(Un)Constitutional Carry: How Drug and Gun Laws Conspire in Stand Your Ground States to Create a Disarmed, Submissive Class Based on Race

JACKSON WHETSEL, ESQ.*

* Jackson is an Assistant Federal Public Defender in the District of Puerto Rico. He has also served as a private criminal defense attorney as well as a state- and federal-level public defender in Tennessee. Academically, his focus is human and constitutional rights. He hopes this article is able to highlight the intersection of constitutional concerns and human rights through a close analysis of recent Second Amendment jurisprudence.

INTRODUCTION

Violence abounds in American culture. Today, the use of lethal force is an increasingly relevant issue. Violent images are projected from our screens and thrown in our faces frequently. Officer-involved shootings seem to occur daily. Citizen-on-citizen shootings such as the killings of Trayvon Martin and Ahmaud Arbery have raised awareness concerning so called "Stand Your Ground" laws that allow for the use of lethal force outside of the home and absent any requirement to retreat.[1] Gun laws have also come under recent scrutiny with the highly publicized shootings of three, and killings of two, Black Lives Matter supporters by a seventeen-year-old who carried a high-powered firearm across state lines in preparation for potential violence.[2]

The deaths of Trayvon Martin and many others began the Black Lives Matter movement that calls attention to unequal access to justice for Black Americans and the unjustly violent treatment of Black bodies.

1. Inigo Alexander, *From Trayvon Martin to Ahmaud Arbery–'Stand Your Ground' Laws Remain Controversial*, NEWSWEEK (Feb. 26, 2022, 3:00 AM), https://www.newsweek.com/ten-years-after-trayvon-martin-stand-your-ground-laws-remain-controversial-self-defense-1682571.

2. *Id.*

It was a Black Lives Matter event at which Rittenhouse appeared with his high-powered firearm and eventually shot three people, leaving two dead.[3] The racially based biases of and disagreements between the citizens of our nation have become painfully evident once again.

Born from war and built on the institution of slavery, the United States has an unfortunate but profound relationship with both lethal violence and racial oppression. A close examination of a citizen's current access to the legal right to use lethal force in self-defense and the accompanying ability to stand one's ground reveals some direct connections to the violently enforced systems of past racial oppression and supports the conclusion that Black lives still do not matter (as much) under the law in America.

With the perceived need to protect themselves amidst this racially volatile, violent society, many Americans are arming themselves.[4] This increased weaponization in preparation for self-defense is being reflected in new legislation that purports to make Americans safer by liberalizing gun possession. The latest movement in this direction is being called "Constitutional Carry" by supporters, and Tennessee has already passed its version with a bill that was signed into law in April and officially enacted on July 1, 2021.[5]

This new legislative movement was built on rhetoric espoused by pro-gun lobbyists like the National Rifle Association (NRA) who argue that more guns in the hands of more people will make everyone safer.[6] But by continuing to operate within what this article terms the

3. *Id.*

4. CAROLINE E. LIGHT, STAND YOUR GROUND viii, 163 (2017) (stating that while Americans account for less than five percent of the world's population, they possess forty to fifty percent of the world's guns and that the majority of those guns are possessed for self-defense; while the overall percentage of gun owners has decreased since 1977, the number of guns acquired for self-defense has increased steadily resulting in a third of Americans owning guns, twenty percent of those owners own about a third of the nation's guns, and there are now more registered firearms in America than people).

5. S.B. 765, 112th Gen. Assemb., Tenn. Pub. Acts 108 (Tenn. 2021) [hereinafter S.B. 765].

6. *See* Natalie Allison, *Gov. Bill Lee to NRA: Tennessee Permitless Carry Part of 'Public Safety Agenda,'* THE TENNESSEAN (March 22, 2021) [hereinafter *Public Safety Agenda*] https://www.tennessean.com/story/news/politics/2021/03/22/tennessee-permitless-carry-gov-lee-joins-nra-call-tn-constitutional-gun-bill/6958260002.

"law-abiding citizen/felon dynamic" (LAC/FD), this new legislation will not protect everyone but rather empower some while endangering others. The LAC/FD is the result of years of "tough on crime" legislation that has prioritized public safety by purporting to crack down on dangerous and violent crime.[7] That movement spawned the War on Drugs which to this day is the most active faction of the law enforcement system. It is also the primary cause of overwhelming racial disproportionalities within our current state of mass-incarceration and disenfranchisement.

Self-defense and gun ownership are inextricably linked in American culture and law.[8] Guns are tools capable of taking life immediately. Life is the ultimate human right as indicated by its primacy in the famous triumvirate of rights enumerated in the Declaration of Independence.[9] Because guns are so inherently dangerous, the proponents of the "liberalization" of gun possession espouse the "law-abiding citizen's" ability to possess firearms while claiming that dangerous people (criminals) should not be allowed to possess firearms. This dualistic approach to citizenship and use of the criminal justice system as the sole filter for access to rights, immunities, and privileges under the law is precisely what this article describes as the LAC/FD. This dynamic operates primarily through the War on Drugs to allow white Americans to be deemed "law-abiding citizens" while Black Americans are disproportionately labeled "felons" and disenfranchised to the point of being stripped of full citizenship.

As life is the ultimate human right, access to the means to protect that life can be viewed as the measure of the legal value of one's life. Because Black Americans statistically lack access to self-defense, their lives do not matter as much under the law. Black Americans are disarmed and forced to retreat while their white counterparts are allowed to carry handguns and stand their ground.

This article analyzes the current status of firearm and self-defense laws within the "law-abiding citizen/felon dynamic" created mainly by the War on Drugs and concludes that the intersection of

7. *See generally* James P. Lynch & William J. Sabol, *Did Getting Tough on Crime Pay?*, URBAN INSTITUTE 1 (1997), https://www.urban.org/sites/default/files/publication/70411/307337-Did-Getting-Tough-on-Crime-Pay-.pdf.

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

9. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating the unalienable rights are "Life, Liberty, and the pursuit of Happiness").

firearm, self-defense, and drug laws perpetuates historic notions of racially disparate access to rights, especially the ultimate right to life. Section I analyzes "Constitutional Carry" by looking closely at Tennessee's new legislation. It highlights precisely what the bill changes. But it also points out the numerous prohibitions to firearm possession and carrying that still remain valid and on the books. Section I then examines exactly what the bill affects, and concludes that it creates an exception to the general prohibition of carrying a firearm "with the intent to go armed." As discussed in greater detail below, carrying a firearm "with the intent to go armed" includes the carrying of a gun for the purpose of potential use against another person—including the use against another in self-defense.

As the new legislation has been labeled "Constitutional Carry," Section II turns its attention to the Second Amendment. It analyzes the circumstances surrounding the founding of the nation, including the drafting and ratification of the Constitution, an intense process negotiated with much political maneuvering by some prominent founders. Forming such a nation on the heels of a revolution espousing anti-government and egalitarian ideals proved quite difficult, and many of the states would not ratify without the promise of the inclusion of a bill of rights, which would enumerate and explicitly reserve certain rights for the People and the States.[10] What eventually became the Bill of Rights included the right of the people to keep and bear arms. Though many historians and legal scholars have opined that the right was bestowed to the People as a collective entity to be expressed during militaristic action, the current state of American jurisprudence is that the right to keep and bear arms is an individual, human right founded on the principles of self-defense.[11]

As self-defense is now a fundamental component of the right to keep and bear arms, Section III examines American self-defense jurisprudence. From the English common law to modern, statutory structures for self-defense, Section III analyzes its evolution from the robust "duty to retreat" to today's more "American minded" notion of "standing ground" in the face of a threat. Section III uses Tennessee's

10. *See* LIGHT, *supra* note 4, at 11 (stating "Our founding legal document, the Constitution, originally granted the rights of citizenship to white, propertied men, and the first immigration and naturalization law similarly allowed naturalization to 'any Alien being a free white person'").

11. *See Heller*, 554 U.S. 570 (2008).

statutory structure for self-defense as an example and notes that many conditions are required for the use of lethal force to be deemed justified under the law. Of particular significance, one's legal status greatly affects the ability to legally possess a firearm, and therefore affects one's ability to stand their ground. If a person is of felon status, they are deemed to be "engaged in illegal activity" while in possession of a firearm and lose the ability to stand their ground.

Because a person's legal status can have such a drastic effect on their legal access to self-defense, Section IV examines the current functioning of the criminal justice system as the litmus test for citizenship. Section IV concludes that the War on Drugs is the main force behind the overwhelming racial disproportionalities in our current state of citizenship. The War on Drugs disenfranchises Black Americans at an overwhelming rate for activity that is committed at the same rate across all races. By elevating drug offenses to the top of the law enforcement priority list, and by primarily focusing on Black drug activity, the War on Drugs perpetuates racially-based access to citizenship while remaining superficially color-blind in its legal language. Further, Section IV demonstrates how drug laws work to deter access to self-defense through firearm possession, specifically, by situating drug offenses alongside violent offenses despite evidence that drug offenders should not be treated like violent offenders.

The War on Drugs is the driving force behind the LAC/FD. This dynamic as currently applied uses the criminal justice system as the litmus test for citizenship. Nothing other than birth is required for citizenship, but a felony conviction erases access to rights and privileges. Regarding access to self-defense, this dynamic guards access to the right to lethal use of force, granting it to white Americans while depriving it from Black Americans. Not having access to legal rights based on race is eerily reminiscent of much of American history. Section V looks back across that history and ultimately concludes that while legislation like Tennessee's new "Constitutional Carry" connects to the original circumstances surrounding the Constitution, it will produce unconstitutional results in that access to self-defense will be determined along racial lines as opposed to via legal merit. Section V seeks to connect the dots along the lines of history, rhetoric, and legislation to understand how current laws can have archaic, racially based results without mentioning race explicitly.

I. TENNESSEE'S FORM OF "CONSTITUTIONAL CARRY"

Tennessee's version of what proponents are calling "Constitutional Carry" went into effect on July 1, 2021.[12] It is being touted as a "permitless carry" law,[13] and its supporters, including Governor Lee, have stated that this legislation is part of a public safety agenda.[14] The name of the legislation is due to its supporters' claims that the right for citizens to carry firearms—openly or concealed, with or without a permit, inside or outside the home—has a constitutional basis in the Second Amendment to the United States Constitution. Tennessee's governor stated that this legislation simultaneously "protects the Second Amendment" and "creates a safer environment."[15]

The tricky thing about guns is that they are objects capable of lethal force. So, stating that the possession of them makes things safer for everyone promotes heated debate.[16] Tennessee's new bill was no exception and received a great deal of pushback from, interestingly enough, the very groups charged with the task of public safety. Police groups and officials have stated the new law "would put officers in vulnerable positions."[17] The Tennessee Sheriff's Association, the Tennessee Association of Chiefs of Police, and The Tennessee Bureau of Investigation all opposed the new law.[18]

Nevertheless, the law's proponents insist that "none of us want gun violence," and that they are also "working really hard . . . to bring forth laws that increase penalties for violent offenders."[19] After all, "it is very simple what the founders had in mind,"[20] and "what's most

12. Duane W. Gang & Natalie Allison, *What to Know About Tennessee's Permitless Carry Law*, THE TENNESSEAN (July 1, 2021), https://www.tennessean.com/story/news/politics/2021/04/01/new-no-permit-tennessee-handgun-carry-bill-what-to-know/4836900001.

13. *Id.*

14. *Id.*; *Public Safety Agenda*, *supra* note 6.

15. *Public Safety Agenda*, *supra* note 6.

16. *See Heller*, 554 U.S. at 653–55 (Stevens, J., dissenting).

17. *Public Safety Agenda*, *supra* note 6.

18. Gang & Allison, *supra* note 12.

19. *Public Safety Agenda*, *supra* note 6.

20. *Id.* (quoting Governor Lee). *But see* District of Columbia v. Heller, 554 U.S. 570 (2008) (as the United States Supreme Court's landmark case regarding the Second Amendment and its most recent and thorough discussion of the legal and historical context of the Second Amendment, it was a 5-4 decision, making it a reasonable

important here is we allow the rights of law-abiding citizens to be protected."[21]

A. The Tennessee Law Creates an Exception to an Existing Prohibition

The bill that was officially signed into law by Governor Lee in April and went into effect on July 1, 2021, states explicitly from the outset that it seeks to create "an exception to the offense of unlawful carrying of a firearm."[22] In its original form, the bill still required that a person meet the qualifications for an enhanced handgun carry permit.[23] That requirement was then changed by the bill's Amendment #1.[24] A person is now excepted from committing the crime of unlawful carrying of a firearm as long as the person carries a handgun, lawfully possesses the handgun, is "in a place where the person is lawfully present," and is at least twenty-one years old (or at least eighteen years of age and is active-duty military or has been honorably discharged).[25]

Some groups advocating for gun rights have argued that this legislation does not go far enough.[26] They mainly point to the limitations on types of firearms and age.[27] The bill does require that people be twenty-one years old or older (unless they have military involvement, in which case they can be as young as eighteen). The bill is also limited to handguns.[28]

What, then, does this bill actually do? In short, it creates an exception for people who fit certain requirements. What may be important to note, then, is that it does not remove any prohibitions on firearm possession. Those prohibitions remain statutorily intact under the

conclusion that it is anything but "simple" to understand "what the founders had in mind").

21. *Public Safety Agenda*, *supra* note 6 (quoting Governor Lee).

22. S.B. 765, *supra* note 5.

23. *Id.*

24. *Id.*

25. *Id.* (effectively replacing requirement one of meeting requirements for an enhanced handgun carry permit with the age/military requirement).

26. *See* Gang & Allison, *supra* note 12.

27. *Id.*

28. S.B. 765, *supra* note 5.

Tennessee Code Annotated.[29] Instead of removing prohibitions, this bill simply excepts, or exempts, certain people from a specific firearm prohibition that makes Tennesseans criminally liable for carrying firearms with the intent to go armed.[30]

This is important because law enforcement officers will still have criminal statutes on the books for which they would have probable cause, or at least reasonable suspicion,[31] to legally stop a Tennessee citizen who is carrying a firearm—even a handgun—and determine whether or not the person is excepted from the otherwise relevant and applicable statutory prohibitions against firearm possession. In other words, this bill will most likely not result in the unfettered carrying of handguns in Tennessee as many seem to believe, especially considering the wide ranging pushback against the legislation from law enforcement.[32]

As Tennessee's form of "Constitutional Carry" has also been referred to as "permitless carry," it also affects the requirements of obtaining and possessing a permit in certain situations. If a person meets the three requirements listed above, then she is no longer required to have a carry permit when transporting and storing firearms or ammunition in her vehicle.[33] Therefore, a citizen who meets the requirements to carry a handgun (or, technically, to be excepted from the criminal prohibition of unlawfully carrying a handgun) will also be able to store and transport the handgun and ammunition in their vehicle without violating the law and without needing a valid handgun carry permit to do so. Additionally, this bill changes the requirement that a handgun carry permit holder "must have the permit in the holder's immediate possession at all times when carrying a handgun."[34] The new bill limits the requirement to have the permit in immediate possession to instances "when carrying a handgun *in a location or manner that would be*

29. *See generally* TENN. CODE ANN. § 39-17-1301 (2021).

30. S.B. 765, *supra* note 5; *see* TENN. CODE ANN. § 39-17-1307(a) (2021) (stating the prohibition); TENN. CODE ANN. § 39-17-1307(g) (2021) (currently codifying the new exception to the application of subsection (a)).

31. *See* Terry v. Ohio, 392 U.S. 1 (1968).

32. *See* Gang & Allison, *supra* note 12.

