat. 1313, 1326 (2022) (emphasis added) (codified at 34 U.S.C. § 10152(a)(1)).

³³ See 554 U.S. 570, 635 (2008).

³⁴ See Blocher & Charles, *supra* note 12, at 1289, 1308.

³⁵ Sasha Abramsky, *Wresting Gun Policy from the Hands of the Radical Fringe: A Q&A with Garen Wintemute*, NATION (Dec. 16, 2012), <https://www.thenation.com/article/archive/wresting-gun-policy-hands-radical-fringe-qa-garen-wintemute/> [<http://web.archive.org/web/20210616201629/https://www.thenation.com/article/archive/wresting-gun-policy-hands-radical-fringe-qa-garen-wintemute/>].

³⁶ Veronica A. Pear et al., *Firearm Violence Following the Implementation of California’s Gun Violence Restraining Order Law*, JAMA NETWORK OPEN (Apr. 5, 2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2790705> (including as a co-author Garen J. Wintemute of the Violence Prevention Research Program).

³⁷ *Id.* at 1 (emphasis added). See also Rachel Dalafave, *An Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 867, 900 (2021) (“Red flag laws are not associated with statistically significant changes in homicides rates.”); John R. Lott, Jr. & Carlisle E. Moody, *Do Red Flag Laws Save Lives or Reduce Crime?* 4 (Dec. 28, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316573 (“Red flag laws had no significant effect on murder, suicide, the number of people killed in mass public shootings, robbery, aggravated assault, or burglary. There is some evidence that rape rates rise.”); Kopel, *supra* note 16, at 51 (noting that the first red flag law dates back to 1999 but “[n]o research has found any statistically significant reduction in crime—including mass shooting fatalities—from confiscation laws.”).

D. Unexpected Implications of Federal Imprimatur on Red Flag Laws

Another implication of the federal funding of these state statutes urges caution—the way their adoption ought to influence judicial treatment of firearms reinstatement petitions, by persons with prior criminal convictions. Federal law generally prohibits firearms possession by persons who have committed state misdemeanors punishable by more than two years of imprisonment or felonies, among others.³⁸ The ban is permanent, unless the wrongdoer’s civil rights are restored by expungement of the crime or the like.³⁹ Federal statutes do not generally tether an ongoing disarmament to current dangerousness.⁴⁰ An illustration of a disqualifying conviction from 2016 is provided by *United States v. Phillips*,⁴¹ where the prior conviction of “misprision of felony”, according to the briefing, comprised the appellant’s “fail[ing] to report the sale of drugs by a person who was selling marijuana.”⁴²

To date, courts have generally declined to entertain the substance of individualized constitutional challenges to these restrictions, summarily rejecting them. There are two primary principles on which courts found this conclusion. One is an assertion that courts, as institutions, are unable to identify accurately whether a person has a heightened propensity to violence. In *Binderup v. Attorney General*, a Federal appellate court justified rejecting constitutional challenges in these words: “[T]he Supreme Court and our Court have recognized in the Second Amendment context that the Judicial Branch is not ‘institutionally equipped’ to conduct ‘a neutral, wide-ranging investigation’ into post-conviction

³⁸ 18 U.S.C. §§ 921(a)(20), 922(g)(1); *see, e.g.*, 18 U.S.C. § 922(g)(6)–(7) (listing those dishonorably discharged from the military and those who renounce U.S. citizenship as additional categories of people prohibited from possessing a firearm).

³⁹ *See* 18 U.S.C. § 921(a)(20) (providing that expungement, pardon, or the restoration of rights are the only methods to restore firearm possession). Recently signed legislation in some cases limits the ban arising from a misdemeanor crime of domestic violence to five years where the relationship was a “dating relationship.” Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(c)(2)(C), 136 Stat. 1313, 1332–33 (2022) (codified at 18 U.S.C. § 921(a)(33)). The drafting raises issues concerning its precise import that are beyond the scope of this work.

⁴⁰ *See* Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the “Virtuous”*, 25 TEX. REV. L. & POL. 245, 247, 256–57 (2021) (explaining that violent propensity is not required to disarm a firearm owner); BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1, 5 (2010), <https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf#page=34> (demonstrating in Table 1.2.1 that only about 18% of state court felony convictions arise from violent crime, although the firearm prohibition applies universally).

⁴¹ 827 F.3d 1171, 1173–74 (9th Cir. 2016).

⁴² Appellant’s Opening Brief at 18–19, *Phillips*, 827 F.3d 1171 (Nos. 14-10448, 14-10449) (stating Phillips “failed to report the sale of drugs by a person who was selling marijuana to Mr. Phillips.”).

assertions of rehabilitation or to predict whether particular offenders are likely to commit violent crimes in the future.”⁴³

Because Congress has implicitly concluded courts are competent in this arena by explicitly funding judicial procedures that require an evaluation of violent propensity,⁴⁴ courts will no longer be able to abnegate a duty to weigh individual claims seeking reinstatement of firearms rights. Firearms bans arising from stale crimes can no longer be validated merely by pointing to an institutional inability to make those assessments.

The second principle which courts have relied upon is suspect to the core. This approach is founded on the notion that a person who previously has been convicted of a serious crime is no longer “virtuous.”⁴⁵ That approach to construing constitutional rights has been thoroughly discredited when presented outside the context of firearms law. “In modern constitutional law, rights are not selectively doled out by legislatures to those whom elected officials deem to be sufficiently virtuous or worthy.”⁴⁶

In sum, legislative efforts to fund these red flag laws may have unintended consequences. In courts that proceed forthrightly, applying the principles articulated in their opinions, federal funding of implementation of red flag procedures necessitates more favorable consideration of petitions, by those with prior criminal convictions, for reinstatement of firearms rights.

II. LESS PROMINENT COSTS OF RED FLAG LAWS

A. *Red Flag Laws Causing Government Victimization*

Maryland adopted a red flag law that became effective on October 1, 2018.⁴⁷ A news story reports 114 petitions were initiated in the first

⁴³ *Binderup v. Att’y Gen.*, 836 F.3d 336, 350 (3d Cir. 2016) (quoting *United States v. Bean*, 537 U.S. 71, 77 (2002)).

⁴⁴ See Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12003(a)(2)(I)(vi), 136 Stat. 1313, 1325–26 (2022) (codified at 34 U.S.C. § 10152(a)(1)) (allocating funds for the implementation of state court extreme protection risk order programs); Anita Bernstein, *Implied Reverse Preemption*, 74 BROOK. L. REV. 669, 683 (2009) (stating that Congress implies rejection through withholding funds, so courts must consider what message Congress sends by funding judicial activity).

⁴⁵ See, e.g., *Medina v. Whitaker*, 913 F.3d 152, 159 (D.C. Cir. 2019) (stating, “A number of other circuits have . . . concluded that history and tradition support the disarmament of those who were not (or could not be) virtuous members of the community,” but noting “we need not accept this theory outright”). See generally Barondes, *supra* note 40, at 248 n.7 (collecting additional authority).

⁴⁶ Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1563 n.67 (2009).

⁴⁷ Public Safety–Extreme Risk Protective Orders, ch. 250, 2018 Md. Laws 1251, 1255, 1264–65, 1278–94 (codified as amended at MD. CODE ANN., PUB. SAFETY §§ 5-601 to -610 (LexisNexis, LEXIS through 2022 Reg. Sess. of Gen. Assemb.)); MD. CODE ANN., CTS. & JUD.

month.⁴⁸ On November 5, the thirty-sixth day of the statute's effectiveness, police officers killed Gary J. Willis while serving an order.⁴⁹

These orders are often served without advance notice,⁵⁰ early in the morning: for example, the story about Willis reports that the officers were “called at 5:17 a.m.” to his home.⁵¹ David Kopel notes, “Colorado created a special exemption from its rules limiting no-knock raids, in order to allow confiscations to always be carried out by no-knock, without the statutory safeguards applicable to all other no-knock raids.”⁵²

As to service of warrants in general, i.e., not limited to those associated with red flag orders, law enforcement may select the late evening or early morning to enhance their safety. For example, in one case, the court notes:

PSP [(the Pennsylvania State Police)] did not immediately execute the search warrant but, instead, continued to surveil the residence until approximately 10:00 or 10:30 p.m. and returned at approximately 3:00 or 3:30 a.m. on November 20, 2018 to continue their surveillance. PSP did not execute the search warrant until November 20 due to concerns for the safety of police officers executing the warrant and because PSP protocols call for the unit to execute warrants in the early morning hours.⁵³

One can surely see why officers serving these orders might find it safer to serve them in the early morning hours. However, the process is not safe for targets of the petitions.

PROC. §§ 9-109(d)(9), 9-109.1(d)(8), 9-121(d)(8) (LexisNexis, LEXIS through 2022 Reg. Sess. of Gen. Assemb.).

⁴⁸ Theo Hayes & Kim Dacey, *Armed Man Shot by Anne Arundel County Police Dies*, WBALTV11 (Nov. 6, 2018, 5:56 PM), <https://www.wbaltv.com/article/police-investigate-officer-involved-shooting-in-ferndale/24658392> [<http://web.archive.org/web/20190507043055/https://www.wbaltv.com/article/police-investigate-officer-involved-shooting-in-ferndale/24658392>].

⁴⁹ The shooting occurred on Monday, November 5, 2018. Alex Mann, *'You're Not Taking That!' Family Turmoil Preceded Fatal Police Shooting in Maryland's Only Red Flag Death*, CAP. GAZETTE (Oct. 1, 2019 5:00 AM), [<https://web.archive.org/web/20191002044251/https://www.capitalgazette.com/news/ac-cn-red-flag-20191001-zjzsbra735eatkkm2qmobz5z4a-story.html>].

⁵⁰ Kopel, *supra* note 16, at 80. Blocher and Charles assert that the elimination of ex parte orders would make the laws “ineffective or impractical.” Blocher & Charles, *supra* note 12, at 1296–97.

⁵¹ Hayes & Dacey, *supra* note 48. See also Kopel, *supra* note 16, at 55–56 (noting that Willis's “niece said that her late uncle ‘like[d] to speak his mind,’ but ‘wouldn't hurt anybody’” and that the police “didn't need to do what they did”).

⁵² Kopel, *supra* note 16, at 51.

⁵³ *United States v. Pryer*, No. 4:19-CR-00085, 2020 WL 4819930, at *1 (M.D. Pa. Aug. 19, 2020). See also *State v. Peters*, 622 N.W.2d 918, 926 (Neb. 2001) (“[T]he affidavit provided information showing that the execution of the warrant at a time when surprise and speed could be accomplished, such as at night and without knocking, could serve to protect the safety of the officers involved. . . . Accordingly, we conclude that the interests of justice are best served by the authorization of nighttime service.”).

Indeed, Maryland's experience, in the Willis red flag case, with the hazards associated with serving warrants on persons to seize their firearms did not yield changes assuring safety in seizing firearms. Only a few months after the Gary Willis event, Duncan Lemp—a software engineer—was shot and killed in an early morning execution of a warrant to seize firearms. A municipal report on the shooting reveals that Lemp was shot in his bedroom at around 4:30 a.m., following a “break and rake,” in which one officer used a fireman's pike tool to break a bedroom window and, move aside blinds, with another armed officer then stepping to view inside the bedroom.⁵⁴ A news story reports, “Lemp's girlfriend, Kasey Robinson, and his parents have said the software engineer was asleep in his bedroom when police fired at him from outside the house in Potomac, Maryland, a suburb of Washington, D.C.”⁵⁵

In that case, the justification for seizure of firearms was not a red flag order. Rather, it was the subject's prior “criminal history as a juvenile.”⁵⁶ The Duncan Lemp case illustrates one cannot presume Maryland to have used its failed experience with Gary Willis to eliminate the safety concerns arising from pre-dawn firearm seizures at citizens' houses.

It is somewhat disappointing to note the extent to which commentary addressing these statutes elides the details of the government killing targets of the orders. A Westlaw search for secondary sources since 2020, designed generally to identify discussion of red flag orders (albeit with some over-inclusion), identified 386 secondary source items,⁵⁷ only twenty-four percent of which reference “self-defense”⁵⁸ and only one percent of which reference Gary Willis.⁵⁹

The following figure contextualizes the emphasis of the academic discourse by revealing levels of popular discourse on related subjects. It displays the relative public attention to the police shooting of Gary Willis compared to that of Michael Brown, as reported by Google Trends, over a

⁵⁴ Montgomery Cnty. State Attorney's Off. Dep't, Report: In the Matter of the March 12, 2020 Police-Involved Shooting in Potomac, Maryland (2020), <https://www.montgomerycountymd.gov/SAO/Resources/Files/REPORTMarch2020Event.pdf>.

⁵⁵ Michael Kunzelman, *No Charges for Police in Death of “Boogaloo” Movement Martyr*, AP NEWS (Dec. 31, 2020), <https://apnews.com/article/media-maryland-us-news-police-shootings-1182a35615898c1ed8d5ebdbfc6ad962>.

⁵⁶ Press Release, Montgomery Cnty. Dep't of Police, Update: Officer-Involved Shooting in Potomac; Additional Information Released (Mar. 17, 2020), https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail_Pol.aspx?Item_ID=32049.

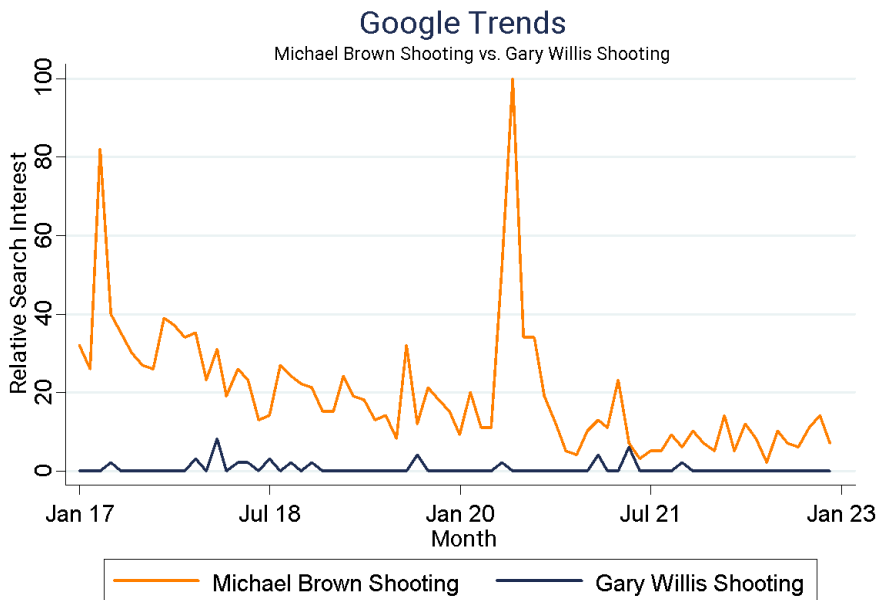
⁵⁷ Westlaw search: adv: (“red flag law” “extreme risk protection order”) & DA(aft 12-31-2019) (visited Jan. 6, 2023) (reporting 386 results in Secondary Sources).

