

Second Amendment Decision Rules, Non-Lethal Weapons, and Self-Defense

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SECOND AMENDMENT DECISION RULES, NON-LETHAL WEAPONS, AND SELF- DEFENSE

General public debate about the Second Amendment has focused almost exclusively on the regulation of firearms. After Heller and McDonald, the scope of the Second Amendment’s protection has been hotly contested. One area of the Second Amendment that has been less discussed is the decisional rules that would govern non-firearms and levels of protection based on location. This Comment proposes two Second Amendment Constitutional decisional rules. Broadly, this Comment suggests that the “common use” test for “arms” should be modified for the development of new arms, such as non-lethal weapons, that are subject to the Second Amendment. The proposed “common use for the self-defense purpose” test attempts to add more precision by tying the weapon to the individual right to self-defense. Second, this Comment argues that a decisional rule that adjusts for location and arm type will comport with the objectives of the Second Amendment, i.e., self-defense, and provide an additional means for self-defense outside the home. This argument is supported by Court precedent and practical objectives that increase the ability of individuals to defend themselves outside the home and simultaneously attempt to decrease the lethality of these confrontations.

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I. INTRODUCTION

December 14, 2012, started off like any other day for the parents of the 458 children enrolled at Sandy Hook Elementary.¹ As scheduled in the school’s recently updated emergency protocols, the front entry doors were closed and locked at 9:30 a.m.² Twenty-year-old Adam Lanza had just left his house, where he had shot his mother in the head four times.³ Lanza then drove to Sandy Hook Elementary equipped with his mother’s Bushmaster XM15-E2S rifle,⁴ fired through the locked entry doors to gain access to the building, and preceded to fire 152 rounds at

1. *Enrollment Report as of November 30, 2012*, NEWTOWN PUBLIC SCHOOL DISTRICT (Feb. 1, 2013), <http://www.newtown.k12.ct.us/LinkClick.aspx?fileticket=Ka95L6cIbcU%3d&tAbid=3295&mid=39347>.

2. James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A1 (reporting that the school district changed the security policy earlier in the year); Kate Hartman, *School Security Remains a Priority Since Newtown Shooting at Sandy Hook Elementary*, REG. CITIZEN (Aug. 27, 2013), <http://www.registercitizen.com/general-news/20130827/school-security-remains-a-priority-since-newtown-shooting-at-sandy-hook-elementary>.

3. Barron, *supra* note 2; Ashley Fantz, *Shooter’s Mother Wanted Her Son to Fit In, Friend Says*, CNN.COM (Dec. 21, 2012, 12:43 PM), <http://www.cnn.com/2012/12/16/us/connecticut-nancy-landa-profile>.

4. Press Release, Conn. State Police, *State Police Identify Weapons Used in Sandy Hook Investigation; Investigation Continues* (Jan. 18, 2013), *available at* <http://www.ct.gov/depp/cwp/view.asp?Q=517284&A=4226>; Barron, *supra* note 2.

the children and staff.⁵ In less than five minutes,⁶ Lanza left a trail of carnage that resulted in the deaths of twenty-six innocent people, including twenty children and six school staff.⁷ Upon learning that the police had arrived, Lanza took his own life with a pistol.⁸ Twenty-six more lives had been added to the recent string of active-shooter mass shootings,⁹ and these deaths add to the 32,163 gun-related deaths in 2011.¹⁰

Annual homicide rates in the United States have gone up and down since 1995, but hover around 15,953 per year, with rates of homicide per 100,000 people down by half since 1993.¹¹ In 2011, there were a total of 11,101 gun homicides, accounting for almost 70% of all homicides in the United States.¹² Additionally, 851 individuals died unintentionally at the hands of guns.¹³ The seriousness of homicide and deaths by guns in the

5. See Dave Altimari et al., *Lanza Studied Mass Murders: Researched Multiple Killers*, HARTFORD COURANT, Mar. 14, 2013, at A1.

6. Susan Candiotti et al., *Newtown Shooting Details Revealed in Newly Released Documents*, CNN.COM (Mar. 29, 2013, 9:53 AM), <http://www.cnn.com/2013/03/28/us/connecticut-shooting-documents/>; see also Rich Scinto & Luther Turmelle, *Newtown Shooting: An Interactive Timeline of Events*, NEW HAVEN REG. (Dec. 15, 2012), <http://www.nhregister.com/articles/2012/12/16/news/doc50cd04641ce4f908399785.txt>.

7. Barron, *supra* note 2 (reporting that twenty of the twenty-six people killed were children); Scinto & Turmelle, *supra* note 6.

8. See Altimari et al., *supra* note 5.

9. See Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (July 20, 2012, 6:32 PM), <http://www.motherjones.com/politics/2012/07/mass-shootings-map> (reporting that there have been at least sixty-two mass shootings since 1982—including several shootings in 2012: Colorado theatre, Wisconsin Sikh temple, and Minnesota manufacturer, among others). While the *Guide to Mass Shootings* includes statistics on how often the killer obtained a weapon legally, these statistics seem to misrepresent the claim because, for instance, it claims Adam Lanza's weapons were obtained legally, *see id.*, suggesting to the reader that he went out and purchased the weapons legally, when in fact, the weapons were purchased by his mother and he took and used them. Caroline Bankoff, *Newtown Shooter Adam Lanza's Mother Was an Avid Gun Collector*, N.Y. MAG. (Dec. 16, 2012, 10:35 AM), <http://nymag.com/daily/intelligencer/2012/12/adam-lanzas-mother-was-an-avid-gun-collector.html>; Fantz, *supra* note 3. So, technically, the weapons were purchased legally but were obtained by Adam Lanza without permission. See Follman et al., *supra*.

10. See Philip Alpers et al., *Guns in the United States: Total Number of Gun Deaths*, GUNPOLICY.ORG, http://www.gunpolicy.org/firearms/compareyears/194/total_number_of_gun_deaths (last visited Jan. 29, 2014).

11. See DONNA L. HOYERT & JIAQUAN XU, U.S. CTR. FOR DISEASE CONTROL, 61 NAT'L VITAL STAT. REP. NO. 6, DEATHS: PRELIMINARY DATA FOR 2011, at 19 tbl.2 (2012); *Gun Homicide Rate Declines By Half Since 1993 Peak*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (May 2, 2013), http://www.pewsocialtrends.org/2013/05/07/gun-violence-in-america/s_t_13-05-02_ss_gun-crimes_02_murder-rate/.

12. See HOYERT & XU, *supra* note 11, at 19 tbl.2.

13. *Id.* at 18 tbl.2.

country cannot be underestimated, nor should the problem be swept under the rug.

To illustrate the significance of guns in the United States, current estimates put the total number of guns owned by civilians in the United States at around 270 million.¹⁴ The United States has the highest rate of private ownership of firearms at 88.8 per 100 people, making it higher than Yemen, Iraq, and Afghanistan.¹⁵ Additionally, it would take the next ninety-two countries, by highest rate of ownership per weapons combined, to hit 255 million firearms owned by citizens.¹⁶ China, taking the position of 102, has 4.9 weapons per 100 people and a grand total of 40 million weapons.¹⁷ The United States purchases roughly 4.5 million of the 8 million new guns manufactured worldwide.¹⁸

These statistics are not meant to show that guns should be banned or that they should not be sold—by contrast, the statistics show three valuable things: (1) that individuals need to be better trained on storing and using guns; (2) that high numbers of weapons correlate to a high number of gun-related deaths; and (3) that other alternatives to guns should be explored in an effort to curb gun-related violence and death.

By comparison, the statistics for the number of civilian-purchased, non-lethal weapons are not as clear as the statistics for lethal weapons purchases. Civilian purchases of tasers numbered 198,000 as late as 2009.¹⁹ Because more than one company sells irritant sprays, little numerical data exists on irritant spray sales numbers; however, a recent article estimates that there may be at least 600,000 people who possess irritant sprays.²⁰ The rate of death by stun guns is substantially lower,

14. See Aaron Karp, *Completing the Count: Civilian Firearms*, in SMALL ARMS SURVEY 2007: GUNS AND THE CITY 39, 39 (2007).

15. *Id.* at Annexe 4 (per 100 civilians: Yemen at 54.8; Iraq at 34.2, Afghanistan at 4.4).

16. *Id.*

17. *Id.*

18. Laura MacInnis, *U.S. Most Armed Country with 90 Guns Per 100 People*, REUTERS (Aug. 28, 2007), <http://www.reuters.com/article/2007/08/28/us-world-firearms-idUSL2834893820070828> (citing Karp, *supra* note 14, at 46).

19. Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 201 & n.6 (2009) [hereinafter Volokh, *Nonlethal Self-Defense*] (citing Elizabeth Zavala, *Tasers Gain Widespread Acceptance, but Tarrant Sheriff Is Rare Holdout*, FORT WORTH STAR-TELEGRAM, Oct. 11, 2009, at B1).

20. Volokh, *Nonlethal Self-Defense*, *supra* note 19, at 201 n.6. As Professor Volokh notes, this number was based on the 12,804 active irritant spray licenses in the state of Massachusetts as of July 15, 2009, and extrapolated over the entire population. *Id.* This

“no more than 0.01% per use.”²¹ Conversely, the rate of death for gunshot victims in deliberate attacks is about 20% and the rate of death for knife attack victims in deliberate attacks is 2%.²²

In light of the horrific massacre at Sandy Hook Elementary,²³ divergent solutions to the problem of gun violence generally, and gun violence in schools specifically, have been proposed.²⁴ Unfortunately, both sides of the debate neglect to raise the use of non-lethal weapons as a deterrent to violent crime, which can simultaneously decrease the use of guns and increase an individual’s ability to defend himself.²⁵ The United States Supreme Court, by its decision in *District of Columbia v. Heller*,²⁶ pronounced a “constitutional operative proposition,”²⁷ or

number is likely low because many states allow possession of irritant spray without a license. *Id.*

21. Eugene Volokh, *Older Minors, the Right to Keep and Bear (Almost Entirely) Nonlethal Arms, and the Right to Defend Life*, 43 ARIZ. ST. L.J. 447, 450 (2011) [hereinafter Volokh, *Older Minors*]; see also *infra* notes 34–38 and accompanying text.

22. Volokh, *Older Minors*, *supra* note 21, at 450.

23. See Barron, *supra* note 2.

24. Compare THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT’S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 2 (2013), available at www.wh.gov/now-is-the-time (proposing four solutions to reduce gun violence: (1) “Closing background check loopholes to keep guns out of dangerous hands”; (2) “Banning military-style assault weapons and high-capacity magazines, and taking other common-sense steps to reduce gun violence”; (3) “Making schools safer; and” (4) “Increasing access to mental health services”), with Wayne LaPierre, NRA Executive Vice President & CEO, NRA Press Conference 7–8 (Dec. 21, 2012) (transcript available at http://home.nra.org/pdf/Transcript_PDF.pdf) (arguing that armed police in schools through a national armed security program would stem the tide of school shootings). The divergent approaches to gun violence seem to suggest that little progress will be made because neither side wants to address the real roots of violent crime, such as socio-economic and cultural factors. See DON B. KATES, JR., GUNS, MURDERS, AND THE CONSTITUTION: A REALISTIC ASSESSMENT OF GUN CONTROL 58 (1990) (“The basic determinants of violent crime are fundamental socio-cultural, institutional, and economic factors that no gun law can overcome. So long as perhaps 1 of every 300 persons who grow up in the United States is inclined toward violent crime, our society will be far more violent than either gun-banning England or gun-loving Switzerland, where only 1 of 30,000 inhabitants is so inclined.”).

25. See, e.g., *Atlanta Woman Uses Stun Gun to Help Officer in Distress*, WSB-TV.COM (Jan. 26, 2009, 6:23 PM), <http://www.wsbtv.com/news/news/atlanta-woman-uses-stun-gun-to-help-officer-in-dis/nJTqt/>.

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

27. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (stating that a “constitutional operative proposition” represents the Court’s understanding of a particular constitutional provision).

constitutional rule,²⁸ that the Second Amendment guarantees an individual right to keep and bear arms for self-defense.²⁹ While the Court offered strikingly little decisional guidance when developing this constitutional rule,³⁰ little guidance leaves open room for innovative arguments.

Given the current lack of guidance in how courts are to apply and develop Second Amendment jurisprudence, the Court has an opportunity to provide clarity and stability for non-lethal weapons that can be used in self-defense. Rarely are rights categorical—most of the amendments within the Bill of Rights contain special exceptions³¹—and the Second Amendment should be no different. Through the acceptance of non-lethal weapons as “arms,” a nuanced legal distinction between lethal and non-lethal weapons, and a test that provides more or

28. See Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1431 & n.2 (2009) (citing Berman, *supra* note 27, at 9) (stating that a “constitutional operative proposition” is a “constitutional rule”).

29. See *Heller*, 554 U.S. at 636.

30. See Massey, *supra* note 28, at 1431. While the Court provided a new constitutional rule in *District of Columbia v. Heller*, little if any guidance was given on when this right is infringed and no constitutional decisional rules were provided regarding the following: defining the right; identifying who can assert the right; special circumstances that qualify the right; the burden on the right that “constitutes a presumptive infringement of it must be articulated”; and the level of scrutiny must be practically “phrased in a useable manner.” *Id.* (attempting to provide a framework and discussion for the decisional rules that were left out of the opinion in *Heller*).

31. This can be seen through the exceptions for freedom of speech and association. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969) (expanding free speech rights to students in schools, but recognizing that reasonable limitations may be placed on that right in certain circumstances); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463–64, 466 (1958) (including the right to keep membership lists private within the freedom of association provided by the First Amendment, but suggesting that if the state were able to show a substantial and compelling interest in obtaining the lists, the right may be infringed). *But see Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 132–33 (1977) (ruling that prisoners’ First Amendment right of association to join labor unions is outweighed by the state’s legitimate objectives). The Fourth Amendment’s protection against unreasonable searches and seizures also has limited exceptions. See, e.g., *Oliver v. United States*, 466 U.S. 170, 178–81 (1984) (holding that a field owned by the defendant falls outside of the Fourth Amendment’s protection because there is no reasonable expectation of privacy in the field); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (stating that the school environment requires the relaxation of some of the Fourth Amendment restrictions that authorities are subject to). Additionally, there are certain individuals that have been exempted from the proportionality review courts typically undergo when confronted with a freedom from cruel and unusual punishment issue under the Eighth Amendment, preventing the execution of these individuals regardless of their crime. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564, 578 (2005) (those under eighteen at the time of their crime); *Atkins v. Virginia*, 536 U.S. 304, 311–12, 321 (2002) (mentally disabled).

less protection of one's right to bear arms based on location, the Court has a unique opportunity to shape the current arms debate in a way that will give state lawmakers the flexibility and time needed to address the roots of violence while giving lawfully acting citizens an individual right to self-defense in a variety of contexts.

In order to evaluate whether non-lethal weapons are arms and to craft the proper test for determining whether a weapon is protected under the Second Amendment, this Comment starts by describing what non-lethal weapons are and how they work. Part III walks through recent Court history and the Court's transition from a collective to an individual right under the Second Amendment. Part IV shows that the current makeup of different states' non-lethal-weapons schemes is so confusing and unclear that those law-abiding citizens who wish to carry non-lethal weapons will likely need to hire an attorney to understand the laws, creating an undue burden on those citizens. Further, this Section will show that current federal law does not and should not attempt to nationally regulate non-lethal weapons. Finally, a brief proposal will highlight the constitutional decisional rule that should be used and the precedential and practical reasons to support such a proposal. While the ideas in this Comment are not entirely novel, taken as a whole they suggest an innovative solution that the Court may use to help solve a current crisis with a constitutional decisional rule that will satisfy both precedential and practical objectives.