33. S.B. 765, *supra* note 5 (now codified as TENN. CODE ANN. § 39-17-1313 (2021)).

34. S.B. 765, *supra* note 5; *see* TENN. CODE ANN. § 39-17-1351(n)(1) (2021).

prohibited if not for the person's status" as a handgun carry permit holder.[35]

These seem to be fairly straightforward changes in the law. However, their results are likely to be much less straightforward. Prior to this bill, it was always a crime to carry a firearm if deemed to be doing so "with the intent to go armed."[36] There was a statutory defense to that crime for permit holders.[37] Therefore, it was always the simplest and safest course of action to obtain a permit and avoid a criminal charge, or at least have a statutory defense immediately available if charged. Following the media attention and rhetoric that surrounded this new legislation, many Tennesseans will likely feel emboldened to carry a handgun without having obtained a permit to do so and without regard to the numerous prohibitions that remain valid.

B. The Tennessee Law Does Not Remove Any Existing Firearm Prohibitions

What is important to emphasize here again is that this new legislation does not eliminate the offense of unlawful carrying of a firearm.[38] Rather, it merely creates an exception for people who meet the three requirements.[39] Two of those requirements are that a person "lawfully possesses the handgun" and is "lawfully present" in the place.[40] Tennessee's prohibitions against firearm and handgun possession remain voluminous. As will be explored later in a slightly different context, whether or not a person is actively violating one of these numerous prohibitions against firearm possession could directly affect whether or not the person lawfully possesses the handgun or is deemed to be lawfully present in a place. If not deemed to be in lawful possession or to be lawfully present in the place, then the person does not

35. S.B. 765, *supra* note 5. This portion is now codified at TENN. CODE ANN. §§ 39-17-13519(n)(1) and 39-17-1366(e), which affects both enhanced and concealed handgun carry permit holders.

36. TENN. CODE ANN. § 39-17-1307(a)(1) (2021).

37. *See* TENN. CODE ANN. § 39-17-1308(a)(2) (2021) ("It is a defense . . . if the carrying was . . . by a person authorized to possess or carry a firearm pursuant to § 39-17-1315, § 39-17-1351, or § 39-17-1366.").

38. S.B. 765, *supra* note 5; TENN. CODE ANN. § 39-17-1307(a)(1) (2021).

39. S.B. 765, *supra* note 5.

40. *Id.*

meet the requirements of the new bill, is not excepted, or exempted, from the general prohibition against carrying a handgun with the intent to go armed and is therefore criminally liable for that conduct, which constitutes the unlawful possession of a firearm.[41] Additionally, as will be explored in depth, a person's legal status remains a concern of the legislature in regards to the ability to possess and carry firearms.

As mentioned above, this bill only pertains to handguns. Tennesseans are still prohibited from carrying certain types of weapons, such as machine guns.[42] Numerous restrictions on the transfer of firearms remain in place, as well as restrictions on certain types of ammunition.[43] Of course, there are prohibitions against carrying firearms during judicial proceedings, on school property, and on public grounds.[44]

Providing a firearm or handgun to a juvenile is criminally prohibited.[45] Likewise, a juvenile is criminally prohibited from possessing a handgun.[46] Similarly, it is illegal to provide a firearm to a person who is intoxicated, and a person who is under the influence is prohibited from possessing a handgun.[47]

Furthermore, local, state, and federal entities, as well as corporations, and even individuals, can prohibit the possession of weapons, including firearms and handguns, by any person on the entity's or individual's property.[48] The entity or individual merely needs to post notice, and any person is thereafter prohibited from possessing a weapon at those functions and on those properties.[49]

Ultimately, this bill does not liberalize the carrying of handguns to the degree advertised by its proponents or feared by its opponents. It merely excepts people of a certain age (or age and military experience) from the prohibition of carrying a firearm as long as the

41. TENN. CODE ANN. § 39-17-1307(a)(1) (2021).

42. TENN. CODE ANN. § 39-17-1302(a)(3) (2021).

43. TENN. CODE ANN. §§ 39-17-1303–1304 (2021); TENN. CODE ANN. § 39-17-1316 (2021).

44. TENN. CODE ANN. §§ 39-17-1306 (2020); 39-17-1309 (2020); 39-17-1311 (2020).

45. TENN. CODE ANN. §§ 39-17-1303 (2014); 39-17-1320 (1994).

46. TENN. CODE ANN. § 39-17-1320 (1994).

47. TENN. CODE ANN. §§ 39-17-1303 (2014); 39-17-1321 (2020).

48. TENN. CODE ANN. §§ 39-17-1315 (2014); 39-17-1359 (2020).

49. TENN. CODE ANN. § 39-17-1359 (2020).

possession of the handgun and the person's presence are lawful. As outlined above, there are numerous instances wherein the carrying of the handgun in itself would make either the possession of the handgun or the presence of the person in the particular place, or both, unlawful.

For instance, a twenty-five-year-old Tennessean who is not otherwise prohibited from possessing a firearm and is not prohibited from being present at a public park nonetheless commits an offense if deemed to be carrying with the intent to go armed on public grounds.[50] Even under the new bill this would be an offense. Only permit holders are excused from the prohibition of carrying handguns on public grounds, but that exemption is not valid if the grounds are in use by any educational institution for an athletic event or school-related activity.[51]

The bill does bring changes, but only for people of certain ages who wish to carry handguns in certain places (seemingly not open to the public).[52] The location of the person when carrying remains a key, determinative factor as to the lawfulness of the carrying, the lawfulness of the person's presence in the place, and the necessity of obtaining a carry permit prior to carrying the handgun in the place. Again, one's legal status also determines the lawfulness of the carrying.

As Tennessee has merely created an exception for certain people as opposed to actively overturning current prohibitions against carrying handguns, one may safely conclude that the members of the legislature remain concerned about Tennesseans obtaining and possessing firearms. Though touted as a movement toward the liberalization of firearm possession, this bill does as much, if not more, to deter the possession of firearms by certain members of society, particularly those with criminal history. This bill is less a move toward the liberalization of American handgun possession as it is the continuation of the "tough-on-crime" movement which currently operates within and reinforces the LAC/FD to keep access to fundamental human rights racially oppressed.

50. TENN. CODE ANN. § 39-17-1311 (2020).

51. TENN. CODE ANN. § 39-17-1311(b)(1)(H)(i)–(ii) (2020).

52. *See* TENN. CODE ANN. § 39-17-1307(a)(2)(C) (2021) (raising the offense level of carrying a handgun with the intent to go armed from a Class C misdemeanor under section 39-17-1307(a)(2)(A) to a Class A misdemeanor "if the person's carrying of a handgun occurred at a place open to the public where one (1) or more persons were present"); TENN. CODE ANN. § 39-17-1311 (2020).

This bill elevates the grade of offense and possible punishments for theft of a firearm. Any theft of a firearm is now felonious, regardless of the value of the firearm.[53] Additionally, this bill increases the minimum period of confinement for the offense from 30 to 180 days.[54] This bill also adds an enhancement factor to be considered by judges when fashioning sentences pursuant to statutory guidelines. The new legislation requires, or at least allows, judges to enhance sentences when the state proves that the offense for which the person is being sentenced "involved the theft of a firearm from a motor vehicle."[55] The bill even creates a new crime. It will be a Class B misdemeanor offense for a person to carry a firearm with the "intent to go armed" if the person has been convicted of stalking, has been convicted of DUI(s) within certain periods of time, or "is otherwise prohibited from possessing a firearm by [federal law] as it existed on January 1, 2021."[56]

The most severe change this law brings, though, may be the mandatory minimum service for violent and drug felons found in possession of a handgun. "[T]here shall be no release eligibility until the person has served 85 percent of the sentence imposed by the court, less sentence credits earned and retained. However, no sentence reduction credits . . . shall operate to reduce below 70 percent the percentage of sentence imposed by the court such person must serve before becoming release eligible."[57] This provision shall apply to all felons prohibited from possessing firearms pursuant to Tennessee Code Annotated § 39-17-1307(b) and (c), as well as providing a handgun to a juvenile or

53. S.B. 765, *supra* note 5; TENN. CODE ANN. § 39-14-105(a)(1)–(2) (2021).

54. S.B. 765, *supra* note 5; TENN. CODE ANN. § 39-14-105(d) (2021); H.B. 167, 111th Gen. Assemb., Tenn. Pub. Acts 486 (Tenn. 2019).

55. S.B. 765, *supra* note 5; TENN. CODE ANN. § 39-14-105(d) (2021).

56. S.B. 765, *supra* note 5; TENN. CODE ANN. § 39-17-1307(h) (2021); *see also* 18 § U.S.C. 922(g).

57. S.B. 765, *supra* note 5; TENN. CODE ANN. § 40-35-501(y) (2022); *see also* TENN. CODE ANN. § 39-17-1307 (2021) (making it a B felony for violent felons to possess firearms and a C felony for drug felons to possess handguns, while it is only an E felony for regular felons to possess handguns); TENN. CODE ANN. § 40-35-112 (2010) (demonstrating that only violent felons and drug felons would face a potential, singular sentence of eight years or more for possessing a firearm); TENN. CODE ANN. § 40-35-303(b) (2021) (limiting eligibility for probation to singular sentences of eight years or less).

permitting a juvenile to possess a handgun under § 39-17-1320.[58] It is precisely this provision that will perpetuate the inequalities of the LAC/FD.

Ultimately, this bill changes Tennessee's statutory structure of prohibitions against carrying handguns by carving out an exception—arguably, a very limited exception. It does not give one the right to go armed by carrying a handgun. It indeed remains illegal to carry a handgun "with the intent to go armed" in the state of Tennessee. If a person carrying a handgun with the intent to go armed has a valid permit to do so, then they have a statutory defense to the charge.[59] And with the new bill, a person who is twenty-one years of age or older should be excepted, or not even considered to be acting criminally, when carrying a firearm with the intent to go armed as long as they do so in compliance with all other prohibitions against firearm and handgun possession that remain valid and on the books.

C. The Tennessee Law Applies to "The Intent to Go Armed"

So what, exactly, does it mean to carry a handgun, or any weapon for that matter, "with the intent to go armed"? A review of Tennessee case law reveals that it essentially means the carrying of a weapon for the use, or even potential use, of that weapon against another person. Though owning a pistol has always been allowed, the carrying of one has long been regulated under Tennessee law.[60] That regulation "prohibits the carrying of a pistol for the purpose of going armed," but that prohibition should not be considered "as a statutory denial by implication of the right of an individual in Tennessee to own a pistol."[61] It is merely "the carrying thereof, under the condition stated in the statute, which is prohibited. That condition is a carrying with the

58. S.B. 765, *supra* note 5; TENN. CODE ANN. §§ 39-171307(b)(1)–(3), (c)(1)–(2) (2021); TENN. CODE ANN. § 39-17-1320 (1994).

59. TENN. CODE ANN. § 39-17-1308(a)(2) (2020).

60. Biggs v. State, 341 S.W.2d 737, 738 (Tenn. 1960) (quoting Heaton v. State, 169 S.W. 750, 751 (Tenn. 1914)) ("[O]ur statutes do not prohibit one from owning a pistol . . . the owner of a pistol, while he cannot carry or sell it in Tennessee, may keep it in his residence or place of business for his protection.").

61. *Biggs*, 341 S.W.2d at 739.

intent to go armed. If the individual is carrying the pistol, but without that intent, he is not violating [the statute]."[62]

The Tennessee Supreme Court has stated,

> It is necessary in such cases for the State to prove the accused's intent and purpose in carrying the weapon was to be and go armed, because the mere act of doing so may be lawful and does not establish criminal intent and does not create a presumption of guilt and does not deprive him of his presumption of innocence.[63]

But the intent necessary "to support a conviction for carrying a weapon with the intent to go armed may be proved by the circumstances surrounding the carrying of the weapon."[64]

While the mere carrying of a weapon can be accomplished without the necessary, criminal intent of going armed, courts in Tennessee have been "very slow to recognize such excuses when the weapon is being carried loaded and ready for instant use. If not carried for the purpose of being armed, there seems no excuse for carrying it loaded."[65] And further, the intent of the carrying may change, and it can do so immediately. "However innocent an intent might be originally, the intent can be changed instantly into an unlawful intent. That is to say, it requires no period of time to form an unlawful intent. When one draws a pistol and fires it at another, clearly at that time he is carrying the pistol for the purpose of going armed."[66]

Of particular importance, the intent, or even the preparation, to defend one's self with a weapon is deemed an intent to go armed under Tennessee law.[67] "By the defendant's testimony he carried the pistol that day to protect himself, that is, to go armed. It is no defense that a

62. *Id.* TENN. CODE ANN. 39-4901 is now codified at TENN. CODE ANN. § 39-17-1307(a)(1). TENN. CODE ANN. § 39-17-1307(a)(1) (2021).

63. Bennet v. State, 530 S.W.2d 788, 792 (Tenn. Crim. App. 1975) (citing Liming v. State, 417 S.W.2d 769 (Tenn. 1967)).

64. *Id.* at 792.

65. McNew v. State, 144 S.W.2d 740, 741 (Tenn. 1940).

66. *Id.*

67. Cole v. State, 539 S.W.2d 46 (Tenn. Crim. App. 1976).

defendant has armed himself solely for the purpose of self-defense."[68] It is therefore a logical conclusion that any carrying of a handgun for the purpose of the potential use, or even in a manner that would allow for the ready use, of that handgun against another person, even in self-defense, is a crime under Tennessee law.[69]

And it is that crime, specifically, that Tennesseans are excepted from committing if they meet the three requirements of the new bill. This bill extends the concept of handgun possession for readied use in self-defense beyond the home, building off the federal precedent set in *Heller*. But it will also continue to function within and support the LAC/FD to ensure this access to self-defense remains racially oppressed.

II. HOW DID WE GET HERE? *DC V. HELLER* AND THE CONSTITUTIONAL BASIS FOR AN INDIVIDUAL'S RIGHT TO POSSESS HANDGUNS

The Second Amendment to the United States Constitution 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."[70] At twenty-seven words, or 144 characters, including spaces, the Second Amendment is a now tweetable tenant of American law. But over the course of 220 years, this seemingly simple and certainly short conglomeration of phrases has been the center of heated debate. The legal debate has culminated, for now, in the Supreme Court's 2008 *Heller* decision in which nine justices cumulatively issued a total of three opinions resulting in a narrow 5-4 decision. The popular debate is certainly still far from over. But for now, *Heller*'s holding is the law of the land, and individual citizens have the right to possess handguns for their own protection.[71]

68. *Id*. at 49 (quoting Taylor v. State, 520 S.W.2d 370, 371 (Tenn. Crim. App. 1974)).

69. TENN. CODE ANN. § 39-17-1307(a)(1) (2021).

70. U.S. CONST. amend. II.

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

A. The Second Amendment and Its Origin

In the wake of a Revolutionary War fueled by "the Spirit of '76",[72] the founding fathers constructed a governmental body with power over its governed. The Revolution was sparked by ideas and political arguments embodied in Thomas Paine's 47-page pamphlet *Common Sense*. Paine passionately argued "the good people of this country are grievously oppressed by the combination" of the King and Parliament.[73] The oppression of the people by a monarchial government was certainly an issue of the time. Paine expressed it as a human rights issue, claiming the "cause of America is in a great measure the cause of all mankind."[74]

"Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries *by a government*, which we might expect in a country *without a government*, our calamities is heightened by reflecting that we furnish the means by which we suffer."[75] Paine went on to describe the horrors of hereditary succession, amongst other "evil[s] of monarchy," and lend credence to the notions of political power held by the people who choose their governmental representation.[76] Paine's passionately pled overtures espousing democratic rule were ideological leaders of the Revolution, at the very least. For "[o]nce" the colonies "had rejected the authority of George III . . . sovereignty had shifted from a monarchy claiming to derive its authority from God to a legislature claiming to derive its authority from 'the people.'"[77]

The Revolution sought to remove sovereignty from the monarchy. And it succeeded. The immediate question, then, was where to put sovereignty in a newly formed, monarch-less government.