⁵⁸ Westlaw search: adv: (“red flag law” “extreme risk protection order”) & DA(aft 12-31-2019) & (“self-defense” or “self defense” or “selfdefense”) (visited Jan. 6, 2023) (reporting 94 results in Secondary Sources).

⁵⁹ Westlaw search: adv: (“red flag law” “extreme risk protection order”) & DA(aft 12-31-2019) & (gary +3 willis) (visited Jan. 6, 2023) (reporting four results in Secondary Sources).

period of time where, as shown in Figure 2, coverage of the Michael Brown shooting had greatly subsided:

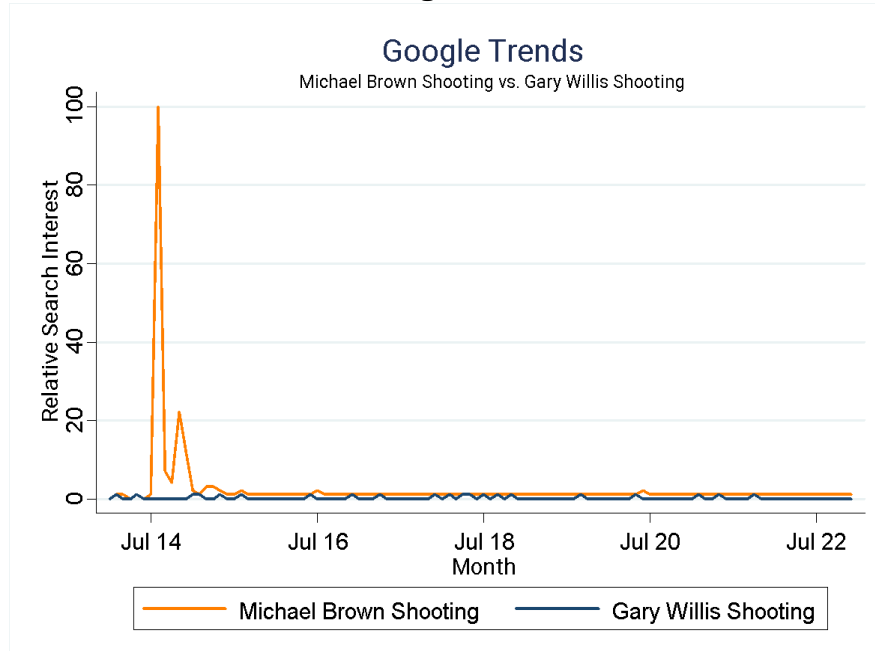
Figure 1



Note—Table comparing relative monthly interest in *Michael Brown shooting* and *Gary Willis shooting*, as reported by Google Trends internet search data, for 2017 through 2022.⁶⁰

For the period of 2017 to 2022, the peak monthly value for *Gary Willis shooting* is 8, compared to 100 for *Michael Brown shooting*. This is, of course, after the peak in popular conversation concerning the Michael Brown shooting. The following figure shows the relative monthly search interest for *Michael Brown shooting* and *Gary Willis shooting* for 2014 through 2022.

⁶⁰ GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2017-01-01%202022-12-31&geo=US&q=michael%20brown%20shooting,gary%20willis%20shooting> (last visited Jan. 13, 2023).

Figure 2

Note—Table comparing monthly interest in *Michael Brown shooting* and *Gary Willis shooting* as reported by Google Trends internet search data, for 2014 through 2022.⁶¹ Values reported by Google Trends as “<1” have been rounded up to 1.

The figures in the aggregate illustrate that relative to the Michael Brown shooting, the police shooting initiated by service of a red flag order received negligible public attention. Searches for the red flag shooting victim were an order of magnitude lower than the peak searches for the Michael Brown shooting in the year following the red flag shooting (Figure 1). And searches for the Michael Brown shooting at that time were almost two orders of magnitude lower than those for the Michael Brown shooting when it occurred. (Figure 2).

The lack of public attention to police shootings when red flag orders are served commends a review of the danger associated with serving those orders. Some relevant factors are the domestic murder rate and the anticipated rate at which the enforcement process will grossly err in an over-inclusive fashion—when the police will kill someone who would not

⁶¹ GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2014-01-01%202022-12-31&geo=US&q=michael%20brown%20shooting,gary%20willis%20shooting> (last visited Jan. 13, 2023).

have committed a violent crime using a firearm in the time period covered by the order.⁶²

These red flag laws are only of use where the target has not committed some prior crime that by itself gives rise to a firearms ban. Where a disqualifying crime has been committed, there is no need to resort to a judicial determination that, for other reasons, a person should be disarmed. The federal prohibitions are extensive—they include state misdemeanors for which one may be incarcerated for more than two years and most felonies.⁶³ Also giving rise to prohibitions are convictions for misdemeanor crimes of domestic violence.⁶⁴ So too are “adjudicat[ions] as a mental defective or . . . commit[ments] to a mental institution.”⁶⁵ States are free to expand on the list.⁶⁶ Urging adoption of red flag laws, then, is designed to enhance the circumstances that give rise to a prohibition other than the commission of listed criminal acts.

A predictive process for disarming persons who have not committed disqualifying crimes cannot be justified if it puts the government in the position of killing people, who would not commit a serious crime with a firearm during the period covered by the order, at a rate that even approaches the murder rate in the United States. How much it would need to be below the murder rate is, of course, a question of judgment. An appropriate starting point would be a factor of one-tenth or one-hundredth—one or two orders of magnitude below the murder rate.

The rate for murder and nonnegligent manslaughter in the United States was below 5 per 100,000 in 2013 and 2014, thereafter surging to 6.5 per 100,000.⁶⁷ Maryland courts granted 646 temporary ex parte

⁶² That is certainly not to say it would be satisfactory for the government to kill preemptively those who would commit violent crime in the future. The author is unaware of definitive research about the safety consequences of serving red flag protection orders. Some recent investigations fail to find a relationship between these laws and murder rates. *See supra* notes 36–37 and accompanying text.

⁶³ 18 U.S.C. §§ 921(a)(20), 922(g)(1).

⁶⁴ *Id.* § 921(a)(33), amended by Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(a), (c), 136 Stat. 1313, 1332–33 (2022); 18 U.S.C. § 922(g)(9). The presence of an outstanding domestic violence restraining order also creates a ban, which in that case is limited to the duration of the order’s pendency. *Id.* § 922(g)(8).

⁶⁵ 18 U.S.C. § 922(g)(4). The term “[c]ommitted to a mental institution” excludes voluntary admissions and admissions for observation. 27 C.F.R. § 478.11 (2021), amended by Secure Gun Storage and Definition of “Antique Firearm,” 87 Fed. Reg. 182 (Jan. 4, 2022).

⁶⁶ 18 U.S.C. § 927.

⁶⁷ *Crime Data Explorer*, FED. BUREAU OF INVESTIGATION, <https://cde.ucr.cjis.gov/LATEST/webapp#/pages/explorer/crime/crime-trend> (last visited Jan. 20, 2023) (select “Homicide” in “Crime Select” to produce the same data) (reporting a rate of 6.5 homicides per 100,000 people across the U.S. in 2020). The term “homicide” as used in the statistics reported by the FBI consists of murder and nonnegligent manslaughter. *Id.* (select “Related offenses” under “About the Data”) (“Violent crime is composed of four offenses: homicide (murder and nonnegligent manslaughter), rape, robbery, and aggravated assault.”).

extreme risk protection orders in the first twelve months of the Act.⁶⁸ One subject being killed per 646 temporary ex parte orders in the first year translates to a rate of killing by the government of approximately 155 per 100,000.⁶⁹ Extrapolating this rate, based on the first-year experience: being included in the set of persons designated by these procedures puts one in a group subject to being killed by the government at a rate of over twenty times the annual murder rate in the country (6.5 per 100,000).⁷⁰

It does not seem fair to disregard Maryland's experience in the first year as an unrepresentative, mere first-year phenomenon. Duncan Lemp was killed in the second year of the Maryland Act's effectiveness, suggesting that the killing of Gary Willis did not prompt a governmental reassessment that has now made firearm seizures safe.⁷¹

Let us then turn to how over-inclusive we expect a red flag process to be. What is relevant here is the standard for the initial issuance of an

⁶⁸ *About District Court*, MD. CTS., <https://mdcourts.gov/district/about#stats> (Oct. 28, 2022) (showing that Maryland courts granted 646 temporary ex parte extreme risk order protections from October 1, 2018, to October 1, 2019).

⁶⁹ That is, one killing in 646 orders is 0.155%. That is a rate of 155 per 100,000.

Maryland has two short-term procedures for initiating a red flag order ex parte. It is to be filed with a District Court if open, or, if not, a District Court commissioner. MD. CODE ANN., PUB. SAFETY § 5-602 (West, through 2022 Reg. Sess. of Gen Assemb.). A hearing for a temporary extreme risk protective order may be ex parte. *Id.* §5-604(a). If the petition is successful, a subsequent hearing is generally to be held within seven days of order service, subject to extension for up to six months. *Id.* § 5-604(c).

If the process is initiated with a commissioner and it is successful, it results in issuance of an interim extreme risk protective order. *Id.* § 5-603(a). The process contemplates a very-short-term order. An issued order is required to state the date of a subsequent temporary extreme risk protective order hearing. *Id.* § 5-603(b). In general, the interim order lasts two business days, or until an earlier hearing on the temporary extreme risk protective order. *Id.* § 5-603(e).

Over the first twelve months, there were 606 interim orders and 646 temporary orders issued. *See About District Court*, *supra* note 68. That site indicates there were 965 "cases filed" in that period.

The relevant statistic for the purposes of this Essay is the number of unannounced firearms seizures. These statistics do not reveal the number of overlaps (cases where an interim order was followed by a temporary order), resulting, one would anticipate, in only one unannounced firearm seizures, whether before or after the temporary order. Of course, an order might not result in any seizure, e.g., where the subject has fled, or the subject is arrested for other criminal conduct before any home raid. Although these statistics do not reveal the precise number of unannounced firearms seizures, the number of temporary orders seems a reasonable estimate. One supposes it cannot exceed 965. Even if there had been 965 unannounced home seizures, that would equate to a rate of 104 per 100,000, 16 times a 6.5 per 100,000 murder rate.

⁷⁰ *See also Crime Data Explorer*, *supra* note 68 (citing the murder rate ranging from 4.5 to 6.5 per 100,000 people over 2011–2020).

⁷¹ *See Michael Ruiz, Maryland Prosecutors Rule Out Charges Against Cops in Death of Boogaloo 'Martyr' Duncan Lemp*, FOX NEWS (Dec. 31, 2020, 4:31 PM), <https://www.foxnews.com/us/maryland-charges-boogaloo-martyr-duncan-lemp> (stating Lemp was killed March 12, 2020); 2018 Md. Laws Ch. 1251, § 3 (stating an Oct. 1, 2018 effective date).

order—which will often be in an *ex parte* proceeding.⁷² That is because it is in response to the initial order that the arms will be seized.⁷³

There will be orders issued for the wrong person,⁷⁴ on the basis of fallacious allegations (e.g., retaliatory petitions fomented by *persona animus*)⁷⁵ or for patently insufficient reasons, such as a social media post merely depicting evidence of exercise of a constitutional right.⁷⁶ The standard for issuance of an order may be a mere preponderance of the evidence, or even lower, including “reasonable cause.”⁷⁷ It is claimed “the most common standard of proof for *ex parte* orders is reasonable, probable, or good cause of an imminent risk,”⁷⁸ with a clear minority requiring even a preponderance of the evidence and only one “clear and convincing” evidence.⁷⁹

This typical standard does not express in quantitative terms the degree to which it validates over-inclusive issuance of orders. But by its express terms, it is more over-inclusive than a 51:49 standard of more likely than not. One should think an *ex parte* proceeding is likely to be well more over-inclusive than that. As an initial assessment, let us assume that three-quarters of the persons subjected to orders would not have committed a violent crime with a firearm.⁸⁰ A lower bound may be one-third: It has been reported that approximately one-third of the *ex parte* orders in Connecticut were not affirmed in a subsequent contested

⁷² See Larosiere & Greenlee, *supra* note 12, at 156 (noting that preliminary hearings under red flag laws are held without the gun owner present).

⁷³ *Id.*

⁷⁴ See Kopel, *supra* note 16, at 56 (noting that a red flag order was issued against the wrong Jon Carpenter in Florida).

⁷⁵ Cf. Sady Swanson, *Fort Collins Woman Found Guilty of Lying on Red Flag Petition Against CSU Police Officer*, COLORADOAN, <https://www.coloradoan.com/story/news/2022/04/22/fort-collins-woman-who-filed-red-flag-petition-against-officer-convicted/7401449001/> (May 4, 2022, 3:14 PM) (addressing a woman who falsely stated in a red flag petition that she shared a child with a law enforcement officer who had fatally shot her son).

⁷⁶ See Kopel, *supra* note 16, at 56–57 (explaining that an order was issued against a man for his social media post about a homemade, apparently lawful AR-15 and his social media post criticizing anti-gun activists).