II. NON-LETHAL ARMS DEFINED AND THEIR TYPES

An analysis of non-lethal weapons and their proper place within the Second Amendment is not useful unless an understanding of these weapons is established.³² Non-lethal weapons are defined as “[w]eapons that are explicitly designed and primarily employed so as to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.”³³

32. This explanation of types and differences of non-lethal weapons is particularly important as there is a common perception among gun-rights advocates that those who advocate for tighter gun controls have no substantial knowledge about guns. Whether this is true or not, establishing a common understanding of terms and types will help to reduce confusion, increase awareness, and focus on the merits.

33. U.S. DEP'T OF DEF., *DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 373 (2005). These weapons typically employ a method of incapacitation that does not destroy their target and “are intended to have one, or both, of the following characteristics: (1) They have relatively reversible effects on personnel or material. (2) They affect objects differently within their area of influence.” *Id.* Interestingly, the U.S. Department of Defense created a

Although the definition and name implies that non-lethal weapons are never lethal, this is a slight misnomer.³⁴ Non-lethal weapons are designed to incapacitate a threat without death and minimize permanent damage.³⁵ However, these definitions focus on the intent of the weapons, not the actual outcome.³⁶ While the definition is open to multiple interpretations and functional differences,³⁷ the characteristics that make non-lethal weapons non-lethal are that their effects are reversible; the weapons significantly reduce the probability of death and permanent injury; and they are intended to deter, disrupt, disorient, and deny instead of destroy.³⁸

The types of non-lethal weapons discussed below are those typically

Joint Non-Lethal Weapons Directorate by Congressional initiative and Department of Defense Directive 3000.03E. See U.S. DEP'T OF DEF., DIRECTIVE NO. 3000.03E, POLICY FOR NON-LETHAL WEAPONS (2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/300003p.pdf>; U.S. DEP'T OF DEF., JOINT NON-LETHAL WEAPONS DIRECTORATE: NON-LETHAL WEAPONS REFERENCE BOOK (2011), available at <http://www.jnlwp.defense.gov>. Non-lethal weapons are sometimes called "less lethal weapons." See CAL. PENAL CODE § 16780 (West 2012) ("Less lethal weapon" means any device that is designed to or that has been converted to expel or propel less lethal ammunition by any action, mechanism, or process for the purpose of incapacitating, immobilizing, or stunning a human being through the infliction of any less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort. It is not necessary that a weapon leave any lasting or permanent incapacitation, discomfort, pain, or other injury or disability in order to qualify as a less lethal weapon.").

34. See, e.g., ACLU OF S. CAL., PEPPER SPRAY: A MAGIC BULLET UNDER SCRUTINY 27 (1993) (reporting the deaths of seven individuals between January 5 and September 9, 1993, due to police use of pepper spray); AMNESTY INT'L, USA—STUN WEAPONS IN LAW ENFORCEMENT 2 (2008) (reporting that at least 330 individuals died between 2001 and 2008 after being struck with a taser by police). Although reports partly minimized the role pepper spray played in the deaths, the studies were not conclusive of the role pepper spray played in the police-use deaths. See, e.g., JOHN GRANFIELD ET AL., INT'L ASS'N OF CHIEFS OF POLICE, PEPPER SPRAY AND IN-CUSTODY DEATHS 3 (1994) (describing studies that suggest the results of a series of deaths involving police oleoresin capsicum (OC) use were not attributable to the OC); NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, OLEORESIN CAPSICUM: PEPPER SPRAY AS A FORCE ALTERNATIVE 5 (1994) (explaining the potential for death resulting from OC exposure).

35. ERIK L. NUTLEY, NON-LETHAL WEAPONS: SETTING OUR PHASERS ON STUN? POTENTIAL STRATEGIC BLESSINGS AND CURSES OF NON-LETHAL WEAPONS ON THE BATTLEFIELD 2 (2003).

36. JOHN L. BARRY ET AL., NON-LETHAL MILITARY MEANS: NEW LEVERAGE FOR A NEW ERA 5 (1994); NUTLEY, *supra* note 35, at 2.

37. See NUTLEY, *supra* note 35, at 2. While this discussion focuses a great deal on non-lethal weapons from the standpoint of the military, the different types, uses, and pitfalls of these weapons from a military perspective can help shed light on different civilian uses and can help with figuring out what types of arms fall within the scope of the Second Amendment. See discussion *infra* Part V.A–B.

38. See NUTLEY, *supra* note 35, at 3.

available as personal self-defense weapons. Non-lethal weapons that are typically available for personal self-defense are determined by three factors: cost, access, and ease of use.³⁹ While each of these factors can play varied roles in an individual's decision to purchase and possess these weapons, most civilian weapons used for personal self-defense can be broken into three main types: blunt force objects, electrical weapons, and irritant sprays.⁴⁰

39. Cost, for instance, may be a high barrier to certain types of acoustic-based weapons that could be used by the civilian population. The Long-Range Acoustic Device (LRAD) can target threats with a 95-decibel sound wave (similar to standing next to a train), leaving them disoriented, but cost between \$20,000 and \$30,000 in 2005. Bruce V. Bigelow, *Device Helped Thwart Pirates: Sound Waves Are Turned Into Weapon by S.D. Firm*, SAN DIEGO UNION-TRIB., Nov. 9, 2005, at C1. Additionally, access to this original system and its size, thirty-three inches across and nearly forty-five pounds, make this weapon highly ineffective for personal self-defense use. *Id.* However, advances in technology are proving to make these weapons more functional in personal ways by decreasing size and costs. *See LRAD 100X Long Range Acoustic Device*, LRAD CORP., <http://www.lradx.com/site/content/view/207/110/> (last visited Jan. 31, 2014) (marketing the next LRAD 100X at fourteen inches across and fifteen pounds, while producing a 137-decibel sound wave); Pierre Chamberland, *Sound Cannons*, MARK (Jun. 17, 2010), <http://pioneers.themarknews.com/articles/1711-sound-cannons/#.UyH72T9dWSo> (reporting the cost of an LRAD 100X at \$10,000).

40. There are many different types of non-lethal weapons currently in use by the U.S. military: acoustic, optical, blunt trauma, irritant, and vehicle-stopping. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, DEPARTMENT OF DEFENSE NONLETHAL WEAPONS AND EQUIPMENT REVIEW: A RESEARCH GUIDE FOR CIVIL LAW ENFORCEMENT AND CORRECTIONS (2004) [hereinafter A RESEARCH GUIDE FOR CIVIL LAW ENFORCEMENT]; *Non-Lethal Weapons Program: Current Non-Lethal Weapons*, U.S. DEP'T OF DEF., <http://jnlwp.defense.gov/CurrentNonLethalWeapons.aspx> (last visited Jan. 31, 2014) (describing non-lethal weapons, with pictures, used by U.S. military forces and civilian law enforcement); *Non-Lethal Weapons Program: History*, U.S. DEP'T OF DEF., <http://jnlwp.defense.gov/About/History.aspx> (last visited Jan. 31, 2014). However, the military's use of these weapons is governed by a plethora of international treaties, domestic law, and policies and regulations. *See, e.g.*, Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175 (2012); Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. § 6701 (2012); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 219, 110 Stat. 186, 223-24; N. ATLANTIC TREATY ORG., NATO POLICY ON NON-LETHAL WEAPONS (1999); Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol IV, Entitled Protocol on Blinding Laser Weapons), Oct. 13, 1995, T.I.A.S. No. 09-721.2, 2024 U.N.T.S. 167; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; U.S. DEP'T OF DEF., DIRECTIVE NO.

A. Blunt Force Objects

Blunt force objects are intended to cause temporary pain or injury and can take the form of projectiles, batons, bean-bags, liquid filled munitions, and water cannons, among others.⁴¹ The most common and easy-to-use weapons for self-defense purposes are batons.⁴² With the exception of some projectiles, blunt force objects are some of the oldest and most predominantly used non-lethal weapons because they can be easily manipulated and are inexpensive.⁴³ Batons come in a variety of lengths, designs, and materials.⁴⁴ They are relatively cheap compared to electric weapons and can be purchased at national retailers.⁴⁵ Some can collapse and expand, while others attach to key rings and contain a ball at the end to increase the baton's disabling effects.⁴⁶ Additionally, batons are easily concealable in a pocket, bag, or purse,⁴⁷ but if used improperly, they can cause death or permanent damage.⁴⁸

Another type of blunt force object, projectiles, come as bullets or

3000.03, POLICY FOR NON-LETHAL WEAPONS 2 (1996) (defining non-lethal weapons); U.S. DEP'T OF DEF., INSTRUCTION NO. 6055.15, DOD LASER PROTECTION PROGRAM (2007). Additionally, certain guidance regarding the rules of engagement, implementation of law of war, and guidance using chemical and biological employment of riot control agents and herbicides is given to commanders. *See generally*, JOINT CHIEFS OF STAFF, COMPENDIUM OF CURRENT CJCS DIRECTIVES (2009) (noting, for example, Instructions 3110.07C, 3121.01B and 5810.01C). Although most of these are classified, it is important to note that there is guidance in place for the armed forces' use of these devices. *See id.*

41. *See* NUTLEY, *supra* note 35, at 14 tbl.2.

42. Charlie Mesloh et al., *Less Lethal Weapons for Law Enforcement: A Performance Based Analysis*, 8 L. ENFORCEMENT EXECUTIVE F. 133, 141 (2008); *see also* WEAPONS & PROTECTIVE SYS. TECHS. CTR., A GUIDEBOOK FOR LESS LETHAL DEVICES: PLANNING FOR, SELECTING, AND IMPLEMENTING TECHNOLOGY SOLUTIONS 4-2 (Edward L. Hughes & Robert A. Osborne eds., 1st ed. 2010) [hereinafter WEAPONS & PROTECTIVE SYS.], available at <https://www.justnet.org/pdf/WPSTC-GUIDE-FINAL-%282010.05.07%29-COMplete.pdf>.

43. *See* WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-2; *Personal Defense*, CABELA'S, http://www.cabelas.com/catalog/browse/personal-defense/_/N-1100279/Ns-CATEGORY_SEQ_104496480?WTz_1=SBC%3BMMcat104792580%3Bcat104778180 (last visited Mar. 29, 2014) (selling three Smith & Wesson collapsible batons for \$29.99 to \$44.99, depending on length).

44. WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-2.

45. *See Personal Defense*, *supra* note 43 (selling three Smith & Wesson collapsible batons for \$29.99 to \$44.99, depending on length, and a Taser C2 Gold Kit for \$399.99).

46. WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-2.

47. *See Clip-On Batons*, ASP USA, <https://www.asp-usa.com/store/batons/clip-on-batons.html> (marketing the P12 clip-on baton as 5 1/8 inches closed while 11 5/8 inches open).

48. CAL. DEP'T CONSUMER AFFAIRS, BUREAU OF SEC. & INVESTIGATIVE SERVS., BATON TRAINING MANUAL: STUDENT TEXT 16 (2006), available at http://www.bsis.ca.gov/forms_pubs/bat_stuman.pdf.

balls composed of rubber, wood, or foam and are only available to law enforcement or military personnel.⁴⁹ These projectiles can be particularly effective at incapacitating an intruder while reducing the impact of residual or collateral damage.⁵⁰ If these weapons are used improperly, they can cause injury and, in some cases, death; however, these weapons substantially decrease the risk of death to the intended target and others.⁵¹

B. Electric Weapons

Electric weapons are energy devices that use pain and muscle tenancy (or involuntary muscle convulsion) to affect the targeted person.⁵² Electric weapons come in two types: stun guns and tasers.⁵³ Stun guns must directly touch the intended target, leaving the user in a particularly vulnerable position.⁵⁴ Tasers, on the other hand, employ

49. See *Impact Munitions*, DEF. TECH., http://www.defense-technology.com/specialty_impact.aspx (last visited Feb. 1, 2014); see also, e.g., *Foam Baton—40 mm Product Spec Manual*, SAFARILAND (Dec. 2011), available at http://www.defense-technology.com/pdfs/specs/6099_40%20mm%20Foam%20Baton%20Round%20Rev%202012-11.pdf (warning that the foam baton product is to be used only by trained military personnel or law enforcement).

50. See DAVID K. DUBAY & PAUL J. MARQUARD, 2003 SPECIFICATION MANUAL: DEFENSE TECHNOLOGY, KINETIC AND IMPACT PARAMETERS OF LESS-LETHAL MUNITIONS (2003), available at <http://www.defense-technology.com/pdfs/resources/kinetic%20impact%20analysis.pdf>. Unfortunately, much of the ballistic testing data of these types of munitions is held by the military and is not available to the public, but Defense Technology has published some of its findings, which resulted in a greater understanding for the less-than-lethal nature of the munitions. *Id.* According to its tests, the kinetic energy used in its munitions is on par with a .22 bullet, which can penetrate a human at most distances because the force is concentrated in such a small area, unlike a bean bag projectile. *Id.* However, the blunt force projectiles can still cause serious impact trauma because more force is being transferred to the body versus being “pushed” into the body like a .22 round. *Id.*

51. KEN HUBBS & DAVID KLINGER, NAT’L INST. OF JUSTICE, IMPACT MUNITIONS USE: TYPES, TARGETS, EFFECTS 2–3 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/206089.pdf> (reporting eight individuals’ deaths from being hit with impact munitions and two additional deaths from lethal rounds mistakenly fired instead of impact munitions).

52. Nat’l Inst. of Justice, *How Conducted Energy Devices Work*, NIJ.GOV (June 23, 2008), <http://www.nij.gov/nij/topics/technology/less-lethal/how-ceds-work.htm>.

53. Mesloh et al., *supra* note 42, at 134. See, e.g., U.S. Patent No. 6,636,412 B2, at [57] (filed Dec. 12, 2001). This patent for Taser International, Inc., includes a brief description: “A hand-held stun gun incapacitates a human target by generating a series of powerful electrical output pulses across first and second spaced apart output terminals in response to closure of a trigger.” *Id.* Taser devices are also known as “tethered systems.” WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-11.

54. Volokh, *Nonlethal Self-Defense*, *supra* note 19, at 204; *Stun Gun vs Taser*, TBO-TECH, <http://www.tbotech.com/stungun-vs-taser.htm> (last visited Feb. 1, 2014).

tethered wires with barbed hooks that transfer the electric current from some distance away.⁵⁵ Consumers are moving towards tasers, which shoot two electrically charged darts up to fifteen feet, over stun guns, which require direct contact with the attacker.⁵⁶ One major disadvantage of tasers is their high cost.⁵⁷

Electric weapons are much more effective than blunt force objects and irritant sprays because of their speed, accuracy, and effect on the target's central nervous system. Yet, electric weapons are not without controversy; more than 330 people died after police used electric weapons on them between 2001 and 2008, but most of these deaths were attributed to other causes.⁵⁸ However, by their own accounts, electric weapons have been used and rigorously tested by more than 11,000 law enforcement agencies.⁵⁹ Additionally, in the cases where individuals died as a result of being shocked, law enforcement had subjected the individual to multiple shocks, often lasting longer than the prescribed

55. WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-11. In recent years, the use of electric weapons in movies and television has increased. See, e.g., HANNIBAL 99:10-25 (Metro-Goldwyn-Mayer 2001); *Archer: White Elephant* (FX Networks television broadcast Jan. 13, 2014).