Whether sovereignty would ultimately rest at the state or the federal level was the central issue.[78] These were "huge political and

72. JOSEPH J. ELLIS, THE QUARTET 133 (2015).

73. THOMAS PAINE, COMMON SENSE 63 (Penguin Classics 1986).

74. *Id.*

75. *Id.* at 65.

76. *Id.* at 76.

77. ELLIS, *supra* note 72, at 133.

78. *Id.* at 113; WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 448.

constitutional questions over sovereignty, slavery, and size" that "would define the history of the emerging American republic well into the next century."[79] Those fervently supporting state sovereignty wanted to ensure that every state retained "its sovereignty, freedom and independence, and every Power, Jurisdiction, and right, which is not expressly delegated to the United States . . . ."[80] They feared too much federal power would render the states "mere provinces of Congress and tending to the establishment of an aristocratical or monarchial government."[81] Fueling the localized perspective "were all the political arguments that colonists had thrown at the British ministry from 1765 to 1775, stigmatizing parliamentary power as illegitimate because it was distant and disconnected from their local and state interests."[82]

Others felt that the "core mistake" of the previously formed Confederation "was to vest sovereignty in the states rather than in a federal government empowered to oversee the economy, including collecting taxes and regulating commerce, and to manage the inevitable expansion of a continental empire."[83] The stronger proponents of this view believed that the federal government should have a veto power over all state laws.[84] Among the American populace, there seemed to be "a prevailing indifference to any national project at all."[85] This concerned Federalists like George Washington who were all too familiar with the shortcomings of the individual colonies when it came to supporting the Revolutionary Army.[86] This became the basis of what historian Joseph J. Ellis describes as "a central paradox of the American Revolution: namely, the two institutions that made victory in the war for independence possible, the Continental Congress and the Continental Army, represented a consolidated kind of political and military

79. ELLIS, *supra* note 72, at 12.

80. *See id.* at 15 (quoting an amendment to the Dickinson Draft by Thomas Burke of South Carolina).

81. *See id.* at 45 (quoting David Howell).

82. *Id.* at 12.

83. *Id.* at 53.

84. *Id.* at 113.

85. ELLIS, *supra* note 72, at 80.

86. *Id.*

power that defied the republican principles on which the American Revolution was purportedly founded."[87]

A delicate, political balancing act, navigated with consistent compromise and ambiguity, ensued in the decade following the Revolution, ultimately culminating in the ratification of the Constitution.[88] All debates from 1776 to 1787 regarding the founding of our singular nation from separate states involved three fundamental disagreements. First, "a sectional split between northern and southern states over slavery; second, a division between large and small states over representation; and third, a more general argument between proponents for a confederation of sovereign states and advocates for a more consolidated national union."[89]

The issue of representation was resolved by compromise.[90] The issue of state sovereignty versus federal sovereignty was also somewhat subdued by compromise, though an ambiguous one rhetorically contrived to allow each side to, if not win the debate, at least not lose it, either.[91] "The people" were the other enumerated entity in the Constitution from whom sovereignty could derive. As simultaneous citizens of both the larger nation as a whole and their individual states, the citizens of the nation could be sovereign voices that voted both state and federal officials into office. They perfectly embodied a hybrid nation where sovereignty lies in all states and the collective, federal government.[92] In this view, neither the federal government nor the state

87. *Id*. at 16; *see also id.* at xviii ("The operative word for the revolutionary generation was *republic* rather *democracy*.").

88. *Id.*; ISAACSON, *supra* note 78, at 448.

89. ELLIS, *supra* note 72, at 9.

90. *See* ISAACSON, *supra* note 78, at 450–60 (describing what would be become known as the Connecticut Compromise, "the House of Representatives would be apportioned by population and the Senate would have equal votes for each state . . . . The new country was, in some ways, 'one political society,' but in other ways it was a federation of separate states, yet these two concepts need not conflict, for they could be combined as 'halves of a unique whole.")

91. *Id.* at 444–60.

92. *See* ELLIS, *supra* note 72, at 158–59; *see also* ISAACSON, *supra* note 78, at 457 ("From its first three words, 'We the people,' to the carefully calibrated compromises and balances that followed, it created an ingenious system in which the power of the national government as well as that of the states derived directly from its citizenry."); *id.* at 454 (quoting Benjamin Franklin, "In free Governments the rulers are the servants, and the people their superiors and sovereigns.").

governments would be the ultimate sovereign, rather sovereignty would reside in the citizenry of each.

Historian Joseph J. Ellis recounts key figures' critical roles in the ratification of the Constitution. Of profound stature, even among these key figures, was James Madison, a deep thinker, persistent and fastidious in his preparation for argument and debate. He orchestrated certain debates, made concessions on certain issues while holding ground on others, all in an effort to form a nation and thus complete the task of the American Revolution.[93]

There is certainly no doubt that Thomas Jefferson was the acclaimed author of the Declaration of Independence. And George Washington, having led the victorious Revolutionary Army and served as the new nation's first president, is deservedly recognized as the "father of the nation." But, "there is no question that Madison was the 'Father of the Bill of Rights.'"[94]

Following thorough and passionate debates regarding size, representation, and sovereignty at the Constitutional Convention in 1787, "the major criticism seemed to be that the Constitution lacked a bill of rights."[95] But was such a bill necessary? Some felt not. The powers that were explicitly given to the federal government in the Constitution were the only powers retained by the federal government. All other rights were retained by the states and the people. So, such a list at the end of the nation's founding document would be superfluous.

Still, states favoring the confederation model insisted on the addition of a bill of rights that would put explicit limits on the powers of the newly formed federal government.[96] "A bill of rights was so important to Jefferson because its essential function was to define what government could *not* do, creating a political zone where individual rights were free to roam beyond the surveillance and restrictions of

93. *See generally* ELLIS, *supra* note 72.

94. *Id.* at 206; *see also* District of Columbia v. Heller, 554 U.S. 570, 656 (noting that "it is telling that James Madison chose to craft the Second Amendment as he did").

95. ELLIS, *supra* note 72, at 169.

96. *Id.* at 174 (speaking of the ratification process as "the debate," "[t]he insistence on amendments in six of the states reflected a deep dissatisfaction with the all-or-nothing terms of the debate."); *id.* at 175 ("In the end, six states submitted 124 proposed amendments, most of which were intended to impose restriction on federal authority.").

kings, courts, legislatures, and judges."[97] These amendments were to be the embodiment of the "human rights" that were "very much on Jefferson's mind" at the time.[98]

Madison, on the other hand, was not as concerned about the lack of a bill of rights, even though he would become the father of the list.[99] Unlike Jefferson, who feared intrusion on liberty from government, Madison thought "the major threat to individual liberty and the rights of minorities came from below rather than above—that is, from popular majorities rather than from government."[100] Nonetheless, though his "motives were almost entirely political," "Madison took the lead in correcting the mistake that he and other delegates in Philadelphia had made by failing to provide a bill of rights."[101]

Once he decided the explicit list of rights necessary for the ultimate ratification of the Constitution by all states, Madison jumped into action and "wrote the first draft single-handedly, ushered it through the House, and negotiated with leaders in the Senate."[102] Originally, Madison had all the core rights bundled into nine amendments. The House unbundled some of them to produce seventeen, which were

97. *Id.* at 203, 207 ("Jefferson regarded [the bill of rights] as more important than the Constitution itself.").

98. *Id.* at 203; ROBERT MOGAN, LIONS OF THE WEST: HEROES AND VILLIANS OF THE WESTWARD EXPANSION (ALGOQUIN BOOKS, 2011) ("Jefferson was fortunate to read law with the outstanding George Wythe . . . . It was while Jefferson was studying for the bar that the controversial Stamp Act was passed by the British parliament. From Wythe and others, he inherited the discussion of natural law and natural right versus positive law. He read Pufendorf's *Of the Law of Nature and Nations*, among many other such treatises, and began drafting and revising the ideas and the phrases that would later be incorporated in the Declaration of Independence.").

99. ELLIS, *supra* note 72, at 203 (Madison wrote, "I have never thought the omission [of a bill of rights] a material defect, nor for any other reason than it is anxiously desired by others . . . I have not viewed it in an important light.").

100. *Id.* at 201, 210 ("And history proved Madison right when, as he had predicted to Jefferson, more abuses of individual rights would occur at the state than the federal level.").

101. *Id.* at 200–201 (Madison wrote in January of 1789, "[W]hatever opinion may be entertained at this point, it is evident that the change of situation produced by the establishment of the Constitution, leaves me in common with the other friends of the Constitution, free, and consistent in espousing such a revisal of it, as will either make it better in itself, or without making it worse, will make it appear better to those who now dislike it.").

102. *Id.* at 206.

"subsequently reduced to twelve by the Senate, and then to ten in the state ratification process."[103]

Ultimately ratified in 1788 and in operation since 1789, the Constitution "is the world's longest surviving written charter of government."[104] The Bill of Rights, as a separate and distinct codicil, "has ascended to an elevated region in the American imagination," assuming "an iconic status of its own, as the legal version of the liberal values first articulated in the Declaration of Independence, and as the classic statement of rights beyond the reach of government, the American version of the Magna Carta."[105]

Jefferson certainly felt that the Bill of Rights was a necessary addition to the nation's founding document, solidifying a realm where one was free from any government intrusion. He felt it necessary to enumerate the human rights that were at the heart of the Declaration of Independence and that fueled "the Spirit of '76." Madison, on the other hand, really did not think a bill of rights was necessary and therefore saw "neither constitutional nor philosophical, but political" significance only.[106] "In short, he viewed the movement for a bill of rights not as an opportunity to glimpse the abiding truths, but as the final step in the ratification process"—merely one last compromise offered to the antifederalists in a final push toward ratification.[107]

It is this dualistic, constitutional origin that continues to confuse us today. Members of the Jeffersonian school of thought regard the Bill of Rights as a sacrosanct declaration of individual liberties that should never be spoken ill of, let alone changed or forgotten. Madisonian followers, however, view the Bill of Rights as nothing more than

103. *Id.* at 209.

104. *Constitution of the United States*, U.S. SENATE, https://www.senate.gov/civics/constitution_item/constitution.htm (last visited January 7, 2023).

105. ELLIS, *supra* note 72, at 213, 207.

106. *Id.* at 212–13.

107. *Id.* at 205; *see also id.* at 213 (noting that Madison referred to the process of drafting the Bill of Rights and having the Constitution ratified as "the nauseus business of amendments." Madison was direct in his intentions: "It is to be wished that the discontented part of our fellow Citizens could be reconciled to the Government which they have opposed, and by means as little unacceptable to those who approve the Constitution in its present form. The amendments proposed in the H. of Rep. had this two-fold object in view.").

a clear demarcation on the limits of federal authority executed, primarily, to appease antifederalists and complete the union of the states.

It is against this backdrop of a dualistic approach to the Bill of Rights as a whole that the confusion surrounding the Second Amendment can be better understood. Certainly, the Jeffersonian view would see the right to bear arms as an individual, human right, sacred in all free and enlightened societies. The Madisonian view would most likely see the same right as mere assurance to the state governments that the country's defense would be secured by state militias as opposed to a standing national army.[108] The Supreme Court recently addressed this issue of opposing schools of thought regarding the Second Amendment in *Heller*.

B. D.C. v. Heller

Given the circumstances and the driving forces of the drafting and ratification of the Bill of Rights described above, the schools of thought regarding the Second Amendment could be referred to as the Jeffersonian and the Madisonian Schools. Regardless of title, the issue at the heart of the Second Amendment contention is not the right itself, but to whom it was given and for what purpose.

The right is unquestionably the right to keep and bear arms. But in what form, in what manner, and for what purpose was this right bestowed to the people? Was this right given to the people as a collective entity, to be exercised as part of the "well regulated militia"? Or was the right given to the people as individual citizens, to exercise for purely personal reasons? In 2008, the Supreme Court decided the latter and based its decision on a singular purpose: self-defense.[109]

Prior to this landmark decision, the legal perspective of the Second Amendment was "that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of

108. *Id.* at 211–12 ("Madison was responding to recommended amendments from five states, calling for the prohibition of a permanent standing army on the grounds that it had historically proven to be an enduring threat to republican values. It is clear that Madison's intention in drafting his proposed amendment was to assure those skeptical souls that the defense of the United States would depend on state militias rather than a professional, federal army.").

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

weapons."[110] The dissenting justices in *Heller* believed this view remains "the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption."[111] In their view, it was clear "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution."[112]

Essentially, the dissenting justices based their opinion on the plain reading of the Amendment. From their perspective, Justice Scalia and his companions in the majority based their holding "on a strained and unpersuasive reading of the Amendment's text; significantly different provisions in the 1689 English Bill of Rights, and in various 19th-century State Constitutions; postenactment commentary that was available to the Court when it decided *Miller*; and, ultimately, a feeble attempt to distinguish *Miller*."[113]

"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."[114] The plain reading of the Amendment grants the right to "the people," but it seems to do so in a manner that relates directly to its use for military purposes. Justifying the holding, Justice Scalia separated the Amendment into distinct clauses—prefatory and operative—and stated that "apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."[115] In discussing the operative clause, Scalia acknowledged the use of the term "the people" in other provisions of the Constitution and indulged in

110. *Id.* at 637 (Stevens, J., dissenting) (citing United States v. Miller, 307 U.S. 174 (1939)). Justice Stevens was joined in his dissent by Justice Souter, Justice Ginsburg, and Justice Breyer. *Id.*

111. *Id.* at 638 (Stevens, J., dissenting).

112. *Id.* at 637 (Stevens, J., dissenting).

113. *Id.* at 639 (discussing *Miller*, 307 U.S. 174, which indicated possession in connection with military service must be necessary for Second Amendment protection); *see Miller*, 307 U.S. at 178 ("In the absence of evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

114. U.S. CONST. amend II.

115. District of Columbia v. Heller, 554 U.S. 570, 578 (2008).

linguistic and logical word games, eventually invoking the Mad Hatter himself.[116]

In Scalia's view, the militaristic purpose enumerated in the prefatory clause is the reason for the right's codification in the Constitution, but is not the reason for the right's existence in the first place.[117] In this view, the right to bear arms was merely codified in the Second Amendment. It existed prior to the codification and self-defense "was the *central component* of the right itself."[118] "By the time of the founding, the right to have arms had become fundamental for English subjects."[119] "They understood the right to enable individuals to defend themselves."[120] Upon the founding of our new nation, "Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'"[121]

Acknowledging that it "is perhaps debatable" whether "the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem," the majority proclaims that "it is not the role of this Court to pronounce the Second Amendment extinct."[122] The majority deems the inherent,

116. *Id.* at 579–81, 589 ("A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on linguistics). If 'bear arms' means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ('for the purpose of self-defense' or 'to make war against the King'). But if 'bear arms' means, as the petitioners and the dissent think, the carrying of arms only for military purposes, one simply cannot add 'for the purpose of killing game.' The right 'to carry arms in the militia for the purpose of killing game' is worthy of the Mad Hatter. Thus, these purposive qualifying phrases positively establish that 'to bear arms' is not limited to military use."); *see id.* at 581–89.

