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## Red-Flag Laws, Civilian Firearms Ownership and Measures of Freedom

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**Essay**

***Red-Flag* Laws, Civilian Firearms Ownership and Measures of Freedom**

by

**Royce Barondes\***

ABSTRACT

This essay provides context for an assessment of a part of the recently-enacted Bipartisan Safer Communities Act—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. The 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, the essay identifies an overlooked impact of this federal legislation. The legislation’s adoption will necessitate courts more favorably consider 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.” 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 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 itself. James Madison in fact expressed some equivocation as to the desirability of a bill of rights on that basis.

In a paragraph of *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010), referenced in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2126 n.3 (2022), 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.” Indeed, living in a society that respects civil rights involves risks that are eliminated by a police state.

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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 the 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.

## Essay

### ***Red-Flag* Laws, Civilian Firearms Ownership and Measures of Freedom**

Blackstone wrote, “[T]he law holds, that it is better that ten guilty persons escape, than one innocent suffer.”<sup>1</sup> Similar sentiments have been expressed by others, with different ratios, e.g., ninety-nine to one.<sup>2</sup> What, then, is the analogous ratio for accuracy in pre-crime<sup>3</sup> fortunetelling, where the stakes of an erroneous decision include death of the blameless?

Congress recently adopted legislation, the Bipartisan Safer Communities Act,<sup>4</sup> which would fund state implementation of statutes described as “*red-flag*” laws.<sup>5</sup> That is a colloquial term for statutes that provide a court may, on application, temporarily suspend a person’s firearms rights, which typically is accompanied by confiscation after an *ex parte* process.<sup>6</sup> Adoption of these laws, and federal funding of them, present precisely 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:

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<sup>1</sup> 5 WILLIAM BLACKSTONE, COMMENTARIES, ch. 27, 358 (St. George Tucker Ed. 1803).

<sup>2</sup> 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 (referencing ratios of ninety-nine to one or higher).

<sup>3</sup> Red-flag statutes as implementation of “pre-crime” is referenced in David French, *Red-Flag Laws—Yes, We Limit Liberty When There’s Evidence of a Threat*, NAT’L REV. (Aug. 7, 2019), <https://www.nationalreview.com/corner/red-flag-laws-yes-we-limit-liberty-when-theres-evidence-of-a-threat/> (“There is no ‘pre-crime’ conviction in American law.”).

<sup>4</sup> Pub. L. No. 117-159, 136 Stat. 1313 (2022).

<sup>5</sup> *Id.* § 12003(a) (to be codified at 34 U.S.C. § 10152(a)(1)(I)).

<sup>6</sup> See *infra* note 39 and accompanying text.

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 ten times greater than the country's murder rate caused by criminals.

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 from variables previously omitted.

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.<sup>7</sup> One concern is that the data are subject to adjustments that are not transparently detailed.<sup>8</sup> Gary Kleck proposes that, in empirical investigations examining international civilian firearms ownership rates, one reference the fraction of a country's suicides that are committed with firearms, instead of the Small Arms Survey Data.<sup>9</sup> This article also uses a more intricate modeling technique, incorporating the 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

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<sup>7</sup> See *infra* note 103 and accompanying text.

<sup>8</sup> See *infra* note 105 and accompanying text.

<sup>9</sup> See *infra* note 109 and accompanying text.

made in the Small Arms Survey by that survey’s authors.<sup>10</sup> 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.

## 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.”<sup>11</sup> They may allow seizure before any contested proceeding.<sup>12</sup> The statutes vary as to who can initiate the proceedings. In some jurisdictions, participation of law enforcement is required, but not so in others.<sup>13</sup> The extent of any right of confrontation also varies. One state 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

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<sup>10</sup> The two-stage least squares modeling technique is described *infra* Part IV.C.

<sup>11</sup> David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 L. & PSYCH. REV. 39, 41 (2020-2021) [hereinafter, Kopel, *Red Flag Laws*].

<sup>12</sup> *E.g.*, Kopel, *Red Flag Laws*, *supra* note 11, at 43; MD. CODE ANN., PUB. SAFETY § 5-603 (Westlaw through legislation effective through June 1, 2022).

<sup>13</sup> *Compare* Kopel, *Red Flag Laws*, *supra* note 11, at 61 (noting the petition must be initiated by government personnel in Connecticut, Indiana and Vermont) and Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1307–1308 (2020), with Kopel, *Red Flag Laws*, *supra* note 11, at 61 (discussing the wider assortment under California law), MD. CODE ANN., PUB. SAFETY § 5-602 (Westlaw through legislation effective through June 1, 2022) (not limiting the petitioner to government personnel).

cross-examination.<sup>14</sup> Unsurprisingly, the extent to which these statutes comport with due process requirements is unsettled.<sup>15</sup>

***Status of the Laws Following Bruen.*** *New York State Rifle & Pistol Association v. Bruen*<sup>16</sup> 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.<sup>17</sup> The analysis articulated in *Bruen* focuses on the following:

[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.<sup>18</sup>

Although *Bruen* does not directly address *red-flag* laws, it does make reference to the relevant historical analogy: surety statutes that did not wholly disarm a class of persons but, rather, would

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<sup>14</sup> See Kopel, *Red Flag Laws*, *supra* note 11, at 65 (discussing telephonic testimony); *id.* at 70–71.

<sup>15</sup> *Caniglia v. Strom*, 141 S. Ct. 1596, 1601 (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.”).

<sup>16</sup> 142 S. Ct. 2111 (2022).

<sup>17</sup> 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 2138. It concludes “We need not address this 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.*

<sup>18</sup> *Id.* at 2131.

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.”<sup>19</sup>

Before *Bruen*, commentators asserted that the relevant analogy was instead to disarmament of Native Americans (as well as vague reference those who had allegiance to the King).<sup>20</sup> This view is debunked by two factors: *Bruen* references, as the relevant analogy for broad disarmament of groups of persons, those surety statutes<sup>21</sup> and an old English statute that allowed disarmament of persons whose conduct would “terrify” members of the public “with evil intent or malice.”<sup>22</sup> That is the relevant precedent articulated by the Court—not disarmament of groups not fully benefitting from civil rights. And the Court’s discussion expressly discounts, as not relevant to understanding the Second Amendment’s scope, a Founding-Era statute that allowed disarmament of slaves.<sup>23</sup> That is, the Court rejects, as inapposite to applying the Second Amendment, Founding-Era disarmament targeted based on race on which those commentators seek to found the constitutionality of far-reaching firearms restrictions.