56. *Stun Gun vs Taser*, *supra* note 54; *Taser Maker Targets Civilian Sales*, ABC NEWS (Feb. 16, 2005), <http://abcnews.go.com/GMA/Technology/story?id=501101&page=1&singlePage=true>. More recently, Taser International has developed a weapon that has a removable cartridge, and the weapon itself can be used as both a taser and stun gun, as the weapon can be used as a stun gun after the user has fired the taser's darts. See TASER INT'L, INC., TASER X26C OPERATING MANUAL 10 (2007), available at https://www.taser.com/images/support/downloads/downloads/mk-inst-x26c-001_rev_a_x26c_manual.pdf (stating the device can be used as a "traditional stun gun-type device" after its probes have been fired). But the company does not sell weapons with stun gun or direct-contact features as the primary function anymore. See *Self Defense Products*, TASER INT'L, INC., <http://www.taser.com/products/self-defense-products> (last visited Mar. 30, 2014). Only Hawaii, Massachusetts, New Jersey, New York, and Rhode Island prohibit the use of electronic weapons by the general public. See HAW. REV. STAT. ANN. § 134-16 (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 140, § 131J (West 2002 & Supp. 2013); N.J. STAT. ANN. § 2C:39-3.h. (West 2005); N.Y. PENAL LAW § 265.01(1) (Consol. 2000 & Supp. 2013); R.I. GEN. LAWS § 11-47-42 (2002 & Supp. 2013). Additionally, Michigan and Wisconsin provide an exception for the general public if they have a concealed carry permit. See MICH. COMP. LAWS ANN. § 750.224a(2)(b) (West Supp. 2013); WIS. STAT. §§ 175.60(1)(d), 941.295(2g) (2011-2012).

57. See *Personal Defense*, *supra* note 43 (selling a Taser C2 Gold Kit for \$399.99).

58. AMNESTY INT'L, *supra* note 34, at 2 (summarizing AMNESTY INT'L, 'LESS THAN LETHAL'? THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT 1 (2008)).

59. *Id.* After research, the Department of Justice claimed that more than 15,000 law enforcement and military agencies use electric weapons. GEOFFREY P. ALPERT ET AL., NAT'L INST. OF JUSTICE, POLICE USE OF FORCE, TASERS AND OTHER LESS-LETHAL WEAPONS 1 (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/232215.pdf>.

five seconds, thus in conflict with recommended use.⁶⁰

Electric weapon manufacturers warn against the use of their devices on small children and those who are physiologically or metabolically compromised, pregnant, infirm, or elderly, as well as individuals with heart conditions or pacemakers, or with low body-mass index.⁶¹ A secondary hazard can occur if the victim falls after being stunned and is injured.⁶² Although these injuries seem severe, when individuals are properly trained, non-lethal weapons such as electronic weapons can significantly reduce lethality.⁶³

C. Irritant Sprays

Irritant sprays are meant to disable an individual by shooting a foam or spray containing an irritant capable of causing temporary blindness, intense pain, and trouble breathing.⁶⁴ Oleoresin Capsicum (OC), commonly called “pepper spray,”⁶⁵ can be varied in its strength and delivery system.⁶⁶ Methods of delivery include fog, stream, foam, gel,

60. See GEOFFREY P. ALPERT ET AL., *supra* note 59, at 16; see also AMNESTY INT’L, *supra* note 34, at 2 (noting that more than 330 people have died in the United States after being stuck by police tasers since 2001). Unfortunately, the use of electrical weapons is not without risk, but when compared with the fatality rate among gunshot victims, the risk is incredibly low. See ACLU OF S. CAL., *supra* note 34, at 27 (noting that seven people in California who had been sprayed with OC died either in police custody or while struggling with police between January 5 and September 9, 1993); Volokh, *Nonlethal Self-Defense*, *supra* note 19, at 205 (explaining that the death rate from gunshot wounds is about 20% and the death rate from knife wounds is roughly 2%).

61. See, e.g., TASER INT’L, INC., TASER CEW WARNINGS, INSTRUCTIONS, AND INFORMATION: CITIZEN 2–3 (2013). However, it is virtually impossible to tell if some of these conditions exist, especially when one is being attacked or threatened.

62. *Id.*

63. See, e.g., GEOFFREY P. ALPERT ET AL., *supra* note 59, at ii; see also *Taser Saves Man’s Life*, TVNZ (June 13, 2012, 2:46 PM), <http://tvnz.co.nz/national-news/taser-saves-man-s-life-4927748> (reporting that a man who stabbed himself in the stomach and barricaded himself in his home was tasered when police were unable to disarm the man and transport him for medical treatment).

64. *What Is Pepper Spray? Is Pepper Spray Dangerous?*, MED. NEWS TODAY (Nov. 25, 2011, 12:00 AM), <http://www.medicalnewstoday.com/articles/238262.php>.

65. A RESEARCH GUIDE FOR CIVIL LAW ENFORCEMENT, *supra* note 40, at app. B at 64. Pepper spray, or oleoresin capsicum, is a derivative of a food product from different chili peppers that have been dried, ground, and combined with a liquid, allowing it to be sprayed through the air. *Id.*

66. See, e.g., Jeanne M. Ditter & Charles S. Heal, *Application and Use of Riot Control Agents*, in RIOT CONTROL AGENTS: ISSUES IN TOXICOLOGY, SAFETY, AND HEALTH 17, 17–20 (Eugene J. Olajos & Woodhall Stopford eds., 2004); DAVID NANCE, SEC. EQUIP. CORP., SABRE O.C. PEPPER SPRAY STUDENT PROGRAM, available at http://www.doc.nv.gov/sites/doc/files/training/south/2013_academy/week_6/SABRE_End_User_Training_PPT_1_1_13/Stu

and powder.⁶⁷ Each delivery system has its own advantages and disadvantages⁶⁸ but should be used properly for the intended effect. Additionally, Ortho Chlorobenzylidene Malononitrile (CS),⁶⁹ Chloroacetophenone (CN or Mace),⁷⁰ Diphenylarenamine Chloroarsine (DM),⁷¹ Hexachlorethane (HC),⁷² and calmatives or sedative agents⁷³ are all forms of irritant sprays.⁷⁴

dent_OC_Powerpoint.pdf (presentation on pepper spray by David Nance, Vice President of Security Equipment Corp.).

67. DAVID NANCE, *supra* note 66; WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-14.

68. See DAVID NANCE, *supra* note 66.

69. STEVEN L. HOENIG, COMPENDIUM OF CHEMICAL WARFARE AGENTS 138-39 (2007). CS gas can be dispensed by burning, aerosol, or explosion and immediately come into contact with the lungs, eyes, skin, and nasal linings causing irritation, burning, coughing, and a runny nose (this description of effects is greatly understated—personal experience of the author at Ft. Jackson during Basic Training). *Id.*

70. Peter G. Blain, *Tear Gases and Irritant Incapacitants: 1-Chloroacetophenone, 2-Chlorobenzylidene Malononitrile and Dibenz[B,F]-1,4-Oxazepine*, 22 TOXICOLOGICAL REV. 103, 104-08 (2003) (discussing the makeup of tear and irritant gases). CN is similar to CS, but is the most toxic of irritant gases and at high concentrations has caused deaths resulting from pulmonary injury, asphyxia, or both. *Id.*

71. NAT'L RESEARCH COUNCIL, REVIEW OF THE ARMY NON-STOCKPILE CHEMICAL MATERIEL DISPOSAL PROGRAM: DISPOSAL OF CHEMICAL AGENT IDENTIFICATION SETS 15 & tbl.1-1 (1999). Commonly known as Adamsite, this aerosol is a vomiting agent and causes many of the same effects as CN and CS gas but is slower to develop and can last many hours. *Id.* at 15 tbl.1-1, 16 tbl.1-2.

72. U.S. EPA, CHEMICAL NAME & SUMMARY FACT SHEET: HEXACHLOROETHANE (2012), available at <http://www.epa.gov/wastes/hazard/wastemin/minimize/factshts/hexchlet.pdf>. HC is a gas that is used by the military in the production and use of smoke grenades and other weapons that produce smoke. *Id.* Although not formally a non-lethal weapon in the traditional sense, HC is used to blind and disorient an enemy and can therefore at times be considered a non-lethal weapon. WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-16. When employing HC gas to distract, confuse, or otherwise psychologically distress the enemy, it is no longer being used as a non-lethal weapon and, in some instances, may be classified as an act of psychological warfare.

73. See JOAN M. LAKOSKI ET AL., THE ADVANTAGES AND LIMITATIONS OF CALMATIVES FOR USE AS A NON-LETHAL TECHNIQUE 15 & tbl.2 (2000). Different types of drugs have been examined for potential use as a calming agent, such as opiates, anti-psychotics, neurolept anesthesia, ketamine, benzodiazepines, rohypnol (date rape drug), and non-benzodiazepines (Ambien). *Id.* at 13 tbl.1; Nat'l Inst. of Justice, *Community Acceptance Panel—Riot Control Agents*, NIJ.GOV (July 11, 2008), <http://nij.gov/topics/technology/less-lethal/Pages/riot-control-agents.aspx>. Russian Special Forces used fentanyl, a potent opium-based narcotic, on Chechen terrorists and hostages during the 2002 siege on the Dubrovka Theatre in Moscow, resulting in the deaths of over 119 civilians. *Russia Names Moscow Siege Gas*, BBC NEWS (Oct. 31, 2002, 2:25 PM), <http://news.bbc.co.uk/2/hi/europe/2377563.stm>.

74. See WEAPONS & PROTECTIVE SYS., *supra* note 42, at 4-13-4-16. While these agents are not typically available to civilians, their availability to military and law enforcement may trigger their acceptance as “commonly used” and therefore must be kept in mind when

Irritant sprays can be less effective than tasers because the target may be able to withstand the type of irritant used. The target can quickly evade the spray, or worse yet, the spray can accidentally blow back in the user's face, putting the user at a substantially higher risk than before the spray was employed.⁷⁵ Sprays can be used multiple times, unlike tasers, and do not require contact with the target at arm's length, like stun guns.⁷⁶ Additionally, irritant sprays are relatively cheap and compact and can be easily stored in a pocket or purse, or placed on a key-chain.⁷⁷

While the use of non-lethal weapons is not without its critics,⁷⁸ the three main varieties that would be most common and available to ordinary citizens are blunt-force objects, electric weapons, and irritant sprays. All three weapon types can be used as arms in the functional sense and they constitute another type of weapon suited to self-defense. This general description of non-lethal weapons, as well as their function and use, should provide the context for discussing the legal framework that surrounds arms and how the Court determines what weapons qualify as arms.

III. THE SECOND AMENDMENT GENERALLY, "ARMS" DEFINED, AND THE RECENTLY CREATED RIGHT TO SELF-DEFENSE

In order to discuss whether non-lethal weapons are protected by the Constitution, the Second Amendment must be described with a particular focus on arms and how the Court determines whether those

discussing definitions and decisional rules for the Second Amendment. See discussion *infra* Part III.A–B.

75. See Volokh, *Nonlethal Self-Defense*, *supra* note 19, at 206.

76. *Id.* at 207.

77. See *Personal Defense*, *supra* note 43 (selling a multitude of pepper sprays, the least expensive being \$6.99, most of which have key rings for portability).

78. See, e.g., DAVID W. HAGY, NAT'L INST. OF JUSTICE, STUDY OF DEATHS FOLLOWING ELECTRO MUSCULAR DISRUPTION: INTERIM REPORT 1–4 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/222981.pdf> (surveying the medical consequences that result from the use of electric weapons such as tasers); David P. Fidler, *The International Legal Implications of "Non-Lethal" Weapons*, 21 MICH. J. INT'L L. 51, 63–65 (1999) (describing various ethical, legal, medical, and political problems with non-lethal weapons such as: non-lethal weapons violating principles of international law, causing unintended health consequences, and putting law enforcement officers, military forces, and civilians in greater danger); Stephen Coleman, *The Moral Dangers of Non-Lethal Weapons*, TED TALKS (Feb. 2012), http://www.ted.com/talks/Stephen_coleman_the_moral_dangers_of_non_lethal_weapons.html (describing moral issues related to the use of non-lethal weapons such as indiscriminate use, death, the use of non-lethal weapons as a "lethal force multiplier," and poor training to use such weapons).

weapons are protected. The historical context that led up to the Court's ruling in *District of Columbia v. Heller*, and its subsequent incorporation in *McDonald v. City of Chicago*,⁷⁹ will show why the current decisional rules were created and how they create shortcomings when evaluating arms.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁸⁰ While the relevant portion of the Amendment to this discussion is arms, one brief point must be made. For quite some time, there have been two general theories about what the Second Amendment protects: (1) an individual right; or (2) a group or militia based right.⁸¹

Heller settled that question: The Second Amendment provides an individual right.⁸² The question remains: What are arms under the Second Amendment?

A. "Arms" under Miller?

Post-*Heller*, the Second Amendment provides for an individual right to keep and bear arms for self-defense.⁸³ In *McDonald*, the Court incorporated the individual right against the states via the Fourteenth

79. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

80. U.S. CONST. amend. II.

81. See STAFF OF S. SUBCOMM. ON THE CONSTITUTION, S. COMM. ON THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 3-6 (1984); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT ix-xi (1994); H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 1-5 (2002); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, in 3 GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT 1, 1-3 (Robert J. Cottrol & Paul Finkelman eds., 1993); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1236-38 (1994); Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511, 511 (2008); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206-07 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640 (1989); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466-71 (1995); Eugene Volokh, "Necessary to the Security of a Free State," 83 NOTRE DAME L. REV. 1, 2-3 (2007); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793-94 (1998); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 237 (2004) (reviewing UVILLER & MERKEL, *supra*).

82. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

83. *Id.* at 592, 636; see also *McDonald*, 130 S. Ct. at 3036, 3050.

Amendment and elucidated that the right to keep and bears arms is “among those fundamental rights necessary to our system of ordered liberty.”⁸⁴ The Court made clear that the right was not unlimited but declined to provide an analytical framework to evaluate regulations of arms in the future.⁸⁵

A looming question that remains after *Heller* and *McDonald* is whether non-lethal weapons are arms that are protected by the Second Amendment. The majority opinion in *Heller* spent considerable time discussing *United States v. Miller*⁸⁶ and its holding that the Second Amendment does not provide an individual right, but a right to arms that have a “reasonable relationship to the preservation or efficiency of a well-regulated militia.”⁸⁷ *Miller* holds that arms are protected under the Second Amendment if the weapon is in “common use” at the present time and is ordinarily a military-related piece of equipment.⁸⁸

To determine whether a weapon is protected as an arm under *Miller*, the weapon must be reasonably related to the purpose of the Second Amendment.⁸⁹ In *Miller*, the defendant transported an unregistered sawed-off shotgun across state lines, violating the National Firearms Act of 1934.⁹⁰ The Court evaluated whether the sawed-off shotgun matched the purpose of the Second Amendment, a collective right that must be reasonably related to the militia, to determine whether the weapon

84. *McDonald*, 130 S. Ct. at 3042, 3050.

85. *Id.* at 3047.

86. *United States v. Miller*, 307 U.S. 174 (1939).

87. *Heller*, 554 U.S. at 622–24 (quoting *Miller*, 307 U.S. at 178).

88. *Miller*, 307 U.S. at 178–79.

89. *See id.* at 178.