117. *Id.* at 599.

118. *Id.*

119. *Id.* at 593.

120. *Id.* at 594.

121. *Heller*, 554 U.S. at 595 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *145–46 n.42). "This may be considered as the true palladium of liberty . . . . The right to self defense is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible." *See id*. at 606 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *143).

122. *Id.* at 636.

natural right of self-defense to be a central and founding component of the Second Amendment.[123] Ultimately holding that the District of Columbia's prohibition against operable handguns in one's residence was unconstitutional, the Court stated that the "Second Amendment . . . surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[124]

The Jeffersonian school of thought, if you will, won out in this Supreme Court battle. The right to keep and bear arms, as codified in the Second Amendment, is a natural, human right inherently bestowed to individuals. And it is so for the sole purpose of self-defense.

This holding, like the new "Constitutional Carry" bill in Tennessee, is specific to handguns. Petitioners argued "that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."[125] The Court responded that "[i]t is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon."[126] The Court then pronounced that, regardless of the basis of their popularity, "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."[127]

The dissent had a problem with this reasoning, pointing out that it may not be the best course to base the constitutionality of prohibiting possession of a thing upon the thing's popularity.[128] Despite their

123. *Id.* at 628.

124. *Id.* at 635.

125. *Id.* at 629.

126. *Id.*

127. *Heller*, 554 U.S. at 629 (enumerating the many potential reasons for the popularity of handguns, "There are many reasons that a citizen may prefer a handgun for home defense: It is easier 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.").

128. *Id.* at 721 (Breyer, J., dissenting) ("But what sense does this approach make? According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment *does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban

popularity in America, "the very attributes that make handguns particularly useful for self-defense are also what makes them particularly dangerous. That they are easy to hold and control means that they are easier for children to use. That they are maneuverable and permit a free hand likely contributes to the fact that they are by far the firearm of choice for crimes such as rape and robbery."[129]

The majority attempts to address these types of concerns about the dangerousness of handguns. "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ."[130] This analysis, then, is the legal basis, or perhaps the legal result, of the political rhetoric of the law-abiding citizen versus the dangerous criminal.[131] Good, reasonable people have the right to possess handguns for their protection while dangerous, unreasonable people do not.

Though the dissent remained fearful of "the unfortunate consequences that today's decision is likely to spawn," the majority's take on the issue is the law of the land.[132] Individual, law-abiding citizens have the right to possess handguns for their protection. This landmark Supreme Court decision has apparently set the stage for state legislatures to act. Tennessee has done so already, passing its version of "Constitutional Carry" discussed above, essentially extending the *Heller* holding beyond the hearth and home in Tennessee.

III. SELF-DEFENSE

Legislation like Tennessee's Constitutional Carry bill discussed in Section I has its constitutional basis in the Second Amendment for the sole purpose of self-defense, as discussed in Section II. Therefore, Section III focuses on self-defense law and its evolution from English

it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.").

129. *Id.* at 711 (Breyer, J., dissenting).

130. Likewise, the majority had no problem with the constitutionality of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions or qualifications on the commercial sale of arms." *Id.* at 626–27.

131. *See id.*

132. *Id.* at 722 (Breyer, J., dissenting).

common law to current, statutory structures for self-defense, using as an example Tennessee's statutory structure for what is being popularly termed "the right to stand your ground."

> The necessary consequence of man's right to life is his right to self-defense. In a civilized society, force may be used only in retaliation and only against those who initiate its use. All the reasons which make the initiation of physical force an evil, make the retaliatory use of physical force a moral imperative. If some 'pacifist' society renounced the retaliatory use of force, it would be left helplessly at the mercy of the first thug who decided to be immoral. Such a society would achieve the opposite of its intention: instead of abolishing evil, it would encourage and reward it.[133]

The above quotation from Ayn Rand accurately captures the notion of self-defense and the way it has come to be regarded as one of most sacrosanct pillars of the American justice system.[134] But it was not always that way. Much as the very founding of our nation was fueled by the "Spirit of '76" as discussed in Section II, the nation's relationship with the notion of self-defense has been fueled by the same sentiments of the Enlightenment.[135] The people were once legally required to rely on the Crown for their protection, but the growing feeling in the new republic was that citizens can and should be allowed to defend themselves in the face of an assault. A review of self-defense jurisprudence reveals two main components: the ability to use force against another, and the duty to retreat, or lack thereof, in the face of a threat.

133. AYN RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM 77 (1961).

134. *See id.*

135. *See supra* note 72 and accompanying text.

A. The Duty to Retreat and the Right to Self-Defense

Civilized societies generally eschew violence. The governing bodies of such societies create laws and systems intended to protect their citizens from such violence. Sir William Blackstone wrote, "[O]f crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the Creator."[136] Life is the ultimate right.

As it related to self-defense, the English common law "reserved lethal punishment exclusively for the Crown."[137] It prioritized human life over property and "imposed a robust duty to retreat, which commanded that one 'retreat to the wall behind one's back' before meeting force with force."[138] The duty to protect citizens and punish wrongs was reserved for the Crown. "If one were attacked or threatened, the king and his laws, not the individual, would avenge the injury."[139] English subjects were always "obligated to retreat if threatened, rather than respond with lethal violence."[140]

This reliance on the Crown to protect one's own life in the face of a threat or assault ran counter to the ideals espoused by many of the Enlightenment thinkers. In 1651, Thomas Hobbes "became the first to invoke an inalienable right to self-defense," stating "[A] covenant not to defend my selfe from force, by force, is always voyd."[141] Later, in 1690, John Locke argued that "Whoso sheddeth man's blood, by man shall his blood be shed," and proclaimed self-defense to be "that great law of nature."[142] From the perspective of the Enlightenment, self-defense was a natural, human right.

The ideals of the Enlightenment would later prove to be inspirational sources for the American Revolution. In the United States, "retreat from an assault," tends to be viewed "as cowardly and incompatible with the values of liberal democracy."[143] The notion "of backing away from a threat or of allowing the state to protect one from harm

136. LIGHT, *supra* note 4, at 19.
137. *Id.* at 11.
138. *Id.*
139. *Id.*
140. *Id.* at 19.
141. *Id.*
142. LIGHT, *supra* note 4, at 19.
143. *Id.*

clashed with the ideals of independence and individual rights on which the nation was founded."[144]

B. Exceptions to the Duty to Retreat and the Evolution of American Self-Defense Jurisprudence

The one exception to this duty was the "castle doctrine" which became part of the English common law in the early 1600s.[145] The doctrine was "based on the assumption that a man should not have to retreat from an attacker within the space that is intended to be his haven from the dangers of the outside world and from intrusion from the government."[146] Originating in 1604, the castle doctrine made the citizen the sovereign of his own household; no longer dependent on the Crown's use of lethal force to defend his hearth, the individual citizen may defend his life and home with lethal force with no duty to retreat.[147] Delivering the opinion in what is known as "Semayne's Case," Sir Edward Coke stated that "[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose," popularizing the term "a man's house is his castle."[148]

This idea of having no duty to retreat, or in other words, to have the ability to stand one's ground and meet force with force, soon expanded beyond the household. By the late nineteenth century, ideas about what constituted the "true man" and the "American mind" began to be seen as incompatible with the duty to retreat, and legal holdings across the nation began to reflect that vision of incompatibility.[149] These rulings, primarily based on the legal theory of necessity, "all but eliminated the obligation to retreat" and culminated with the Supreme Court announcing a right to "stand [one's] ground" in 1895.[150] "The

144. *Id.* at 12, 18–20.

145. *Id.* at 12.

146. *Id.*

147. *Id.* at 20.

148. LIGHT, *supra* note 4, at 20.

149. *Id.* at 12–13.

150. *Id.* at 13–14; Beard v. United States, 158 U.S. 550, 551–62 (1895) (quoting Erwin v. State, 29 Ohio St. 186, 199–200 (1876)) (emphasis added) ("It is true that all authorities agree that the taking of life in defense of one's person cannot be either justified or excused, except on the ground of necessity, and that such necessity must

weight of modern authority, in our judgment, establishes the doctrine that when a person being without fault, and in a place where he has a right to be, is violently assaulted, he may, *without retreating*, *repel force by force*, and if, in the reasonable exercise of that right to self-defense, his assailant is killed, he is justifiable."[151]

Tennessee's evolutionary process concerning the duty to retreat largely mirrored that of the nation as a whole described above. For quite some time, "self-defense was a matter of common law in Tennessee rather than statutory law."[152] The common law regarding self-defense included a duty to retreat: "Also well established in the law of excusable homicide is the requirement that the slayer must have employed all means in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life."[153]

Tennessee Courts adhered to the "castle doctrine" as well and "recognized a limited exception to the duty to retreat when a person is acting in 'defense of one's home or habitation.'"[154] Whether the exemption from the duty to retreat would be extended beyond the

be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question then is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the sole ground that he failed to fly from his assailant when he might safely have done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a *true man* who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or to do him enormous bodily harm."); *Id.* at 561–62 (quoting Runyan v. State, 57 Ind. 80, 84 (1877) (emphasis added)) ("A very brief examination of the American authorities makes it evident that the ancient doctrine as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of *the American mind* seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense.").

151. *Beard*, 158 U.S. at 562 (quoting *Runyan*, 57 Ind. at 84).

152. State v. Perrier, 536 S.W.3d 388, 397 (2017).

153. *Id.* (citing State v. Kennamore, 604 S.W.2d 856, 859 (Tenn. 1980)).

154. *Id.* (citing *Kennamore*, 604 S.W.2d at 858–59).

parameters of one's own home remained unresolved for quite some time.[155] The General Assembly finally answered this question in 1989 when it passed Tennessee Code Annotated § 39-11-611 stating "[t]here is no duty to retreat before a person threatens or uses force."[156]

The "true man" doctrine extends the exemption from the duty to retreat beyond the person's home as long as the person is "in a place where the person has a right to be."[157] This abandonment of the duty to retreat was "the primary distinction" between the common law and the statutory structure of self-defense.[158]

C. Tennessee's Statutory Structure for Self-Defense

Tennessee's current statutory structure concerning self-defense and one's ability to stand their own ground begins with TCA § 39-11-601 which states quite simply that "[i]t is a defense to a prosecution that the conduct of the person is justified under this part." The actual self-defense statute is found at TCA § 39-11-611. In the context of deadly encounters between citizens, the active ingredients of Tennessee's statutory recipe to stand one's ground are found in subsections (b) and (c), and somewhat (d) and (e).

As discussed immediately above, America's evolving relationship with self-defense resulted in some key concepts. Those concepts include the retaliatory use of force against a use or threatened use of force that is considered to be imminent and reasonable, lack of provocation by the party claiming self-defense, and the duty, or lack thereof, to retreat before defending one's self. All of these key concepts are covered in Tennessee's self-defense statute.

1. Tennessee's statutory use of force and duty to retreat

Tennessee's statute does not denote a proactive right to literally "stand your ground," but instead states that there is "no duty to

155. *See Kennamore*, 604 S.W.2d 856; State v. Morrison, 371 S.W.2d 441 (Tenn. 1963).

156. *Perrier*, 546 S.W.3d at 397.

157. *Id.* at 399; *see* State v. Renner, 912 S.W.2d 701, 704 (Tenn. 1995).

158. *Perrier*, 546 S.W.3d at 399 (citing 11 DAVID L. RAYBIN, TENNESSEE PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 28:36 (last updated 2021).

retreat"[159] before one can be found justified in "threatening or using force against another person"[160] even to the point of "using force intended or likely to cause death or serious bodily injury."[161] This act of using force in the face of "an imminent danger of death or serious bodily injury" is again never actually denoted within the statute as justified.[162] The use of force is deemed legally justified in juxtaposition to situations that are defined as "not justified" in subsection (e).[163] In Tennessee then, it is legally justified to use force intended or likely to cause death or serious bodily injury against another person as long as one does not consent to or provoke the use of force by the other person.[164]

Of course, this use of force will only be deemed legally justified if the person using such force has a "reasonable belief" of "an imminent danger of death or bodily injury."[165] Further, the "danger creating the belief" must be "real, or honestly believed to be real at the time"[166] and that "belief must be founded upon reasonable grounds."[167]

As confusing as the latter parts of subsection (b) read, the end result is that the use of deadly force against another person is legally justified in the face of an imminent danger of death or serious bodily injury when, or perhaps better said, as long as, one's belief in that danger is deemed reasonable.[168] One is then presumed to have had such a reasonable belief when in their own household or dwelling,[169] likely tracing back to the "castle doctrine."

Tennessee's self-defense scheme has two separate prongs: the actual use of force and the duty, or lack thereof, to retreat before using such force. A citizen has no duty to retreat before using force, and the use of that force will even be presumed reasonable if within the parameters of their own home. However, both the presumption of reasonableness within one's own home and the ability to stand one's ground

159. TENN. CODE ANN. § 39-11-611(b)(1) (2022).
160. *Id.*
161. TENN. CODE ANN. § 39-11-611(b)(2) (2022).
162. TENN. CODE ANN. § 39-11-611(b)(2)(A) (2022).
163. TENN. CODE ANN. § 39-11-611(e) (2022).
164. TENN. CODE ANN. § 39-11-611(e)(1)-(2) (2022).
165. TENN. CODE ANN. § 39-11-611(e)(2)(A) (2022).
166. TENN. CODE ANN. § 39-11-611(b)(2)(B) (2022).
167. TENN. CODE ANN. § 39-11-611(b)(2)(C) (2022).
168. TENN. CODE ANN. § 39-11-611 (2022); *see also* LIGHT, *supra* note 4.
169. TENN. CODE ANN. § 39-11-611(c) (2022).

may be lost if deemed to have been acting unlawfully.[170] Whether or not one is deemed to be "engaged in unlawful activity" at the time of a deadly confrontation is the statutory basis, then, for whether or not one will be legally presumed to have been acting reasonably within one's own home as well as whether or not one has a duty to retreat.[171]

2. Legal status and the felon's predicament

Self-defense is an important notion in America, especially in the South.[172] It is a legal right, to the point of being esteemed as a duty.[173] The rhetoric has always been that "good" people deserve this right while "bad" people or criminals do not.[174] But the notion of having a right and duty to protect one's self and one's family rings so true in many states that it supersedes the potential danger of having "bad" people with guns.[175]

It is within this dense and convoluted statutory structure that things get murky for the Tennessean with a felony conviction: a felon has a right to self-defense by use of deadly force and a defense to a prohibition of firearm possession if used in said self-defense; but the felon is nonetheless simultaneously subject to prosecution for the mere possession of the firearm the entire time leading up to the justified use of the firearm and felons possessing firearms lose their privilege to stand their ground before using force.[176] Thus, the felon's predicament: bring the proverbial knife to a gun fight or risk liberty and be required to retreat in the face of a reasonable threat.

Under the theory that everyone is safer when good people have guns and bad people do not, Tennessee promulgated Tennessee Code

170. TENN. CODE ANN. § 39-11-611(b)(1)–(2), (d)(3) (2022); *see* State v. Perrier, 536 S.W.3d 388, 399 (Tenn. 2017).

171. *See Perrier*, 536 S.W.3d at 399.

172. LIGHT, *supra* note 4; *see also Perrier*, 536 S.W.3d at 400.

173. LIGHT, *supra* note 4.

174. LIGHT, *supra* note 4; *see also Public Safety Agenda*, *supra* note 6; District of Columbia v. Heller, 554 U.S. 570 (2008).

175. *See generally* TENN. CODE ANN. §§ 39-17-1322(a), 39-17-1307 (2022) (providing that regular felons can have long guns and a defense for a handgun in the house).