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<sup>19</sup> *Bruen*, 142 S. Ct. at 2148.

<sup>20</sup> 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.”). The relevant historical description was described by a court as follows: “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* 116 (2011)).

<sup>21</sup> *Bruen*, 142 S. Ct. at 2148–50.

<sup>22</sup> *Id.* at 2141. The concurrence recites the slipshod, unreasoned *Heller* dicta concerning longstanding restrictions. *Bruen*, 142 S. Ct. 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 13, at 1294–95.

<sup>23</sup> *Bruen*, 142 S. Ct. at 2144.



*Second*, 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.”<sup>24</sup>

Additionally, the Court makes an 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.<sup>25</sup> 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.

***Absence of Efficacy.*** The Bipartisan Safer Communities Act expressly excludes a requirement for government-paid counsel as a requirement for federal funding.<sup>26</sup> *District of Columbia v. Heller* has confirmed that owning a firearm is a civil right secured by the Constitution.<sup>27</sup> 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.

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<sup>24</sup> *Id.* at 2142.

<sup>25</sup> *Id.* at 2151–52.

<sup>26</sup> Those funded by the federal government must include: “the right to be represented by counsel at no expense to the government.” Bipartisan Safer Communities Act., <sup>26</sup> Pub. L. No. 117-159, § 12003(a)(2), 136 Stat. 1313, 1326 (2022) (to be codified at 34 U.S.C. § 10152(a)(1)(I)).

<sup>27</sup> 554 U.S. 570, 635 (2008).

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”<sup>28</sup>—co-authored a work examining whether these statutes decreased murder rates. 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.”<sup>29</sup>

***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

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<sup>28</sup> Sasha Abramsky, *Wresting Gun Policy from the Hands of the Radical Fringe: A Q&A with Garen Wintemute*, THE 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/>].

<sup>29</sup> Veronica A. Pear et al., *Firearm Violence Following the Implementation of California’s Gun Violence Restraining Order Law*, 5 JAMA Network Open at 1/11 (Apr. 2022) (emphasis added) (co-authors include Garen J. Wintemute of the “Violence Prevention Research Program”), available at [https://jamanetwork.com/journals/jamanetworkopen/articlepdf/2790705/pear\\_2022\\_oj\\_220150\\_1648234846.28801.pdf](https://jamanetwork.com/journals/jamanetworkopen/articlepdf/2790705/pear_2022_oj_220150_1648234846.28801.pdf). 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., and Carlisle E. Moody, *Do Red Flag Laws Save Lives or Reduce Crime?*, at 4 (Dec. 28, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3316573](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, *Red Flag Laws*, *supra* note 11, at 51 (noting the statutes date to 1999 but, “No research has found any statistically significant reduction in crime—including mass shooting fatalities—from confiscation laws.”).

judicial treatment of firearms reinstatement petitions, by persons with prior criminal convictions. Federal law generally prohibits firearms possession by persons who have committed felonies or state misdemeanors punishable by more than two years imprisonment, among others.<sup>30</sup> The ban is permanent, unless the wrongdoer’s civil rights are restored by expungement of the crime or the like.<sup>31</sup> Federal statutes do not generally tether an ongoing disarmament to current dangerousness. An illustration of a disqualifying conviction from 2016 is provided by *United States v. Phillips*,<sup>32</sup> a prior conviction of “misprision of felony”—in that case, according to the briefing, failing “to report the sale of drugs by a person who was selling marijuana.”<sup>33</sup>

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 assertions of rehabilitation or to predict whether particular offenders are likely to commit violent crimes in the future.”<sup>34</sup>

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<sup>30</sup> 18 U.S.C. §§ 921(a)(20); 922(g)(1) (Westlaw through Pub. L. No. 117-\_\_\_).

<sup>31</sup> 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), 136 Stat. 1313, 1333 (2022) (adding 18 U.S.C. § 921(a)(33)(C)). The drafting raises issues concerning its precise import that are beyond the scope of this work.

<sup>32</sup> 827 F.3d 1171, 1176 (9th Cir. 2016).

<sup>33</sup> Appellant's Opening Brief at 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.”).

<sup>34</sup> *Binderup v. Att’y Gen. United States of Am.*, 836 F.3d 336, 350 (3d Cir. 2016) (opinion announcing judgments of the court) (quoting *United States v. Bean*, 537 U.S. 71, 77 (2002)).

Because Congress has implicitly concluded courts *are* competent in this arena by explicitly funding that judicial activity, 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 will no longer be validated merely by pointing to an institutional inability to make those assessments.

The second principle on which courts have relied 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.” 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.”<sup>35</sup>

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.

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<sup>35</sup> Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1563 n.67 (2009).

## II. LESS PROMINENT COSTS OF *RED-FLAG* LAWS

### A. *Red-Flag* Laws Causing Government Victimization

Maryland adopted a *red-flag* law effective October 1, 2018.<sup>36</sup> A news story reports 114 petitions were initiated in the first month.<sup>37</sup> On the thirty-sixth day of the statute's effectiveness, police officers killed Gary J. Willis while serving an order.<sup>38</sup>

These orders are often served without advance notice,<sup>39</sup> early in the morning. The story reports the officers were “called at 5:17 a.m.” to the Willis home. Another target, Duncan Lemp, was shot and killed while one of these petitions was served in a 4:30 a.m. no-knock raid of his dwelling on March 12, 2020.<sup>40</sup> 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.”<sup>41</sup>

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<sup>36</sup> Public Safety—Extreme Risk Protection Orders, 2018 Md. Laws ch. 250 (H.B. 1302), codified as amended at MD. CODE ANN., PUB. SAFETY §§ 5-601 to -610; MD. CODE ANN., CTS. & JUD. PROC. §§ 9-109(d)(9), 9-109.1(d)(8) (Westlaw through legislation effective through June 1, 2022).

<sup>37</sup> Theo Hayes, *Armed Man Shot by Anne Arundel County Police Dies*, WBAL-TV (updated Nov. 6, 2018), <https://www.wbal.com/article/police-investigate-officer-involved-shooting-in-ferndale/24658392> [<http://web.archive.org/web/20190507043055/https://www.wbal.com/article/police-investigate-officer-involved-shooting-in-ferndale/24658392>].

<sup>38</sup> *Id.*

<sup>39</sup> Kopel, *Red Flag Laws*, *supra* note 11, at 80. Blocher and Charles appear obliquely to assert elimination of ex parte orders would make the laws “ineffective or impractical.” Blocher & Charles, *supra* note 13, at 1297.