⁷⁷ See *id.* at 67–68 (quoting MASS. GEN. LAWS ANN. ch. 140, § 131T (West, Westlaw through ch. 125, 134, 136, 144–47, 149, 158, 174 2022 2d Ann. Sess.)) (comparing the standards of proof across various states, with reasonable doubt being the lowest articulated standard); VT. STAT. ANN. tit. 13, § 4054(b)(1) (LEXIS through 2021 Adj. Sess.) (creating a preponderance of the evidence standard for *ex parte* hearings).

⁷⁸ Blocher & Charles, *supra* note 12, at 1340.

⁷⁹ *Id.*

⁸⁰ See generally Alan M. Dershowitz, *A Yellow Light for Red-Flag Laws*, WALL ST. J., Aug. 7, 2019, at A15 (“Research shows that any group of people identified as future violent criminals will contain many more who won’t be violent (false positives) than who will (true positives). More true positives mean more false ones. Such groupings also fail to identify many future violent criminals (false negatives).”).

proceeding.⁸¹ Or, the lower-bound may be one-half—the standard is lower than a preponderance of the evidence.

So, we can estimate the rate at which designation as being within the set of persons subject to red flag orders results targeting persons who would not commit violent firearms crimes in the period covered by red flag orders, extrapolating Maryland's experience, as follows: This designation results in an estimated rate of a blameless person being killed by the government as follows: Extrapolating Maryland's first-year experience, at a lower-bound of 52 per 100,000 designated for red flag targeting (one-third of 155 per 100,000⁸²), with the estimated rate, derived from the nature of the standard of evidence, of about 116 per 100,000 designated (three-quarters of 155 per 100,000).

Even were the Willis event to be the only adverse result from the issuance of the orders in Maryland over the five-year period ending October 2023, that would still result in an estimated rate of wholly innocent persons being killed exceeding the annual murder rate. That is, the rates referenced in the prior paragraph exceed the annual murder rate by more than a factor of five.

Under none of these scenarios is the harm associated with killing innocents in serving red flag orders justifiable.⁸³ And it would seem such

⁸¹ David Kopel writes, “[a]bout a third of gun confiscation orders are wrongly issued against innocent people.” *Red Flag Laws: Examining Guidelines for State Action: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 5 (2019) (written testimony of David B. Kopel, Adjunct Scholar, Cato Inst.) (citing Michael A. Norco & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONN. L. REV. 1609, 1619 (2014)). Incompleteness of the relevant underlying records noted by Norco and Baranoski, Norco & Baranoski, *supra*, at 1619, introduces significant imprecision in the estimate.

Maryland's experience seems comparable. In the first 12 months, 646 temporary orders were issued and 425 final orders were issued. *See About District Court, supra* note 68 (showing that Maryland courts granted 646 temporary ex parte extreme risk order protections from October 1, 2018, to October 1, 2019). That is, the number of temporary orders was 66% of the final orders. Of course, a temporary order might not be followed by a final one for reasons other than the initial proceeding erred in its assessment, e.g., the subject might have passed away.

George Parker reviewed the results of red flag judicial proceedings in Marion County, Indiana. George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013*, 33 BEHAVIORAL SCIS. & L. 308 (2015). The observations in his data set appear to involve court hearings following seizure of firearms. *E.g., id.* at 308 (stating “prosecutors filed petitions in court to retain weapons seized by police under this law” a number of times equal to the number of observations in his sample). The claims were dismissed 28.7% of the time. *Id.* at 314 tbl.1. Parker's work, then, provides an alternative source supporting an ultimate estimation of an error rate just below thirty percent.

However, Parker provides tabular information that is somewhat ambiguous in its presentation. His information also references 5.7% of the outcomes involving transfer of the arms, but the table does not clarify the extent to which these are included in dismissals. *Id.*

⁸² *See supra* note 69.

⁸³ Of course, tallying all the benefits and consequences is complicated. As noted

below, surveys estimate annual defensive firearms use rates of up to 2.5 million. *See infra* note 85 and accompanying text. So, one endeavoring to justify red flag laws as enhancing safety would need to incorporate the consequences of the subjects being disarmed.

However, one might assert that the acceptable rate of innocent persons being killed in red flag orders is some multiple higher than those referenced above. An order following a firearms seizure may be renewed, resulting in a multi-year period in which a subject is disarmed. And, that view would continue, one ought to divide the above-referenced acceptable rates by the average duration, in years, of the orders staying in effect.

In some states, where the orders are not long-lasting, this would change little. A popular press report indicates Colorado's experience is that that the substantial majority do not last more than one year. As to the 146 orders issued in 2020 and 2021, "The orders are extended only in rare cases—they were requested 13 times, granted eight times. . . . The bottom line: After Wednesday, 116 of the 146 people who were ordered to give up their guns can legally get them." Zack Newman & Kevin Vaughan, *Gun Seizures More Likely Under Colorado's Red Flag if Law Enforcement Is Involved*, 9NEWS (May 25, 2022, 9:43 PM), <https://www.9news.com/article/news/investigations/red-flag-law/73-bd22f338-2605-477f-a1f5-e8b5570f2534>. So, the above estimate may be conservative, i.e., understate the risk of being killed by the police, annualized based on the ultimate duration of the order.

Perhaps the longest plausible estimate as to the average duration one might use, if one wished best to support the desirability of red flag laws, would be approximately ten years. One might arrive at that as follows.

Parker's work reveals that where hearings were held, five years after an initial deprivation, in approximately eighteen percent, the order was dismissed, with the subject entitled to return of his or her arms. In particular, there were 111 such hearings in 2007 through 2011, 27 (24.3%) of which were dismissed at the subsequent hearing. Parker, *supra* note 81, at 319–20. However, of those 27, the subject agreed to destruction of his or her firearms in four, and in three the subject agreed to transfer the weapons to another person. *Id.* at 320. Eliminating those seven proceedings yields 20 of the 111 proceedings in which the arms were returned, or 18%. In that study, the average of subjects was 42.6. *Id.* at 314 tbl.1. The clear majority of subjects were male (80.9%). *Id.* at 314 tbl.1.

Recent government statistics show a life expectancy of 32.7 years for a male of 45. Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2020*, NAT'L VITAL STAT. REPS., Aug. 8, 2022, at 2 tbl.A. Thus, on average, these cannot be sequentially renewed and, on average, last more than 32.7 years. Ten years seems like a suitable estimate of the average, in view 32.7 being the maximum possible average, and the fact that individuals become less dangerous as they age. *See Number of Murder Offenders in the United States in 2020, by Age*, STATISTA, www.statista.com/statistics/251884/murder-offenders-in-the-us-by-age/ (visited Jan. 6, 2023).

One might come to the ten-year estimate in the following way. These involve predictive assessments of criminality where, by definition, the individual has not been previously found guilty of any of the expansive list of crimes, including assorted nonviolent crimes and violent crimes not involving firearms, some involving weapons and some not, that give rise to a firearms prohibition.

Let us consider what it means for such an order to be extended to twenty years. At some time, the individual was predicted to have a propensity for violence using a firearm, that had not previously manifested in any criminal act that would result in criminalizing firearms possession—none of the violent crimes involving hands or weapons other than firearms, and none of the non-violent crimes. But someone asserts, at the time of the initial issuance, the individual changed, and had acquired a heightened, unacceptable level of propensity for violence using a firearm—the individual must be immediately disarmed.

Then, five years later, at a renewal, the renewal is only required where a crime giving rise to a firearms prohibition has not been committed. At that time, one might become suspicious as to the prediction. Why is it that five years have passed for this highly dangerous

person who has committed none of the much less serious crimes that give rise to a firearms prohibition?

The same line of thought might occur after ten years, on a second renewal request. One would become increasingly suspicious that the prediction was in error. By the third request for renewal, after fifteen years, the judiciary of which the request is sought ought to be thinking: Fool me once (initially), depriving a person of his constitutional rights, shame on you; fool me twice (at the five-year renewal), shame on me; fool me three times (at the ten-year renewal), extreme shame on me; and at the sought fifteen-year renewal—fifteen years of deprivation of a constitutional right unsupported by criminal conviction over fifteen years are enough.

If they all end after fifteen years, there is a ten-year weighted average if the number ending in the first and last five-year periods are the same. But, if a rough estimate is insufficient, one might contextualize the estimate with the following:

As noted above, *see supra* note 81, 28.7% of the initial claims were not dismissed. Let us take it that the same percentage of initial orders are not sought to be renewed every five years. That is, five years of experience of there not being a crime giving rise to a prohibition results in a similar likelihood that reassessment of the circumstances indicates that application for renewal is not warranted. That would mean that, after five years, of 100 orders initially issued, renewal would not be sought in 28.7 and it would be sought in the remainder, 71.3. Applying the rate that Parker found for rejection of applications of 18 percent would yield an estimate of:

For 100 orders issued, after five years, renewal is sought in 71.3 and that renewal request rejected in 18 percent (12.8) and accepted in 82 percent (58.5). So, of the 100 orders issued, only 58.5 would extend at least 10 years, with the remainder, 41.5 ($12.8 + 28.7$) lasting only 5 years.

If we take it that the same frequencies apply after 10 years, we would have:

Of the 58.5 orders issued that extended at least 10 years, renewal would be sought after 10 years in 71.3 percent, or 41.7, with renewal not sought in 16.8 (28.7%). Again, taking that sought renewals are rejected 18% of the time, this would result in ($41.7 \times 82\%$) 34.2 renewals, and 7.5 where renewal was sought but rejected. So, a total of 24.3 would end after 10 years (16.8 where renewal was not sought and 7.5 where renewal was sought but rejected).

If we take it that the same frequencies apply after 15 years, we would have, 34.2 orders that last at least 15 years, renewal would be sought in 71.3%, or 24.4, and not sought in 28.7% of the 34.2, 9.8. Of those 24.4 where renewal was sought, it would be denied in 18% of the times, or 4.4, and granted in 20.0. So, a total of 20.0 would last at least 20 years, with the orders ending in fifteen years for 14.2 of the original 100 orders ($9.8 + 4.4$).

So far, of 100 orders issued, we have 41.5 orders lasting 5 years, 24.3 orders lasting 10 years, and 14.2 lasting 15 years. For each five-year period, the number of orders ending in that period is approximately 58.5% of the number ending in the prior 5-year period. 24.3 is 58.6% of 41.5. 14.2 is 58.4% of 24.3. Subject to rounding, the ratio will be the same for successive five-year periods. Following that, we would get, a weighted average of approximately 11.7 years:

a dangerous process, which creates risk of serious physical injury to the innocent, would need evidence that it enhances safety beyond assisting in restraining suicide, which is lacking.⁸⁴

B. No Governmental Obligation to Protect

Yet the physical danger to targets associated with these red flag proceedings is not limited to being shot in a pre-dawn police raid. Justice Alito has stated, “According to survey data, defensive firearm use occurs up to 2.5 million times per year.”⁸⁵ The estimated annual defensive uses of firearms substantially exceed, by about a factor of ten, the annual rate of violent crime using firearms (and, of course, the much lower annual murder rate using firearms).⁸⁶

	No. of 100	Term	Weighted Ave.
Lasting 5 years	41.5	5	2.1
Lasting 10 years	24.3	10	2.4
Lasting 15 years	14.2	15	2.1
Lasting 20 years	8.3	20	1.7
Lasting 25 years	4.9	25	1.2
Lasting 30 years	2.9	30	0.9
Lasting 32.7 years	<u>3.9</u>	32.7	<u>1.3</u>
Total	100		11.7

⁸⁴ See *supra* note 37 and accompanying text.

⁸⁵ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2158–59 (2022) (Alito, J., concurring). See also INST. MED. & NAT’L RSCH. COUNCIL NAT’L ACAD.’S, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (Alan I. Leshner et al. eds., 2013) (“Defensive use of guns by crime victims is a common occurrence, although the exact number remains disputed. Almost 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.” (citations omitted)).

⁸⁶ Federal data presented for 2020, under the heading “All Violent Crime Offense Characteristics,” show a total of 179,867 violent crimes as involving firearms of some type. *Crime Data Explorer*, *supra* note 67. It may be that the way that the current interface presents the data results in it being incompletely presented. The tabular data for 2019 reveal firearms were used in the 279,414 violent crimes in 2019 (robbery and aggravated assault: 269,159, murder and non-negligent manslaughter, 10,258). FED. BUREAU INVESTIGATION, 2019 CRIME IN THE UNITED STATES: TABLE 19 [hereinafter TABLE 19], <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-19> (last visited Oct. 25, 2022); FED. BUREAU INVESTIGATION, 2019 CRIME IN THE UNITED STATES: TABLE 20, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-20>. The 2019 data do not reveal a frequency for rape using a firearm, TABLE 19, *supra*, but other sources indicate that would account for less than one percent of violent crimes with firearms. *Number of Forcible Rape and Sexual Assault Victims in the United States in 2020*, by Weapon

Additionally, disarmament of a target of a red flag proceeding is not accompanied by government taking actual responsibility for making up for the increased victimization risk arising from the target being disarmed. That the government is not responsible for the consequences of disarming someone, albeit outside the context of red flag laws, is illustrated by *Vaughn v. City of Chicago*.⁸⁷

One Albert Vaughn went to the location of a group altercation to retrieve his younger brother.⁸⁸ He was armed with what was described by, and apparently perceived by, an officer who forced him to disarm as a stick.⁸⁹ It was alleged, by Vaughn's estate, that he was ordered by officers at gunpoint to drop the wood, which he did.⁹⁰ In particular, in deposition testimony, one Officer Cummings stated that Vaughn "was walking toward me, him and two other individuals, with sticks in their hands. I drew my weapon or ordered them to drop the sticks. They dropped the

Presence, STATISTA, <https://www.statista.com/statistics/251931/usa--reported-forcible-rape-cases-by-weapon-presence/> (last visited Nov. 1, 2022) (showing 1,680 for 2020).

Blocher and Charles assert, "The interest in having one's firearms is significant, but the justification for delay and the confirmation of judicial authorization all point to the reasonableness of a short span of mere weeks before the final hearing." Blocher & Charles, *supra* note 12, at 1335. They do not contextualize this assertion by noting that firearms are used defensively at a rate ten times the frequency with which they are used to commit serious violent crimes. Although one might seek to frame the relevant numbers as to the innocent citizen's loss of self-defense, this Essay shall limit that style of quantitative framing to the risk of being killed during the confiscatory seizure.