176. *Perrier*, 536 S.W.3d 388.

Annotated § 39-17-1307.[177] This law prohibits citizens from carrying firearms with the "intent to go armed" and prohibits all firearm possession for those with certain criminal histories. To further incentivize felons to not possess firearms—and supported by the notion that the severity of prior convictions proportionally relates to the dangerousness of the current firearm possession—the grade of offense, and therefore the potential punishment, increases depending on the types of convictions on a criminal's record.[178]

While the rhetoric behind these statutes initially makes sense, the situation soon arises where a felon is called upon to defend herself. Has the felon lost one of the most valued rights in our society? The right—the duty, even—to protect oneself and one's own family? Or as Ayn Rand put it, do felons lose the "necessary consequence" of their "right to life"?[179]

States such as Tennessee answer that question resoundingly: absolutely not.[180]

> A person shall not be charged with or convicted of a violation under this part if the person possessed, displayed or employed a handgun in justifiable self-defense or in justifiable defense of another during the commission of a crime in which that person or the other person defended was a victim.[181]

The right of self-defense by use of a handgun, and as protected by the Second Amendment, is available to a felon in Tennessee, then, after all. A felon may use deadly force with a handgun and have a legal defense to both the killing and the firearm offense.[182] However, all things are not equal for the felon in a potentially fatal encounter.

Looking back to the self-defense statute itself, one "who is *not engaged in conduct that would constitute a felony or Class A*

177. *See also* 18 U.S.C. § 922(g). Note: at all times, a Tennessean is subject to federal firearm regulations and prohibitions in addition to those under Tennessee law.

178. TENN. CODE ANN. § 39-17-1307(b)-(c) (2022); *see also* 18 U.S.C. § 924(e).

179. RAND, *supra* note 133.

180. TENN. CODE ANN. § 39-17-1322 (2022).

181. TENN. CODE ANN. § 39-17-1322(a) (2022); *Perrier*, 536 S.W.3d at 404 n.6.

182. *Perrier*, 536 S.W.3d at 402; TENN. CODE ANN. § 39-17-1322 (2022). *But see* 18 U.S.C. § 922(g).

misdemeanor and is in a place where the person has a right to be *has no duty to retreat* before threatening or using force . . . ."[183] The "engaged in" language certainly connotes a sense of active criminality (actually manufacturing, distributing, or selling controlled substances; actually committing or attempting to commit a crime of violence). Nonetheless, § 39-17-1307 is still on the books, and it criminalizes the mere possession of a firearm by a felon.

Could the mere possession of a firearm qualify as being "engaged in unlawful activity" for the purposes of § 39-11-611(b)(1)–(2)? The answer there is no. As has been discussed thoroughly, possessing a firearm is an individual's right, and as such is inherently legal. Unlike possession of controlled substances, it is the possessor's status as a felon that makes the possession illegal, not the illegality of the object being possessed. Under this reasoning, the crime of being a felon in possession of a firearm is considered a status offense.[184]

The question then becomes, does a person's legal status as a felon qualify as "being engaged in unlawful activity" if in possession of a firearm? Even in a state that has statutorily built-in defenses for the felon in possession of a firearm if deemed to have been used as permitted in justifiable self-defense?[185]

The Supreme Court of Tennessee answered these precise questions in *State v. Perrier*. As a starting point, as if anticipating this very scenario, the General Assembly begins both § 39-11-611(b)(1) and (b)(2) with the words "[n]otwithstanding § 39-17-1322."[186] In *Perrier*,

183. TENN. CODE ANN. § 39-11-611(b)(1)–(2) (emphasis added).

184. *See Status Crime*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining a "status crime" as a "crime in which a person is guilty by being in a certain condition or of a specific character," offering vagrancy as an example of a status crime, and noting that a status crime is also referred to as a "status offense" or a "personal-condition crime").

185. TENN. CODE ANN. § 39-17-1322 (2022).

186. *Perrier*, 536 S.W.3d at 404. The defendant attempted to use this language as support for his argument that the General Assembly "did not intend for possession, display, or employment of handguns to ever be unlawful activity that would require the defendant to retreat before using defensive force." *Id.* Though the Court does not directly address this argument, but instead refers to history and the everlasting right to self-defense even when yoked with the duty to retreat first, the defendant's argument unfortunately does not work grammatically. *Id.* "Notwithstanding" is defined as "despite" or "in spite of." *Notwithstanding*, BLACK'S LAW DICTIONARY (9th ed. 2009). Read in that fashion, it seems the General Assembly is stating that, in spite of having

the defendant made some compelling arguments regarding the self-defense statute and his ability as a felon to defend himself with the use of a firearm.[187] Two of those arguments, and the Court's respective holdings, or lack thereof, are of particular relevance to this article.

The defendant first argued that the "not engaged in unlawful activity" language only related to the duty to retreat as opposed to the right of self-defense in whole.[188] Secondly, the defendant asserted "that the General Assembly 'intended for there to be a nexus requirement between the defendant's unlawful activity and the defendant's need to assert self-defense,' in other words, that the defendant's unlawful activity is what caused him to have to defend himself."[189]

The Court agreed with the defendant on the first issue,[190] but ultimately found his argument on the second issue "unnecessary to resolve."[191] The Court looked back to the common law and concluded that "a duty to retreat does not mean that a person cannot defend herself or himself."[192] A person "may still defend himself even to the point of using deadly force, and as Code Section 39-17-1322 makes clear, may be acquitted of a weapons offense if a jury finds that his self-defense was justifiable."[193]

In arriving at this conclusion, the Court noted that Tennessee's self-defense "statutory language is not clear and unambiguous" and looked at the State's history with self-defense.[194] It also turned to other states' self-defense statutes and case law interpreting them for guidance.[195] The Court found that "[i]nterpreting 'not engaged in unlawful activity' as used in subsections (b)(1) and (b)(2) as a condition on the

an eventual defense to the charge of being a felon in possession, the status of being a felon in possession of a firearm nonetheless renders one "engaged in unlawful activity" for the purposes of having a duty to retreat in the face of danger under TENN. CODE ANN. § 39-11-611 (2022). The Court, though perhaps for different reasons, ultimately agrees with this interpretation. *Perrier*, 536 S.W.3d at 404, 409.

187. *Perrier*, 536 S.W.3d at 394.

188. *Id.* at 398.

189. *Id.*

190. *Id.* at 399, 404.

191. *Id.* at 404.

192. *Id.* at 398–400.

193. *Id.* at 404.

194. *Id.* at 398.

195. *Id.* at 398–401.

privilege to not retreat is consistent with the way 'engaged in unlawful activity' is used as a limitation on the subsection (c) presumption" (of reasonableness when defending one's self within one's home).[196] The Court held, therefore, that the "engaged in unlawful activity" language "applies only to a person's duty to retreat."[197]

The defendant argued that the trial court's instruction to the jury that he was a felon in possession of a firearm at the time of the alleged use of the firearm effectively "gutted" his self-defense argument.[198] The jury could believe he used the gun in justifiable self-defense but still find him guilty due to his failure to retreat.[199] The Court was unpersuaded, stating that having a duty to retreat and a right to self-defense were not mutually exclusive provisions.[200] Perhaps somewhat missing the point, the Court declined to address the defendant's argument concerning the requirement of a nexus between his unlawful activity and the need to use defensive force, finding harmless error as no reasonable juror could have believed the defendant's theory of self-defense.[201]

Following the holdings in *Perrier*, the result is clear. The status offense of possession of a firearm by a convicted felon is deemed being "engaged in unlawful activity" to the point that a felon possessing a firearm has a duty to retreat in the face of a reasonable threat under Tennessee Code Annotated § 39-11-611.[202] Also of note here is that the *Perrier* Court saw the ability to defend oneself with force as a *right*, while it referred to the ability to stand one's ground as a *privilege*.[203]

The end result is that one's legal status—law-abiding citizen or felon—determines one's access to the right of self-defense. The felon status deprives a citizen of the right to bear arms, a right built upon and encompassing the right to self-defense as its central component. And further, if citizens of felon status dare bear arms—even if solely for self-defense—and subject themselves to the severe sanctions of the many criminal prohibitions of felons possessing firearms, they also

196. *Id.* at 399.
197. *Id.*
198. *Id.* at 404.
199. *Id.*
200. *Id.*
201. *Id.* at 404–05.
202. *Id.* at 404.
203. *Id.* at 399, 401.

forfeit the privilege to stand their ground and thereby subject themselves to the additional duty to retreat before using force—even in the face of a reasonable threat.

Because legal status determines one's access to self-defense, and thus, one's right to life, it is imperative to focus on how we determine legal status. One's citizenship, or ability to access the rights and privileges afforded to the subjects of the nation, was once completely determined by race. Though today's legal landscape purports to be free of that racist origin, a close examination of the way we currently determine legal status reveals clear connections to those antiquated forms of permitting access to citizenship.

IV. GUNS AND DRUGS: RACE AS LEGAL STATUS THROUGH WAR ON DRUGS

"If you do the crime, you do the time." A popular American phrase, it implies that "time" is the singular result of a criminal conviction in our justice system. The use of the word "time," of course, is a reference to one's loss of liberty or time spent incarcerated. It suggests a simple tit-for-tat situation wherein a criminal defendant is convicted, serves their time, and then reenters our society fully restored as the citizen they were prior to the unfortunate incident that led to their arrest and conviction. The reality is not that simple.[204]

In Tennessee, as in almost all states, one loses a series of very important rights and privileges upon conviction for a felony offense.[205] A convicted felon loses the right to vote,[206] hold public office,[207] and serve on a jury.[208] Of particular relevance to this article, the convicted felon also loses the right to possess a firearm.[209]

These are important rights as they are essentially the ways in which citizens participate in our form of self-governance. They were some of the most fervently sought-after rights during the revolutionary

204. *See generally* Vincent P. Wyatt, *CRIME AND PUNISHMENT . . . AND PUNISHMENT: Your Clients Need to Know the Collateral Consequences of a Criminal Conviction*, 46 TENN. BAR J. 12 (2010).

205. *Id.*

206. TENN. CODE ANN. § 40-20-112 (2022).

207. TENN. CODE ANN. § 29-8-101 (2022).

208. TENN. CODE ANN. § 40-20-114 (2022).

209. TENN. CODE ANN. § 39-17-1307 (2021); 18 U.S.C. § 922(g)(1).

era, when the world turned from bloodline-determined monarchy to a more democratic, inclusive approach to government.[210] Taking away these rights, then, is a way to keep a certain faction of society as non-participants in our form of government.

On the surface, having convicted felons as nonparticipants in government might seem logical. Anyone who has acted in such an untrustworthy, violent, or otherwise dangerous manner should not be trusted or vested with the power to hold public office or vote for public officials. Nor should a dangerously untrustworthy person be able to possess or carry a firearm—a tool capable of producing immediate death.

Importantly, though, while the transition of power from a monarch to the people was supported by, and promised to further, the ideals of equality and inclusivity, it occurred while simultaneously limiting fundamental rights and privileges to property-owning white men.[211] The modern legal landscape in America purports to be post- or even non-racial, making discrimination based on race constitutionally impermissible.[212] However, as has been the subject of recent historical research and social commentary, the criminal justice system now ironically operates in our society in a manner that is eerily reminiscent of the racially-based systems of discrimination and oppression of our past.[213]

We should be cautious of any system that continues to have drastically disproportionate effects on citizens of different races. In her groundbreaking work, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander demonstrates how the criminal justice system operates to dole out punishment and the brand of felon disproportionately based on race. The main mechanism accountable for the overwhelming racial disparities in our criminal justice system is the War on Drugs.

This Section explores how the War on Drugs functions to brand Black Americans as felons, disenfranchising them at an overwhelmingly disproportionate rate to their white counterparts for activity

210. PAINE, *supra* note 73; U.S. CONST. amends. I –X; ISAACSON, *supra* note 78, at 447–52 (talking about voting for congress and constitutional convention).

211. LIGHT, *supra* note 4, at 11.

212. U.S. CONST. amend. XIV; Civil Rights Act of 1964, 42 U.S.C. 2000 (1964).

213. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (rev. ed. 2012); 13TH (Netflix 2016).

engaged in at similar rates. It then examines how the felon brand affects one's rights, privileges, and potential punishments for otherwise lawful activity—especially in the context of being able to legally defend one's self through firearm possession—and ultimately concludes that the criminal justice system as currently applied in America operates to render Black citizens an unarmed, legally submissive class, particularly in stand your ground states.

A. The War on Drugs

> "These double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class-blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional rights in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black."[214]

In 2016, Black Americans comprised 27% of all arrested individuals in the United States. That is double their share of the overall population.[215] Of particular note is the rate and severity in which Black Americans are arrested, convicted, and punished for drug offenses given that these are crimes committed at roughly equal rates across

214. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM, 8–9 (1999).

215. FBI UNIFORM CRIME REPORTING PROGRAM, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-21; U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPSR6H&prodType=table (stating black people comprised about 13% of the population in 2010).

races.[216] The War on Drugs, along with its accompanying policing policies such as "Broken Windows" and "Stop and Frisk," both sanction and encourage "higher levels of police contact with African Americans" including "higher levels of police contact with innocent people and higher levels of arrests for drug crimes."[217] In effect, "U.S. criminal justice policies have cast a dragnet targeting African Americans."[218]

Black drivers have been found to be more likely to be pulled over than whites, and once pulled over, they are far more likely to be searched and arrested.[219] Once arrested, Black Americans are "more likely than whites to be denied bail, to have a higher money bond set, and to be detained because they cannot pay their bond."[220] The increased likelihood of pretrial detention has drastic effects on the overall outcomes for Black defendants because "[p]retrial detention has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, to be sentenced to prison, and to receive longer sentences."[221]

Though Black and Latino Americans comprised only 29% of the U.S. population in 2016, they accounted for 57% of the U.S. prison population.[222] This statistic is almost identical for drug crimes as Blacks and Latinos made up 56% of inmates nationwide serving sentences for drug offenses.[223] This translates to an imprisonment rate for Black adults that is 5.9 times that of white adults.[224]

---

216. THE SENTENCING PROJECT, at 3, https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf (Mar. 2018); *see also* ALEXANDER, *supra* note 213

217. *Id.*

218. *Id.*

219. *Findings*, THE STANFORD OPEN POLICING PROJECT, https://openpolicing.stanford.edu/findings/; Lynn Langton & Matthew Durose, *Police Behavior in Traffic and Street Stops, 2011*, (Sept. 2013), https://bjs.ojp.gov/content/pub/pdf/pbtss11.pdf; Christine Eith & Matthew R. Durose, *Contacts Between the Police and the Public, 2008*, (Oct. 2011), https://bjs.ojp.gov/content/pub/pdf/cpp08.pdf; *see also* ALEXANDER, *supra* note 213, at 84–88, 154–58, 167.