<sup>40</sup> Michael Ruiz, *Maryland Prosecutors Rule out Charges Against Cops in Death of Boogaloo ‘Martyr’ Duncan Lemp*, FOX NEWS (Dec. 31, 2020), [<http://web.archive.org/web/20201231214240/https://www.foxnews.com/us/maryland-charges-boogaloo-martyr-duncan-lemp>]. *See also* Kopel, *Red Flag Laws*, *supra* note 11, at 55–56 (noting, “The victim’s niece said that her late uncle ‘likes to speak his mind,’ but ‘wouldn’t hurt anybody.’”); *id.* at 56 (further quoting the victim’s niece as “They didn’t need to do what they did.”).

<sup>41</sup> Kopel, *Red Flag Laws*, *supra* note 11, at 51.

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.

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 302 secondary source items,<sup>42</sup> only nineteen percent of which reference “self-defense”<sup>43</sup> and only one percent of which reference Gary Willis.<sup>44</sup>

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:

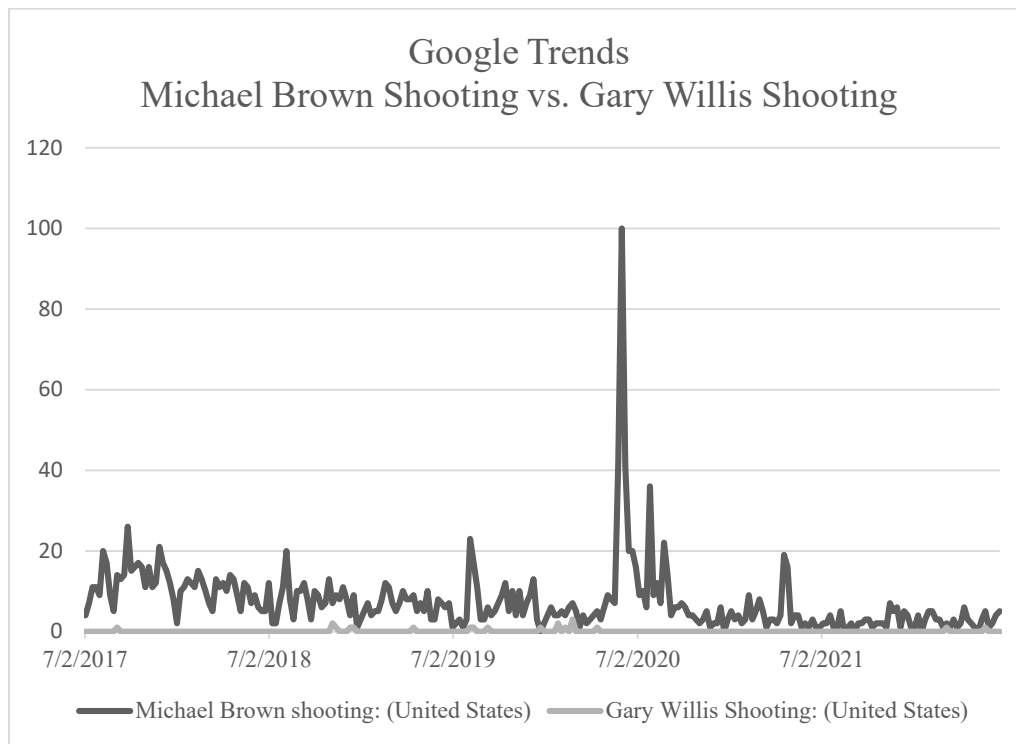
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<sup>42</sup> Westlaw search: advanced: (“red flag law” “extreme risk protection order”) & DA(aft 12-31-2019) (reporting 302 Secondary Source items).

<sup>43</sup> Westlaw search: advanced: (“red flag law” “extreme risk protection order”) & DA(aft 12-31-2019) & (“self-defense” or “self defense” or “selfdefense”) (reporting 57 Second Source items).

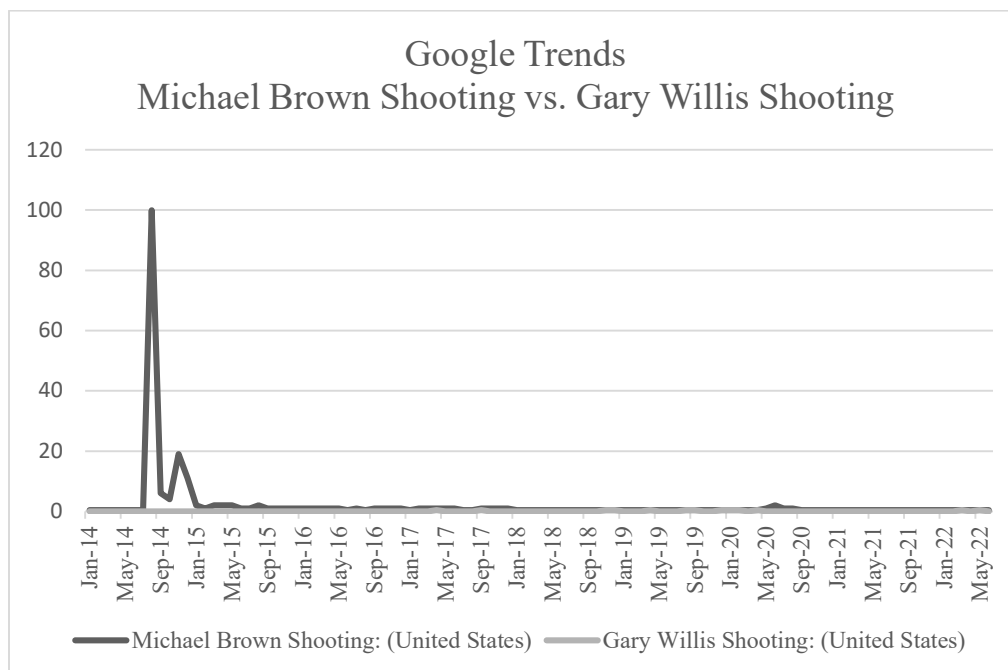
<sup>44</sup> Westlaw search adv: advanced: (“red flag law” “extreme risk protection order”) & DA(aft 12-31-2019) & (gary +3 willis) (reporting 3 Secondary Source items).

**Figure 1**



Over the last five years, the peak value for *Gary Willis shooting* is 3, compared to 100 for *Michael Brown shooting*. This is, of course, after the peak in popular conversation concerning the Michael Brown shooting. The same chart, adjusted to span all coverage of the 2014 Michael Brown shooting, is shown in Figure 2.