⁸⁷ 181 F. Supp. 3d 570, 571, 574–75 (N.D. Ill. 2015) (granting summary judgment for the defendant-police officers on the grounds that Vaughn's substantive Due Process rights were not violated under the state-created danger doctrine when police disarmed him).

This case is merely illustrative of the authority bearing on lack of governmental accountability for failing to protect members of the public. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750–51, 768 (2005) (stating, "[w]e decide in this case whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated"; and holding, "[w]e conclude, therefore, that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband"); *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1330–31 (11th Cir. 2020); *Riss v. City of New York*, 240 N.E.2d 860, 860–61 (N.Y. 1968) (holding there was no municipal liability "for failure to provide special protection to a member of the public who was repeatedly threatened with personal harm and eventually suffered dire personal injuries for lack of such protection"; noting statutes had on occasion provided for "municipal liability for losses sustained as a result of riot"); *Hartzler v. City of San Jose*, 120 Cal. Rptr. 5, 8, 10 (Cal. Ct. App. 1975) (police not liable for refusal to come immediately to the home of a woman whose husband had called saying he was coming to kill her). *See generally* *Leake v. Caine*, 720 P.2d 152 (Colo. 1986), *abrogated in part by statute*, COLO. REV. STAT. § 24-10-106.5 (through Oct. 16, 2022, of 2d Reg. Sess).

⁸⁸ *Vaughn*, 181 F. Supp. 3d at 571.

⁸⁹ *Vaughn v. City of Chicago*, No. 14 C 47, 2014 WL 3865838, at *1 (N.D. Ill. Aug. 5, 2014).

⁹⁰ *Id.* at *1.

sticks and approached me.”⁹¹ Additionally, in response to a question, “And you drew your weapon. You told them to do what?”, Officer Cummings stated, “To drop the sticks they had in their hand.”⁹²

The estate also alleged Vaughn was then approached by a person who had a bat and had been shouting obscenities at Vaughn.⁹³ Vaughn’s estate further alleged,

The defendant officers did not order the man to halt or drop the bat as he approached Vaughn. Instead, the officers simply watched as the man clubbed Vaughn in the head with the bat and then fled from the scene. Vaughn was transported to a local hospital where he was pronounced dead.⁹⁴

On summary judgment, Vaughn’s estate lost.⁹⁵ In reaching the conclusion, the court notes that the attack came “without warning” by one “hiding in a nearby house or behind an ambulance.”⁹⁶ The court applied a standard of “whether Defendants failed to protect Albert in a way that shocks the conscience after disarming him in a dangerous environment.”⁹⁷ In rejecting the claim, the court provided the following analogy: “Vaughn’s claim boils down to Defendants’ failure to assign a personal bodyguard for Albert”⁹⁸ Indeed, as *Vaughn* illustrates, government disarmament is not accompanied by accountability for causing the target to be defenseless.

C. *Relationship Between Firearms Ownership and Freedom*

Debate concerning firearms restrictions is often framed from the exclusive perspective of whether the particular enactment will or will not increase public safety. For example, Fagundes and Miller assert, “This Part explains why it is necessary to re-frame the Second Amendment’s core value as safety, not self-defense simpliciter, and relates that purpose to the historical role of the city as supplier of armed internal security.”⁹⁹ That framing contradicts one of the Second Amendment’s underlying objectives—to promote freedom. Although some commentators are inclined to characterize dismissively the notion of firearms rights as

⁹¹ Deposition of Officer Robert E. Cummings at 35, *Vaughn*, 181 F. Supp. 3d 570 (No. 14 C 47) (deposition of Sept. 19, 2013, attached as Exhibit D to Defendants’ Rule 56.1 statement of Undisputed Material Facts, *Vaughn*, 181 F. Supp. 3d 570 (No. 14 C 47)).

⁹² *Vaughn*, 2014 WL 3865838, at *37. The court subsequently concluded that what were perceived by this officer as “sticks” were boards removed in haste from a porch, without dallying to remove the nails. *Vaughn*, 181 F. Supp. 3d at 571.

⁹³ *Vaughn*, 2014 WL 3865838, at *1.

⁹⁴ *Id.*

⁹⁵ *Vaughn*, 181 F. Supp. 3d at 576.

⁹⁶ *Id.* at 575.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Dave Fagundes & Darrell A.H. Miller, *The City’s Second Amendment*, 106 CORNELL L. REV. 677, 682 (2021).

furthering freedom,¹⁰⁰ there is wide evidence that one objective of passage of the Fourteenth Amendment was to prevent the deprivation of ordinary civil liberties effected by disarming persons.¹⁰¹

Sections A and B have identified components of safety that are often (but not universally¹⁰²) de-emphasized in consideration of red flag confiscation orders.¹⁰³ But equally important, the focus proffered by Fagundes and Miller is, simply, rejected by both repeated reference in the Court's Second Amendment jurisprudence and ordinary American notions of civil rights.

The opinion in *District of Columbia v. Heller* itself rejected precisely this style of balancing:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.¹⁰⁴

Subsequently, the primary opinion in *McDonald v. City of Chicago* noted,

¹⁰⁰ See, e.g., Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 281 (2020) (describing such conceptions as “narratives that construct realities” that “gun rights advocates have developed and deployed”).

¹⁰¹ See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2151 (2022) (“In the years before the 39th Congress proposed the Fourteenth Amendment . . . [a]n assistant commissioner to the [Freedmen’s] Bureau from Alabama similarly reported that men were ‘robbing and disarming negroes upon the highway.’” (quoting H.R. EXEC. DOC. NO. 70, 39th Cong., 1st Sess., 297 (1866))).

¹⁰² See, e.g., Larosiere & Greenlee, *supra* note 12, at 165 (not sketching the magnitudes); Dennis P. Chapman, *Firearms Chimera: The Counter Productive Campaign to Ban the AR-15 Rifle*, 8 BELMONT L. REV. 191, 221–22 (2020) (quoting the local police chief’s efforts to justify initiating the Willis seizure, which referenced uncertainty as to what would have happened but for the seizure, and noting a commentator’s retort that Willis probably would have been alive).

¹⁰³ See, e.g., Blocher & Charles, *supra* note 12, at 1309, 1312 (asserting, “the risk of false positives seems far outweighed by the risk of false negatives,” cross-referencing a brief, unsupported discussion without attempting to calculate a rate of innocent death and any comparison of it to the criminal murder rate); Dalafave, *supra* note 37, at 897, 899 (finding a relationship between red flag laws and decreased suicide—but *not* a statistically significant relationship with homicide rates—and opining that firearms create “a negative externality for society,” favorably commenting on statutes that “strike a balance” between the costs of restricting gun ownership and improper gun use); Caitlin M. Johnson, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. ILL. L. REV. 1515, 1531–32 (2021) (asserting “the collective rights of the public still outweigh the rights of the individual within his or her home”). These authors’ reliance on a public safety rationale is in tension with *Heller* and *Bruen*.

¹⁰⁴ 554 U.S. 570, 634 (2008).

The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. . . . Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.¹⁰⁵

Additionally, in *Bruen*, the Court rejects New York’s attempt to posture the issue as involving a balancing of public safety concerns—a balancing whose outcome, if relevant, New York’s briefing asserted the petitioners conceded.¹⁰⁶ New York articulated the following, unsuccessful argument:

Kachalsky examined the “studies and data” New York introduced there, which “demonstrat[ed] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces.”

Research from before and after *Kachalsky* shows that jurisdictions that restrict public carry experience lower rates of gun-related homicides and other violent crimes than those that do

Petitioners do not address, much less attempt to refute, any of this research.¹⁰⁷

The *Bruen* Court, however, rejects the validity of that characterization of the relevant issue. It quotes in part the above-quoted statement in *McDonald*¹⁰⁸ and notes, “Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a ‘sensitive place’ simply because it is crowded and protected generally by the New York City Police Department.”¹⁰⁹

More generally, our Bill of Rights reflects the conclusion that there are some civil rights that must be preserved, even though their preservation decreases public safety or inhibits law enforcement. Maintaining a society not dominated by the intrusions of a police state necessitates their preservation.¹¹⁰ By way of example, then-Judge

¹⁰⁵ 561 U.S. 742, 783 (2010).

¹⁰⁶ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133–34 (2022).

¹⁰⁷ Brief for Respondents at 43–44, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (alteration in original) (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012), *abrogated by Bruen*, 142 S. Ct. 2111).

¹⁰⁸ *Bruen*, 142 S. Ct. at 2026 n.3 (“‘The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications.’” (alteration in original) (quoting *McDonald*, 561 U.S. at 783)).

¹⁰⁹ *Bruen*, 142 S. Ct. at 2134.

¹¹⁰ By way of example, Justice Brandeis, supporting an exclusionary rule, famously dissented:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and

McConnell wrote: “Even people with prior convictions retain Fourth Amendment rights; they are not roving targets for warrantless searches.”¹¹¹ One should think society would be manifestly less dangerous were any prior criminal conviction to result in permanent, complete forfeiture of freedom from unreasonable governmental searches.

A second illustration is the invalidation of former-Mayor Bloomberg’s now-rejected approach to widespread frisking of individuals in certain locales.¹¹² Mayor Bloomberg touted the benefits of the now-rejected approach in these words: “There is no doubt that stops are a vitally important reason why so many fewer gun murders happen in New York than in other major cities—and why we are the safest big city in America.”¹¹³ Yet that alleged safety rationale does not validate the abrogation of a constitutionally-enumerated civil right.¹¹⁴

satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Olmstead v. United States, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting), *overruled* by *Katz v. United States*, 389 U.S. 347 (1967).

To go back to the Founding Era, John Adams opined that “American independence was . . . born” with a famous speech of James Otis railing against the legality of writs of assistance. 2 JOHN STETSON BARRY, *THE HISTORY OF MASSACHUSETTS* 263, 266 (1856).

¹¹¹ *United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005).

¹¹² See *Floyd v. City of New York*, 770 F.3d 1051, 1054 (2d Cir. 2014) (per curiam) (chronicling the elimination of New York City’s discriminatory “stop-and-frisk” policy through the City’s adoption of Judge Sheindlin’s remedial order).

And we know that governmental tailoring of restrictions on firearms rights will also produce dubious distinctions; it already does. Felonies that do not give rise to a federal firearms prohibition include “Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.” 18 U.S.C. § 921(a)(20)(A). Federal law allows certain business criminals to keep their firearms, but not so for the less-well-heeled criminals. The history foreshadows problematic variations in the application of federally funded red flag laws.

¹¹³ Michael Bloomberg, Mayor of N.Y.C., Address on Public Safety to NYPD Leadership (Apr. 30, 2013), <https://www1.nyc.gov/office-of-the-mayor/news/151-13/mayor-bloomberg-delivers-address-public-safety-nypd-leadership>.

¹¹⁴ One supposes that then-Mayor Bloomberg did not advance public support for the procedure with the words, “I think we disproportionately stop whites too much and minorities too little. It’s exactly the reverse of what they say,” Bloomberg said on his weekly radio show, in response to the City Council passing two bills aimed at reining in the controversial policing tactic.” Yoav Gonen, *Bloomberg: ‘We Disproportionately Stop Whites Too Much and Minorities Too Little’ in Stop-Frisk Checks*, N.Y. POST (June 28, 2013), <https://nypost.com/2013/06/28/bloomberg-we-disproportionately-stop-whites-too-much-and-minorities-too-little-in-stop-frisk-checks/>.

1. Prior Work by Kopel, Moody and Nemerov

In a 2008 article, David Kopel, Carlisle Moody, and Howard Nemerov illuminate statistical relationships between measures of freedom and firearm ownership.¹¹⁵ The measures of freedom they used were:

- An annual rating provided by Freedom House (in which a lower figure is better);¹¹⁶
- An annual Corruption Perceptions Index published by Transparency International (in which a higher figure is better);¹¹⁷ and
- An Index of Economic Freedom published by Heritage Foundation (in which a higher figure is better).¹¹⁸

Data for civilian firearms per capita were taken by Kopel, Moody, and Nemerov from the then-current edition of the Small Arms Survey.¹¹⁹

At that time, per capita firearms ownership data were available for only fifty-nine countries.¹²⁰ On dividing their data set of countries into quartiles, based on per capita civilian firearms ownership, they find countries in the quartile with the highest per capita firearm ownership have the best average measures of freedom.¹²¹ However, for each of their measures, the relationship was not monotonically increasing or monotonically decreasing among the quartiles.¹²²

They also report results of regressions estimating the relationship between measures of freedom (some rescaled so that higher values are better for each), as the dependent variables, and reported civilian firearms ownership as, apparently, the only independent variable.¹²³ They find a positive relationship.¹²⁴

Availability of a larger data set and additional variables allows a more nuanced assessment of the nature of the relationships.¹²⁵ That is presented below.

¹¹⁵ David Kopel et al., *Is There a Relationship Between Guns and Freedom? Comparative Results from Fifty-Nine Nations*, 13 TEX. REV. L. & POL. 1, 3 (2008).

¹¹⁶ *Id.* at 3–4.

¹¹⁷ *Id.* at 3, 5.

¹¹⁸ *Id.* at 3, 6.

¹¹⁹ *Id.* at 3, 9 n.52, 10.

¹²⁰ *Id.* at 3.

¹²¹ *Id.* at 17–18.

¹²² *Id.* at 17. A “monotonic” relationship is one “having the property either of never increasing or of never decreasing as the values of the independent variable or the subscripts of the terms increase.” *Monotonic*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/monotonically>.

¹²³ See Kopel et al., *supra* note 115, at 7–8, 22, 23 (comparing gun ownership to Freedom from Corruption, Economic Freedom, and Economic Success as measured by World Bank’s Purchasing Power Parity (“PPP”) rather than the Freedom House rating).

¹²⁴ *Id.* at 22–23.

¹²⁵ See *infra* note 129.