220. THE SENTENCING PROJECT, *supra* note 216, at 6 n.29.

221. THE SENTENCING PROJECT, *supra* note 216, at 6.

222. U.S. BUREAU OF JUSTICE STATISTICS, *Prisoners in 2016* (Jan. 2018), https://bjs.ojp.gov/content/pub/pdf/p16.pdf..

223. *Id.*

224. *Id.*

These racial disparities "stem in part from the policing and pretrial factors described earlier, and are compounded by discretionary decisions and sentencing policies that disadvantage people of color because of their race or higher rates of socioeconomic disadvantage."[225] Prosecutors tend to charge people of color with crimes that carry more severe punishments than the crimes for which they charge white people.[226] "Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites,"[227] and "[s]tate prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws."[228]

The results are undeniable. In 2000, the Human Rights Watch reported that, in seven states, African Americans constitute 80 to 90 percent of all imprisoned people.[229] "When the War on Drugs gained full steam in the mid-1980s, prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level *more than twenty-six times* the level in 1983."[230] While these statistics have varied over the years since "their zenith in the mid-1990s," it nonetheless "remains the case that African Americans are incarcerated at grossly disproportionate rates throughout the United States."[231]

But, as Michelle Alexander so accurately notes, there has always been "an official explanation for all of this: crime rates."[232] In

225. THE SENTENCING PROJECT, *supra* note 216, at 7 (citing Nazgol Ghandoosh, *Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System* (2015), https://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf).

226. THE SENTENCING PROJECT, *supra* note 216, at 7; *see also* ALEXANDER, *supra* note 213, at 109–12, 147.

227. THE SENTENCING PROJECT, *supra* note 216, at 7–8 (citing Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2–80 (2013)); *see also* 18 U.S.C. § 924(e).

228. THE SENTENCING PROJECT, *supra* note 216, at 8 (citing Charles Crawford, et al., *Race, Racial Threat, and Sentencing Habitual Offenders*, 36(3) CRIMINOLOGY, 481–512 (1998)).

229. ALEXANDER, *supra* note 213, at 122.

230. *Id.* at 123.

231. *Id.*

232. *Id.*

blunter terms, Black people are arrested for drug crimes more frequently than white people because Black people commit more drug crimes than white people. Alexander discusses how this "explanation has tremendous appeal," but cautions one not to believe it "before you know the facts" because "it is consistent with, and reinforces, dominant racial narratives about crime and criminality dating back to slavery."[233]

In actuality, "[p]eople of all races use and sell illegal drugs at remarkably similar rates."[234] Contrary to popular belief,[235] if there are any significant differences in rates of illegal drug activity across races, they suggest that whites are more likely to engage in illegal drug use and dealing.[236] Nonetheless, drug offenses remain the most common convictions for federal inmates while Blacks and Hispanics account for over 65% of the federal inmate population.[237]

It is certainly undesirable, in today's age, a century and a half removed from the Civil War, that our nation continues to operate in a manner so akin to the archaic and inhumane ways of the past. Certainly, racial prejudice—whether implicit or explicit, latent or manifest, fueled by hatred or merely transmitted by tradition or confusion—persists. But this section aims to look past that pure or personal prejudice to examine how the criminal justice system operates to yield consistent results slanted against Black Americans and benefiting white

233. *Id.*; *see generally* 13TH (Netflix 2016).

234. *Id.* (footnote omitted); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., http://www.samhsa.gov/data/sites/default/files/NSDUHNationalFindingsResults2010-web/2k10ResultsTables/NSDUHTables2010R/HTM/Sect1peTabs1to46.htm (noting that blacks and whites reported using an illicit drug within the last year at similar rates, 16.8% and 15.3%, respectively).

235. ALEXANDER, *supra* note 213, at 133 (discussing results from a 1995 study published in the *Journal of Alcohol and Drug Education* wherein 95 percent of respondents pictured a black person when asked to describe a drug user).

236. *Id.* at 123 (citing to studies suggesting that "whites, particularly white youth, are more likely to engage in illegal drug dealing than people of color" and that "white students use cocaine at seven times the rate of black students, use crack cocaine at eight times the rate of black students, and use heroin at seven times the rate of black students.").

237. *U.S. Sentencing Commission*: *Over 65% of Federal Prisoners are Black or Hispanic*, Def. Servs. Off. Training Div. (May 21, 2021), https://www.fd.org/news/us-sentencing-commission-over-65-federal-prisoners-are-black-or-hispanic (stating that over 65,000 of a total of 151,729 federal inmates were incarcerated for drug offenses, which is roughly 43 percent).

Americans. If Black and white people use and sell illegal drugs at remarkably similar rates, why do Black Americans see the harsh effects of felony drug convictions at overwhelmingly disproportionate rates?

The disproportionate incarceration and disenfranchisement of Black Americans is systemic, beginning with the distribution of funding and police resources in certain communities. Greater amounts of policing lead to greater amounts of police contact. More contact with police leads to more searches and, of course—since it has been proven that all people use and sell drugs at roughly the same rate—more obtaining of evidence of drug crimes. This in turn leads to more charges, and more charges lead to more convictions which result in more incarceration and disenfranchisement. It is a numeric, statistical function of the system.

Through this numerically driven, mechanical process things can appear to be color- and class-blind while simultaneously churning out racially disparate results. The biggest fuel source for this criminal justice machine is the War on Drugs. Despite recent efforts at criminal justice reform, the numbers are holding steady. In early 2021, almost half of all federal inmates were incarcerated for drug offenses.[238] "Some 34.9 percent of incarcerees held by the U.S. Bureau of Prisons (BOP) are Black; and 31.6 percent are Hispanic."[239]

These numbers simply do not make sense if our justice system is colorblind. As stated above, all races violate drug laws at the same rate. In America, white people make up roughly 72% of the population.[240] Black people make up roughly 13-15% of the population.[241] About half of the overall prison population is incarcerated for a drug offense, and nonwhite people make up over half of those behind bars for drug offenses.

238. *Id.*

239. *Id.*

240. Nicholas Jones, et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, UNITED STATES CENSUS BUREAU (Aug. 21, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html (showing the white alone American population fell to 61.6%, down from 72.4% in 2010; the overall white population, consisting of white alone and in combination with, remains around 72 percent).

241. *Id.*

Perhaps even greater an injustice than racially-based disparities in incarceration are the side- or after-effects of a felony drug conviction. Felons lose their rights and are subject to a considerable amount of collateral consequences. Since these rights and privileges are being lost at an overwhelmingly disproportionate rate racially, the current state of affairs raises significant constitutional concerns. A system of racially-based rights is the antithesis of Equal Protection.

B. Collateral Consequences and Racial Disparities

In addition to the prosecutorial trends, policies, and practices discussed above, "African Americans—particularly Black men—are most exposed to the collateral consequences associated with a criminal record."[242] Collateral consequences of a felony conviction mainly include the deprivation of rights and privileges otherwise available to a citizen. In Tennessee, as in many other states, these rights and privileges stripped from felons are numerous and surprisingly far reaching.

A conviction "can have a wide-ranging impact, barring the ability to vote, sit on a jury, hold public office, and other civil rights, to limiting the ability to pursue certain occupations and even affecting their eligibility for many government programs."[243] One's eligibility for certain types of housing and employment can be affected by a felony conviction.[244] And a felon can even have their marital and parental rights adversely affected.[245]

While 8% of all adults in the United States had a felony conviction on their record in 2010, that rate was 33%, *one third*, for African-American men.[246] In 2016, a record 6.1 million Americans were barred

242. SENTENCING PROJECT, *supra* note 216, at 9.

243. Wyatt, *supra* note 204, at 12.

244. *Id.* at 14, 16 (regarding housing); *id.* at 13 (regarding employment and listing approximately 60 occupations or industries in which a convicted felon cannot obtain employment or will have significant difficulty obtaining employment or licensure).

245. *Id.* at 17.

246. THE SENTENCING PROJECT, *supra* note 216, at 9 (citing Sarah S.K. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in The United States, 1948-2010*, POPULATION ASS'N OF AMERICA (Sep. 11, 2017), https://www.publicwelfare.org/wp-content/uploads/2018/01/The-Growth-Scope-and-Spatial-Distribution-of-People-With-Felony-Records-in-the-US.pdf).

from voting due to a felony conviction.[247] "Felony disenfranchisement rates for voting-age African-Americans was 7.4%—*four times* the rate of non-African Americans (1.8%)."[248] In three particular states—Florida, Kentucky, and *Tennessee*—that rate reached more than 20%.[249]

The rate of Black disenfranchisement is still that high in Tennessee.[250] Comparatively, a Black person in Tennessee is more than 2.5 times more likely to be disenfranchised than all adults.[251] Because that statistic includes Black disenfranchisement rates in both sides of the comparison, it is probably more accurate to say that a Black Tennessean is *more than 10 times more likely* to be disenfranchised than their white counterparts.[252]

1. Additional consequences of drug offending and conviction

People committing and convicted for drug offenses face consequences above and beyond those mentioned above. Other collateral consequences are either reserved solely for drug offenders or increase in severity for those convicted of drug crimes compared to other forms

247. *Id.* at 10 (citing Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/).

248. *Id.* at 10–11 (citing Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/) (emphasis added).

249. *Id.* at 11 (citing Sheryl Gay Stolberg & Erik Eckholm, *Virginia Governor Restores Voting Rights to Felons*, N.Y. TIMES (Apr. 22, 2016), https://www.nytimes.com/2016/04/23/us/governor-terry-mcauliffe-virginia-voting-rights-convicted-felons.html) (emphasis added).

250. Kimberlee Kruesi, *Report: More than 1 in 5 Tennesseans Disenfranchised*, ASSOCIATED PRESS (Oct. 15, 2020), https://apnews.com/article/election-2020-race-and-ethnicity-voting-rights-elections-tennessee-1467837105617bfd351b7b9969dc1683.

251. *Id.* (stating an estimated eight percent of the overall adult population is disenfranchised).

252. Comparing the Tennessee rate of black disenfranchisement of more than twenty percent to the nationwide, non-African American disenfranchisement rate stated earlier of 1.8 percent. *See supra*, notes 248–49.

of crime.[253] Strictly in terms of Second Amendment rights, drug convicts face severely increased penalties for firearm possession.[254]

These increased penalties situate drug crimes similarly with violent crimes and sometimes subject defendants to mandatory imprisonment.[255] The result is an increased societal stigmatization of drug offenders and the legal treatment of drug offenders similar to, if not exactly like and in some cases even worse than, violent offenders—even given data showing drug offenders should be treated as nonviolent offenders.[256] Of particular interest is the way in which this treatment of drug offenders is supported by and works to further the modern rhetoric of the "law abiding citizen" versus the "dangerous felon."

As described above, people lose a series of very important civil rights when they are convicted of a felony. "Once a person is labeled a felon, he or she is ushered into a universe in which discrimination, stigma, and exclusion are perfectly legal and privileges of citizenship such as voting and jury service are off limits."[257] Though we live in times of mass incarceration, most felons are not sent to prison. Many remain under community supervision of some form, such as probation or parole.[258] Regardless of time spent in prison, each felon lives with "the badge of inferiority—the felony record—that relegates people for their entire lives to second-class status."[259]

Some of the most revered rights in our nation—to vote, to hold public office, to sit on a jury, to keep and bear arms—are stripped upon a felony conviction. But some additional consequences are reserved

253. Wyatt, *supra* note 204, at 14, 16 (describing how prior drug charges impact access to various resources).

254. TENN. CODE ANN. § 39-17-1307(b)(1)(B) (2021); 18 U.S.C. § 924(e); *see also* Wyatt, *supra* note 204, at 14 (discussing how drug felons, like violent felons, are barred from firearm for possession for life, whereas non-violent and non-drug felons can reobtain their Second Amendment rights).

255. *See, e.g.*, 21 U.S.C. § 841(b); 18 U.S.C. § 924(e); S.B. 765, *supra* note 5.

256. UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

257. ALEXANDER, *supra* note 213, at 118.

258. *See id.* (stating that 5.1 million people were under some form of community supervision as of 2008).

259. *Id.*

solely for drug offenders. Drug offenders can be deemed ineligible for certain types of housing, student loans, and even food stamps.[260]

College students are ineligible for federal assistance upon a conviction under federal or state law for the possession or sale of controlled substances. This includes virtually all forms of financial assistance—grants, loans, and work assistance. Tennessee, specifically, "further prohibits individuals in violation of the federal drug-free laws from eligibility for the Tennessee Hope Scholarship."[261] Federally, drug offenders are banned from receiving food stamps.[262] Some municipalities will not consider an applicant for public housing if they have drug-related convictions.[263]

The result is that drug felons are that much more stigmatized and removed from mainstream society. Their offense of conviction is elevated in severity above others, like property crimes, and situated alongside violent crimes—the most heinous and feared crimes in our society—like robbery and rape.

2. Specific collateral effects of war on drugs on access to self-defense

As for access to self-defense, both drug and violent felons face drastically increased consequences for mere firearm possession. It is within the statutory construction for felon firearm prohibition that the increased legislative concern with drug felons becomes even more obvious. This legislative concern embodied in the "tough on crime" movement elevates the severity of drug crimes above nearly all others and situates drug crime as a whole alongside violent crime. Rhetorically and legally, the result is that drug crime is made synonymous with violent crime.

The drug conviction, specifically, is used against the felon during and after prosecution in a variety of ways to increase punishment,

260. Wyatt, *supra* note 204, at 16.

261. *Id.*

262. *Id.* Tennessee has modified this federal ban on food stamps, limiting the prohibition on food stamps to those convicted of A felony drug-offenses and allowing drug offenders to receive food stamp benefits if they have completed substance abuse treatment and otherwise followed all recommendations of the court. *Id.*

263. *See id*. (stating that "the Metropolitan Development and Housing Agency in Nashville will not consider an applicant who was involved *in violent or drug-related activity* in the past three years") (emphasis added).

increase severity of penalty for subsequent crimes, and decrease a drug felon's access to otherwise available resources offered to improve one's life such as housing, education, and employment. While every felon loses a significant number of civil rights, this article focuses on the effect of drug and gun laws on one's ability to defend one's self. In so doing, this subsection explores the intersection of drug and gun laws throughout the nation, using as specific examples the primary Federal and Tennessee statutes that prohibit felons from possessing firearms.

Interestingly, the dynamic effect of drug and gun laws in both the state and federal systems shows the same increased legislative concern with drug and gun laws discussed above. One has a right to possess a firearm founded in the Second Amendment and primarily supported by the human right to self-defense.[264] However, that right essentially dissolves to the point of disappearing entirely if the possession of the firearm is coupled with any sort of current or prior drug activity—even mere possession or personal use.[265]

Drug and violent crimes have been situated together through the "tough on crime" movement. Therefore, gun possession is prohibited for anyone who is currently involved in drug activity as well anyone previously convicted of a drug felony at some point in time. The drug felon, either current or past, faces severely increased penalties for their gun possession than do regular felons. Once again, the drug felon is treated like the violent felon, this time specifically as it pertains to one's Second Amendment rights.

The current, or active, drug felon is prohibited from possessing a firearm under both federal and state law. In Tennessee, if one is charged with drug dealing and possessing a firearm simultaneously, the potential penalty for the conduct drastically increases. The firearm need not be used, displayed, or employed in any manner for this to occur. For example, this commonly happens through two types of mere possession charges that do not require any active use of the object possessed. The main drug dealing statute is found at Tennessee Code Annotated § 39-17-417 and common charges under this law claim possession with intent to sell a controlled substance.[266] If a firearm is claimed

264. *Heller*, 554 U.S. 570; *see supra* Section II.