Figure 2



Notes—The peak for searches for Michael Brown shooting in Figure 1 corresponds to the almost imperceptible slight increase in midyear 2020, approximately three-quarters from the beginning of the timeline in Figure 2. Google Trends reports a figure of “<1” for most observations. To permit charting, a numerical value of 0.5 is included for those data points.

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 1).

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. Relevant are the domestic murder rate and the extent to which one expects the enforcement process will grossly err in an over-inclusive



fashion—will kill someone who would not commit a violent crime using a firearm in the covered time period.<sup>45</sup>

These *red-flag* laws are 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.<sup>46</sup> Also giving rise to prohibitions are convictions for misdemeanor crimes of domestic violence.<sup>47</sup> So too are “adjudicat[ion] as a mental defective or . . . commit[ment] to a mental institution.”<sup>48</sup> States are free to expand on the list. 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

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<sup>45</sup> That is not to say it would be satisfactory for the government to kill preemptively those who would commit violent crime in the future.

<sup>46</sup> 18 U.S.C. §§ 921(a)(20); 922(g)(1) (Westlaw through Pub. L. No. 117-\_\_\_).

<sup>47</sup> 18 U.S.C. §§ 921(a)(33); 922(g)(9) (Westlaw through Pub. L. No. 117-\_\_\_), *amended by* Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(c)(2), 136 Stat. 1313, 1333 (2022) (adding 18 U.S.C. § 921(a)(33)(C) and amending 18 U.S.C. § 921(a)(33)(A)(ii)). The presence of an outstanding domestic violence restraining order also creates a ban, which in that case is limited to the duration of its pendency. 18 U.S.C. 922(g)(8) (Westlaw through Pub. L. No. 117-\_\_\_).

<sup>48</sup> 18 U.S.C. § 922(g)(4) (Westlaw through Pub. L. No. 117-\_\_\_). The term “committed to a mental institution” excludes voluntary admissions and admissions for observation. 27 C.F.R. § 478.11 (effective Aug. 24, 2022).

rate is, of course, a question of judgment. A 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.<sup>49</sup> The news story cited above<sup>50</sup> references 114 orders in Maryland in a month—a rate that extrapolates to 1,368 per year. This is in a state with a June 2018 population of 6,042,718, or 1.85% of the U.S. population of 327,167,434.<sup>51</sup> Extrapolating the Maryland experience to the country, we would expect to have approximately 74,000 orders and 54 targets killed per year, or approximately 73 per 100,000 *red-flag* targets.<sup>52</sup> So, extrapolating the 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 ten times greater than the country’s criminal murder rate.*

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.

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

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<sup>49</sup> Federal Bureau of Investigation, Crime Data Explorer (select “Homicide” in “Crime Select”), <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend> (last visited June 25, 2022) (reporting a rate of 6.5 per 100,000 in 2021) (identifying a rate for murder and nonnegligent manslaughter).

<sup>50</sup> *See supra* note 37

<sup>51</sup> Population figures are estimates as of July 1, 2018, available in United States Census Bureau, 2018 National and State Population Estimates (Dec. 19, 2018), <https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html>.

<sup>52</sup> That is:  $1,368 / 0.0185 = 73,946$ ;  $73,946 \times (1 / 1368) = 54.05$ ;  $100,000 \times 54.05 / 73,946 = 73.09$ .

There will be orders issued for the wrong person,<sup>53</sup> on the basis of fallacious allegations (e.g., retaliatory petitions fomented by *persona animus*)<sup>54</sup> or for patently insufficient reasons, such as a social media post merely depicting evidence of exercise of a constitutional right.<sup>55</sup> The standard for issuance of an order may be a mere preponderance of the evidence, or even lower, including “reasonable cause.”<sup>56</sup> It is claimed “the most common standard of proof for *ex parte* orders is reasonable, probable, or good cause of an imminent risk,”<sup>57</sup> with a clear minority requiring even a preponderance of the evidence and only one “clear and convincing” evidence.<sup>58</sup>

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 take it that three-quarters of the persons subjected to orders would not have committed a violent crime with a firearm.<sup>59</sup> A lower bound may be one-third: It has been reported that approximately one-third of the *ex parte* orders in

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<sup>53</sup> See Kopel, *Red Flag Laws*, *supra* note 11, at 56.

<sup>54</sup> E.g., Sady Swanson, Fort Collins Woman Found Guilty of Lying on Red Flag Petition Against CSU Police Officer, Fort Collins Coloradoan (Apr. 22, 2022, 4:08 p.m.), <https://www.coloradoan.com/story/news/2022/04/22/fort-collins-woman-who-filed-red-flag-petition-against-officer-convicted/7401449001/> (addressing perjury of 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).

<sup>55</sup> See Kopel, *Red Flag Laws*, *supra* note 11, at 56–57.

<sup>56</sup> See Kopel, *Red Flag Laws*, *supra* note 11, at 67–68.

<sup>57</sup> Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1340 (2020).

<sup>58</sup> *Id.*

<sup>59</sup> See generally Alan M. Dershowitz, *A Yellow Light for Red-Flag Laws*, WALL ST. J., at A15 (Aug. 7, 2019) (“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).”).

Connecticut were not affirmed in a subsequent contested proceeding.<sup>60</sup> 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 the *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 at a lower-bound rate of 24 per 100,000 designated for *red-flag* targeting (one-third of 73 per 100,000), with the estimated rate, derived from the nature of the standard of evidence, of about 55 per 100,000 designated (three-quarters of 73 per 100,000). This is about an order of magnitude higher than the murder rate.

It would seem that the process is unjustifiable in the following case: It results in the target being designated for inclusion in a group subject to a probability of being killed by the government that is not negligible relative to the murder rate—not less than one tenth or perhaps less than one hundredth. That would necessitate that the process be perhaps one hundred or one thousand times better (less likely to produce the killing of the target) than Maryland’s first-year experience.<sup>61</sup> And it would seem such a dangerous process would need evidence of efficacy, which is lacking.

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<sup>60</sup> David Kopel writes, “[a]bout a third of gun confiscation orders are wrongly issued against innocent people. David Kopel, *Red Flag Laws: Examining Guidelines for State Action* (Mar. 26, 2019) (testimony before United States Judiciary Committee). He relies in part on Michael A. Norko & 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 Norko and Baranoski, Norko & Baranoski, *supra*, at 1619, introduces significant imprecision in the estimate.

<sup>61</sup> One might say that the relevant factor range is ten times or one hundred times better, if one wanted to look at an annualized rate, on the conservative assumption of an ultimate ten-year prohibition.