2. This Essay's Contribution to the Empirical Literature

The article by Kopel, Moody, and Nemerov appears to not have gained traction in law review literature. A Westlaw search reveals four citations to it.¹²⁶ Only four articles in the “Secondary Sources” database in Westlaw reference Transparency’s Corruption Perceptions Index and the phrase “second amendment”, the Kopel, Moody and Nemerov article being the only one referencing firearms or guns.¹²⁷

The currently available data allow for a richer and more compelling analysis. Data for civilian firearms ownership are now available for more countries, allowing for a more powerful analysis.¹²⁸ Additionally, this Essay incorporates other statistical information and brings to bear more sophisticated empirical techniques that become practicable because additional statistical information is available.

In particular, the larger sample size makes it practicable to control for regional variations, which allows for a more precise estimation.¹²⁹ Additionally, the currently available data allow an investigator to control for a country’s rate of serious crime and the extent of law enforcement firearms possession in that country.

¹²⁶ Westlaw search: adv: (kopel +20 “guns #and freedom”) (last visited Nov. 4, 2022). The results are David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99 (2010); Christopher N.J. Roberts, *Standing Our Legal Ground: Reclaiming the Duties Within Second Amendment Rights Cases*, 47 ARIZ. ST. L.J. 235 (2015); John O. McGinnis, *Gun Rights Delayed Can Be Gun Rights Denied*, 2020 U. ILL. L. REV. ONLINE 302 (2020); and Philip M. Nichols, *The Psychic Costs of Violating Corruption Laws*, 45 VAND. J. TRANSNAT’L L. 145 (2012).

¹²⁷ Westlaw search: adv: (transparency /15 (“corruption perceptions” or cpi) & “second amendment”) (last visited Feb. 19, 2023) (identifying nine articles, including Kopel, et al., *supra* note 115); Westlaw search: adv: (transparency /15 (“corruption perceptions” or cpi) & “second amendment” & (firearm or gun or pistol or rifle) (last visited Feb. 19, 2023) (identifying only one article, Kopel et al., *supra* note 115).

¹²⁸ *Compare Civilian Firearms Holdings, 2017*, SMALL ARMS SURVEY <https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-held-firearm-annexe.pdf> (last visited Nov. 23, 2022) (showing data for 230 countries and regions), *with* Kopel et al., *supra* note 115, at 9–10 (discussing an older version of the Small Arms Survey containing only fifty-six countries).

¹²⁹ The intuition that increasing the size of a sample can assist in identifying relationships may be illuminated by a simple illustration. If one wishes to assess whether a coin has been tampered-with to increase the likelihood that, when flipped, it comes-up heads, flipping the coin once is unlikely to reveal much of interest. But, if one flips it many times and it keeps coming-up heads, one will be increasingly convinced by the observations. *See generally* JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 648 (2d ed. 2003) (discussing the benefits of having a “richer” data set, stating “[E]conomists have been interested in whether taxes on cigarettes and alcohol reduce consumption As more years of data at the state level become available, a richer panel data set can be created, and this can help us better answer major policy questions.”); *id.* at 649 (“Deciding on which kind of data to collect often depends on the nature of the analysis. . . . [W]e must ask whether we can obtain a rich enough data set to do a convincing ceteris paribus analysis.”).

Lastly, as noted below, renowned scholar Gary Kleck has identified some concerns with the manner in which the Small Arms Survey compiles civilian firearms ownership information.¹³⁰ The problems appear to be particularly acute as to unregistered civilian firearms ownership.¹³¹ He has recommended an alternative statistic that may be used to assess relative civilian firearms ownership: the fraction of suicides committed with firearms.¹³² The investigation reported in this Essay uses that information as an alternative. Application of Gary Kleck’s insight also allows one to consider alternative empirical techniques that may address bias introduced by adjustments made in the preparation of the reported Small Arms Survey data.

In sum, the analysis allowed by this additional data reveals compelling evidence of a positive relationship between civilian firearms possession and indicators of levels of freedom in a country.

III. DATA

The indices of freedom used in this Essay are:

- the Corruption Perceptions Index 2021, the most recent scores available in June 2022, published by Transparency International (one of the indices of freedom used by Kopel, Moody, and Nemerov);¹³³ and
- selected 2022 component scores published by The Heritage Foundation as part of its series on the Index of Economic Freedom—in particular, its Judicial Effectiveness¹³⁴ and Government Integrity¹³⁵ scores.¹³⁶

¹³⁰ See Kleck, *supra* note 13, at 7–8 (identifying fundamental problems with the process and measurements of the Small Arms Survey, such as its difficulty of replication).

¹³¹ See *id.* at 2 (emphasizing the Small Arms Survey’s estimate of unregistered civilian firearm possession equaling a dubious multiple of the registered possession figures).

¹³² *Id.* at 10–11.

¹³³ *Corruption Perceptions Index 2021*, TRANSPARENCY INT’L, <https://www.transparency.org/en/cpi/2021> (last visited Oct. 17, 2022); see Kopel et al., *supra* note 115, at 5.

¹³⁴ This index “is derived by averaging scores for the following three sub-factors, all of which are weighted equally:

- Judicial independence,
- Quality of the judicial process, and
- Perceptions of the quality of public services and the independence of the civil service.”

TERRY MILLER ET AL., HERITAGE FOUND., 2022 INDEX OF ECONOMIC FREEDOM 456 (2022), https://www.heritage.org/index/pdf/2022/book/02_2022_IndexOfEconomicFreedom_METHODOLOGY.pdf.

¹³⁵ This variable “is derived by averaging scores for the following three sub-factors, all of which are weighted equally:

- Perceptions of corruption,
- Risk of bribery, and
- Control of corruption including ‘capture’ of the state by elites and private interests.”

Id.

¹³⁶ *Id.* at 5–9.

As to the first-listed index, Philip Nichols has noted “legal scholars have comprehensively embraced the Corruption Perceptions Index.”¹³⁷

Firearms ownership information is taken from the Small Arms Survey as of the most recent year currently available, 2017.¹³⁸ The fraction of suicides where a firearm was an instrumentality are computed from the data reported by the Institute for Health Metrics and Evaluation (“IHME”) for 2017.¹³⁹ The rates of selected serious crime, with one exception, represent the sum of the rates for serious assault, rape and robbery, as reported for 2017 by the United Nations Office on Drugs and Crime (“UNODC”).¹⁴⁰ However, that source does not report information for China. The large population there commended the jurisdiction not be omitted, if feasible. Corresponding numbers for 2019 (the closest available year) for assault, rape, and robbery in China were taken from another source.¹⁴¹ The geographic regions were taken from the Small Arms Survey.¹⁴²

¹³⁷ Nichols, *supra* note 126, at 201.

¹³⁸ *Civilian Firearms Holdings, 2017*, *supra* note 128; *Law Enforcement Firearms Holdings, 2017*, SMALL ARMS SURVEY (Mar. 29, 2020), <https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Law-enforcement-firearms-annexe.pdf>.

¹³⁹ *2019 Global Burden of Disease*, INST. FOR HEALTH METRICS & EVALUATION (2019) <https://vizhub.healthdata.org/gbd-results/> (change the native search query by deleting the “Cause” search terms and typing in “firearm”; then from the dropdown, list check the box for “Self-harm by firearm”; and in the “Location” search box, select all countries and major regions (Africa, America, Asia, Europe, Oceania); then in the “Year” search box delete the native “2019” search term and scroll to click on the year “2017”; after clicking on “Search” both a Chart and Table reference will be available to see the specific data).

¹⁴⁰ *Violent & Sexual Crime*, U.N. OFF. DRUGS & CRIME, <https://dataunodc.un.org/dp-crime-violent-offences> (last visited June 22, 2022) (select the categories for “Robbery,” “Serious Assault,” and “Sexual Violence: Rape” and adjust the year slider to be for only “2017”).

¹⁴¹ China’s rates were computed by taking the number of assaults, rapes, and robberies reported in *Statista* and comparing those numbers to China’s 2019 population (1,407,745,000) as reported by The World Bank; 2019 was used as the UNODC did not report data for 2017—having a gap from 2016 through 2018 in its data. C. Textor, *Number of Assault, Rape, and Murder Cases Recorded in China from 2010 to 2020*, STATISTA (Nov. 29, 2021), <https://www.statista.com/statistics/1248115/number-of-assault-rape-murder-crimes-in-china/> (subscription required to access data); C. Textor, *Number of Theft, Fraud, and Robbery Cases Recorded in China from 2010 to 2020 (in 1,000s)*, STATISTA (Nov. 29, 2021), <https://www.statista.com/statistics/1248100/number-of-theft-fraud-robbery-crimes-in-china/> (subscription required to access data); *Population, Total – China*, WORLD BANK (2019), https://data.worldbank.org/indicator/SP.POP.TOTL?end=2021&locations=CN&most_recent_year_desc=false&start=2018 (showing China’s population from 2018 to the most current year available).

¹⁴² See, e.g., *Civilian Firearms Holdings, 2017*, *supra* note 128 (listing major geographical regions—consisting of Asia, Europe, Africa, Oceania, and Americas—for each country included).

Summary statistics for the data are reported in Table 1, below.¹⁴³ The data in the table are divided into two parts. On the left are statistics for all countries used in any empirical analysis. On the right are statistics for countries used in the expanded analysis—one using more control variables. The available sample size decreases for that subsample, because the various supplemental sources omit information for some countries. The primary reason for omission of countries from the subsample is the failure of the United Nations to report the data for the referenced crimes. That is available for less than half of the countries in the full sample (86 out of 186).

However, the two samples—(i) the full sample and (ii) the subsample of countries where statistics for the enhanced analysis provided in this Essay are available—are relatively similar. The primary exception involves the regions of the included countries. The latter subsample omits countries from Oceania, which represent only a handful of observations in the full sample for substantially all of which the additional data are not available. Although countries from Africa represent twenty-nine percent of the full sample, they represent only four percent of the subsample.

There is a higher rate of average civilian firearms ownership in the subsample. That is not a concern for our purposes. Our investigation is designed to address the relationship between freedom and civilian firearms ownership, as applied to the United States. The United States is at the top along that dimension. A disproportionate filtering arising from limited data availability is of diminished concern where the limit disproportionately excludes observations most dissimilar to the observation of interest, the United States.

¹⁴³ See *infra* Table 1. There were some inconsistencies in the way in which information was presented as to countries among the various databases. For example, some have combined data for the United Kingdom while others have separate data for Northern Ireland, Scotland, and England and Wales. *Compare Corruption Perceptions Index 2021*, *supra* note 133 (listing one score for the United Kingdom as a whole), with *Violent & Sexual Crime*, *supra* note 140 (listing a separate score for each country in the United Kingdom). And some countries were dropped as a result of inconsistency in naming that gave rise to uncertainty; for example, Northern Cyprus was separately identified in some databases but not others. *Compare Civilian Firearms Holdings, 2017*, *supra* note 128 (listing both “Cyprus, North” and “Cyprus, Rep. of”), with *Corruption Perceptions Index 2021*, *supra* note 133 (listing one score for Cyprus generally).

Table 1: Summary Statistics

	<u>All Observations</u>				<u>Observations Used in Any Estimation Reported in Table 4</u>			
	Mean	Min.	Max.	N	Mean	Min.	Max.	N.
Firearms civilian per cap (x 100)	9.72	0.00	120.50	186	14.19	0.00	120.50	75
Firearms civilian registered per cap (x 100)	4.45	0.00	27.84	122	5.80	0.01	27.84	75
Firearms civilian unregistered per cap (x 100)	7.01	0.02	120.15	122	8.40	0.02	120.15	75
Law enforcement firearms per cap (x 100)	0.46	0.01	3.56	184	0.59	0.06	1.74	75
Fraction of suicides where gun instrumentality (2017)	0.070	0.002	0.512	182	0.088	0.003	0.512	75
Heritage Judicial Effectiveness	50.31	3.90	98.00	176	63.05	11.80	98.00	75
Heritage Government Integrity	45.42	3.77	99.46	176	55.17	18.95	99.46	75
Transparency Corruption Perceptions Index	43.27	11.00	88.00	180	51.54	20.00	88.00	74
Rate of selected serious crime (x 100,000)	224.3	2.08	1254.4	86	231.3	9.25	1254.4	75
Africa	0.29	0.00	1.00	186	0.04	0.00	1.00	75
Americas	0.18	0.00	1.00	186	0.31	0.00	1.00	75
Asia	0.26	0.00	1.00	186	0.16	0.00	1.00	75
Europe	0.22	0.00	1.00	186	0.49	0.00	1.00	75
Oceania	0.05	0.00	1.00	186	0.00	0.00	0.00	75

Gary Kleck criticizes use of the Small Arms Survey data.¹⁴⁴ The Small Arms Survey attempts to capture both registered and unregistered firearms.¹⁴⁵ Gary Kleck notes that data compilation for some countries involves taking reported numbers of registered firearms and multiplying them by a factor that is the same for the covered countries,¹⁴⁶ and Gary Kleck further reports that “staff state that estimates for some nations

¹⁴⁴ Kleck, *supra* note 13, at 1.

¹⁴⁵ *Civilian Firearms Survey, 2017*, *supra* note 128.

¹⁴⁶ See Kleck, *supra* note 13, at 2 (noting a multiplication factor of 3.6 to estimate the total number of civilian-owned firearms “[f]or the minority of nations for which national governmental counts of registered guns are available”).

‘have been adjusted.’”¹⁴⁷ To presume the ratio of registered to unregistered firearms is consistent across countries is unfounded.¹⁴⁸

The data for some countries are based on surveys.¹⁴⁹ However, Gary Kleck identifies a variety of ways in which the compilation of the survey information is problematic.¹⁵⁰ He notes, “Since most surveys do not ask how many guns were owned by each household or person, SAS staff arbitrarily assume that each gun-owning household contains exactly 1.5 guns”¹⁵¹ He recommends consideration of the “percent of suicides committed with guns” as a proxy for relative civilian firearms ownership.¹⁵² That percentage (restated as a fraction of one, i.e., percentage divided by 100), reported for 2017, is included in the summary statistics table (Table 1). The availability of this proxy statistic also allows for implementation of models that may mitigate concerns arising from undisclosed adjustments in the Small Arms Survey data.