90. *Id.* at 175. The National Firearms Act (NFA) of 1934 created a tax on the production and transfer (to sell and purchase) of certain firearms that were listed under the Act. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2006)). Additionally, the production and transfer of NFA weapons requires registration with the Commissioner of the Internal Revenue. National Firearms Act, 48 Stat. at 1237–38. The Act was created in response to the high gang-based crime of the era and was supposed to reduce and ultimately prevent the transmission and production of certain Class III weapons. *See, e.g.*, Bureau of Alcohol, Tobacco, Firearms, & Explosives, U.S. Dep’t of Justice, *National Firearms Act*, ATF.GOV, <http://www.atf.gov/content/firearms/firearms-industry/national-firearms-act> (last visited Apr. 1, 2014); SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 259 n.69 (2006). The original weapons subjected to the Act were shotguns and rifles with barrels that were less than eighteen inches in length and certain firearms described as “any other weapons” (i.e., machine guns and silencers, sometimes called mufflers). National Firearms Act, 48 Stat. at 1236.

would be protected.⁹¹ The *Miller* Court ultimately held that the sawed-off shotgun was not reasonably related to the militia purpose.⁹² This militia “end in view” application was used until *Heller*.

The Court in *Heller* stated that the militia purpose is not the limit on the legislature’s ability to restrict and regulate private weapons⁹³ and, in dicta, that “*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”⁹⁴ An explanation of the end in view approach and the differing interpretations that have been used is explained in an article by Michael P. O’Shea,⁹⁵ who argues that there are three interpretations of *Miller*’s end in view rule: weak *Miller*⁹⁶; intermediate *Miller*⁹⁷; and strong *Miller*.⁹⁸ Each view purports to demonstrate the nexus needed between the weapon and purpose (militia use), required to satisfy constitutional scrutiny. Under weak *Miller*, protection for possessing and using firearms is only for service connected to a state militia.⁹⁹ Intermediate *Miller* allows for many uses as long as they have some relation to the militia; this view necessarily prohibits use for personal self-defense.¹⁰⁰ Finally, strong *Miller* encompasses the lower *Miller* interpretations, but it protects possession and use for other “traditionally legitimate purposes, such as private self-defense.”¹⁰¹

Strong *Miller* is where defining arms becomes critical because not all types of personal weapons qualify as arms; only arms that are

91. *Miller*, 307 U.S. at 178. On appeal, *Miller* presented no appellate brief and his counsel failed to show for oral argument. See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 66–67 (2008). The Court, in *Heller*, emphatically argued that the fact that no party argued against the governmental action is a fairly strong reason to doubt the *Miller* analysis. See *Heller*, 554 U.S. at 623 (arguing “reason enough, one would think, not to make [*Miller*] the beginning and the end of this Court’s consideration of the Second Amendment”). While the argument that lack of an adversary is strong evidence of a reason to doubt the analysis of *Miller* may have merit, it is not clear that the Court would have come up with a better or more well-reasoned analysis.

92. *Miller*, 307 U.S. at 178.

93. *Heller*, 554 U.S. at 622.

94. *Id.* at 623.

95. Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 354–62 (2009).

96. *Id.* at 354–55.

97. *Id.* at 355–57.

98. *Id.* at 358–62.

99. *Id.* at 354–55.

100. *Id.* at 355–57.

101. *Id.* at 358–59.

reasonably related to militias are protected. The threshold question in *Miller* and under strong *Miller* is whether the weapon under scrutiny is “part of the ordinary military equipment” and is “of the kind in common use at the [present] time.”¹⁰² This approach provides a litany of problems when advances in technology put new weapons—that can be more or less lethal—in the hands of soldiers.¹⁰³ According to this approach, weapons like fully automatic assault rifles, grenade launchers, and light machine guns could be in common use when used by soldiers, and certain state and federal limits could be unconstitutional.¹⁰⁴

B. “Arms” under *Heller* and *McDonald*?

The *Miller* approach was, in some senses, all but obliterated by Justice Scalia’s holding in *District of Columbia v. Heller*.¹⁰⁵ In *Heller*, a police officer brought suit to enjoin a longstanding District of Columbia ban on handguns.¹⁰⁶ Justice Scalia, after a lengthy historical analysis,¹⁰⁷ invalidated the ban on the grounds that it violated the Second Amendment individual right to keep and bear arms for self-defense of “hearth and home.”¹⁰⁸ To prevent outright overruling *Miller*, the Court created an exception for *Miller* and held that *Miller* was not based on the right but the weapon because sawed-off shotguns can never be used for any law-abiding purpose.¹⁰⁹

The Court in *Heller* defined arms as “[anything] that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike

102. *Id.* at 358 (alterations in original) (quoting *United States v. Miller*, 307 U.S. 174, 178–79 (1939)) (internal quotation marks omitted). This approach protects personal-defense arms that are connected to a militia purpose. *Id.* at 358–59 (citing David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 15 WM. & MARY BILL RTS. J. 1237, 1237 (2007) (reviewing CORNELL, *supra* note 90)). In a footnote to Saul Cornell’s commentary on the mind frame of the Court during the *Miller* decision, he argues that the Court wanted to maintain flexibility in dealing with the Second Amendment because of two concerns of the time: (1) the passage of federal gun control laws in response to the growth of organized crime; and (2) Hitler’s rise in Europe. See CORNELL, *supra* note 90, at 259 n.69.

103. See O’Shea, *supra* note 95, at 380–83.

104. See, e.g., 18 U.S.C. § 922(b)(4) (2012) (prohibiting the sale of any destructive device, as defined in § 921(a)(4), or machinegun).

105. *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

106. *Id.* at 575–76.

107. See *id.* at 576–619.

108. See *id.* at 635.

109. See *id.* at 622–25.

another”¹¹⁰—a very broad definition. More important, “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”¹¹¹

The Court did not go on to declare the District of Columbia ban unconstitutional solely on the grounds that the home is the most protected place and that there is a right to self-defense within the home for arms, but it added that the fact that the ban was against handguns was significant:

The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose [of self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.¹¹²

The concern is that a statement banning all restrictions on the ability of individuals to defend themselves will allow homeowners to use any means (e.g., machineguns and grenades) for self-defense. To clarify, the opinion merely protects handguns for self-defense within the home and does not address what types of arms are protected in the home and whether the self-defense granted under the Second Amendment extends beyond the home to cover other residences, self-owned businesses, or properties.¹¹³

The Court then goes on to explain that *Miller* is read only for the proposition “that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”¹¹⁴ And, in dicta, the Court

110. *Id.* at 581 (quoting 1 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed., London, W. Flexney 1771) (unpaginated, definition of “Arms”)).

111. *Id.* at 582. This certainly supports the idea that non-lethal weapons, such as electronic weapons, are *prima facie* protected.

112. *Id.* at 628–29 (footnote omitted) (internal citation omitted) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)). It could be the case that this is dicta and that *Heller* could have been completely dealt with on the right to self-defense grounds, leaving the Court free to reconfigure its decisional rules for arms.

113. *See id.* at 635.

114. *Id.* at 625.

indicated that the long standing bans on possession of arms by certain people (such as felons and the mentally ill), and in certain places, is not in question.¹¹⁵ What the Court in *Heller* does is change the purpose of the Second Amendment. The Second Amendment under *Miller* protects only those arms that had a nexus to the militia and under *Heller* the nexus is to self-defense.¹¹⁶ One of the fundamental problems with this approach is that *Heller* does not abandon *Miller's* common use test.¹¹⁷ Once *Heller* changed the purpose, and therefore the nexus, the common use test should have been adjusted for the self-defense purpose.

The current common use test for militias is not abandoned and is used as an argument that legislative bans on “dangerous and unusual weapons” are sufficient to meet constitutional scrutiny.¹¹⁸ Justice Scalia includes, as a list of the weapons deemed dangerous and unusual, the short-barreled shotgun and machine gun.¹¹⁹ A problem is that all weapons are inherently dangerous, so allowing bans on “dangerous weapons” could allow a ban on all weapons. An “unusual weapon” designation is not helpful either: Weapons that are not normally used by the militia today, such as a musket, could be banned because it is currently unusual. It is certain that the Founders would have argued strenuously against the regulation of muskets.

115. *Id.* at 626–27 (stating, in dicta, that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms”).

116. Compare *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that arms need to have “some reasonable relationship to the preservation or efficiency of a well regulated militia”), with *Heller*, 554 U.S. at 635 (holding that citizens have the right to possess a firearm in their homes for the purpose of self-defense).

117. See *Heller*, 554 U.S. at 627.

118. See *id.* Justice Scalia holds that the limitation on “dangerous and unusual” weapons is “supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* However, there is no precedential support beyond *Miller*, which has been effectively overruled because society today lacks traditional militias and the limitation uses the logical flow of weapons associated with militias used in *Miller* to continue a prohibition on dangerous and unusual weapons not based on self-defense within the home. Unfortunately, this mix-and-match use of decisional rules provides for more confusion than consistency. See discussion *infra* Part IV.

119. See *Heller*, 554 U.S. at 625, 627. Although Justice Scalia did not use the term “machine gun,” he was likely referring to the M16A-1 rifle, which has fully automatic capabilities. See *id.*

Aside from an issue of circularity,¹²⁰ the presumption that arms are prima facie protected conflicts with the requirement that they be in common use. This is not to mention the issue that arises when advances in technology create new and innovative ways to protect us. Just as the First Amendment protects new forms of speech, the Second Amendment should protect new forms of arms, and the current test does not do this.¹²¹

Additionally, the current test sets certain weapons up to fail to gain constitutional protection because Congress restricted those weapons in the past, preventing those weapons from being in common use. Unfortunately, this approach partly harkens back to the analysis under *Miller* and neglects to recognize that the National Firearms Act of 1934 effectively caused weapons to be removed from common use because of pricing and regulation.¹²² In *Heller*, arms do not include weapons that *are not commonly possessed* for lawful purposes.¹²³ Again, this decisional rule is problematic. *Heller* further concludes that to “bear arms” means to “wear, bear, or carry [weapons] upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready . . . in a case of conflict with another person”;¹²⁴ there is an individual right to carry “in case of confrontation.”¹²⁵ This definition begs the question: Do citizens ordinarily wear, bear, or carry weapons upon their person, in their clothing, or pocket, being armed and ready

120. See O’Shea, *supra* note 95, at 381, 384–86 (arguing that using a constitutional rule that bases protection on the “presence or absence” of certain arms “runs a serious risk of harmful circularity”).

121. See Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 197–98 (5th Cir. 2012) (adopting a two-step framework for Second Amendment challenges based on guidance from the First Amendment); *Ezell v. Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (holding that the Second Amendment “protects similarly intangible and unqualifiable interests” as the First Amendment). The *Ezell* Court goes on to explain that Second Amendment infringements are not the kind that can be compensated by damages. *Id.*

122. See National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2006)); Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387, 1393 (2009). Lerner and Lund explore the idea that but for the NFA, many of the weapons that are “unusual” would not be unusual today, and Justice Scalia’s failure to address this issue “empowers Congress to create its own exceptions to the Second Amendment so long as the Supreme Court waits awhile before it checks to see whether particular weapons are in common civilian use.” Lerner & Lund, *supra*, at 1392–93.

123. *Heller*, 554 U.S. at 625.

124. *Id.* at 584 (alterations in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)) (internal quotation marks omitted).

125. *Id.* at 592.

for conflict inside their abode?¹²⁶ No—of course not. To “bear arms” based on the *Heller* definition suggests that there is a right to self-defense outside the home because people do not bear arms inside their house, they only possess them.¹²⁷ Two questions remain unclear by the Court’s decision: (1) What are lawful arms; and (2) What is commonly possessed?

In *McDonald v. City of Chicago*, the Court held that the individual right to self-defense recognized in *Heller* is applicable to states via the Due Process Clause of the Fourteenth Amendment.¹²⁸ *McDonald* presented a very similar factual scenario to *Heller* but failed to add any significant discussion about arms. In *McDonald*, the City of Chicago banned private ownership of handguns within the city, and plaintiffs were Chicago residents who desired to possess a handgun for self-

126. See *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

127. See *Peruta v. County of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014) (holding that the Second Amendment extends outside the home); *Moore*, 702 F.3d at 936 (holding that Illinois’ ban on concealed weapons was unconstitutional). The Seventh Circuit was the first circuit to suggest that the Second Amendment right to self-defense extends outside the home when it held that the right to practice with firearms at a range is an ancillary of the right. *Ezell v. Chicago*, 651 F.3d 684, 704–10 (7th Cir. 2011). Additionally, state courts in Illinois, Ohio, Oregon, Michigan, and a plurality in Georgia have found a right to carry in public. *Hertz v. Bennett*, 751 S.E.2d 90, 96 (Ga. 2013) (Blackwell, J., concurring); *People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013); *People v. Yanna*, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012); *State v. Christian*, 307 P.3d 429, 443 n.11 (Or. 2013). On the other hand, the Second and Third Circuits have both failed to recognize an absolute right to carry in public spaces. *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3449 (U.S. Jan. 9, 2014) (No. 13-827); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013). And the state courts that do not extend the right to carry outside the home are California, D.C., Maryland, Massachusetts, and New York. *People v. Dykes*, 209 P.3d 1, 43–44 (Cal. 2009); *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010); *Williams v. State*, 10 A.3d 1167, 1177, 1179 (Md. 2011); *Commonwealth v. McCollum* 945 N.E.2d 937, 954 (Mass. App. Ct. 2011); *People v. Perkins*, 880 N.Y.S.2d 209, 210 (App. Div. 2009). Thomas Jefferson listed an individual right to self-defense with other individual freedoms:

The constitutions of most of our States assert, that all power is inherent in the people; that they may exercise it by themselves...or they may act by representatives, freely and equally chosen; *that it is their right and duty to be at all times armed*; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press.

Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in 16 THE WRITINGS OF THOMAS JEFFERSON 42, 45 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903) (emphasis added).

128. U.S. CONST. amend. XIV; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

defense.¹²⁹ The statute banning weapons was almost the same as the ban in *Heller*.¹³⁰ The issue on appeal only dealt with the application of the Court's holding in *Heller* and whether the individual right to keep and bear arms for self-defense within the home was applicable to the states via the Fourteenth Amendment.¹³¹

Justice Alito's plurality opinion focused mainly on the issue of incorporation but held, in line with *Heller*, that there is an individual right to bear arms for self-defense within the home.¹³² The opinion adopted the exceptional language from *Heller* that "prohibit[s] . . . the possession of firearms by felons and the mentally ill" and "forbid[s] the carrying of firearms in sensitive places such as schools and government buildings, or . . . impos[ed] conditions and qualifications on the commercial sale of arms" and applied it to the states.¹³³ The plurality merely adopted the *Heller* language and failed to provide further decisional rules or guidance on arms and what is sufficient to qualify a weapon as "commonly possessed." Further, the Court failed to provide an analytical framework for firearm challenges.

IV. NON-LETHAL WEAPONS STATUTES & REGULATIONS TODAY

Non-lethal arms statutes and regulations are typically governed by individual states and are so complex that average citizens are generally unable to follow or comprehend the laws. States certainly have a right to regulate within their borders, to be sure, but a state's ability to regulate pales in comparison to the monumental task that interstate travelers will face when attempting to follow state and local laws while moving through multiple states. Additionally, the federal government has statutes governing firearms but lacks any individual or

129. See *McDonald*, 130 S. Ct. at 3026.

130. Compare *Heller*, 554 U.S. at 630 ("Except for law enforcement personnel . . . , each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." (alterations in original) (quoting D.C. CODE § 7-2507.02 (2001))), with *McDonald*, 130 S. Ct. at 3026 (noting that the "City ordinance provides that '[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.' The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City." (alterations in original) (internal citation omitted) (quoting CHI., ILL., MUN. CODE § 8-20-040(a) (2009))).

131. *McDonald*, 130 S. Ct. at 3036, 3050.