We are here referencing the best characterization of the Maryland experience. Of course, shootings that result in the serious bodily injury of the innocent are also relevant. And there may well have been other events that did not come to this author’s casual attention.

## 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.”<sup>62</sup> 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).<sup>63</sup>

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<sup>62</sup> *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2159 (2022) (Alito, J. concurring). *See also, e.g.*, Alan I. Leshner et al., Committee on Priorities for a Public Health, National Research Council, *Priorities for Research to Reduce the Threat of Firearm-Related Violence*, at 15 (2013) (“Defensive use of guns by crime victims is a common occurrence, although the exact number remains disputed (Cook and Ludwig, 1996; Kleck, 2001a). 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 (Kleck, 2001a), in the context of about 300,000 violent crimes involving firearms in 2008 (BJS, 2010).”).

<sup>63</sup> Federal data presented for 2020, under the heading “All Violent Crime Offense Characteristics,” show total of 179,867 violent crimes as involving firearms of some type. <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend>. 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). FBI, 2019 Crime in the United States, tbls. 19, 20, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-20>; <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-19>. The 2019 data do not reveal a frequency for rape using a firearm, but other sources indicate that would account for less than one percent of violent crimes with firearms. Statista, Number of forcible rape and sexual assault victims in the United States in 2020, by weapon presence, <https://www.statista.com/statistics/251931/usa--reported-forcible-rape-cases-by-weapon-presence/> (visited June 11, 2022) (showing 1,680 for 2020).

Blocher and Charles assert, without explanatory justification, “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 13, 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 a serious violent crime. Although one might seek to sketch the relevant numbers as to the innocent’s loss of self-defense, we shall limit that style of quantitative sketch to the risk of being killed during the confiscatory seizure.

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*.<sup>64</sup> One Albert Vaughn went to the location of a group altercation to retrieve his younger brother. He was armed with a stick. It was alleged, by Vaughn's estate, that he was ordered by officers at gunpoint to drop the stick, which he did. The estate also alleged Vaughn was then approached by a person who had a bat and had been shouting obscenities at Vaughn. 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."<sup>65</sup>

On summary judgment, Vaughn's estate lost. In reaching the conclusion, the court notes that the attack came "without warning" by one "hiding in a nearby house or behind an ambulance."<sup>66</sup> The court applies a standard of "whether Defendants failed to protect Albert in a way that shocks the conscious after disarming him in a dangerous environment."<sup>67</sup> In rejecting the claim, the court provides the following analogy: "Vaughn's claim boils down to Defendants' failure to assign a personal bodyguard for Albert."<sup>68</sup> Indeed, government disarmament is not accompanied by accountability for causing the target to be defenseless

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<sup>64</sup> No. 14 C 47, 2014 WL 3865838, at \*4 (N.D. Ill. Aug. 5, 2014), *later proceedings at Vaughn v. City of Chicago*, 181 F. Supp.3d 575 (N.D. Ill. 2015) (granting summary judgment for the defendants).

<sup>65</sup> *Id.* at \*1.

<sup>66</sup> *Vaughn*, 181 F. Supp. 3d at 575.

<sup>67</sup> *Id.* at 575.

<sup>68</sup> *Id.* at 575.

### 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.”<sup>69</sup> That framing contradicts an underlying objective—to promote freedom. Although some commentators are inclined characterize dismissively the notion of firearms rights as furthering freedom,<sup>70</sup> 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.<sup>71</sup>

Subparts A and B have identified components of safety that are often (but not universally<sup>72</sup>) de-emphasized in consideration of *red-flag* confiscation orders.<sup>73</sup> But equally important, the focus

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<sup>69</sup> Dave Fagundes & Darrell A. H. Miller, *The City’s Second Amendment*, 106 CORNELL L. REV. 677, 682 (2021).

<sup>70</sup> E.g., Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 281 (2020) (describing this conceptualization as “narratives that construct realities” that “gun rights advocates have developed and deployed.”).

<sup>71</sup> E.g., *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2151–52 (2022) (“An assistant commissioner to the 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))).

<sup>72</sup> E.g., Matthew Larosiére & Joseph G.S. Greenlee, *Red Flag Laws Raise Red Flags of Their Own*, 45 LAW & PSYCHOL. REV. 155, 165 (2021) (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 (2020) (referencing the killing of Gary Willis) (same).

<sup>73</sup> E.g., Blocher & Charles, *supra* note 13, at 1309, 1312 (asserting, “And, as noted below, the risk of false positives seems far outweighed by the risk of false negatives,” cross-referencing an unsupported, brief discussion, not attempting to calculate a rate of innocent death and any comparison of it to the criminal murder rate); Rachel Dalafave, *An Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 867, 899 (2021) (in finding a relationship between *red-flag* laws and decreased suicide (but *not* a statistically significant relationship with homicide rates, referencing that firearms create a “negative externality for society” and favorably commenting on statutes that “strike a balance”); Caitlin M. Johnson,

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.<sup>74</sup>

Subsequently, the primary opinion in *McDonald v. City of Chicago* noted, “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.”<sup>75</sup>

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. 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

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*Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. ILL. L. REV. 1515, 1531 (2021) (asserting “the collective rights of the public still outweigh the rights of the individual within his or her home). That articulation of a public safety rationale is in tension with *Heller* and *Bruen*. See *infra* notes 74–78 and accompanying text.

<sup>74</sup> *D.C. v. Heller*, 554 U.S. 570, 634 (2008).

<sup>75</sup> 561 U.S. 742, 783 (2010).



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 not . . . .

Petitioners do not address, much less attempt to refute, any of this research.<sup>76</sup>

The *Bruen* Court, however, rejects the validity of that characterization of the relevant issue. It quotes in part the above-quoted statement in *McDonald*<sup>77</sup> 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.”<sup>78</sup>

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. Maintaining a society not dominated by the intrusions of a police state necessitates their preservation.<sup>79</sup> By way of example, then-Judge McConnell wrote: “Even people with prior convictions retain Fourth Amendment rights; they are not roving targets for warrantless searches.”<sup>80</sup> One should think

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<sup>76</sup> Brief for Respondents, *Bruen*, 142 S. Ct. 2111, at 43–44 (No. 20-843) (citing *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012), *abrogated by Bruen*, 142 S. Ct. 2111).

<sup>77</sup> *Bruen*, 142 S. Ct. at 2026 n.3 (referencing language quoted *supra* text accompanying note 75).

<sup>78</sup> *Id.* at 2133–34..

<sup>79</sup> *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 783, (2010) (Alito, J., announcing judgment of the Court). (“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.”) (quoted in part in *Bruen*, 142 S. Ct. at 2026 n.3).