IV. RESULTS AND ANALYSIS

A. A Simple Comparison of Quartiles

As an initial step, we examine whether a basic relationship reported by Kopel, Moody, and Nemerov still obtains: a generally increasing freedom associated with increased quartile of civilian firearms ownership. They found such a relationship, although it was not monotonically increasing. The relationship is monotonically increasing for two of the three freedom statistics: the Heritage Judicial Effectiveness and Heritage Government Integrity scores.

As to the third freedom statistic, Transparency’s Corruption Perceptions Index, the middle two quartiles are very close to each other (40.841 and 41.511), albeit in an order reversed from the expectation. The variation between the means of the middle two quartiles—one being 98.4% of the other (40.841 is 98.4% of 41.511)—is smaller than that found by Kopel, Moody, and Nemerov (91.6%).¹⁵³

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 3. Kleck also notes, “SAS staff also arbitrarily drop some registration figures based on their subjective judgment that they ‘appeared suspiciously low.’” *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See, e.g., id.* at 4 (describing the surveys for half the countries covered by surveys as “necessarily a hodge-podge of mostly one-time surveys that were not standardized across countries,” and stating the authors “do not claim that all surveys covered guns kept in vehicles, garages, sheds or other locations outside the home”).

¹⁵¹ *Id.* at 3–4.

¹⁵² *Id.* at 8, 10–11.

¹⁵³ The Corruption Perceptions Index for the year reported by Kopel, Moody, and Nemerov is on a different scale (0 to 10). *See* Kopel et al., *supra* note 115, at 17. And Kopel, Moody, and Nemerov report the quartiles in the opposite order—quartile 1 is the highest firearms ownership, as opposed to this Essay, which uses the default convention reported by

In sum, with a larger data set, the relationships revealed in the summary statistics become more clearly revealed. Greater civilian firearms ownership is more clearly linked to greater measures of freedom.

Table 2: Average Freedom Statistics Partitioned by Quartile of per Capita Civilian Firearms Ownership

	Firearms civilian per cap (x 100)	Heritage Judicial Effectiveness	Heritage Government Integrity	Transparency Corruption Perceptions Index
1	0.860	38.277	36.234	36.422
	48	48	48	45
2	3.529	43.240	40.170	41.511
	45	42	42	45
3	9.534	56.633	46.493	40.841
	47	42	42	44
4	25.207	64.145	59.439	54.000
	46	44	44	46
Total	9.719	50.309	45.423	43.267
	186	176	176	180

Note—Assorted mean freedom statistics partitioned by quartile, within the observations used, of Small Arms Survey civilian firearms ownership figures. Second column shows mean *civilian firearms per cap (x 100)* for the quartile. Number of country observations below the mean of the country statistic for each quartile. Each freedom statistic is defined so that a higher score is better (indicates more freedom).

B. Ordinary Least Squares Regressions

Our next step in confirming that this relationship still exists between freedom and civilian firearms ownership, as identified by Kopel, Moody, and Nemerov, involves identifying that basic relationship between civilian firearms ownership and measures of freedom—as they apparently did, without accounting for other variables.¹⁵⁴ That is presented in Table 3, Panel A, models 1, 3 and 5. Each shows there is a positive relationship between civilian firearms ownership and measure of freedom, that is

the Stata software used. In any case, the corresponding figures reported by Kopel, Moody and Nemerov are 4.75 for next-to lowest firearms ownership quartile, and 4.35 for the next-to-highest firearms ownership quartile. *Id.* (discussing quartile statistics of firearm ownership compared to liberty indices).

¹⁵⁴ See Kopel et al., *supra* note 115, at 22–23 (charting a relationship between firearm ownership and indices of freedom). See *generally id.* (limiting their analysis, of the smaller data set then available, to firearm ownership and the indices of freedom in their analysis).

statistically significant at the one percent level, a level that is sometimes summarily referenced as indicating a result is “highly significant.”¹⁵⁵

These simple models show that the per capital civilian firearms ownership on its own accounts for between eight and thirteen percent of the variation in freedom among the countries (R^2 ranging from 0.078 to 0.130).

Our first extension of the results found by Kopel, Moody, and Nemerov involves consideration of the alternative proxy for relative civilian firearms ownership suggested by Gary Kleck: the fraction of suicides where a firearm is the instrumentality.¹⁵⁶ In this simple regression, omitting other variables, there is a positive relationship between that proxy for relative civilian firearms ownership and freedom, which is statistically significant at the customarily employed five-percent confidence cut-off level as to one of the three measures of freedom: Judicial Effectiveness. It is statistically significant at the ten-percent level for the Government Integrity measure of freedom. So, one can reject the hypothesis that civilian firearms ownership is wholly unrelated to this

¹⁵⁵ A result that is statistically significant at the one percent level is often described as “highly significant,” as the concluding remarks of this footnote show.

Although it is not typical to include, in an essay reporting the results of regressions, background information as to foundational principles concerning the meaning of assorted statistical terms, the author has been advised that inclusion of such information is desirable. Hence, the author notes the following which is relevant to understanding the results of the statistical investigations reported in this Essay.

A treatise states as to the meaning of a “null” hypothesis, significance levels and p -values:

Tests of significance are generally designed to test the “null hypothesis.” The null hypothesis might be that a coin is “fair” or that substance A does not cause illness B. The question addressed by tests of significance is: What must the results of a study look like before we are willing to reject the null hypothesis? A p -value represents the probability that a positive association would result from random variation if no association is in fact present, that is, if the null hypothesis is true. A p -value of .05 may be interpreted as a 5 percent probability of observing an association at least as large as that found in the study when in truth the null hypothesis of no association is correct.

A test employing a .05 significance level does not mean that when we observe a significant result the null hypothesis has a 95 percent chance of being false. Rather, it means that if the null hypothesis is correct there was less than a 5 percent chance of generating this data.

1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 2:5 n.6 (2022–2023 ed.).

That treatise elsewhere notes:

In practice, statistical analysts often use certain preset significance levels—typically 5% or 1%. The 5% level is the most common in social science, and an analyst who speaks of “significant” results without specifying the threshold probably is using this figure. An unexplained reference to “highly significant” results probably means that p is less than 1%.

Id. § 5:36 (footnotes omitted).

¹⁵⁶ Kleck, *supra* note 13, at 9–11.

proxy for civilian firearms ownership. However, use of this proxy results in a significantly diminished predictive power for the model. Only one percent to four percent of the variation in the freedom index is accounted for by this proxy.

Table 3: OLS Regressions; Freedom Indices as Dependent Variable

Panel A: Full Data Set

	(1)	(2)	(3)	(4)	(5)	(6)
	<u>Transparency CPI</u>		<u>Government Integrity</u>		<u>Judicial Effectiveness</u>	
Firearms civilian per cap (x 100)	0.410*** (3.039)		0.640*** (3.236)		0.720*** (2.941)	
Frac. suicides w/ gun instrumentality (2017)		33.06 (1.454)		51.58* (1.882)		88.13** (2.545)
Constant	39.22*** (23.69)	41.00*** (20.59)	39.36*** (17.89)	41.87*** (17.61)	43.50*** (15.75)	44.27*** (14.86)
Observations	180	176	176	175	176	175
R-squared	0.078	0.013	0.130	0.022	0.112	0.043

Note—Ordinary least squares regressions, where the dependent variable is a country's freedom index (Transparency International's Corruption Perceptions Index, and The Heritage Foundation's Judicial Effectiveness and Government Integrity scores). Higher scores for each are better. Robust *t*-statistics in parentheses below coefficient estimates. Significance at the 1%, 5% and 10% levels shown by ***, ** and *, respectively.

Panel B: OLS Regressions with Additional Independent Variables

	(7)	(8)	(9)
	Transp. CPI	Gvt. Integ.	Jud. Effect.
Law enforcement firearms per cap (x 100)	-10.67** (-2.163)	-12.77** (-2.203)	-8.752 (-1.020)
Rate of selected serious crime (x 100,000)	0.0238*** (3.714)	0.0285*** (4.211)	0.0292*** (3.798)
Firearms civilian registered per cap (x 100)	0.792*** (2.718)	0.928*** (2.653)	1.356*** (3.498)
Africa	-29.05*** (-7.057)	-34.24*** (-6.679)	-28.95*** (-4.386)
Americas	-23.18*** (-4.889)	-27.41*** (-5.235)	-20.38*** (-3.116)
Asia	-11.40* (-1.986)	-13.52* (-1.991)	-19.99** (-2.436)
Constant	57.62*** (10.57)	62.62*** (9.810)	64.18*** (7.927)
Observations	74	75	75
R-squared	0.407	0.417	0.428

Note—Ordinary least squares regressions, where the dependent variable is a country's freedom index (Transparency International's Corruption Perceptions Index, and The Heritage Foundation's Judicial Effectiveness and Government Integrity scores). Higher scores for each are better. In these models, countries in Oceania are omitted, in light of their infrequency in the sample. Robust *t*-statistics in parentheses below coefficient estimates. Significance at the 1%, 5% and 10% levels shown by ***, ** and *, respectively.

The first primary extension made in this Essay's investigation allows examination of whether other explanatory factors account for the variation between freedom statistics and civilian firearms ownership. The initial approach to that is included in Table 3, Panel B. With the larger data set, one can control for the geographic region of the country, the rate of selected serious crimes, and the number of firearms possessed by the country's law enforcement, expressed per capita of the general population (x 100), i.e., the per capita computation does not reflect the number of law enforcement firearms per law enforcement officer. In these estimations, civilian firearms ownership is limited to the apparently more reliably

reported registered firearms. In these models, countries in Oceania are omitted, in light of their infrequency in the sample.

Controlling for these additional factors, the relationship between the more reliably reported civilian firearms ownership (the registered firearms) and each statistic representing country freedom remains positive and statistically significant at the one-percent confidence level (a level much more demanding than the customary five-percent level for identifying statistically significant relationships).¹⁵⁷

The results also show a statistically significant relationship between the rate of selected serious crime and freedom. The relationship is positive—higher serious crime rates are associated with greater freedom. Indeed, there are reasons to expect there might be such a positive relationship. As noted above, the American tradition, memorialized in the Bill of Rights, involves identifying certain actions that government cannot take that, although potentially increasing public safety, are off-limits as improperly infringing on the core components of a free society.

The United States is atypical in its extent of civilian firearms ownership—a distinction that was conceptualized at the Founding as a desirable feature.¹⁵⁸ In unreported results, the models were re-estimated excluding the United States. The relationship between *firearms civilian registered per cap (x 100)* and each dependent variable remains statistically significant at the one-percent level.¹⁵⁹

The estimations show that the independent variables account for a healthy portion of the variation in freedom among the countries. In each model, this handful of variables accounts for forty percent or more of the variation in the freedom index (R^2 ranging from 0.407 to 0.428).¹⁶⁰

¹⁵⁷ See *supra* Table 3: Panel B.

¹⁵⁸ As eminent litigator Stephen Halbrook, the author of the leading treatise on firearms law, see STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK 1 (2022–2023 ed.) [hereinafter, HALBROOK, FIREARMS DESKBOOK], has noted:

When independence was won and the federal Constitution was proposed, James Madison heralded that Americans possess an “advantage of being armed . . . over the people of almost every other nation,” adding: “Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.”

Stephen P. Halbrook, *Virginia’s Second Amendment Sanctuaries: Do They Have Legal Effect?*, 33 REGENT U. L. REV. 277, 300 (2021) (footnote omitted) (first quoting THE FEDERALIST NO. 46 (James Madison); and then quoting *id.*).

¹⁵⁹ Royce Barondes, Table 3: Panel B Data Calculations (on file with Regent Law Review) (displaying coefficients for registered firearm possession of 0.830, 0.975, and 1.392 for the OLS regressions for CPI, Government Integrity, and Judicial Effectiveness, respectively, with *p*-values of 0.6%, 0.6%, and 0.1%, respectively).

¹⁶⁰ See *supra* Table 3: Panel B.

C. Two-Stage Least Squares Regressions

These results reported in Section IV.B rely on a measure of firearms ownership that is adjusted, prior to reporting, in ways that are not fully transparent. If those adjustments are related to perceptions of freedom in the country, the assumptions underlying an ordinary least squares model—the type of model reported in Part IV.B—are not present.

An alternative technique, which may attenuate the impact of the hidden adjustments, was also used: a two-stage least squares model. In this approach, a country's registered civilian firearms ownership is (in the first stage) estimated based on the fraction of its suicides that are committed using a firearm (and other controlling variables). In this technique, one then computes the relationship between that estimate, consisting of a combination of variables that are not directly adjusted by the authors of the Small Arms Survey, and indices of freedom.¹⁶¹

In particular, we model the relationship in two steps. First, we predict *firearms civilian registered per cap (x 100)* given the variables: *fraction of suicides where gun instrumentality (2017)* and dummy variables identifying the region, Africa, Americas, and Asia. Europe is omitted, because that is the held-out or comparison case. That is, we estimate:

$$\begin{aligned} \text{firearms civilian registered per cap (x 100)} &= a + \beta_1 \text{fraction of suicides} \\ &\text{where gun instrumentality (2017)} + \beta_2 \text{Africa} + \beta_3 \text{Americas} + \beta_4 \text{Asia} + \\ &\text{random error} \end{aligned}$$

This produces an estimate for registered civilian firearms ownership in which the impact of adjustments made by the authors of the Small Arms Survey is attenuated. Let us say, for example, that the Small Arms Survey authors made an adjustment for the firearms figures for one country: let's call it Country X. That adjustment made by the survey authors for a single country typically would have a minor impact on the predicted values for Country X.¹⁶² It would simply result in a slight adjustment of the

¹⁶¹ See generally THOMAS H. WONNACOTT & RONALD J. WONNACOTT, INTRODUCTORY STATISTICS FOR BUSINESS AND ECONOMICS 731–33 (4th ed. 1990) (discussing the two stage least squares technique).