132. *Id.*

133. *Id.* at 3047 (quoting *Heller*, 554 U.S. at 626-27) (internal quotation marks omitted).

comprehensive statute governing non-lethal weapons. This section will help illustrate the problems that are associated with the convoluted nature of the state-by-state non-lethal weapons scheme, which leaves many travelers without the opportunity for self-defense.

A. The Upper Mid-West: A Complicated Array of State-by-State Non-Lethal Weapons Statutes

One of the major problems that interstate travelers, especially truck drivers and families taking vacations, face when attempting to carry or use non-lethal weapons for self-defense is the plethora of varying and sometimes confusing statutes that make up state and local laws. To comply with each state's law, the traveler would have to spend an extraordinary amount of time—or hire an attorney, something that individuals traveling cross-country likely cannot afford—researching law, and possibly interpreting it incorrectly, creating a heavy burden on the traveler. One only needs to look at a couple of articles to understand the complexity and utter frustration that trained legal professionals, let alone non-legally trained citizens, will find when attempting to properly follow and categorize the array of state non-lethal weapons laws.¹³⁴

1. State-by-State

The primary objective of this state-by-state review is to show that the current statutory scheme in an increasingly mobilized country can create major problems for travelers and result in self-defense threats with little recourse. In particular, truckers and families traveling cross-

134. See, e.g., Volokh, *Nonlethal Self-Defense*, *supra* note 19, 199 app. 2 (listing the vast array of different non-lethal weapons statutes throughout the states and various provisions of such statutes that do not always make clear whether a particular defensive weapon, device, or implement is banned or not); Steven W. Kranz, Comment, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 *HAMLIN L. REV.* 637, 646–47, 654–56, 637 app. (2006) (discussing the complexity of “shall-issue” licensing, the problems associated with inconsistent statutory schemes among states, and listing thirty-eight pages of state concealed carry laws); see also Ryan S. Andrus, Note, *The Concealed Handgun Debate and the Need for State-To-State Concealed Handgun Permit Reciprocity*, 42 *ARIZ. L. REV.* 129, 155–56 (discussing the need for consistency and supporting a nation-based solution, but also acknowledging federalism concerns). Another layer of complexity that occurs with shall-issue licensing is that the statutes mainly address handguns and are not always clear whether licensing applies to handguns alone or includes concealable weapons. Unlike most states, Illinois’ new concealed carry statute explicitly excludes electric weapons, among others. 430 *ILL. COMP. STAT. ANN.* 66/5 (West 2014) (“‘Handgun’ does not include . . . a stun gun or taser . . .”).

country are particularly vulnerable to the different state laws they must follow regarding the purchase, use, and possession of non-lethal weapons.¹³⁵ This section will start by explaining the varied and complicated non-lethal weapons statutes in Illinois, Michigan, Wisconsin, Indiana, and Minnesota. While evaluating the different statutes, it will be easy to demonstrate that individuals who travel from state-to-state will become overwhelmed by trying to figure out and comport with the laws and will do one of two things: (1) forgo carrying a weapon altogether and thus subject themselves to increased risk of harm; or (2) carry the weapon illegally, recognizing that they would rather protect themselves and their family and risk potential liability than go unarmed. This section will also demonstrate that if one state in a line of states prohibits the carrying of non-lethal weapons, it can make it incredibly difficult to carry and use those weapons in bordering states.

Before forging on, it is critical to have a brief understanding of concealed carry laws and reciprocity. Concealed carry laws in each state vary, but generally speaking, they provide for an application process that a citizen will complete in order to obtain and carry a weapon.¹³⁶ Each state has different requirements, such as a minimum amount of training, or disqualifiers, such as a conviction for an act of violence.¹³⁷ Reciprocity allows a non-resident to carry within that state, subject to certain requirements and restrictions.¹³⁸ The most typical requirement is that the non-resident has a concealed carry permit from his home state.¹³⁹ Each state decides whether or not to offer reciprocity to other states and vice-a-versa.¹⁴⁰ Throughout the multiple state surveys, reciprocity arrangements may arise.

a. Illinois

Before July 9, 2013, Illinois was the last state to enact legislation that

135. These two types of travelers, families on vacation and truckers, were picked because they are most likely to travel interstate and would be the most likely to need protection because they spend so much time on the road and would be required to comply with varying state and local laws before entering each state.

136. See, e.g., WIS. STAT. § 175.60 (2011–2012).

137. See, e.g., *id.* § 175.60(3)–(4).

138. See, e.g., *id.* § 175.60(18).

139. See, e.g., WIS. ADMIN. CODE JUS § 17.13 (May 2013).

140. See, e.g., *id.*

allows citizens to conceal and carry weapons.¹⁴¹ Two cases provided the impetus for this legislation: a Seventh Circuit case and an Illinois Supreme Court case.¹⁴² After a tumultuous round of legislating and negotiating, and a looming deadline, the state passed a new concealed carry law that allows citizens to carry handguns.¹⁴³ While the state of Illinois passed a *shall* issue concealed carry statute in response, the law explicitly exempts a stun gun or taser.¹⁴⁴ The criminal code prohibits the carry and possession of a “bludgeon, black-jack, slung-shot, sand-club, sand-bag, metal knuckles or other knuckle weapon regardless of its composition, throwing star, or any knife,” or any stun gun or taser if it is carried with an intent to use it against another “unlawfully,” unless “when on his land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an

141. See Firearm Concealed Carry Act, Ill. P.A. 98-63 (2013) (codified at 430 ILL. COMP. STAT. ANN. 66/1-999 (2014)); Brenden Moore, *Illinois Gears Up for Concealed Carry*, DEPAULIA (Jan. 12, 2014, 9:01 PM), <http://www.depauliaonline.com/nation-world/illinois-gears-up-for-concealed-carry-1.3129740#.UuKz19LnaM8>; William Spain, *Illinois Allows Concealed Firearms to Be Carried*, USATODAY.COM (Jan. 8, 2014, 6:52 PM), <http://www.usatoday.com/story/news/nation/2014/01/08/illinois-concealed-guns-carry-chicago/4379409/>.

142. See *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901, 902 (7th Cir. 2013) (holding that Illinois' concealed carry ban was unconstitutional and giving the state 180 days to enact legislation); *People v. Aguilar*, 2 N.E.3d 321, 328 (Ill. 2013) (holding that the state's aggravated unlawful use of a weapon statute, which prohibited concealed carry, violated the Second Amendment).

143. Ray Long et al., *General Assembly Overrides Governor's Veto of Concealed Carry Bill*, CHI. TRIB. (July 9, 2013 10:10 PM), <http://www.chicagotribune.com/news/local/breaking/chi-illinois-concealed-carry,0,4356935.story>. Illinois' Governor, Pat Quinn, was attempting to provide more stringent regulation of handguns in the bill: to include a ban on carrying firearms in places that sell alcohol, to restrict magazine capacity, and to limit the carrying of a concealed firearm to one at a time. *Id.* Although Governor Quinn attempted to change the bill through an amendatory veto, the legislature overrode the altered bill. *Id.*; *Bill Status of HB0183*, ILGA.GOV, <http://www.ilga.gov/legislation/billstatus.asp?DocNum=0183&GAID=12&GA=98&DocTypeID=HB&LegID=69231&SessionID=85&SpecSess=#actions> (last visited Apr. 6, 2014).

The amendatory veto process is a power granted to Illinois governors allowing them to make changes to bills that have passed. If a simple majority in each chamber accepts the governor's changes, the altered bill becomes law. If three fifths of each chamber (36 of the state's 59 senators, and 71 of the 118 representatives) vote to override the veto, the original bill becomes law. If neither happens, the bill is dead.

Kurt Hofmann, *Governor Quinn Violates U.S. and Illinois Constitutions Simultaneously*, EXAMINER.COM (Aug. 1, 2012), <http://www.examiner.com/article/governor-quinn-violates-u-s-and-illinois-constitutions-simultaneously>; see also ILL. CONST. art. IV, § 9.

144. See Firearm Concealed Carry Act, Ill. P.A. 98-63 § 5 (2013) (codified at 430 ILL. COMP. STAT. ANN. 66/5 (West 2014)) (“‘Handgun’ does not include . . . a stun gun or taser . . .”).

invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm."¹⁴⁵ It is legal to carry a non-lethal "liquid gas or substance" that is designed for personal use (i.e., irritant sprays).¹⁴⁶

b. Wisconsin

Under Wisconsin law, an individual who possesses or uses electric weapons is guilty of a Class H felony unless the individual is a licensee or is carrying in his own dwelling, place of business, or on his own land.¹⁴⁷ The most recent exception allowed by state law for the carry of concealed electric weapons is that the individual is a licensee.¹⁴⁸ For concealed carry purposes, a "weapon" is "a handgun, an electric weapon, . . . a knife other than a switchblade knife . . . or a billy club."¹⁴⁹ A licensee must be at least twenty-one years of age, pass a background investigation, and provide proof of training.¹⁵⁰ Additionally, the

145. 720 ILL. COMP. STAT. ANN. 5/24-1(a)(1)-(4) (West 2010). However, the exception for abode does not apply to or affect the transport of such weapons unless they (1) "are broken down in a non-functioning state"; (2) "are not immediately accessible"; or (3) "are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card." *Id.* 5/24-1(a)(4).

146. *Id.* 5/24-1(a)(3).

147. WIS. STAT. § 941.295(1m), (2g) (2011-2012). This excludes police officers, armed forces on duty, or corrections personnel. *Id.* By contrast, individuals who carry a concealed handgun are guilty of a Class A misdemeanor. WIS. STAT. § 941.23(2). A Class H felony subjects the convicted to "a fine not to exceed \$10,000," imprisonment not exceeding six years, or both. *Id.* § 939.50(3)(h). A Class A misdemeanor subjects the convicted to a fine not to exceed \$10,000, imprisonment not exceeding nine months, or both. *Id.* § 939.51(3)(a). By the logic of the Wisconsin statutes, the penalty for possessing an electric weapon subjects one to a substantially higher maximum penalty than the concealed carry of a pistol, potentially five years and three months more imprisonment.

148. 2011 Wis. Act 35 § 38 (codified at WIS. STAT. § 175.60(1)(j), (2g)).

149. WIS. STAT. § 175.60(1)(j).

150. *Id.* § 175.60(3)(a), (4)(a), (9)(g). The training requirement according to Wisconsin Act 35 is a copy of a document that the applicant completed training for any of the following: hunter safety program; firearm safety course conducted by a state or national organization, law enforcement agency, or school; military training; or unrevoked concealed carry license from another state. 2011 Wis. Act 35 § 38 (codified at WIS. STAT. § 175.60(4)(a)); *CCW Training Requirements*, WIS. DEP'T OF JUSTICE, <http://www.doj.state.wi.us/dles/cib/conceal-carry/training-requirements> (last visited Feb. 3, 2014). After Wisconsin Act 35 was passed, the Wisconsin Department of Justice and Attorney General, J.B. Van Hollen, were given authority to promulgate rules regarding training and decided that four hours training was sufficient to meet statutory requirements. 2011 Wis. Act 35 § 22 (codified at WIS. STAT. § 165.25(12m)); Mark R. Hinkston, *Wisconsin's Concealed Carry Law*, WIS. LAW., July 2012, at 10, 15. The governor of Wisconsin, Scott Walker, approved the DOJ's temporary four-hour training requirements until permanent rules were written. Patrick Marley, *Concealed Weapons Rules Signed*, MILWAUKEE J. SENTINEL, Oct. 15, 2011, at B1. In November, the

individual must be legally able to own and possess a handgun.¹⁵¹

Interestingly, the concealed carry statute does not restrict devices that contain and deploy OC. Tear gas, UV dye, or combination sprays are not permissible, while OC spray is legal, subject to Wisconsin Department of Justice regulations.¹⁵² These regulations provide that the device cannot contain more than 10% OC,¹⁵³ the entire weight of ingredients must not exceed sixty grams,¹⁵⁴ and if it is sold in Wisconsin, it must have an effective range of at least six feet, but not more than twenty feet.¹⁵⁵ It is less clear what blunt force weapons can be possessed or carried on one's person, concealed, or in the vehicle.¹⁵⁶ Like most states, possessing these devices within your own home, on your own land, or within your place of business, is legal.¹⁵⁷

Legislature's Joint Committee for Review of Administrative Rules overruled J.B. Van Hollen and, by a 7-3 split, removed the hourly training requirement from the rules. Patrick Marley, *Need for 4 Hours of Gun Training Tossed*, MILWAUKEE J. SENTINEL, Nov. 8, 2011, at A1.

151. WIS. STAT. § 175.60(3).

152. *Id.* § 941.26(4)(a), (4)(i)(2); WIS. ADMIN. CODE JUS § 14.05 (Feb. 2014).

153. JUS § 14.05.

154. *Id.* § 14.07.

155. *Id.* § 14.06.

156. Weapons for concealed carry purposes are handguns, electric weapons, knives other than switchblades, or billy clubs. WIS. STAT. § 175.60(1)(j). However, these weapons only seem to apply to concealed carry because there is a special statute that restricts the possession of electric weapons for everyone except permit holders, *Id.* § 941.295, while there are no other possession statutes for other blunt objects. However, Wisconsin does restrict "dangerous weapons" for those under eighteen. *Id.* § 948.60(2)(a). That statute has a special definition for dangerous weapons that only applies to that section and includes:

[A]ny firearm, loaded or unloaded; any electric weapon, as defined in s. 941.295(1c)(a); metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles; a nunchaku or any similar weapon consisting of 2 sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather; a cestus or similar material weighted with metal or other substance and worn on the hand; a shuriken or any similar pointed star-like object intended to injure a person when thrown; or a manrikigusari or similar length of chain having weighted ends.

Id. § 948.60(1). The ultimate conclusion is that if the weapons are specifically listed under section 948.60 and not listed under section 175.60, then all the other weapons are okay for concealed possession.

157. WIS. STAT. § 941.295(2g)(b). Prior to the passage of Wisconsin Act 35, Wisconsin did not protect one's ability to carry weapons in one's place of business and, up until 2003, private business owners were unable to conceal weapons at their places of business. *See* 2011 Wis. Act 35 § 55 (codified at WIS. STAT. § 941.23(2)(e)); *State v. Hamdan*, 2003 WI 113, ¶¶ 3-4, 84, 264 Wis. 2d 433, 665 N.W.2d 785 (holding that private store owners have a constitutional right to concealed carry). Wisconsin does not recognize concealed carry in a vehicle for those without a license. *See, e.g., State v. Fisher*, 2006 WI 44, ¶¶ 32, 65, 290 Wis.

c. Michigan

The state of Michigan allows electric weapons to be openly carried in public,¹⁵⁸ possessed in the home,¹⁵⁹ or concealed carry with a license.¹⁶⁰ A licensee (whether resident or non-resident) is required to carry a valid driver's license and concealed carry license anytime they are carrying.¹⁶¹ Additionally, if someone who is carrying a concealed weapon is stopped by a peace officer, he must "immediately disclose to the peace officer that he or she is carrying a pistol" or other weapon.¹⁶² Further, a peace officer can request to see the person's license and at that time, the person must show the peace officer his license to carry a concealed pistol and his driver's license.¹⁶³ The possession and carrying of a "self-defense spray or foam device" is allowed subject to certain device requirements,¹⁶⁴ but is generally allowed for those over eighteen years of age.¹⁶⁵ Finally, the possession and carry of dangerous weapons are restricted to the home, place of business, or other land owned by that

2d 121, 714 N.W.2d 495 (using an "extraordinary circumstances" test for carrying in vehicles); *State v. Cole*, 2003 WI 112, ¶¶ 49, 50, 264 Wis. 2d 520, 665 N.W.2d 328. The extraordinary circumstances test created a rule that will almost always prevent concealed carry in a vehicle. Unless the individual "reasonably believes that he or she is *actually confronted* with a threat of bodily harm or death and that carrying a concealed weapon is necessary for protection from the threat," ordinary circumstances exist. *Fisher*, 2006 WI 44, ¶ 32 (emphasis added). This process (or test) is devoid of realities in the real world. The problem is that individuals are not given notice prior to an assault, robbery, rape, or murder. Justice Ann Walsh Bradley (the author of the opinion) seems to be operating in an academic and legal world where all criminals abide by basic presumptions of logic, which is wholly out of touch with the practical effects of this test, and effectively prevents individuals from protecting themselves until it is too late. See *Fisher*, 2006 WI 44. Robbers and rapists do not send you a formal memo giving you sufficient notice to get some concealed carry permit or other self-defense weapon before they strike—they operate on surprise.