<sup>80</sup> *United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005).

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.<sup>81</sup> 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.”<sup>82</sup> Yet that alleged safety rationale does not validate the abrogation of a constitutionally-enumerated civil right.<sup>83</sup>

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<sup>81</sup> See *Floyd v. City of New York*, 770 F.3d 1051, 1054 (2d Cir. 2014) (referencing settlement agreement under which the claimants would not oppose termination of “the District Court’s jurisdiction after a period of five years if the City can show substantial compliance with the reforms contained in Judge Scheindlin’s remedial order”).

And we know that governmental tailoring of restrictions on firearms rights will also produce dubious distinctions. That is because it currently does. One class of felony that not give rise to a federal firearms prohibition is this: “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) (Westlaw through Pub. L. No. 117-\_\_\_). 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.

<sup>82</sup> Mayor Michael Bloomberg, Address on Public Safety to NYPD Leadership (April 30, 2013), <https://www1.nyc.gov/office-of-the-mayor/news/151-13/mayor-bloomberg-delivers-address-public-safety-nypd-leadership> [<https://web.archive.org/web/20140807161255/https://www1.nyc.gov/office-of-the-mayor/news/151-13/mayor-bloomberg-delivers-address-public-safety-nypd-leadership/>].

<sup>83</sup> 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, NYPost.com (June 28, 2013), <https://nypost.com/2013/06/28/bloomberg-we-disproportionately-stop-whites-too-much-and-minorities-too-little-in-stop-frisk-checks/>.

***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.<sup>84</sup> The measures of freedom they used were:

An annual rating provided by Freedom House<sup>85</sup> (in which a lower figure is better);

An annual Corruption Perceptions Index published by Transparency International<sup>86</sup> (in which a higher figure is better); and

An Index of Economic Freedom published by Heritage Foundation<sup>87</sup> (in which a higher figure is better).

Data for civilian firearms per capita were taken by Kopel, Moody and Nemerov from the then-current edition of the Small Arms Survey.<sup>88</sup>

At that time, per capital firearms ownership data were available for only fifty-nine countries.<sup>89</sup> 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. However, for each of their measures, the relationship was not monotonically increasing or monotonically decreasing among the quartiles.

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. They find a positive relationship.

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<sup>84</sup> David Kopel et al., *Is there a Relationship Between Guns and Freedom? Comparative Results from Fifty-Nine Nations*, 13 TEX. REV. L. & POL. 1 (2008).

<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> Kopel et al., *supra* note 84, at 9.

<sup>89</sup> Kopel et al., *supra* note 84, at 3.

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

***This Essay's Contribution to the Empirical Literature.*** The article by Kopel, Moody and Nemerov appears not to have gained traction in the law review literature. A Westlaw search reveals four citations to it.<sup>90</sup> Only three articles in the “Secondary Sources” database in Westlaw reference Transparency’s Corruptions Perceptions Index and the phrase “second amendment”, the Kopel, Moody and Nemerov article being the only one referencing firearms or guns.<sup>91</sup>

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

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<sup>90</sup> Westlaw search: adv: kopel +20 “guns #and freedom” (June 23, 2033). 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, 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).

<sup>91</sup> Westlaw search: adv: (transparency /15 (“corruptions perceptions” or cpi)) & “second amendment”) (July 21, 2022) (identifying three articles); Westlaw search: adv: (transparency /15 (“corruptions perceptions” or cpi)) & “second amendment” & (firearm or gun or pistol or rifle), identifying only Kopel et al., *supra* note 84.

Lastly, as noted below,<sup>92</sup> renowned scholar Gary Kleck has identified some concerns with the manner in which the Small Arms Survey compiles civilian firearms ownership information. The problems appear to be particularly acute as to unregistered civilian firearms ownership. He has recommended an alternative statistic that may be used to assess relative civilian firearms ownership: the fraction of suicides committed with firearms. 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 that this additional data allows 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, and Moody and Nemerov);<sup>93</sup> and

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<sup>92</sup> See *infra* note 103.

<sup>93</sup> <https://www.transparency.org/en/cpi/2020>.

- selected 2022 component scores published by The Heritage Foundation as part of its series on the Index of Economic Freedom—in particular, their Judicial Effectiveness<sup>94</sup> and Government Integrity<sup>95</sup> scores.<sup>96</sup>

As to the first-listed index, Philip Nichols has noted “legal scholars have comprehensively embraced the Corruption Perceptions Index.”<sup>97</sup>

Firearms ownership information is taken from the Small Arms Survey as of the most recent year currently available, 2017.<sup>98</sup> 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.<sup>99</sup> 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

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<sup>94</sup> This index is described in a methodology section as:

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., The Heritage Foundation, 2022 Index of Economic Freedom, at 456 (2022), [https://www.heritage.org/index/pdf/2022/book/02\\_2022\\_IndexOfEconomicFreedom\\_METHODOLOGY.pdf](https://www.heritage.org/index/pdf/2022/book/02_2022_IndexOfEconomicFreedom_METHODOLOGY.pdf)

<sup>95</sup> This variable is described as:

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.* at 456–57.

<sup>96</sup> The scores were published at: <https://www.heritage.org/index/> (visited June 17, 2022).

<sup>97</sup> Nichols, *supra* 91, at 201.

<sup>98</sup> Small Arms Survey, <https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-held-firearms-annexe.pdf> (civilian ownership data) (visited June 14, 2022); <https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Law-enforcement-firearms-annexe.pdf> (visited June 14, 2022) (law enforcement ownership data).

<sup>99</sup> <https://vizhub.healthdata.org/gbd-results/> (visited July 16, 2022).

and Crime.<sup>100</sup> 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 for China were taken from another source.<sup>101</sup> The geographic regions were taken from the Small Arms Survey.

Summary statistics for the data are reported in Table 1, below.<sup>102</sup> 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

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<sup>100</sup> <https://dataunodc.un.org/> (visited June 22, 2022).

<sup>101</sup> The rates for China were computed by taking the numbers of assaults, rapes and robberies reported for China by [statista.com](https://www.statista.com) (visited June 29, 2022), with the rate computed by reference to China's 2019 population of reported by The World Bank of 1,407,745,000, [https://data.worldbank.org/indicator/SP.POP.TOTL?locations=CN&most\\_recent\\_year\\_desc=false](https://data.worldbank.org/indicator/SP.POP.TOTL?locations=CN&most_recent_year_desc=false) (visited June 28, 2022). Statista did not report data for 2017—the source having a gap from 2016 through 2018.