¹⁶² In some circumstances, however, an individual observation may be particularly influential in determining the estimated relationship. One procedure for identifying those highly influential observation involves computing the Cook's distance. See StataCorp LLC, Regress Postestimation, at 11, <https://www.stata.com/manuals/rregresspostestimation.pdf> (last visited Feb. 15, 2023). “[V]alues of Cook's distance greater than $4/n$ should also be examined.” *Id.* For a sample size of 75, the referenced value is 0.053. Re-estimating Models 10 through 12, omitting observations with a Cook's distance greater than or equal to 0.05 in the first stage, yields estimations in which *fraction of suicides where gun instrumentality (2017)* remains statistically significant at the one percent level. Royce Barondes, Table 4: Panel A Data Calculations (on file with Regent Law Review) (running regressions duplicating the estimations reproduced in Table 4, Panel A, but omitting observations with, in the first stage, a Cook's distance greater than or equal to 0.05).

weighting applied to the variables not generated by the authors of the Small Arms Survey—the continent of the country and the fraction of suicides where a firearm was the instrumentality.

The predicted values from this estimation are then used as one of the independent variables in estimating the variable of interest—the freedom index:

$$\text{freedom index} = a + \beta_1 \text{predicted firearms civilian registered per cap (x 100)} + \beta_2 \text{law enforcement firearms per cap (x 100)} + \beta_3 \text{rate of selected serious crime (x 100,000)} + \text{random error}$$

The results of estimating the ultimate models of interest (the second step models) are shown in Table 4, Panel A. Although the statistical software package used, Stata 15, does not automatically report the results of the first step, those were separately estimated to report in Panel B, models 13 through 15.

**Table 4: Two-Stage Least Squares Regression
Panel A: The Final Regressions Estimating Level of Freedom**

	(10)	(11)	(12)
	Transp. CPI	Gvt. Integ.	Jud. Effect
<u>Predicted</u> firearms civilian registered per cap (x 100)	2.833*** (4.386)	3.424*** (4.518)	3.848*** (4.939)
Law enforcement firearms per cap (x 100)	-6.181 (-0.985)	-7.586 (-1.026)	-3.488 (-0.459)
Rate of selected serious crime (x 100,000)	0.0115 (1.525)	0.0140 (1.577)	0.0232** (2.537)
Constant	35.98*** (6.260)	36.51*** (5.416)	37.42*** (5.399)
Observations	74	75	75
R-squared			0.074
Wald chi-squared	19.94	21.15	27.52
p-value	0.0002	0.0001	0.0000

Note—First-stage estimates the variable *predicted firearms civilian per cap (x 100)* (the dependent variable in the first stage), using independent variables *fraction of suicides where gun instrumentality (2017)*, *Africa*, *Americas* and *Asia* (Europe being held-out). The z-statistics in parentheses are below the coefficient estimates. Significance at the 1%, 5% and 10% levels shown by ***, ** and *, respectively.

**Panel B: Regressions Estimating the Instrumental Variable:
Dependent variable is *firearms civilian registered per cap (x 100)***

	(13)	(14)	(15)	(16)	(17)	(18)
Frac. suicides w/ gun instrumentality (2017)	29.43*** (3.368)	29.44*** (3.394)	29.44*** (3.394)	29.39*** (3.337)	29.40*** (3.363)	29.40*** (3.363)
Africa	-5.863* (-1.764)	-5.862* (-1.776)	-5.862* (-1.776)	-5.904* (-1.754)	-5.905* (-1.767)	-5.905* (-1.767)
Americas	-6.178*** (-4.074)	-6.190*** (-4.169)	-6.190*** (-4.169)	-6.295*** (-3.481)	-6.308*** (-3.569)	-6.308*** (-3.569)
Asia	-4.633** (-2.446)	-4.632** (-2.464)	-4.632** (-2.464)	-4.605** (-2.397)	-4.604** (-2.414)	-4.604** (-2.414)
Rate selected serious crime (x 100,000)				0.000322 (0.121)	0.000329 (0.125)	0.000329 (0.125)
Constant	6.086*** (5.133)	6.085*** (5.170)	6.085*** (5.170)	6.048*** (4.892)	6.046*** (4.929)	6.046*** (4.929)
Observations	74	75	75	74	75	75
R-squared	0.311	0.313	0.313	0.311	0.313	0.313

Note—Ordinary least squares regressions, where the dependent variable is a country's *firearms civilian registered per cap (x 100)*. In these models, countries in Oceania are omitted, in light of their infrequency in the sample. The *t*-statistics in parentheses are below the coefficient estimates. Significance at the 1%, 5% and 10% levels is shown by ***, ** and *, respectively.

Using this alternative technique, the *predicted firearms civilian registered per capita (x 100)* remains positively associated with each freedom index, statistically significant at the one-percent level. Such a positive relationship, again statistically significant at the one-percent level, is also found in unreported results where the United States is omitted.¹⁶³ And the results shown in Panel B indicate that using the proxy recommended by Gary Kleck, and the other variables, accounts for a substantial percentage, thirty-one percent, of the variation in *firearms civilian registered per cap (x 100)* between countries reported in the Small Arms Survey.

An R-squared value is not reported by the software for two of the models (models 10 and 11). The absence of a reported R-squared for this

¹⁶³ See Royce Barondes, Table 4: Panel A Data Calculations (on file with Regent Law Review) (running regressions duplicating the estimations reproduced in Table 4, Panel A, but omitting the United States (decreasing the number of observations in each of the estimated models by one) continues to show a positive relationship between predicted firearms civilian registered per cap (x 100) and the dependent variable (the level of freedom); the *p*-value for the civilian firearm variable in each model is 0.00).

style of model is not a problem: “Does this mean our parameter estimates are no good? Not really. . . . If our two-stage model produces estimates of these parameters with acceptable standard errors, we should be happy—regardless of . . . R^2 .”¹⁶⁴ The two-stage models reported in Table 4, Panel A, have “acceptable” standard errors, i.e., are associated with statistically significant estimates.¹⁶⁵

The variable *rate of selected serious crime (x 100,000)* is not included in estimating in the *predicted firearms civilian registered per capita (x 100)* in the first stage. Models 16 through 18, in Panel B, reveal what the first-stage regression would look like were *rate of selected serious crime (x 100,000)* included. The point is to show that the omission is suitable. That variable would not be statistically significant (a *t*-statistic of 0.12 or 0.13).¹⁶⁶

D. How the Results Contextualize an Assessment of the Civil Right to Bear Arms

In this section, we will examine how the empirical results reported above contextualize the analysis of the constitutionality of red flag laws.

1. The Need to Identify Salient Benefits of an Enumerated Right

Even taking into account the country’s law enforcement firearms per capita and the rate of selected serious crimes, lawful civilian firearms ownership is associated with increased freedom in all model constructs. And the relationship persists when one uses more intricate modeling techniques designed to mitigate the impact of any possibility of bias in adjustments made in the Small Arms Survey data by that survey’s authors.

The results for the rates of serious crimes illuminate the trade-off between safety and some aspects of freedom (see models 7, 8, 9 and 12). That would be consistent with the notion that higher freedom (along at least some dimensions) is associated with increased serious crime, but that harm may be mitigated by increased freedom associated with lawful civilian firearms ownership.

¹⁶⁴ William Sribney et al., *Negative and Missing R-squared for 2SLS/IV*, STATA (<https://www.stata.com/support/faqs/statistics/two-stage-least-squares/>) (last visited Dec. 18, 2022).

¹⁶⁵ See *supra* Table 4: Panel A (showing *p*-values not greater than one percent for the predicted registered firearms variable in the regression models that lack R^2 values).

¹⁶⁶ Moreover, the parameter estimate would indicate that any counter-factual hypothesized relationship would not be material in magnitude. Multiplying the highest parameter estimate, 0.000329, by the average value of the serious crime parameter within the sample, 231.29, would result in a predicted change in *firearms civilian registered per capita (x 100)* of 0.076. That figure is negligible compared to the average *firearms civilian registered per capita (x 100)* in the sample, 5.8. See *supra* Table 1.

It is not suggested that the empirical analysis reported above is tailored to address exclusively the relationship between freedom and firearms restrictions under red flag laws. That is not to say the empirical analysis is irrelevant to understanding the suitability of red flag laws. It is relevant. And that is a consequence of the way the relevant analysis is framed by the opinion in *Bruen*, and the alternative approaches that the *Bruen* opinion rejects.¹⁶⁷

As noted above, one perspective that courts could take in assessing the contours of the civil right to bear arms involves “re-fram[ing] the Second Amendment’s core value as safety”¹⁶⁸ However, the Court in *Bruen* finds its analysis of restrictions on the civil right to bear arms upon restrictions present at the founding (or potentially at the time of the adoption of the Fourteenth Amendment) for purposes of deriving the scope of the right.¹⁶⁹ This relevant inquiry the Court styles as involving whether a “firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.”¹⁷⁰ Thus, the framework that *Bruen* adopts involves first identifying general principles that guide the analysis of restrictions on the civil right to bear arms and then applying those general principles to a particular context.

The benefits of the civil right to bear arms and its disadvantages have disproportionate levels of conspicuousness. The alleged harms arising from having a civil right to bear arms often are presented in contexts where those harms can be framed in a particularly conspicuous fashion. The alleged benefits from recognizing that civil right in the presented contexts are more diffuse.

When an unstable person criminally misuses firearms to injure multiple people, proponents of red flag laws present the situation as a basis for more widespread adoption of or adding extensive prohibitions, to existing red flag laws. The framing is misleading because one cannot say that red flag laws would have made a difference. The presence of a red flag law in a jurisdiction that experiences one of these events will often be accompanied by claims that the problem is the relevant red flag law was not sufficiently comprehensive.¹⁷¹

¹⁶⁷ See *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022) (rejecting the use of “means-end scrutiny” or an “interest-balancing analysis” when deciding the constitutionality of firearm regulations and requiring a historical analysis to reveal if the regulation is consistent with legal tradition).

¹⁶⁸ Fagundes & Miller, *supra* note 99, at 682.

¹⁶⁹ See *Bruen*, 142 S. Ct. at 2129–31.

¹⁷⁰ *Id.* at 2127.

¹⁷¹ See Ian Ayres & Frederick E. Vars, *New York’s Red Flag Law Failed in Buffalo. Here’s How to Fix It*, WASH. POST (May 24, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/05/24/new-york-red-flag-law-failed-buffalo-shooting-gun-violence/> (after the Buffalo shooting recommending that grounds for an ERPO under New York’s red flag law should be broader).

The salience of the circumstances results in calls to “do something”, detached from cogent analysis. President Biden, for example, stated just after adoption of the Bipartisan Safer Communities Act,¹⁷² “Their message to us was: Do something,’ Mr. Biden said of the families of gun violence victims. ‘How many times have you heard that? Just do something. For God’s sake, just do something.’ ‘Well, today, we did,’ the president added.”¹⁷³ The call to do something, untethered to either efficacy or contextualization of the civil right to bear arms as among the various rights that are promoted for purposes of having a free society at the conscious expense of safety concerns, was not restricted to one side of the aisle. Senator Sen. John Cornyn, a Republican of Texas, noted, “I’ve received tens of thousands of calls and letters and emails with a singular message—do something.”¹⁷⁴

One cannot ignore the possibility that salience in public discourse of the disadvantages of recognizing an enumerated constitutional right will influence a judge to adopt an unwarranted curtailment of the constitutional right. James Madison in fact expressed such a concern in referencing ambivalence to adoption of a Bill of Rights.¹⁷⁵

As part of analyzing a reflexive legislative response to an unreasoning herd mentality that is fomented following one of these events, it is important to identify those most salient benefits of the civil right to bear arms. This Part presents one such piece of authority. Although it does not have the same appeal to an unreasoning crowd, it has the advantage of salience arising from precise quantification. In sum, the context in which the general principles are applied influences the extent to which one needs to emphasize salient benefits arising from adoption of the civil right to bear arms. And it is for that reason that the analysis in Section IV has been presented in connection with considering this particular restriction on the civil right to bear arms (red flag laws).

¹⁷² Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

¹⁷³ Cochrane & Kanno-Youngs, *supra* note 2.

¹⁷⁴ Consider This from NPR, *On Gun Control, Two Big Steps in Opposite Directions*, NPR, at 0:47 (June 27, 2022), <https://www.npr.org/2022/06/27/1107919152/on-gun-control-two-big-steps-in-opposite-directions>.

¹⁷⁵ He wrote:

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light . . . because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.

Madison, *supra* note 3, at 271.

2. Analysis Does Not Support Firearms Registration Requirements

The results in this Essay show a positive relationship between freedom and both civilian firearms ownership, per capita, and civilian registered firearms ownership, per capita. It would be erroneous to conclude that this latter relationship supports firearms registration in the United States.

The United States is atypical in terms of the number of civilian firearms per capita.¹⁷⁶ As among developed countries, the United States is atypical in that, in many parts of the United States, civilian-owned firearms are not required to be registered.¹⁷⁷ In many countries, unregistered civilian firearms are necessarily arms possessed unlawfully.¹⁷⁸

What is relevant for purposes of assessing the relationship between freedom and civilian firearms ownership is the extent to which firearms are possessed by persons other than those who should not possess firearms. Because the Second Amendment preserves the natural right to bear arms from infringement, in the American tradition, that is limited to

¹⁷⁶ See *Civilian Firearms Holdings, 2017*, *supra* note 128 (estimating that the United States is the only country to have more guns than citizens).

¹⁷⁷ Creating a federal registry of ordinary firearms through assorted information currently collected by the federal government is unlawful. See HALBROOK, FIREARMS DESKBOOK, *supra* note 158, § 3:16. There is a registry for certain types of firearms, including machine guns. 26 U.S.C. §§ 5841, 5845, 5861, 5871 (requiring the registration of certain types of firearms—including machine guns—and designating a penalty of imprisonment or a fine for unregistered possession). Some states have statutes requiring the registration of firearms. See, e.g., HAW. REV. STAT. §§ 134-1, 134-3 (LexisNexis, LEXIS current through 2022 Legis. Sess.). It is beyond the scope of this Essay to discuss the extent to which, after *Bruen*, those requirements are lawful.