158. *People v. Yanna*, 824 N.W.2d 241, 245–46 (Mich. Ct. App. 2012) (holding that tasers and stun guns were arms sufficient for protection under the Second Amendment).

159. *Id.* at 246.

160. MICH. COMP. LAWS ANN. § 750.224a(2)(b) (West Supp. 2013). Additionally, non-residents can carry concealed in Michigan if they are licensed by another state to carry. *Id.*; MICH. COMP. LAWS ANN. § 28.432a(1)(h) (West 2012).

161. MICH. COMP. LAWS ANN. § 28.425f(1) (West 2012). This requirement applies to all law enforcement personnel, including other state and federal officers. *Id.*

162. *Id.* § 28.425f(3).

163. *Id.* § 28.425f(2).

164. See MICH. COMP. LAWS ANN. § 750.224d(1)(a) (West Supp. 2013) (requiring the device to contain "[n]ot more than 35 grams of [CS] and inert ingredients. . . . [or] not more than 10% [OC]").

165. *Id.* § 750.224d(4).

person.¹⁶⁶

d. Indiana

The Indiana statute prohibiting an individual from carrying a handgun on himself or in his vehicle without a license¹⁶⁷ applies to electric weapons.¹⁶⁸ However, to carry or possess other dangerous weapons seems legal because there is minimal regulation of those objects. The only place in the statutes where “deadly weapon” is used is where a predicate crime, like battery, was committed with a deadly weapon.¹⁶⁹ Chemicals designed to incapacitate are considered deadly weapons when used unlawfully, but there is no statute directly prohibiting the purchase, possession, or carry of irritant sprays or their subsequent use for self-defense.¹⁷⁰

166. MICH. COMP. LAWS ANN. § 750.227(1) (West 2004) (“A person shall not carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon, except a hunting knife adapted and carried as such . . .”). A dirk is a dagger. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 513 (4th ed. 2000). The 17th century Scottish dirk came from the medieval ballock dagger, a short, thinner, more concealable weapon than the more modern dirk. See Chad Arnow, *Spotlight: The Scottish Dirk*, MYARMOURY.COM, http://www.myarmoury.com/feature_spot_dirks.html (last visited Jan. 15, 2014). For an interesting history of the dirk and its development, see *id.* The Imperial Japanese Navy officers carried and used the dirk, unlike the English officers who carried a sword. FRED. T. JANE, THE IMPERIAL JAPANESE NAVY 276 (1904). The stiletto the statute references is not the stiletto heel (although some could certainly be used as weapons), but a dagger-like knife intended to be used for stabbing as opposed to regular daggers that can slash and cut. PETER LIMBURG, WHAT’S IN THE NAMES OF ANTIQUE WEAPONS 78 (1973).

167. See IND. CODE ANN. § 35-47-2-1 (LexisNexis 2009).

168. *Id.* § 35-47-8-4. Minors are also prohibited from purchasing or possessing electric weapons. See *id.* § 35-47-8-5(a).

169. See, e.g., *id.* § 35-42-2-1(a)(3). These statutes increase the felony level when committing crimes with “deadly weapons,” which are defined as a “loaded or unloaded firearm” or

A destructive device, weapon, device, taser . . . or electronic stun weapon . . . equipment, chemical substance, or other material that in the manner it . . . could ordinarily be used; or . . . is intended to be used; is capable of causing serious bodily injury.

IND. CODE ANN. § 35-31.5-2-86(a) (LexisNexis 2012). However, this statute excludes law enforcement officials when using the device according to their training and while engaged in official duties. *Id.* § 35-31.5-2-86(b).

170. See *id.* § 35-31.5-2-86(a); *supra* notes 69–74 (discussing the use of chemicals designed to incapacitate).

e. Minnesota

In Minnesota, citizens may possess and use electric weapons and tear gas compounds to defend themselves.¹⁷¹ These weapons are subject to multiple regulations, such as requiring that the device be labeled or accompanied with instructions,¹⁷² that local licensing requirements are followed,¹⁷³ and that they cannot be sold to minors or to individuals who have committed certain crimes.¹⁷⁴ However, minors under sixteen can possess tear gas compounds with the permission of their parent or guardian; minors under eighteen are prohibited from possessing any electric weapons.¹⁷⁵ The use of blunt force objects takes a slightly tricky trajectory: possessing and carrying most dangerous weapons is legal unless done for an unlawful purpose.¹⁷⁶ Dangerous weapons do not include metal knuckles or switch blade knives because a separate line in that subsection specifically precludes the manufacture, possession, or sale of those items.¹⁷⁷ Although minors are able to handle or use a firearm, air gun, ammunition, or explosive (hopefully this means fireworks) with their parent's written permission, the statutes do not clarify what other non-lethal weapons can be carried by minors.¹⁷⁸

2. State-by-State Problems

The problems inherent in a state-by-state system where individuals are prevented from protecting themselves with non-lethal weapons are

171. MINN. STAT. ANN. § 624.731 subd. 2 (West 2009). Under this statute, authorized tear gas compounds include “a lachrymator or any substance composed of a mixture of a lachrymator including chloroacetophenone, alphachloroacetophenone; phenylchloromethylketone, orthochlorobenzalmalonitrile or oleoresin capsicum, commonly known as tear gas.” *Id.* § 624.731 subd. 1(1).

172. *Id.* § 624.731 subd. 2(a).

173. *Id.* § 624.731 subd. 5.

174. *Id.* § 624.731 subd. 3(a)–(b). Also, like most states, Minnesota law does not prohibit the possession and use of these devices by local, state, and federal law enforcement and the military. *Id.* § 624.731 subd. 6.

175. *Id.* § 624.731 subd. 3(a).

176. *Id.* § 609.66 subd. 1(1)–(5). Subsection 5 specifically forbids the possession of “any other dangerous article or substance” used unlawfully. *Id.* § 609.66 subd. 1(5).

177. *See id.* § 609.66 subd. 1(4). The dangerous weapons definition is quite broad. *Id.* § 609.02 subd. 6 (“‘Dangerous weapon’ means any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.”).

178. *See id.* § 609.66 subd. 1b.

heightened when individuals are traveling in their vehicles, especially with their families. Traveling families and truckers spend most of their time in vehicles driving, and they spend nights in motels, at truck stops, or on the side of the road. While making these trips, these travelers are particularly vulnerable to attacks in the form of hijackings, cargo thefts, sexual assaults, and abductions.¹⁷⁹ The heightened use of roadways throughout the country has increased roughly sixty-five percent in the past twenty-five years,¹⁸⁰ underscoring the increasingly important need for individuals to protect themselves within their own vehicles.

The problem of interstate non-lethal weapons statutes may be demonstrated by imagining the different laws a trucker or family of four traveling from Minnesota to Michigan (necessitating travel through Wisconsin, Illinois, and Indiana) would encounter. In Minnesota, adults and minors above sixteen can carry irritant spray, including tear gas compounds, and adults can use electric weapons.¹⁸¹ Moving to Wisconsin, irritant sprays are allowed, except one must be eighteen years of age¹⁸² and all other weapons are unavailable to possess unless one has a concealed carry license.¹⁸³ Additionally, a licensee must be

179. See Blake Morrison, *Along Highways, Signs of Serial Killings—At Least 459 Believed Slain in the Past 40 Years*, USA TODAY, Oct. 5, 2010, at A1 (reporting 459 murders by suspected serial killers who use the interstate highway system to find and dispose of the bodies); Bruce C. Smith, *Highway Hijackers Target Truckers' Loot*, INDIANAPOLIS STAR, Feb. 25, 2010, at A1 (reporting the assault and hijacking of a truck driver in Indiana and the rise of highway-based hijackings); *Highway Serial Killings: New Initiative on an Emerging Trend*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/news/stories/2009/april/highwayserial_040609 (last visited Feb. 19, 2014) (announcing the Highway Serial Killings initiative to raise awareness among law enforcement and the general public regarding the issue); *Man Arrested in Multimillion-Dollar Car Theft Ring Based in Illinois*, LEADER (Oct. 8, 2012, 6:38 PM), <http://leaderpub.com/2012/10/08/man-arrested-in-multimillion-dollar-car-theft-ring-based-in-illinois/> (reporting a multi-million dollar car theft ring that used the interstate highway system). In response to crime on the interstate system, the National Crime Prevention Council created a national Highway Watch system, similar to a neighborhood watch. See *Strategy: Highway Watch*, NAT'L CRIME PREVENTION COUNCIL, <http://www.npc.org/topics/home-and-neighborhood-safety/strategies/strategy-highway-watch> (last visited Feb. 8, 2014).

180. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC VOLUME TRENDS: DECEMBER 2012 (2013), available at http://www.fhwa.dot.gov/policyinformation/travel_monitoring/12dectvt/12dectvt.pdf (reporting the total travel in millions of vehicle-miles traveled in 1987 at 1,924,328, and in 2012 at 2,938,535).

181. See MINN. STAT. ANN. § 624.731 subd. 2, 3.

182. See WIS. STAT. § 941.26(4)(k) (2011–2012) (“Any person who has not yet attained the age of 18 years and who possesses a device or container described in par. (a)[, a device or container that contains OC,] is subject to a Class E forfeiture.”).

183. See *id.* § 175.60(1)(j), (2g).

twenty-one years old, barring the possible possession of these weapons for someone who is not yet twenty-one.¹⁸⁴ If a family was traveling through Wisconsin, the only non-lethal weapon it could possess would be an irritant spray, preventing travelers from possessing and carrying a majority of non-lethal weapons options.¹⁸⁵ Once the travelers move into Illinois, the issues become much more complicated. Although concealed carry recently went into effect in Illinois, the legislation does not authorize concealed carry of a stun gun or taser.¹⁸⁶ Additionally, if one does not have a concealed carry permit, most weapons in a vehicle must be in the trunk, locked up, disassembled, or have the batteries removed.¹⁸⁷ This means that anyone who is not from the state of Illinois must adhere strictly to the vehicle transportation laws and must be lawful possessors in their home state.¹⁸⁸

Next, Indiana requires a license to concealed carry, but it is not clear if the state prohibits the possession or use of certain non-lethal weapons, whether one is walking about in public or in one's vehicle.¹⁸⁹ Michigan does allow the family to possess a weapon in the vehicle, but if pulled over the family must immediately notify law enforcement that it is in possession of a weapon, and the family is prevented from possessing and carrying other dangerous weapons in the family's vehicle.¹⁹⁰ Ultimately, the practical reason for carrying non-lethal weapons in your vehicle—self-defense—is rendered pointless when you travel through some of these states because restrictions in one state can prevent the ability to

184. *See id.* § 175.60(3)(a).

185. *See id.* § 941.26(4)(a), (4)(i)(2); WIS. ADMIN. CODE JUS ch. 14 (Feb. 2014).

186. Firearm Concealed Carry Act, Ill. P.A. 98-63 § 5 (2013) (codified at 430 ILL. COMP. STAT. ANN. 66/5 (2014)). Illinois does allow non-residents to get a concealed carry permit, but there is no reciprocity for those that currently have a concealed carry permit from another state, except if individuals are driving through Illinois and the weapon remains in the vehicle. *See* 430 ILL. COMP. STAT. ANN. 66/40. This can create additional burdens for non-residents driving through Illinois.

187. 430 ILL. COMP. STAT. ANN. 65/2(a)(1), (b)(9) (West 2014). The Illinois Supreme Court recently reversed the ban preventing non-residents from possessing a weapon or ammunition unless they had a FOID card. *See People v. Holmes*, 948 N.E.2d 617, 624 (Ill. 2011). After this ruling, if one is moving from Milwaukee, Wisconsin to Gary, Indiana the trip would normally take 120 miles or two hours (depending on Chicago area traffic); however, under prior Illinois law, this same trip would have required a major detour in order to comply—either through the upper peninsula of Michigan (747 miles or 12 hours) or out to Iowa and around Illinois (1,124 miles or 18.5 hours).

188. *See Holmes*, 948 N.E.2d at 624; 430 ILL. COMP. STAT. ANN. 66/40.

189. *See* IND. CODE ANN. §§ 35-47-2-1, 35-47-8-4 (LexisNexis 2009).

190. MICH. COMP. LAWS ANN. § 28.425f(3) (West 2012); MICH. COMP. LAWS ANN. § 750.227(1) (West 2004).

possess in other states, even if your final destination allows for the possession of those weapons. Additionally, this would create issues for someone who owns and possesses these weapons legally in one state but is moving to certain other states, like Illinois¹⁹¹ or Michigan.¹⁹² The complicated nature of state-by-state statutes, coupled with the increased need for individuals to protect themselves in their vehicles, underscores the need for more constitutional clarity in regard to what qualifies as arms and how far the right of self-defense extends.

B. Federal Non-Lethal “Arms” Statutes & Regulations

There are two areas where the federal government has rules in regard to arms: laws and regulations.¹⁹³ The Firearm Owners' Protection Act (FOPA),¹⁹⁴ commonly cited in reference to interstate firearms travel, protects persons traveling with firearms through states that would otherwise prohibit them.¹⁹⁵ However, FOPA does not extend to non-

191. See *supra* Part IV.A.1.b. According to the Illinois State Police website, “[n]ew Illinois residents have sixty calendar days after obtaining an Illinois driver’s license or Illinois Identification Card to obtain a FOID card.” *Firearm Owner’s Frequently Asked Questions*, ILLINOIS ST. POLICE, <http://www.isp.state.il.us/foid/firearmsfaq.cfm> (last visited Feb. 5, 2014). However, the answers on the website “are meant only to give general guidance” regarding transporting firearms and ammunition. *Id.* “The answers do not and are not meant to replace statutory language.” *Id.* And finally, individuals transporting weapons are still required to follow all the state laws and local ordinances, of which, the City of Chicago and other Chicago area suburbs have seemingly changed after *McDonald v. City of Chicago*. See *McDonald v. City of Chicago*, 130 S. Ct 3020, 3047–50 (2010); *Firearm Owner’s Frequently Asked Questions, supra*; see also Azam Ahmed, *NRA Sues Chicago, 3 Towns to Repeal Bans on Firearms*, CHI. TRIB., June 28, 2008, at 18; James Kimberly & Andrew L. Wang, *Suburbs with Gun Bans Split on Court Ruling*, CHI. TRIB., June 27, 2008, at 20. Although the City of Highland Park, a suburb of Chicago, still has a handgun possession prohibition on its books that would prevent non-residents from coming into the community with a handgun, it provides exceptions for law enforcement, military, and a few others. HIGHLAND PARK, ILL., CODE § 134.003 (1974), available at http://www.cityhpil.com/documents/21/31/CHAPTER%20134%20HANDGUN%20CONTROL_201310240852059539.pdf.