265. TENN. CODE ANN. §§ 39-17-1307, 1324 (2008); 18 U.S.C. §§ 922(g), 924(c).

266. TENN. CODE ANN. § 39-17-417(a)(4).

to have been possessed simultaneously with the possession of the controlled substance, the common additional charge is brought under T.C.A § 39-17-1324 which prohibits the possession of a firearm "during the commission of a dangerous felony." And to alleviate any concern or potential argument regarding the inherent "dangerousness" of drug possession, the General Assembly explicitly defines dangerous felonies within the same statute to include possession with intent to sell a controlled substance.[267]

If convicted of both offenses, the overall sentence is increased in three main ways. First, the sentence for gun possession carries an increased mandatory minimum sentence.[268] Second, the sentence imposed for gun possession is a mandatory term of imprisonment as it is not eligible to be served in any alternative fashion such as probation or parole.[269] And third, that sentence must be served consecutively to the underlying sentence for the controlled substance offense.[270]

The federal statutes operate similarly. Common drug dealing charges are brought under 21 U.S.C. § 841 and often claim possession with intent to distribute a controlled substance. If charged with possessing a firearm "in furtherance of any" "crime of violence or drug trafficking crime" under 18 U.S.C. § 924(c), the overall sentence is severely increased. The drug dealing charge alone often carries a

267. TENN. CODE ANN. § 39-17-1324(i)(1)(L). *See generally* TENN. CODE ANN. § 39-17-1324(i)(1) (including possession of controlled substances as a dangerous felony alongside other violent crimes such as murder, kidnapping, and burglary and including an attempt to commit any listed offense as a dangerous felony as well at subsection (M)).

268. *Compare* TENN. CODE ANN. § 39-17-1324(g)(1) (classifying possession of a firearm during the commission of a dangerous felony as a Class D felony while requiring a "mandatory minimum three-year sentence"), *with* TENN. CODE ANN. § 40-35-112(a)(4) (setting the mandatory minimum sentence for a Class D felony at two years).

269. TENN. CODE ANN. § 39-17-1324(e)(2) ("[S]hall not be eligible for . . . probation pursuant to §40-35-303…or any other program whereby the person is permitted supervised or unsupervised release into the community prior to the service of the entire mandatory minimum sentence imposed . . . ."); TENN. CODE ANN. § 40-35-501(j) ("There shall be no release eligibility for a person committing a violation of § 39-17-1324(a) or (b) . . . until the person has served one hundred percent (100%) of the minimum mandatory sentence.").

270. TENN. CODE ANN. § 39-17-1324(e)(1).

mandatory minimum term of imprisonment.[271] If convicted of both the underlying drug offense and the simultaneous possession of a firearm, the defendant must serve an additional term of imprisonment.[272] And that additional term of imprisonment also carries a mandatory minimum of five years which must be served consecutively to the sentence for the drug offense.[273]

A conviction for a drug offense then drastically increases the penalties for any subsequent possession of a firearm in both the state and federal systems, again, in quite similar ways. No drug activity, or any type of accompanying illegal activity, is necessary for these increased penalties if subsequently found in possession of a firearm. In Tennessee, any convicted felon is prohibited from possessing a firearm.[274] Drug felons, again, are positioned closer to violent felons and are therefore subject to greatly enhanced sentences as compared to the statutorily mandated sentences for regular felons.[275] A regular felon found in possession of a handgun is charged with an E felony and faces a sentence of one to six years.[276] A drug felon possessing a firearm, however, commits a C felony and faces a sentencing range of three to fifteen years, much like their violent felon counterparts who commit B felonies and face sentences of eight to thirty years for possessing a firearm.[277]

271. 21 U.S.C. § 841(b).

272. 18 U.SC § 924(c)(1)(D)(i) ("[A] court shall not place on probation any person convicted of a violation of this subsection").

273. 18 U.S.C. § 924(c)(1)(A)(i)–(iii); *see also* 18 U.S.C. § 924(c)(1)(D)(ii) ("[N]o term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was . . . possessed.").

274. TENN. CODE ANN. § 39-17-1307 (b)(1)(A)–(B) (2018).

275. *Compare* TENN. CODE ANN. § 39-17-1307(b)(1)–(2), *with* TENN. CODE ANN. § 39-17-1307(c).

276. TENN. CODE ANN. § 39-17-1307(c)(1). Note that, under Tennessee law alone, a regular felon is not prohibited from possessing all firearms, rather, regular felons are only prohibited from possessing handguns. *Id.* Deductively, then, regular felons may possess long guns under Tennessee law. *Id.* Nonetheless, they will remain prohibited from such possession federally. 18 U.S.C. § 922(g); TENN. CODE ANN. § 40-35-112 (1989).

277. TENN. CODE ANN. § 39-17-1307(b)(3) (2018); TENN. CODE ANN. § 40-35-112 (1989).

Federal laws work similarly in this regard, too. 18 U.S.C. § 922(g) is the primary statute prohibiting possession of firearms. Of course, it prohibits the possession of firearms by any and all felons. But drug felons are again situated directly alongside violent felons and are subject to severely increased sentencing. Federal sentencing is dictated by two main structures: statutorily mandated sentencing ranges promulgated by Congress, and permissive, directive sentencing guidelines promulgated by the Sentencing Commission. The judge must consider the guideline range in fashioning an appropriate sentence, but the judge is not bound to the guideline range.[278]

If convicted of the charge of prohibited possession of a firearm by a convicted felon under § 922(g), defendants face a statutorily mandated sentencing range of zero years to ten years.[279] The guideline range for the prohibited possession of the firearm, though, has been drastically affected by the War on Drugs. First, any prior controlled substance or crime of violence conviction can increase the defendant's base offense level.[280] And second, the instant possession of drugs can increase the offense level by four levels.[281] In this way, the Sentencing Guidelines work to increase sentences for the possession of drugs and guns in much the same fashion as the state and federal statutes.

The mere possession of a firearm subsequent to prior drug convictions, but absent any simultaneous, instant drug activity, can carry drastically increased consequences in the federal system. As discussed immediately above, prior controlled substance and violent felony convictions can increase one's base offense level under the Guidelines. But statutorily, a repeat offender faces drastically increased sentences, even up to life in prison, for the mere possession of a gun. Popularly known as the Armed Career Criminal Act and promulgated at 18 U.S.C. 924(e), the law increases punishment for anyone found in possession of a firearm after sustaining "three previous convictions . . . for a violent felony or a serious drug offense, or both." Instead of facing a sentence in the range of zero to ten years, the defendant faces a term of

278. *See* United States v. Booker, 543 U.S. 220, 226 (2005); 18 U.S.C. § 3553(a)(4).

279. 18 U.S.C. § 924(a)(2).

280. *See* 18 U.S.C. app. § 2K2.1(a)(1)–(4) (raising the offense level from a 14 for a regular felon at 18 U.S.C. app. § 2K2.1(a)(6), 20–26 for drug and violent felons).

281. *See* U.S.C. app. § 2K2.1(b)(6)(B).

"not less than fifteen years," meaning fifteen years to life imprisonment.[282]

In these ways, the drug felon is positioned alongside the violent felon and denied access to self-defense through possession of a firearm in a much more severe manner than all other citizens, including other nonviolent felons. Again, it may seem logical or even intuitive that a person who has committed three violent felonies involving the use of force against another person, the infliction of bodily injury, or the use or display of a firearm should no longer be allowed to possess a firearm. But under the federal statutory structure described above, a person who has three prior convictions for selling marijuana—a substance widely decriminalized across the nation—can face a sentence of life imprisonment for the mere possession of a firearm (the possession of which is a constitutionally protected right founded in the natural, human right to self-defense).

3. Rethinking the conflation of drug and violent crime: sentencing commission recommends violent conviction requirement for enhanced sentencing

It may appear obvious at first that drug and violent offenders are treated differently than other felons. The rhetoric that has supported the promulgation of "tough on crime" laws has consistently placed these two types of crimes together and above other types of crime on the law enforcement priority list. The rhetorical stance is these are the types of crimes that harm society the most.

But do they? Should these two, distinct types of crime be so conflated atop the crime prevention priority list? A close examination of recent developments with the Career Offender portion of the United States Sentencing Guidelines suggests they should not.

The Career Offender guidelines were promulgated as part of the aforementioned "tough on crime" movement.[283] They focus solely on

282. *See* 18 U.S.C § 924(e)(1) (stating that the "court shall not suspend the sentence of, or grant a probationary sentence to," any person sentenced under this subsection).

283. *See* UNITED STATES SENTENCING COMMISSION, *supra* note 256, at 12 (stating that the "genesis of the career offender directive set forth at 28 U.S.C. § 994(h) was an amendment by Senator Edward M. Kennedy to the Violent Crime and Drug

drug and violent crimes and situate the two exactly alike. Defendants are eligible for sentencing under the enhanced guideline calculations as a Career Offender if their "instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense" and they have "at least two prior felony convictions of either a crime of violence or a controlled substance offense."[284]

The goal of the Career Offender guidelines is to meet the legislative mandate to ensure that "career criminals" are sentenced to the "maximum or approximately the maximum penalty for the current offense."[285] This legislative directive from Congress to the Sentencing Commission was made to "assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers."[286] The Committee's opinions and Congress's directive demonstrate equal concern about drug trafficking crimes and violent crimes among those responsible for promulgating our sentencing laws and procedures. Likewise, the resulting Career Offender guidelines ensure equally increased guideline punishments for repeat violent and drug offenders.

However, new research and closer examination of the Career Offender guidelines and the results of their application have the Sentencing Commission reconsidering the original notion that drug offenders and violent offenders should be treated and punished alike. The Sentencing Commission conducted a "multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction."[287] One of the primary concerns of the study was "a lack of distinction between offenders with differing types of qualifying offenses of conviction or differing types of predicate offenses."[288]

The Sentencing Commission categorized Career Offenders by their pathways to career offender status. Since the Career Offender

Enforcement Improvement Act of 1982" and that the Career Offender enhancements eventually became part of the Sentencing Reform Act of 1984).

284. 18 U.S.C. app. § 4B1.1(a).

285. UNITED STATES SENTENCING COMMISSION, *supra* note 256, at 12 (quoting SEN. REP. NO. 98-225, at 175 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182); *see also* 28 U.S.C. § 994(h).

286. UNITED STATES SENTENCING COMMISSION, *supra* note 256, at 12 (quoting SEN. REP. NO. 98-225, at 175 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182).

287. UNITED STATES SENTENCING COMMISSION, *supra* note 256, at 2.

288. *Id.* at 26.

guidelines focus solely on drug and violent offenders, the three categories for this study were "drug trafficking only," "violent only," and "mixed" offenders.[289] Overall, the Commission found "clear and notable differences between drug trafficking only career offenders and those career offenders who have committed a violent offense."[290]

Those who had committed a violent offense generally have more serious prior convictions and more extensive overall criminal histories.[291] Those with violent convictions have a higher recidivism rate, reoffend more quickly following a previous sentence or release, and tend to reoffend with a more serious new offense than do their drug trafficking only counterparts.[292] Yet, despite this evidence and trends across the nation showing that courts tend to treat drug only offenders with more leniency than violent offenders,[293] the Career Offender guidelines often operate to punish drug trafficking offenders *more harshly* than violent offenders.[294]

Due to this counterintuitive functioning of the Career Offender guidelines, the Commission made some recommendations to Congress. The Commission found that "a more tailored approach to determining who qualifies for career offender status is appropriate,"[295] and concluded that "the significant enhancements provided by the career offender directive, and the related career offender guideline, are most appropriately reserved for those offenders who committed a felony 'crime

289. *Id.* at 27 (defining "drug trafficking only" offenders as "offenders with a drug trafficking instant offense, two or more prior drug trafficking convictions, and no prior violent offenses"; "violent only" offenders as "offenders with a violent instant offense of conviction, two or more prior violent convictions, and no prior drug trafficking offenses"; and the "mixed category" as "offenders who have either a drug trafficking or violent instant offense of conviction and any combination of violent and/or drug trafficking prior offenses").

290. *Id.* at 26.

291. *Id.* at 30.

292. *Id.* at 26, 39–42.

293. *Id.* at 34–37.

294. *Id.* at 31–33 (discussing how the Career Offender guidelines are driven in part by the maximum statutory penalty for the instant offense and demonstrating how drug offenses can carry greater statutory maximums than violent offenses, using as examples "the primary drug trafficking statute, 21 U.S.C. § 841, which can carry a maximum "up to life imprisonment" and the offense of Hobbs Act Robbery,18 U.S.C. § 1951, which carries "a statutory maximum penalty of 20 years imprisonment").

295. *Id.* at 43.

of violence.'"[296] Ultimately, the Commission formally recommended that Congress "amend the career offender directive at 28 U.S.C. § 994(h) to more effectively differentiate between career offenders with different types of criminal records by requiring that an offender have committed a felony 'crime of violence' either as the instant offense of conviction or as one of the required predicate convictions."[297]

Notwithstanding this report from the Sentencing Commission and other support for a sentencing reform movement such as the First Step Act, not much has changed and the numbers are holding steady. People are charged with and convicted of felony crimes at a high rate, in general, leading to mass incarceration. The main engine driving the machine of mass incarceration is the War on Drugs. That war is responsible for practically half of the inmates across the nation as well as numerous felons still living in disenfranchisement. Its continued results have drastically disproportionate effects across the racial line of white and nonwhite, and especially drastic effects on Black males in terms of imprisonment and disenfranchisement rates which result in loss of full, legal status. Understanding this functionality of the criminal justice system illuminates the rhetorical connection between our ideas about the drug felon, specifically, and the historic confusion about Black criminality deserving marginalization and disenfranchisement becomes apparent.[298]

The notion of the "dangerous (Black) drug felon" and the accompanying need to protect society against that particular felon have replaced the older systems of legally enforced racial inferiority. The LAC/FD is the new Jim Crow, the new Separate-but-Equal, the new Black Codes, the new Slavery. And the end result is that, generally speaking, Black males have less access to the fundamental, human right of self-defense and are far more likely to have a duty to retreat in the face of a reasonably perceived white threat. Just as in older, seemingly ancient ways, white people are granted legal agency and sovereignty over their own bodies in the most ultimate and necessary form while nonwhite people are not.

296. *Id.* at 44.

297. *Id.*

298. LIGHT, *supra* note 4, at 110 (discussing the "spurious myth of white vulnerability to Black criminality"); *see generally* ALEXANDER, *supra* note 213; *see also* AMEND: THE FIGHT FOR AMERICA (Netflix 2021); 13TH (Netflix 2016).

V. LAW-ABIDING CITIZEN/FELON DYNAMIC: HISTORIC, RHETORICAL, AND LEGISLATIVE CONNECTIONS

The essential abolition of one's Second Amendment rights has always been supported by the "tough on crime" rhetoric that produced the notion of the "dangerous drug felon" and legally situated the drug felon alongside the violent felon. *Blackwell v. Haslam* provides the perfect example of the complete conflation, both rhetorically and legally, of drug crime with dangerous violence. Mr. Blackwell was a convicted drug felon in Georgia.[299] He subsequently received a full pardon from the State of Georgia and then moved to Tennessee where he filed for a declaratory judgment that he could possess firearms without violating the law. The case was ultimately decided by analyzing the Full Faith and Credit Clause. The Court found appropriate circumstances to apply the public-policy exception to the Clause because Blackwell was "a convicted *violent* drug felon," though only his drug conviction is mentioned.[300] Drug felons are disarmed, and the legal justification is dangerousness.