¹⁷⁸ It is not within the scope of this Essay to attempt to compile current information concerning the extent of registration requirements of other countries. One will encounter statements that, as to many countries, apparently equate unregistered arms with illegally-owned ones. E.g., Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 854 (2008) (“The German police union estimates that Germany has about 45 million civilian guns: about 10 million registered firearms; 20 million that should be registered, but apparently are not; and 15 million firearms—such as antiques . . . and black-powder weapons . . . that do not have to be registered.”) (quoting SMALL ARMS SURVEY, GRADUATE INST. OF INT’L STUDIES, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 51)). These requirements are, of course, subject to change.

The Johnson and co-authors book has online two volumes, comprising 437 pages, addressing international and comparative issues identifying information from various countries. NICHOLAS JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY chs. 18–19 (3d ed. 2022), http://firearmsregulation.org/www/FRRP3d_CH18.pdf, http://firearmsregulation.org/www/FRRP3d_Ch19.pdf. Those chapters of that book identify assorted registration requirements for various countries as of various points in time. E.g., *id.* at 1733 (“Since 1920, all lawful acquisitions of handguns in Great Britain have been registered with the government”); *id.* at 1740 (stating, as to Switzerland, “Current owners [of semi-automatic rifles] may keep them, but must register them within three years.” (footnote omitted)); *id.* at 1800 (stating as to South Africa, “[a]ll guns must be registered”).

persons who have done something warranting disarmament, after a finding affording due process.¹⁷⁹ And registration may ultimately limit the frequency of firearms possession by the law-abiding that has a beneficial relationship with freedom.¹⁸⁰

Although a full analysis is beyond the scope of this Essay, it is noted, by way of example, that registration is related to disarmament. In 1976, Nelson T. “Pete” Shields, identified in the Nicholas Johnson and co-authors text as chairman of the National Coalition to Control Handguns, an organization that “would later change its name to Handgun Control, Inc., and later still to the Brady Campaign,” stated:¹⁸¹

Our ultimate goal—total control of handguns in the United States—is going to take time. My estimate is from seven to ten years. The first problem is to slow down the increasing number of handguns being produced and sold in this country. The second problem is to get handguns registered. And the final problem is to make the possession of *all* handguns and *all* handgun ammunition—except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal.¹⁸²

3. Causation

Kopel, Moody, and Nemerov dedicate much of their discussion to issues of causation.¹⁸³ Discussion of the results in this Essay may bog down on consideration of whether civilian firearms ownership causes increased freedom, or whether increased freedom causes increased civilian firearms ownership. That one is construing a constitutional provision influences the suitable perspective to take as to that matter. Contemporary courts are not in the position of creating the content of the civil right to bear arms on their own.¹⁸⁴ Rather, the process of adopting a written constitution entails setting the basic principles. In the

¹⁷⁹ In discussing the requirement for federal funding of red flag procedures, referenced above, Halbrook writes, “Presumably such programs would be subject to the Constitution without this declaration.” HALBROOK, FIREARMS DESKBOOK, *supra* note 158, § 2:44. See generally *supra* note 20 and accompanying text.

¹⁸⁰ See *Heller v. District of Columbia*, 670 F.3d 1244, 1291 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“[R]egistration requirements are often seen as half-a-loaf measures aimed at deterring gun ownership.”).

¹⁸¹ NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 431 (1st ed. 2012) (reproducing the following quote).

¹⁸² Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 53, 57–58.

¹⁸³ See Kopel et al., *supra* note 115, at 23–28, 30–31 (exploring the different causal relationships between guns and freedom).

¹⁸⁴ See *N.Y. Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (concluding that because the founding generation set the bounds of the Second Amendment, the place of modern courts is to give “unqualified deference” to the preeminent right of citizens to use firearms in self-defense).

constitutional sphere, courts have the more limited role of applying the principles that have been duly adopted to the circumstances at hand.¹⁸⁵

However, it may be beneficial to make a few observations concerning causation and a relationship between freedom and firearms ownership. One might imagine that the relationship might be of three types:

i. Being armed causes freedom, in the sense of being armed prevents deprivation of freedom. That could be deprivation by lower-level actors (states or municipalities, in the United States, or members of the public), or it might be deprivation by the jurisdiction's highest governmental authority (the federal government, in our case).

ii. Being armed is part of exercise of a right free people are understood to have. In this case, it does not seem entirely apt to say that possessing firearms causes freedom, or that freedom causes (results in) firearm ownership. In this case, possession of a firearm is an essential tool necessary to have—to be able to exercise—one component of freedom.

iii. Being armed is caused by having freedom. This might be a circumstance where a free society has a government that is viewed by its population with sufficient favor that the government allows its subjects to be armed—that the government does not fear that having an armed population will result in its overthrow.

We shall turn to illustrations. But it is helpful, before doing that, to note the relevance to firearms restrictions in the United States. Each of the relationships could provide support for the notion that application of the Second Amendment should not be guided by attempts to restrict historically recognized firearms rights to make society safer.

Let us turn to the first nature of a relationship between freedom and firearms possession. As to some applications of the civil right to bear arms, the context, as identified by the Supreme Court, illustrates that the direction of causality is that firearms possession causes increased freedom.¹⁸⁶ A detailed reading of *McDonald* and *Bruen* reveals a conclusion that one objective of making the Second Amendment applicable to the states was to prevent disarmament of freedmen, and that was done so as to facilitate their exercise of civil rights more generally.¹⁸⁷ That is,

¹⁸⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–78 (1803) (establishing that courts are bound by the language of the Constitution and must apply its text to the cases before them).

¹⁸⁶ See *Bruen*, 142 S. Ct. at 2150–52 (recognizing the Second Amendment freedom to defend oneself and how it can be used to preserve other rights, particularly the right to life); see also THE FEDERALIST NO. 46, 247–48 (James Madison) (George W. Carey & James McClellan eds., 2001) (describing the important role firearm ownership can have in preserving individual liberty).

¹⁸⁷ Through a relatively tedious review of the language of *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Bruen*, one comes to the conclusions that (i) following the Civil War, Congress perceived that blacks needed to be allowed to be armed in order to allow their exercise of political rights, (ii) prior federal law was not up to the task of assuring that those

in this circumstance, adoption of the amendment was designed to implement causality in a particular direction: allowing persons to retain arms that were perceived as necessary to exercise other civil rights.

The second style of relationship—the right to bear arms represents a right that is integral being able to possess one aspect of freedom—may be illustrated by recent events. In the recent school shooting in Uvalde, Texas:

Eva Mireles' husband, a police officer, tried to save her after she was shot at Robb Elementary School in Uvalde, Texas, according to the director of the state Department of Public Safety, Col. Steven McCraw.

persons could remain armed and (iii) adoption of the Fourteenth Amendment was part of the Federal effort to do that.

Although inclusion of these details, ancillary to the point of an essay, may be excessively intricate for some, the author notes:

(i) *Bruen's* analysis recites the following:

On July 6, 1868, Congress extended the 1866 Freedmen's Bureau Act, see 15 Stat. 83, and reaffirmed that freedmen were entitled to the "full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . including the constitutional right to keep and bear arms." That same day, a Bureau official reported that freedmen in Kentucky and Tennessee were still constantly under threat: "No Union man or negro who *attempts to take any active part in politics*, or the improvement of his race, is safe a single day; and nearly all sleep upon their arms at night, and carry concealed weapons during the day."

Bruen, 142 S. Ct. at 2151–52 (emphasis added) (citation omitted) (first quoting Freedmen's Bureau Act, § 14, 14 Stat. 173 (1866); and then quoting H.R. Exec. Doc. No. 329, at 40).

(ii) As to prior law not being up to the task, *McDonald* notes: "Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *McDonald*, 561 U.S. at 772.

(iii)(a) As to the Fourteenth Amendment being necessary to achieve the objective:

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks. Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.

Id. at 775 (footnote omitted).

(iii)(b) As to the Fourteenth Amendment doing so:

Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen's Bureau bill, which of course explicitly mentioned the right to keep and bear arms. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect "the constitutional right to bear arms" and not simply to prohibit discrimination. See also Amar, Bill of Rights 264–265 (noting that one of the "core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of freedmen who had been stripped of their arms and to "affirm the full and equal right of every citizen to self-defense").

Id. at 742 (citation omitted).

During a Texas Senate hearing Tuesday on the police response to the shooting, McCraw said that Mireles' husband, Ruben Ruiz, had his gun taken away, was detained and escorted off the scene after he received a call from his wife.¹⁸⁸

Being able to defend oneself or one's loved-ones—not being dependent on the whims of a government that has discretion to decide who is worthy of being defended and in what contexts—is a core component of freedom.¹⁸⁹ That is even more strongly the case where governmental exercise of that discretion is not accompanied by accountability.¹⁹⁰ Compelled dependency on an ineffectual government is the converse of freedom.

This is not a novel concept within the American tradition. Nicholas Johnson and co-authors describe Samuel Adams as having made the “most extensive prewar American analysis of the right to arms” in a newspaper article, written under the pseudonym E.A.,¹⁹¹ which includes the following:

At the revolution, the British Constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into a law, and stands as a bulwark to the natural rights of subjects. “To vindicate these rights,[]” says Mr. *Blackstone*, [“]when actually violated or attack'd, the subjects of England are entitled first to the regular administration and *free course of justice* in the courts of law—next to the right of *petitioning the King* and parliament for redress of grievances—and lastly, to the right of *having and using arms for self-preservation and defence*.” These he calls “auxiliary subordinate rights, which serve principally as *barriers* to protect and maintain inviolate the three great and primary rights of *personal security, personal liberty and private property*”: And that of *having arms for their defense* he tells us is “a public allowance, under due restrictions, of the *natural right of resistance and self preservation*, when the sanctions of society and laws are found *insufficient* to restrain the *violence of oppression*.”¹⁹²

¹⁸⁸ Liz Calvario, *Officer Husband of Slain Uvalde Teacher Tried to Save Her. His Gun Was Taken Away*, NBC NEWS (June 22, 2022), <https://www.nbcnews.com/news/us-news/slain-ualde-teachers-officer-husband-tried-wife-gun-was-taken-away-rcna34710>.

¹⁸⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (“[Blackstone’s] description of it [(the right to have arms)] cannot possibly be thought to tie it to militia or military service. It was, he said, ‘the natural right of resistance and self-preservation.’” (citations omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 139 (1765))); *State v. Buzzard*, 4 Ark. 18, 36 (1842) (Lacy, J., dissenting) (“I deny that any just or free government upon earth has the power to disarm its citizens and to take from them the only security and ultimate hope that they have for the defense of their liberties and their rights.”).

¹⁹⁰ See, e.g., *supra* notes 87–98 and accompanying text (illustrating an absence of an enforceable governmental duty to protect the public).

¹⁹¹ JOHNSON ET AL., *supra* note 178, at 220.

¹⁹² SAMUEL ADAMS, E.A. (1769), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS 316, 317–18 (Henry Alonzo Cushing, ed., G.P. Putnam’s Sons 1904) (1769) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *141, *143–44).

The third style of relationship, in which increased freedom causes more firearms being personally owned, might arise where there are regional cultural norms that are associated with freer societies and that cultural norm also independently of freedom interests results in increased firearms possession.¹⁹³ One of the ways one seeks to control for that is through controlling for other factors in the empirical investigation, as this work does by including continent and law enforcement firearms.

We have noted that the Second Amendment and the Fourteenth Amendment were framed to further freedom.¹⁹⁴ The increasingly extensive modeling of the relationship between firearms ownership and freedom increasingly narrows the ability to claim plausibly that the authors of those instruments were in error in perceiving relationships between freedom and firearms rights.

CONCLUSION

This Essay began referencing a widely-cited perspective on allowable error rates in the criminal context. Blocher and Charles assert that, in assessing red flag confiscation orders, the apt comparison is to civil proceedings, not criminal proceedings. Because we are assessing conscious adoption of legislation that gives rise to a propensity to being killed by the government at a rate that is substantial, relative to the murder rate, the relevant vantage-point involves the errors suitable in administering the criminal law (and, one supposes, the criminal law applicable to capital crimes). Extrapolating from the experience following Maryland's adoption of red flag confiscation orders reveals rates of police officers killing targets that is substantial when compared to the murder rate.

The Supreme Court in *Bruen* directly rejected New York's position that alleged safety benefits of preventing firearms possession in public justified a style of impingement on the right to bear arms that was not

¹⁹³ See Kopel et al., *supra* note 115, at 26 (discussing a possible relationship between cultural norms and firearms ownership).

¹⁹⁴ See *supra* notes 186–87, 190–92 and accompanying text.

Blocher and Charles write:

Although the consequence (denial of access to a firearm) might be significant, extreme risk laws are a *civil* proceeding designed to protect both the gun owner and those close to him or her. So long as it is complied with, the order carries no criminal sanctions, and there is no situation in which “gun owners are presumed to be guilty and must then prove their innocence.” Of course, constitutional protections apply in the civil context as well as the criminal context, but the relevant protections have to do with due process rather than constitutional criminal procedure rights. The rhetoric of criminal law is unhelpful in understanding or resolving those civil due process cases.

Blocher & Charles, *supra* note 12, at 1317 (footnotes omitted) (quoting José Niño, *Red Flag Laws: The Latest Anti-Gun Scheme*, MISES INST. (July 27, 2022), <https://mises.org/power-market/red-flag-laws-latest-anti-gun-scheme>).

present in the Founding Era.¹⁹⁵ The *Bruen* Court's approach implements the principle expressed in *Heller* that the Second Amendment was not subject to a "freestanding 'interest-balancing' approach."¹⁹⁶

This Essay expands on the existing empirical evidence that civilian firearms possession is associated with increased freedom. The relationship is shown to remain, significant at the one-percent level, after controlling for the jurisdiction's rate of serious crime and law enforcement firearms per capita. And the relationship holds when one uses an alternative technique that may address bias introduced by undisclosed adjustments made in the firearms ownership data by the authors of the Small Arms Survey.

After *Bruen*, maintaining a society that enhances the public's freedom remains central to application of the Second Amendment to impingements on firearms rights, such as red flag laws. The empirical evidence supports the ongoing vitality of that focus. Civilian firearms ownership remains associated with a government structured to enhance the freedom of the governed.

¹⁹⁵ See *supra* notes 106–09 and accompanying text.

¹⁹⁶ See *supra* note 104 and accompanying text.