192. See *supra* Part IV.A.1.c.

193. See, e.g., 18 U.S.C. ch. 44 (2012); 27 C.F.R. pt. 479 (2013).

194. Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C § 921).

195. 18 U.S.C. § 926A. See, e.g., *Coal. of N.J. Sportsmen v. Florio*, 744 F. Supp. 602, 609–10 (1990). The safe harbor provision provides:

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither

lethal weapons. Another set of laws deal with the Bureau of Alcohol, Tobacco, and Firearms (ATF), under Chapter 44 of Title 18 of the United States Code, which regulates federal gun laws.¹⁹⁶ The federal firearms law covers five broad areas: prohibited persons;¹⁹⁷ acquisition and manufacture;¹⁹⁸ interstate transportation;¹⁹⁹ antiques;²⁰⁰ and unlawful use.²⁰¹ Each of these areas revolves around the term “firearm,” which is defined as “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.”²⁰² Federal law does regulate the purchase, manufacture, or possession of tasers because the ATF does not classify tasers as firearms.²⁰³ However, an argument could be made that a definitional

the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: *Provided*, That in the case of a vehicle without a compartment separate from the driver’s compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A.

196. 18 U.S.C. ch. 44; 28 C.F.R. § 0.130(a)(1) (delegating the Attorney General’s powers under 18 U.S.C. ch. 44 to the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives).

197. 18 U.S.C. § 931.

198. *Id.* § 923.

199. *Id.* § 922(a)(1)(A).

200. *Id.* § 921(a)(3)(D), (a)(16).

201. *Id.* § 922.

202. *Id.* § 921(a)(3).

203. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, U.S. DEP’T OF JUSTICE, ATF RULING 80-20 (1980) [hereinafter ATF RULING 80-20], *available at* <http://www.atf.gov/files/regulations-rulings/rulings/atf-rulings/atf-ruling-80-20.pdf>; 27 C.F.R. § 478.11 (2013) (defining firearm). The Bureau originally determined that a taser, which used gunpowder to fire the electrical barbs, was subject to the federal firearms law:

Held, a hand-held device designed to expel by means of an explosive two electrical contacts (barbs) connected by two wires attached to a high voltage source in the device is a “firearm” within the purview of 18 U.S.C. 921(a)(3)(A). It is also an “any other weapon” under the National Firearms Act (26 U.S.C. 5845(e)).

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, U.S. DEP’T OF JUSTICE, ATF RULING 76-6 (1976), *available at* <http://www.atf.gov/files/regulations-rulings/rulings/atf-rulings/atf-ruling-76-6.pdf>; 27 C.F.R. § 178.11 (1976). However, subsequent design changes to tasers, specifically the mechanism used to release and expel the projectiles, changed from gunpowder to a combination of electric battery and nitrogen, convinced the ATF that the new models were not firearms and therefore not subject to federal regulations for the manufacture, sale, and possession of these devices. *See* ATF RULING 80-20, *supra*; 27 C.F.R.

change to “firearm” would include non-lethal weapons under federal law or the enactment of different legislation.²⁰⁴

The federal government does regulate non-lethal weapons through several federal agencies, such as the Transportation Security Administration,²⁰⁵ Department of the Army,²⁰⁶ and many others that regulate what civilians can bring beyond certain points.²⁰⁷ Additionally,

§ 478.11 (2013) (defining firearm); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-464, TASER WEAPONS: USE OF TASERS BY SELECTED LAW ENFORCEMENT AGENCIES 18 (2005).

204. Congress could likely enact legislation governing criminal actions and the use of non-lethal weapons. Most of the provisions listed under the federal firearms statutes could apply to the regulation of non-lethal weapons. One interesting discussion would occur if Congress attempted to regulate non-lethal weapons in or near schools. See Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (codified at 18 U.S.C. § 922(q)(2)(A)(2012)). Although *United States v. Lopez* would be invoked by arms advocates, it is likely that Congress would attempt to tie that regulation more closely to other gun laws, similar to the re-written version of the Gun Free School Zones Act, which has not been declared unconstitutional. See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding the Interstate Commerce Clause does not give Congress the power to regulate the acceptable proximity of a gun to a school zone); Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-369-71 (codified at 18 U.S.C. § 922(q)(2)(A)).

205. 49 C.F.R. § 1540.111 (2013). However, there are some regulations that allow certain airline personnel to carry non-lethal weapons on planes. See 49 U.S.C. § 44903(i) (2006).

206. 32 C.F.R. §§ 552.101(a)(8), 552.127 (2013) (prohibiting the sale, possession, carry, or transportation of certain weapons, including stun guns and tasers, on certain military installations and facilitates).

207. See, e.g., TRANSP. SEC. AGENCY, PREPARE FOR TAKEOFF: TSA'S PROHIBITED ITEMS LIST (2014), available at http://www.tsa.gov/sites/default/files/assets/prohibiteditems_brochure.pdf. For most federal agencies, civilians are not admitted without clearance through the organization and a pass through a metal detector. For example, the TSA screens civilians for civilian travel by air and limits the objects that can be taken in the cabin and those that can be checked and stored underneath the cabin. *Id.* Most air passengers are unfamiliar with TSA regulations that allow travelers to check bags containing certain weapons. See *id.* (allowing travelers to check box cutters, razors, scissors, swords, ammunition, BB guns, firearms, flare guns, axes, hatchets, crowbars, cattle prods, billy clubs, black jacks, brass knuckles, kubatons, martial arts weapons, night sticks, nunchucks, electric weapons, throwing stars, and one four ounce self-defense spray as long as it has a safety mechanism and contains less than 2% of CS or CN). The TSA recently proposed to allow small knives (no more than 2.36 inches in length and ½ inch wide) on planes, prompting widespread confusion, concern, and opposition, which led to the abandonment of the proposal. Martin Hugo, *Regulation: Change Allowing Knives on Planes Is Delayed*, L.A. TIMES, Apr. 23, 2013, at B1; see also, e.g., Matt Hosford & Lauren Effron, *American Airlines Joins Opposition to TSA Policy on Knives*, ABCNEWS.GO.COM (Mar. 12, 2013), <http://abcnews.go.com/Travel/american-airlines-joins-opposition-tsa-policy-knives/story?id=18711518>; Thom Patterson & Catherine E. Shoichet, *TSA Chief Faces Critics, Says New Knife Policy Will Stand*, CNN.COM (Mar. 15, 2013, 6:45 AM), <http://www.cnn.com/2013/03/14/travel/tsa-knives-congress/index.html> (discussing the TSA Chief's reasoning for allowing small knives in airline cabins); *Opposition to Allowing Small Knives on Planes Grows*, CBSNEWS.COM (Mar. 8, 2013, 7:02 AM), <http://www.cbsnews.com>.

the Department of Commerce regulates the export sales of tasers.²⁰⁸ However, the regulation in these cases is very specific and does not touch on issues of states' rights or the ability of individuals to be armed for self-defense (because the places that prohibit weapons have armed security for protection). The current federal scheme does not address the issue of non-lethal weapons—nor should it. Federalism issues give states most of the power to regulate weapons laws, leaving the Court in a unique position to keep the power to regulate in the states' hands and simultaneously allow law-abiding citizens to use non-lethal weapons for self-defense.

V. NON-LETHAL WEAPONS AS “ARMS” AND COMMON USE FOR SELF-DEFENSE: WHY PRECEDENT & PRACTICALITY SUPPORT THIS APPROACH

The Second Amendment provides for an individual right to self-defense in the home.²⁰⁹ The Second Amendment also provides a right to bear arms for self-defense.²¹⁰ The questions then become: Does the right extend outside the home, and what arms can be used for self-defense? Where the problem starts is not with the newly recognized right but with the lack of decisional rules, leaving legal scholars and courts to speculate: What are arms and what constitutes common use? This problem is compounded by the overly burdensome state laws that regulate—and in some cases prohibit—the possession and carry of non-lethal arms.²¹¹ Citizens attempting to use non-lethal weapons as a means for self-defense are left without viable alternatives and in some cases may carry lethal weapons instead. The Court has a unique opportunity to remedy these problems by adopting a decisional rule that modifies common use for new weapons by adding a reasonable use test for self-defense to new weapons. Adopting this rule will also add a level of

com/8301-201_162-57573206/opposition-to-allowing-small-knives-on-planes-grows/ (reporting opposition to allowing small knives in airline cabins from the flight attendant union, the Federal Law Enforcement Officers Association (which represents federal air marshals), pilots, and even insurance companies).

208. 15 C.F.R. pt. 774 supp. 1, 0A985 (2013).

209. See U.S. CONST. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

210. See U.S. CONST. amend. II; *Heller*, 554 U.S. at 635.

211. See discussion *supra* Part IV. Undoubtedly, most states have significant laws regarding weapons and new constitutional decisional rules will have a substantial impact on those states attempting to comply. This is why it is so critically important to think about the impact that a decisional rule will have for the type of arm and place that is protected by the Second Amendment's right to self-defense.

protection for self-defense based on location and arm type in a fashion similar to the protections provided by the expectation of privacy under the Fourth Amendment. The discussion below provides the basic framework for the actions the Court should take and sets forth the precedential and practical support for these decisional rules.

A. Adjusting “Common Use”

The entire framework surrounding the determination of arms under *Heller* provides a varied and complicated approach to determining what weapons qualify as arms under the Second Amendment.²¹² Some commentators have been concerned about the common use test for developments in new weaponry.²¹³ One of these commentators has argued for a test that evaluates whether or not the weapon is “no more practically dangerous than what is in common use among law-abiding citizens.”²¹⁴ This test would use the elements of *Heller*: “[C]ommon use, unusualness, dangerousness, and use by law-abiding citizens for lawful purposes.”²¹⁵ While this test seems helpful, it still, as the author of the test notes, is not a “perfect way of reading” *Heller*.²¹⁶

Understandably, the Court in *Heller* was constrained by *Miller*. The common use test alone makes sense when weapons have been around and are readily available to the public. However, the Court could not have meant that anytime a weapon achieves common use status it would achieve constitutionally protected status because a group like the National Rifle Association could tell members to buy more of a particular weapon in order to make it commonly used. This would allow lawful possession of certain types of weapons that even the most strident supporter of the Second Amendment would feel uncomfortable with. And, as argued earlier, this test can prevent problems for those weapons banned prior to *Miller* because some of the weapons have been unavailable for the last seventy-five years.²¹⁷

These concerns can be remedied without reworking the entire

212. *Heller*, 554 U.S. at 625–27.

213. See O’Shea, *supra* note 95, at 380–84; Ron F. Wright, Comment, *Shocking the Second Amendment: Invalidating States’ Prohibitions on Taser with the District of Columbia v. Heller*, 20 ALB. L.J. SCI. & TECH. 159, 181–84 (2010).

214. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1482 (2009).

215. *Id.*

216. *Id.*

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

common use framework. Under the “common use for self-defense purpose test,” the common use test merely incorporates the self-defense purpose when evaluating whether a weapon is an arm. The test will comport with the readings of *Miller* as merely a weapon issue and not a determination of the right. The test, called the common use for self-defense purpose test, does not evaluate whether the weapon, numerically speaking, is commonly used, but whether the type of arm is commonly used for a self-defense purpose. This test avoids the concerns that Justice Scalia has about dangerous and unusual weapons such as automatic weapons and sawed-off shotguns.²¹⁸ Explained another way, the test for whether the arm is in common use is that the arm must be tied to its self-defense purpose—there must be a nexus between the weapon and its self-defense purpose. Like *Miller*’s test, which was tied to common use for a militia-based purpose,²¹⁹ the arm must be reasonably related to self-defense. The Court even alluded to this concept when it explained why the handgun is “the most preferred firearm in the nation . . . for protection of one’s home and family.”²²⁰ Justice Scalia wrote that the handgun is:

[E]asier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.²²¹

218. See *District of Columbia v. Heller*, 554 U.S. 570, 625–27 (2008).

219. *United States v. Miller*, 307 U.S. 174, 178–79 (1939).

220. *Heller*, 554 U.S. at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)) (internal quotation marks omitted).

221. *Id.* at 629. While Justice Scalia did not support this statement, Chris Costa, a well-known figure and one of the top firearms instructors in the country, explains why his choice for home defense is a handgun as opposed to a shotgun:

If I wake up in the middle of the night, half naked, needing to defend my family and my home, I can shoot and employ my handgun one-handed while I grab my children and maneuver around my house extremely quickly, all the while knowing that I have 17 rounds at my disposal. If you have to grab one of your kids because they’ve popped out in between you and a threat, then you’re stuck trying to fire a 12 gauge one-handed; it can be done (I do it all the time in my demonstrations), but not without a lot of practice, and it’s certainly not ideal.

I also believe that trying to deal with a threat that you can’t see is a much greater concern than one you can see. If there’s an intruder in my house that is visible, then I am actually in the process of solving that particular problem. If there’s someone in my house that I can’t see, that scares me much more. So imagine that you have

This list merely needs modification. Implicit in this test is a determination of whether the weapon is discriminate and whether the individual can control the weapon in such a manner that there will be minimal risk of collateral damage to innocent bystanders. The test above will comport with *Miller* because *Miller* only dealt with whether the sawed-off shotgun was a protected weapon, not whether the right extends to individuals for self-defense.²²² This also complies with the implicit concern that the Court does not want to allow particularly dangerous and unusual weapons.²²³

According to the common use test, the AK-47 (being one of the most commonly used weapons in the world) could pass scrutiny, while muzzle-loading weapons (relegated to use by historians, enactors, and enthusiasts) would not be protected as arms.²²⁴ Another example is a grenade, which is commonly used by the military but is not specifically tailored to self-defense and cannot reasonably be used against an individual threat without killing multiple people and would therefore

someone in your house that you can't see, you don't have ear protection, and you don't have a suppressor and are not using a handgun (handguns naturally being quieter than a shotgun)—if you fire that shotgun it's going to be extremely loud, and you will probably lose your hearing for a few minutes. Those few minutes can be vital, because the intruder now knows where you are and you're unable to be as alert as you normally would. Having that suppressor addition is very important to me; using a handgun with a suppressor means if it fires a foot and a half from my ears, my hearing is still protected.

So to sum it up, if I clear my house during the night with a handgun, I can shoot suppressed, I can white light, I can work one-handed if I need to grab one of my kids, and if push came to shove I could pistol-punch an intruder with the muzzle of my gun. I can't do any of that with a shotgun.

Interview by Rem870.com with Chris Costa, Founder, Costa Ludas (Apr. 27, 2012), available at <http://www.rem870.com/2012/04/27/full-interview-with-chris-costa/>. Chris Costa spent twelve years with U.S. Coast Guard special operations, seven years with Applied Marine Technologies, Inc., and four years as President of Magpul Dynamics before building his own company, Costa Ludas. *About Us*, COSTA LUDUS, http://www.costaludas.com/index.php?route=information/information&information_id=4 (last visited Feb. 14, 2014).

222. See *Miller*, 307 U.S. at 175–78. Although it could be argued that a sawed-off shotgun could be used for self-defense, is discriminate (which is much less likely with a sawed-off shotgun), and can be handled by the individual user, the purpose is not usually self-defense, but for unlawful activities, which was the big concern in *Miller*. Additionally, the portion of the test that requires a “reasonable relation” to self-defense would give lower courts some discretion deciding when a weapon is typically used for unlawful activity and not self-defense.