<sup>102</sup> 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. Others have separate data for Northern Ireland, Scotland and England and Wales. 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.

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.

**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)	224.32	2.08	1254.42	86	231.29	9.25	1254.42	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.<sup>103</sup> The Small Arms Survey attempts to capture both registered and unregistered firearms. Gary Kleck notes data compilation for some countries involves taking reported numbers of registered firearms and multiplying that by a factor

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<sup>103</sup> Gary Kleck, *The Small Arms Survey Estimates of National Civilian Firearms Ownership: An Assessment* (Sept. 25, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4065962](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4065962).



that is that the same for the covered countries,<sup>104</sup> and Gary Kleck further reports that “staff state that estimates for some nations ‘have been adjusted.’”<sup>105</sup> To presume the ratio of registered to unregistered firearms is consistent across countries is unfounded.<sup>106</sup>

The data for some countries are based on surveys. However, Gary Kleck identifies a variety of ways in which the compilation of the survey information is problematic.<sup>107</sup> 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 . . . .”<sup>108</sup> He recommends consideration of the “percent of suicides committed with guns” as a proxy for relative civilian firearms ownership.<sup>109</sup> That percentage (restated as a fraction of one, i.e., percentage divided by 100), reported for 2017, is included in the summary statistics table. 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.

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<sup>104</sup> *Id.* at 2.

<sup>105</sup> *Id.* at 2.

<sup>106</sup> He also notes, “SAS staff also arbitrarily drop some registration figures based on their subjective judgment that they ‘appeared suspiciously low.’” *Id.* at 3.

<sup>107</sup> *Id.* at 3

<sup>108</sup> *Id.* at 3.

<sup>109</sup> *Id.* at 8, 10.

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 (40.5 and 41.8), albeit in an order reversed from the expectation. The mean for the middle quartile of higher firearms ownership is 98.4% of that for the middle quartile of lower firearms ownership (40.841 is 98.4% of 41.511). That variation is smaller than that found by Kopel, Moody and Nemerov, 91.6%).<sup>110</sup>

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. 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).

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<sup>110</sup> The Corruptions Perceptions Index for the year reported by Kopel, Moody and Nemerov is on a different scale (0 to 10). 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 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.

## **B. Ordinary Least Squares Regressions**

Our next step in confirming that the relationship between civilian firearms ownership and freedom, identified by Kopel, Moody and Nemerov, involves identifying the basic relationship between civilian firearms ownership and measures of freedom—as they apparently did, without accounting for other variables. 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 statistically significant at the one percent level (which reflects a very high level of confidence there is a positive relationship).

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. 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 assertion that civilian firearms ownership is wholly unrelated to this 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)
	Transparency CPI		Government Integrity		Judicial Effectiveness	
Firearms civilian per cap (x 100)	0.410*** (3.039)		0.640*** (3.236)		0.720*** (2.941)	
Fraction of suicides where 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 0.01%, 0.05% and 0.10% 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 0.01%, 0.05% and 0.10% 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 statistic 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 (x 100).<sup>111</sup> 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).

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,<sup>112</sup> 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.

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<sup>111</sup> The “per capita” reflects the country’s population, not the size of its law enforcement population.

<sup>112</sup> See *supra* note 75 and accompanying text.

The United States is atypical in its extent of civilian firearms ownership—a distinction that was conceptualized at the Founding as a desirable feature.<sup>113</sup> 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.

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).

### **C. Two-Stage Least Squares Regressions**

These results reported in Part IV.B rely on a measure of firearms ownership that is adjusted, prior to reporting, in ways that are not fully transparent.<sup>114</sup> 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

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<sup>113</sup> As eminent litigator Stephen Halbrook, the author of the leading treatise on firearms law, *see* STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK (Westlaw through Sept. 2021 update) [hereinafter, HALBROOK, 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).

<sup>114</sup> *See supra* note 105 and accompanying text.

relationship between that estimate, consisting a combination of variables that are not directly adjusted by the authors of the Small Arms Survey, and indices of freedom.

In particular, we model the relationship in two steps. First, we predict the amount of *rate of selected serious crime (x 100,000)* 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:

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

This produces an estimate for 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 would have a minor impact on the predicted values for *Country X*. It would simply result in a slight adjustment of the 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:

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

This style of model would operate to exclude the extent to which some unspecified factor that is merely related to registered firearms ownership causes increased freedom. Such a cause will not confound the results in this estimation, unless that unspecified factor is also related to *fraction of suicides where gun instrumentality (2017)*.

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
<i>p</i> -value	0.0002	0.0001	0.0000

Note—First-stage estimates the variable *firearms civilian per cap (x 100)* (the dependent variable), using independent variables *fraction of suicides where gun instrumentality (2017)*, *Africa*, *Americas* and *Asia* (Europe being held-out). *z*-statistics in parentheses below coefficient estimates. Significance at the 0.01%, 0.05% and 0.10% 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)
Fraction of suicides where 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 of 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. *t*-statistics in parentheses below coefficient estimates. Significance at the 0.01%, 0.05% and 0.10% levels 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.<sup>115</sup> 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 style of model is not a problem:

<sup>115</sup> Unreported results reveal that the relationships persist, at the same level of significance, when all observations from Africa are omitted.

. . . 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 . . .  $R^2$ .<sup>116</sup>

The two-stage models reported in Table 4, Panel A, have “acceptable” standard errors, i.e., are associated statistically significant estimates.

The *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 0.13 or 0.13).<sup>117</sup>

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

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

***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

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<sup>116</sup> William Sribney et al., Negative and Missing R-squared for 2SLS/IV, <https://www.stata.com/support/faqs/statistics/two-stage-least-squares/> (visited July 18, 2022).

<sup>117</sup> 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, 14.19.

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.

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 *New York State Rifle & Pistol Association v. Bruen*,<sup>118</sup> and the alternative approaches that the *Bruen* opinion rejects.

As noted above,<sup>119</sup> 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 . . . .”<sup>120</sup> However, the opinion in *New York State Rifle & Pistol Association v. Bruen*<sup>121</sup> founds the analysis of restrictions on the civil right to bear arms on 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 of the right. This 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.”<sup>122</sup> The framework that *Bruen* adopts involves first identifying general principles that guide the analysis

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<sup>118</sup> 142 S. Ct. 2111 (2022).

<sup>119</sup> *See supra* note 69

<sup>120</sup> Fagundes & Miller, *supra* note 69, at 682.

<sup>121</sup> 142 S. Ct. 2111 (2022).

<sup>122</sup> *Id.* at 2127.

of restrictions on the civil right to bear arms and then applying those general principles to a particular context.

The benefits of the civil rights 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, that gets postured by proponents of *red-flag* laws 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.

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,<sup>123</sup> “ ‘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.”<sup>124</sup> 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, Republican

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<sup>123</sup> Pub. L. No. 117-159, 136 Stat. 1313 (2022).

<sup>124</sup> Emily Cochrane & Zolan Kanno-Youngs, *Biden Signs Bipartisan Gun Bill, Ending Years of Stalemate in Congress*, N.Y. TIMES, at A24 (June 26, 2022).

of Texas, noted, “ I’ve received tens of thousands of calls and letters and emails with a singular message—do something.”<sup>125</sup>

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.<sup>126</sup>

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 rights to bear arms. This Part IV 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 Part IV has been presented in connection with considering this particular restriction on the civil right to bear arms (*red-flag* laws).

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<sup>125</sup> Consider This From NPR, *On Gun Control, Two Big Steps in Opposite Directions*, NPR (June 27, 2022).

<sup>126</sup> 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 . . . 4 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.

Letter of James Madison to Thomas Jefferson (Oct. 17, 1788), <https://firstamendmentwatch.org/history-speaks-madison-jefferson-letters-on-advisability-of-a-bill-of-rights-1787-1789/#madison-tojefferson24October1787> (visited July 19, 2022).

*Analysis Does Not Support Firearms Registration Requirements.* The results in this Part IV 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. 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.<sup>127</sup> In many countries, unregistered civilian firearms are necessarily arms possessed unlawfully.

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—in the American tradition, that is limited to persons who have done something warranting disarmament, after a finding affording due process. And registration may ultimately limit the frequency of firearms possession by the law-abiding that has a beneficial relationship with freedom.

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 Johnson et al. text as “chairman” of the National Coalition to Control Handguns, an organization that

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<sup>127</sup> Creating a federal registry of firearms through assorted information currently collected by the federal government is unlawful. See HALBROOK, DESKBOOK, *supra* note 113, § 3:16. (There is, however, a registry of privately-owned machineguns. See 18 U.S.C. § 5861(d) (prohibiting private possession of a machinegun that is not registered) (Westlaw through Pub. L. No. 17-\_\_\_). Some states require registration of firearms. *E.g.*, Sean P. Healy, *Gun Trusts the Lethal Pitfalls in Drafting Them and Firearms Issues in Probate*, ch.6, Pt. IV.b.iii, in SEAN P. HEALY & ALAN S. GASSMAN, 10TH ANNUAL FIREARMS LAW: WHAT EVERY TEXAS LAWYER NEEDS TO KNOW (2021) (State Bar of Texas CLE). Registration of long guns is, however, “novel, not historic.” *Heller v. D.C.*, 670 F.3d 1244, 1255 (D.C. Cir. 2011).

“would later change its name to Handgun Control, Inc., and later still to the Brady Campaign,” stated.<sup>128</sup>

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.<sup>129</sup>

**Causation.** Kopel, Moody and Nemerov dedicate much of their discussion to issues of causation.<sup>130</sup> Discussion may bog down on 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. Rather, adoption of a written constitution entails the setting of the basic principles through the process of adoption of the organic document. In the constitutional sphere, courts have the more limited role of applying the principles that have been duly adopted to the circumstances at hand.

As to some applications of the civil rights to bear arms, the context, as identified by the Supreme Court, illustrates that the direction of causality is that firearms possession causes increased freedom. That is the point of the message that one objective of making the Second

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<sup>128</sup> NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 431 (2012) (reproducing the following quote).

<sup>129</sup> Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, at 53, 57–58 (July 26, 1976).

<sup>130</sup> Kopel et al., *supra* note 84, at 23–30.

Amendment applicable to the states was to prevent disarmament of freedmen, their being armed inhibiting restrictions on their exercise of civil rights more generally.<sup>131</sup>

Recent events highlight other ways in which the causality goes in that direction. 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.

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.<sup>132</sup>

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. That is even more strongly the case where, as noted above,<sup>133</sup> in our society, governmental exercise of that discretion is not accompanied by accountability. 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”<sup>134</sup> in a newspaper article, written under the pseudonym E.A., which includes the following:

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<sup>131</sup> See *supra* note 25 and accompanying text.

<sup>132</sup> Liz Calvario, Officer Husband of Slain Uvalde Teacher Tried to Save Her. His Gun was Taken Away, NBCNews.com (June 22, 2022), <https://www.nbcnews.com/news/us-news/slain-uvalde-teachers-officer-husband-tried-wife-gun-was-taken-away-rcna34710>.

<sup>133</sup> See *supra* notes 64–68 and accompanying text.

<sup>134</sup> NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY, at 220 (3d ed. 2022).



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.*”<sup>135</sup>

But the relationship would be relevant to construing the Second Amendment even to the extent the causality were in the opposite direction. The point would be that the founders, and those adopting the Fourteenth Amendment, envisioned a style of free society. The envisioned free society had certain attributes. The drafters of our organic documents having made the choice to preserve a civil right to bear arms, the role of courts is to implement it. That is the case where the expressly adopted right it preserves causes what is modernly termed “freedom,” or where it is simply one of the bundle of attributes that are collectively associated with the contemporary concept of freedom.

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<sup>135</sup> E.A., BOSTON GAZETTE, at 3 (Feb. 27, 1769), in 1 THE WRITINGS OF SAMUEL ADAMS, 317–18 (Harry Alonzo Cushing ed., 1904) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*141, 144) (quoted in JOHNSON ET AL., *supra* note 134, at 220–21).

## CONCLUSION

This essay begins 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.<sup>136</sup> 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 present in the Founding Era.<sup>137</sup> The *Bruen* Court’s approach implements the principle expressed in *Heller* that the Second Amendment was not subject to a “freestanding ‘interest-balancing’ approach.”<sup>138</sup>

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<sup>136</sup> They 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.”<sup>160</sup> 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.<sup>161</sup> The rhetoric of criminal law is unhelpful in understanding or resolving those civil due process issues.

Blocher & Charles, *supra* note 13, at 1317 (footnotes omitted) (quoting José Niño, Red Flag Laws: The Latest Anti-Gun Scheme, Mises Inst. (July 27, 2018) <https://mises.org/power-market/red-flag-laws-latest-anti-gun-scheme> [<https://perma.cc/JKD3-3Z5L>]).

<sup>137</sup> See *supra* note 76–78 and accompanying text.

<sup>138</sup> See *supra* note 74.

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.