223. See *Heller*, 554 U.S. at 627.

224. See Marina Koren, *The Regrets of the AK-47 Creator*, NAT'L J. (Jan. 13, 2014), <http://www.nationaljournal.com/technology/the-regrets-of-the-ak-47-creator-20140113>.

fail the reasonably related to self-defense test that is proposed.²²⁵

A practical problem with the common use test is that it can inhibit the development of new technology—such as electric weapons, irritant sprays, and blunt objects—that can sufficiently stop an attacker while substantially reducing lethality.²²⁶ Finally, making it more difficult for individuals to protect themselves with non-lethal weapons will inevitably lead individuals to use lethal weapons instead. This could lead to the same types of restrictions on dangerous and unusual weapons that prevent non-lethal weapons from being in common use, which is not the desired result.²²⁷ Said another way: If a new non-lethal weapon is not in common use, it would lack protection as an arm and never be able to achieve the status of commonly used, therefore preventing a weapon that could be used for self-defense. The reasonable for self-defense test would not inhibit development of non-lethal weapons and would likely encourage the private development of such weapons for the market.

A modified decisional rule that provides the flexibility necessary to increase protections for other arms, prevents citizens from walking around with sub-machine guns and grenades, and allows private citizens to protect themselves with non-lethal weapons in a responsible manner can be resolved by adding to the current test for new weapons.

B. Under the “Common Use for Self-Defense Purpose Test,” Non-Lethal Weapons Are “Arms”

Under the Court’s current analysis, a non-lethal weapon may not receive the protection of the Second Amendment. Non-lethal weapons need to be in common use, and according to statistical data, while the numbers are increasing, owners of non-lethal weapons pale in comparison to firearm owners.²²⁸ One of the main concerns of Justice Scalia and the Court is preventing dangerous and unusual weapons from entering the market.²²⁹ In order to fix this problem while simultaneously

225. See DEP’T OF THE ARMY, U.S. DEP’T OF DEF., GRENADES AND PYROTECHNIC SIGNALS app. A at A-2 (2009) (stating that fragmentation grenades have an effective casualty-producing radius of fifteen meters).

226. See NUTLEY, *supra* note 35, at 2.

227. See *supra* note 208 and accompanying text.

228. Compare Karp, *supra* note 14, at 39 (finding that United States citizens own 270 million firearms), with *Taser Maker Targets Civilian Sales*, *supra* note 56 (reporting that Taser International has only sold about 100,000 electric weapons since 1994).

229. See *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). Another significant concern is the prevention of prohibited persons, such as felons, individuals adjudicated incompetent, minors, unlawful users of drugs, and those convicted of domestic violence, from

providing a right to self-defense, the Court employs the common use test and a historical analysis of the necessity of banning dangerous and unusual weapons, categorically rejecting protection for certain weapons.²³⁰

Arms for use in self-defense should be determined by their usefulness as a self-defense weapon, which would provide significant protection of non-lethal weapons as arms under the Second Amendment. This test would adjust the common use test, functionally separating lethal and non-lethal weapons—allowing the Court to give heightened protection for non-lethal weapons. Further, the use of non-lethal weapons should be reevaluated in light of the type of weapon being used and the degree of protection afforded to the individual's location.²³¹

Arguments could be made that any item could be considered a self-defense weapon, so long as the purpose is for self-defense. However, virtually all of these can be eliminated through the traditional definition of arms and the self-defense purpose.²³² The common use for self-defense purpose test considers a number of factors to determine whether the weapon should receive protection: (1) Can the weapons be worn or carried; (2) Is the weapon discriminate and easy to control; and (3) Is the weapon intended for self-defense? While there are only three factors to the test, they provide reasonable flexibility in allowing new weapons while not protecting others. For example, if someone sought protections to utilize a dog for self-defense, he would fail to garner Second Amendment protection for a variety of reasons: (1) The dog cannot be worn or carried (unless it is a Pomeranian and in that case, likely not useful for self-defense) and (2) dogs are hard to control and are not always discriminate. While there is certainly room to argue

obtaining weapons. *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1538 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)); 18 U.S.C. § 922(d). The proposed reasonableness to self-defense test should not alter or change the analysis and result for those traditionally prohibited from obtaining arms. Although, an argument could be made that those traditionally prohibited from carrying firearms should be allowed to possess non-lethal weapons in certain limited circumstances because of the reduced lethality.

230. *See Heller*, 554 U.S. at 625–27.

231. Location, for the purpose of this test, would be adjusted based on the need for self-defense. Accordingly, your level of protection changes based on whether you are at home, in a vehicle, or in the public. Ironically, the need for protection may be reversed compared with the test for privacy. *See infra* notes 242–43 and accompanying text.

232. *See Heller*, 554 U.S. at 581 (quoting CUNNINGHAM, *supra* note 110 (unpaginated, definition of “Arms”)).

under the third prong because dogs can be used for self-defense, the other two prongs are not met.

The common use for self-defense purpose will remove weapons that are entirely too dangerous but will allow the development of new weapons, all while protecting non-lethal weapons and giving lower courts the proper deference to resolve these issues.²³³

C. Heightened Protections: The House, the Car, and the Public

The Court has moved from a collective right to an individual right.²³⁴ As the current trend in the circuit courts suggests, the next big decisional rule is not the types of arms protected but the degree of scrutiny for their possession and whether the right extends outside the home.²³⁵ As mentioned earlier, Justice Scalia expressed concern for weapons not in common use, which is likely his way of preventing private citizens from attaining “dangerous and unusual weapons” like automatic weapons, cannons, and grenades.²³⁶ Although the decisional rules on many of these issues have yet to be resolved, a common consensus could be built around special protections for non-lethal weapons outside the home, especially while in the vehicle.

No doubt critics of a right to concealed carry of lethal firearms, such as pistols, may be reluctant to allow possession of non-lethal weapons outside the home. The concern for the public is increased as the possessor leaves the private and enters the public arena. However, allowing for a scale that fluctuates with the location and type of weapon possessed should be similar in nature to the Fourth Amendment’s expectation of privacy.²³⁷ *Heller* and *McDonald* stand for the proposition that the most important and highly protected place is the home.²³⁸ This makes sense and should continue along a trajectory that mirrors Fourth Amendment protections from unreasonable searches and seizures.

233. See *supra* Part V.A–B.

234. Compare *United States v. Miller*, 307 U.S. 174, 178 (1939) (constructing the Second Amendment as a collective right), with *Heller*, 554 U.S. at 592, 624–26 (constructing the Second Amendment as an individual right), and *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (individual right incorporated against the states through the Fourteenth Amendment).

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

236. See *Heller*, 554 U.S. at 625–27; *supra* Part V.A.

237. U.S. CONST. amend. IV.

238. See *supra* notes 108, 131 and accompanying text

Under the Fourth Amendment, the home (or residence, owned property, or place of business) is accorded the most stringent protections, followed by the vehicle, and then public places.²³⁹ However, where there is a difference is the level of scrutiny one would receive when leaving the home. There is also an undoubted right to privacy in the home, say to have private sexual relations in one's home.²⁴⁰ Unlike the right to privacy, which does not extend to private acts committed in public places because the need for that right is lower, the need for bodily integrity and protection from an attacker can occur (and is most prevalent) in public.²⁴¹ As Judge Posner aptly put it “the interest in self-protection is as great outside as inside the home,”²⁴² even though

Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.²⁴³

However, the danger to the public when individuals have weapons outside the home is the critical tension. Creating a sliding scale based on location makes sense from a practical perspective and alleviates much of the tension. The common use for self-defense purpose test contemplates this same tension when it evaluates whether a weapon is

239. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (home); *United States v. Karo*, 468 U.S. 705, 714–15 (1984) (home); *Oliver v. United States*, 466 U.S. 170, 178 (1984) (field); *Payton v. New York*, 445 U.S. 573, 589–90 (1980) (home); *Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979) (vehicle); *Katz v. United States*, 389 U.S. 347, 353 (1967) (public areas); Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 957 (1997) (“The most sacred of all areas protected by the Fourth Amendment is the home.”); Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 907 (2010) (“[P]rivacy in residential search and seizure receives comparatively stronger protection than many other contexts, including commercial buildings, certain automobile searches, computer databases, and public places.”).

240. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

241. See *id.*

242. *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012).

243. *Id.* at 937.

discriminate and can be controlled by the user. This is important because once the user leaves his home the ability to properly and safely use the weapon will reduce the risk of harm to bystanders. Having higher protections for non-lethal weapons is also a viable alternative that could be used to reduce the number of lethal weapons being purchased and subsequently the number of gun-related deaths. Increasing the constitutional protection for non-lethal weapons does not guarantee decreases in homicide by guns, or accidental shootings, or the number of weapons purchased, but it can certainly put a dent in those numbers, and that is something worth seriously considering.

Additionally, some citizens are unwilling to protect themselves with lethal weapons, such as guns or knives. Certain citizens are unwilling to use lethal force for religious, ethical, or moral reasons.²⁴⁴ Some citizens are uncomfortable owning firearms because they do not know how to use them or have children in the home. Others may be afraid to pull the trigger,²⁴⁵ and some may be concerned about missing their attacker and accidentally killing innocent bystanders. All of these concerns can be solved with a non-lethal option. Additionally, women and children, who may be the most vulnerable to violence as a class, are often the individuals who are most reluctant to carry a gun.²⁴⁶ Some have argued that older minors should have a right to self-defense with non-lethal weapons because there is an increased risk of violence being perpetuated against them.²⁴⁷ For adults, they should always be allowed to possess and use non-lethal means to protect themselves; for young

244. See James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141, 144 (1989); Volokh, *Nonlethal Self-Defense*, *supra* note 19, at 207–08 & n.31 (mentioning Quakers and Buddhists).

245. Contrary to popular belief, most citizens, and even soldiers, are uncomfortable with killing. See DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* 4 (1996). For a phenomenally interesting and in depth look at killing and the military's psychological training to overcome the fear of killing, see generally *id.* In his book, Lieutenant Colonel Dave Grossman specifically addresses the problem of "nonfirers" during combat in the Civil War, World War I, and World War II and the military's attempts and eventual success at getting soldiers over their natural compulsion to "turn away from that responsibility." See *id.* at 1, 17–28 (quoting S.L.A. MARSHALL, *MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND* 79 (1947)).

246. Volokh, *Older Minors*, *supra* note 21, at 451 (stating that girls age fifteen to seventeen are three times as likely to be rape or sexual assault victims than women over eighteen, and boys of the same age are three times more likely to be victims of serious violent crime than adults); see also *Why Women Carry Stun-Guns*, SAFETY TECH., <http://www.safetytechnology.com/blog/why-women-carry-stun-guns/> (last visited Feb. 9, 2014) (stating that some women are reluctant to carry firearms).

247. Volokh, *Older Minors*, *supra* note 21, at 449, 451.

adults, over the age of sixteen, there should be the ability to take a class and, with parental permission, to purchase and possess a non-lethal weapon for their own protection.

To be sure, two concerns accompany the use of non-lethal weapons in vehicles: road rage and law enforcement stops. The argument that increasing the ability to possess non-lethal weapons in cars should not deter law-abiding citizens from carrying their weapons. Certainly, individuals who have road rage or are prone to anger can possess and carry within their homes, so long as they are not a felon or convicted of domestic abuse. While imperfect, allowing those with road rage to have non-lethal weapons is certainly better than allowing them to have lethal weapons. It would also be difficult, and possibly unconstitutional, to regulate someone who gets angry more easily than others. Another legitimate concern among law enforcement is the possibility that non-lethal weapons could be used against them at a traffic stop. Law enforcement is aware that individuals can have weapons and should be on alert regardless because those who are willing to attack an officer do not follow the law. Although officers could be victims of non-lethal weapons, their chances of survival are much greater than when being shot with a firearm.²⁴⁸ A final option that should be considered is a requirement that individuals carrying in a vehicle give notice when stopped by law enforcement.²⁴⁹ Again, though, this requirement seems useless because those willing to give notice are not typically going to attack a law enforcement officer.

Giving higher protection to non-lethal weapons outside the home is sure to cause some controversy and is not without legitimate criticism.²⁵⁰ However, the *Heller* Court confirmed the constitutional right of self-defense in the home using handguns.²⁵¹ The Court should take it a step further and give self-defense some teeth: Allow individuals to possess and lawfully use non-lethal weapons outside their home. With increased protection for non-lethal weapons in the vehicle and outside the home, possible decreases in assault, rape, and other violent crimes may occur, while also potentially reducing the instances that lethal self-defense is

248. *See id.* at 450.

249. *See, e.g.*, MICH. COMP. LAWS ANN. § 28.425f(2) (West 2012).

250. *See* Kevin Reece, *ACLU Urges Ban on Use of Tasers, Pepper Spray in Texas Schools*, KHOU.COM (Feb. 13, 2014, 7:08 PM), <http://www.khou.com/news/local/ACLU-urges-ban-on-use-of-tasers-pepper-spray-in-Texas-schools-245463791.html>; *see also supra* note 78.

251. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

used. And, decreasing the number of guns in homes would certainly reduce the number of accidental deaths by children, a number alone that is always worth reducing.²⁵²

VI. CONCLUSION

The Second Amendment should provide added protection for non-lethal weapons; it should allow individuals to possess and carry non-lethal weapons as a means to protect themselves. Non-lethal weapons can reduce fatalities.²⁵³ Additionally, these weapons provide those who are uncomfortable with carrying a firearm the ability to defend themselves. The Court should adjust its decisional rules based on common use and add whether the weapon is reasonably related to the purpose of self-defense and can encompass the risk of harm to the individual and those near and around the user.²⁵⁴ Further, the test should not focus on whether the military does or does not have or use a weapon because the test for reasonability is based on self-defense, not causing insurrection or creating a private militia. This test should create incentives for individuals to defend themselves with non-lethal instead of lethal means.

Increasing the possible use of non-lethal weapons means decreasing the number of guns purchased and used and ultimately decreasing the number of deaths by firearms. One only needs to look at statistics by police departments nationwide to understand how effective non-lethal weapons can be in situations that could have quickly and easily turned deadly.²⁵⁵ Those who want individuals to have a right to self-defense should agree with added protection for non-lethal weapons, especially among those who are uncomfortable using lethal weapons for self-defense. Finally, the public at large will feel much more comfortable with individuals protecting themselves with non-lethal weapons than

252. See CHILDREN'S DEF. FUND, PROTECT CHILDREN, NOT GUNS: OVERVIEW (2013), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/protect-children-not-guns-key-facts-2013.pdf>; NEW YORKERS AGAINST GUN VIOLENCE, FACT SHEET: ACCIDENTAL SHOOTINGS (2013), available at <http://nyagv.org/wp-content/uploads/2013/05/Accidental-Shootings-NYAGV.pdf>; Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y. TIMES, Sept. 29, 2013, at A1; *Accidental Firearm: Fact Sheet*, NAT'L MCH CTR. FOR CHILD DEATH R., <http://www.childdeathreview.org/cause/saf.htm> (last visited Feb. 6, 2014).

253. See Volokh, *Older Minors*, *supra* note 21, at 450.

254. See *Heller*, 554 U.S. at 627.

255. John M. MacDonald et al., *The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events*, 99 AM. J. PUB. HEALTH 2268, 2270, 2272-73 (2009).

toting guns.

Including non-lethal weapons in the definition of arms and providing a common sense approach to self-defense will benefit the public and the Court. Adopting a decisional rule that results in a coherent analysis based on the purpose of self-defense makes sense; providing higher protections and more scrutiny for non-lethal weapons outside the home can provide a balance between the competing interests of gun restriction and increased right to self-defense under the Second Amendment.

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