But studies like the one discussed above show that drug felons, generally, have less serious criminal records and are much less violent offenders than violent felons. And yet, through the War on Drugs, drug crimes are situated right next to, if not above, violent crime in the hierarchy of prosecutorial priority. And it is that very War which produces the greatest racial discrepancies throughout the nation's criminal justice system. Our system bases one's right to possess a firearm in the fundamental, human right to defend oneself and then simultaneously

299. Blackwell v. Haslam, No. M2012–01991–COA–R3–CV, slip op. at 1 (Tenn. Ct. App. June 28, 2013). Mr. Blackwell was a white male. *Id.* Nonetheless, the conflation of violence with drug crimes illustrates how many Black Americans will be disproportionately disenfranchised and disarmed through the War on Drugs and supported by the rhetorical need to protect white Americans from violence despite studies showing drug felons are less violent than violent felons. *Id.*

300. *Id.* ("We hold that Tennessee's public policy on the restoration of firearm rights for a convicted *violent* drug felon is not entirely inconsistent with Georgia's public policy, so the public-policy exception to full faith and credit is not applicable in that situation. However, Tennessee public policy proscribes the restoration of firearm rights for a convicted *violent* drug felon, contrary to Georgia's public policy allowing the restoration of firearm rights for all felons, violent or not. This Tennessee policy implicates public safety so as to warrant application of the public-policy exception to the Full Faith and Credit Clause under the appropriate circumstances.").

strips that right from a class of people disproportionately based on race, leaving it only marginally preferable, if at all, to our past legal systems of oppression based on racial supremacy and legal submission.

Caroline E. Light discusses the increased risks for Black Americans in defending themselves. In doing so, she explores the historical rhetoric of the national discussion on firearm possession. She states that the "language of [Stand Your Ground] laws and the NRA's 'Armed Citizen' campaign promise that any and all citizens may invoke the law to stand their ground. But in practice, only some enjoy this right."[301] Though modern legislation purports to be race-neutral, "we remain trapped in history, attached to collective memories that perpetuate" notions of idealistic citizenship "in the service of white property and power."[302] This rhetorical and legislative path "continues to serve the reigning power structures, sometimes subtly but always with an eye to larger society's understanding of 'reasonableness,'" and it uses historical figures as well as "contemporary models of armed citizenship" to conflate the notions of "gun rights with freedom and civil rights, while equating federal gun regulation with white supremacy."[303]

Light's indictment on the current, racially disparate effects of gun laws is harsh and may appear drastic or even hyperbolic given today's superficially colorblind rhetoric and legal language. However, primarily through the War on Drugs, the current legal landscape in America is that specific statutes work to conflate drug and gun prohibitions resulting in the overwhelming disarmament of the Black community.

Tennessee's most recent Constitutional Carry law, then, is a perfect example of the rhetorical and legislative patterns that Light discusses. It purports to protect everyone equally.[304] Yet it severely reduces parole eligibility for the mere possession of a firearm by a felon, and it does so in a statutory structure that already provides for a greatly enhanced punishment for drug felons as compared to regular felons.[305]

301. LIGHT, *supra* note 4, at 131.

302. *Id.*

303. *Id.* at 131–32.

304. *See supra* Section I.A.

305. For purposes of this article, a "regular felon" is a convicted felon with no prior drug conviction and no prior violent conviction. *See* S.B. 765, *supra* note 5 (now codified at TENN. CODE ANN. § 40-35-501(y)(1)-(2)); TENN. CODE ANN. § 39-17-1307.

All while the War on Drugs methodically attacks Black people through disenfranchisement for conduct committed at the same rate pan-racially.

Tennessee's new law purports to protect the law-abiding citizen by securing the law-abiding citizen's right to carry a handgun for the purpose of self-defense and increasing punishment for any felon possessing a firearm. But as discussed above, the War on Drugs does not actually focus on all drug activity. It is, instead, structured to be more concerned with Black drug activity. All demographic groups use and sell drugs at roughly the same rate, but Black Americans are consistently and disproportionately subjected to the harsh realities of second-class citizenship through drug felon status. "Law-abiding citizen" has come to mean white American, while "drug felon" has come to mean Black American. In this way, laws like Tennessee's new version of Constitutional Carry secure the right to carry a handgun in preparation for self-defense to white people while endangering Black people and subjecting them to increased risk of potential violence and an additional duty to retreat in the face of that violence.

Purporting to secure fundamental, human rights for all while simultaneously and systematically barring the same rights from a group of people based on race may just be the most "Constitutional" thing about this new law after all. In a historical context, this is exactly what our founding fathers accomplished when they constructed the Constitution as our nation's founding document. The Bill of Rights, as discussed above in Section II, was viewed by many as the legal embodiment of the ideals espoused in the Declaration of Independence. These are the ideals of freedom, independence, and self-sovereignty made available to every human as all are created equal. And these deals were also codified during an era in which a group of human beings were not considered equal under the law. Slavery is itself the antithesis of freedom, independence, and self-sovereignty for the enslaved.

The founding fathers of our nation created a government that bestowed rights and privileges to its citizens while limiting the legal definition of "citizen" to white men.[306] In post-Fourteenth Amendment America, our government is now superficially color-blind. Yet, the results of our current system of citizenship are strikingly similar to the ways of the past. The conversation, though, is centered on the LAC/FD

306. LIGHT, *supra* note 4, at 11.

as opposed to the white/non-white racial dynamic. Through the War on Drugs, the LAC/FD is simply a new framework for the racially oppressive ways of the past.

The Constitution is the direct connection from the racially oppressive legal structures of the past to our current, purportedly race-neutral legal structures that produce the same results. In the era of slavery, a person's class, as defined mainly by race, determined one's citizenship. Now, within the LAC/FD, the criminal justice system is the litmus test for one's eligibility for the full rights of citizenship. Popularly revered as President Lincoln's finest political accomplishment abolishing slavery, the Thirteenth Amendment also provided the background for the criminal justice system becoming the new form of legal racial oppression. It states that "[n]either slavery nor involuntary servitude, *except as punishment for crime*…shall exist within the United States."[307] The Thirteenth Amendment is the legal foundation for the current LAC/FD in that the criminal can legally be treated as a lesser or even non-citizen. In a nation purportedly founded on human rights, that equates to the treatment of criminals as lesser or even non-humans under the law.

Because the War on Drugs is now the largest contributor to the criminal justice system, it is therefore the largest contributor to the LAC/FD. As discussed above, the War on Drugs currently operates to ensure that white people remain law-abiding citizens while Black people are labeled felons at grossly disproportionate rates. The result is legally enforced, second-class existence based on race and the treatment of Black people as less deserving of protection under the law.

Recently, numerous tragic events and repeated viewings of Black bodies being subjected to lethal force have led to the Black Lives Matter movement. Events like the deaths of Trayvon Martin and Ahmaud Arbery are certainly factual examples of Black men being perceived as threats, subjected to white violence, and killed in the process. But understanding how this LAC/FD mirrors the racially oppressive results of slavery illustrates exactly how Black lives still do not matter (at least not as much) under the law.

A close examination of the interplay between the law-abiding citizen/felon dynamic and access to self-defense reveals this deplorable fact. Once labeled a felon, one loses the right to possess a firearm as

307. U.S. CONST. amend. XIII (emphasis added).

protected by the Second Amendment. The Supreme Court has stated that the constitutionally protected right for individuals to possess and carry firearms is based in the pre-existing, human right to self-defense.[308] As discussed above, self-defense is an ideal originally espoused during the Enlightenment and resulting Revolutionary Era. The right to defend oneself has become a crux of American citizenship, being described as "the necessary consequence" of one's "right to life."[309]

From that perspective, the ability to defend one's self is the legal essence of what it means to be human and to have the right to live. Taking away one's right to self-defense is to negate the necessary consequence of one's right to life. Viewed in a similar context as the necessary condition to live in our society, the truth of the right to self-defense guarantees the truth of the right to life. Negating the right to self-defense, logically speaking, negates the truth of one's right to life. Essentially, it is impossible to have the right to life without the right to self-defense.[310] Once filtered through the War on Drugs, the result is that Black Americans, particularly Black men, have a decreased right to life in our nation; thus, their lives have a decreased value under the law.

Our founding fathers declared independence by espousing "self-evident," natural human rights that apply to all citizens equally as "all men are created equal."[311] The following decade witnessed a successful Revolution and the gaining of freedom and independence from the British Crown. A successful revolution presented the difficult task of creating a nation—a government with sovereignty over its citizens—that embodied democratic principles held with a cautious approach to centralized, federal power.

308. District of Columbia v. Heller, 554 U.S. 570, 609 (2008).

309. *See supra* note 133 and accompanying text.

310. *See* ETHAN D. BLOCH, PROOFS AND FUNDAMENTALS: A FIRST COURSE IN ABSTRACT MATHEMATICS, 8–9 (S. Axler & K.A. Ribbet eds., 2d ed. 2011). "In logic and mathematics, **necessity** and **sufficiency** are terms used to describe a conditional or implicational relationship between two statements. For example, in the conditional statement: 'If *P* then *Q*', Q is **necessary** for P, because the truth of Q is guaranteed by the truth of *P* (equivalently, it is impossible to have *P* without *Q*). Similarly, P is **sufficient** for Q, because P being true always implies that Q is true, but P not being true does not always imply that Q is not true." *Id.* (emphasis added). This conditional statement would be "if one has the right to life ("P"), then one has the right to self-defense ("Q")." *Id.*

311. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

As discussed in Section II, the founding fathers were able to accomplish this difficult task through compromise and rhetorical vagueness. The three main issues at hand during the ratification process were slavery, size, and representation. Whether the federal or state governments would be more powerful also directly affected these three main issues. The issues of size and representation were determined by compromise, resulting in the bicameral legislature. The issue of sovereignty was handled with vagueness, ultimately resulting in sovereignty vested, in some form, at every level: federal, state, and individual citizens ("the People").

Noticeably undiscussed during this ratification process, though, was the issue of slavery. Some urge not to judge the founders too harshly concerning the institution of slavery and its role within the origin of our nation. Of course, the "residents of late-eighteenth century lacked access to many of our modern values," and therefore, "judging the founding generation through the lens of our own values is inherently presumptive and presentistic."[312]

Wise as that admonishment may be, it would likewise be inappropriate to "downplay the awkward reality" … "that slavery was built into the American founding" and "thereby obscure the most consequential and tragic choice the founders were forced to make." Many of the founding generation and "most prominent founders…fully recognized that slavery was incompatible with the values of the American Revolution." Nonetheless, "they consciously subordinated the moral to the political agenda, permitting the continuance and expansion of slavery as the price to pay for nationhood."[313]

Thomas Jefferson, Alexander Hamilton, and Benjamin Franklin are all examples of prominent founders who were well aware of the incompatibility of slavery with the notion of freedom and independence as individual, human rights. Prior to the Constitutional Convention, Jefferson presented a plan which "insisted that all hereditary titles and privileges would be repudiated and that slavery would end no later than 1800."[314] Hamilton, perhaps more of a federalist than an abolitionist, speculated that state governments would be reduced to mere administrative agencies without any political power. And if not, he

312. ELLIS, *supra* note 72, at xvii.

313. *Id.* at 19.

314. *Id.* at 76 (stating this plan lost by one vote).

correctly predicted that there would be "a civil war based on sectional differences over slavery."[315] Franklin became an ardent abolitionist prior to the Constitutional Convention, "but knowing the delicate compromises being made between north and south, he kept silent on the issue" of slavery at the Convention.[316]

And it is this collective silence in the face of current knowledge that set the legislative tone for our nation. Purposeful silence on the issue of race by those who know that racial oppression is a real human rights issue is incompatible with our modern understanding of the founding principles of our nation. The founders made a conscious decision to avoid the issue and it set a pattern for other issues to be politically prioritized over race. By not directly addressing race our silently aware leaders escape responsibility for the racially oppressive results of their legislation.

Concerned over the forming of the bicameral legislature, Benjamin Franklin used the analogy of the fabled two-headed snake that could die of thirst if its heads could not agree on a singular course around an obstacle.[317] Though the analogy of the two-headed beast may have been accurate, perhaps the precise concern was a bit off base. Rather than a bicameral federal legislature, the real two-headed monster that was formed at the Constitutional Convention was the nation's relationship with race. The nation holds itself out to the world as a beacon of fresh light, espousing new-age ideals of human rights and egalitarianism while simultaneously working within the obscure subtleties of history and law to maintain the racially-based class structure of the past.

Our current legislative practices have clear, evolutionary connections to this dualistic foundation of our nation and evolving American culture. Following the official forming of our nation through the ratification of the Constitution, there were approximately 75 years of legally sanctioned slavery. It took a civil war to end it and culminated with the passing of the Thirteenth Amendment. The "except as punishment for a crime" language of the Amendment set the stage for many new laws to be made—such as the status offense of vagrancy—that allowed for the conviction, imprisonment, and immediate return to

315. *Id.* at 166.

316. ISAACSON, *supra* note 78, at 151–53, 464.

317. *Id.* at 453–54.

legally sanctioned subhuman status for recently liberated Black Americans.[318]

Following the civil rights triumph that was the passage of the Thirteenth through Fifteenth Amendments, there was approximately another century of purportedly non-oppressive legislation that had anything but non-oppressive results. White resistance to the notion of "negro rule" was fierce and led to the Black Codes, Jim Crow laws, and Separate-but-Equal legislation. After nearly a century of continued racial oppression post-slavery, there was yet another racially based Civil Rights movement in the 1950s into the 1960s. This movement culminated in the passage of the Civil Rights Act of 1964, the most sweeping civil rights reform since Reconstruction.[319] The Thirteenth Amendment put an end to the institution of slavery, absent a criminal conviction. The Fourteenth Amendment then granted citizenship to anybody born in the United States. They were landmark accomplishments for civil rights that collectively gave Black Americans full citizenship on the surface of the law. But the implementation of the Black Codes and Separate-but-Equal legislation essentially gutted that superficial, legal claim to citizenship and necessitated the resulting civil rights movement of the 50s and 60s. That movement resulted in the *Brown v. Board of Education* decision of 1954 and the Civil Rights Act a decade later.

Following the many successes of the Civil Rights Movement, namely desegregation, there was strong rhetorical and political resistance. In the 1960s, conservatives began to push political rhetoric that "aggressively exploited the riots [of the Civil Rights Movement] and fears of black crime" and effectively laid "the foundation for the 'get tough on crime' movement that would emerge years later."[320] This "law and order rhetoric—first employed by segregationists—would eventually contribute to a major realignment of political parties in the United States."[321] Republicans began to employ what has become known as the Southern Strategy, which, somewhat admittedly though

318. *See generally* AMEND: FIGHT FOR AMERICA (Netflix 2021); 13TH (Netflix 2016); ALEXANDER, *supra* note 213.

319. *See generally* AMEND: FIGHT FOR AMERICA (Netflix 2021); 13TH (Netflix 2016); ALEXANDER, *supra* note 213.

320. ALEXANDER, *supra* note 213, at 52.

321. *Id.* at 55.

always from behind the curtain, appealed to "racial fears and antagonisms."[322]

This trend continued from the 60s into the 70s. By the 1968 presidential election, "race eclipsed class as the organizing principle of American politics, and by 1972, attitudes on racial issues rather than socioeconomic status were the primary determinant of voters' political self-identification."[323] This "conservative revolution that took root within the Republican Party in the 1960s did not reach its full development until the election of President Ronald Reagan in 1980."[324] During the 70s, "conservatives generally gave lip service to the goal of racial equality but actively resisted desegregation, busing, and civil rights enforcement." It was also at this time that Nixon initially called for a War on Drugs, though no "dramatic shifts in drug policy" followed.[325]

After winning the presidency in 1980, "President Reagan officially announced his administration's War on Drugs" in 1982.[326] And by that time, Reagan had "mastered the 'excision of the language of race from conservative public discourse' and thus built on the success of earlier conservatives who developed a strategy of exploiting racial hostility or resentment for political gain without making explicit reference to race."[327] As Section IV discusses thoroughly, it is the continuing War on Drugs that is the driving force of modern racial disparities in access to constitutionally protected rights and privileges perpetuated by the criminal justice system. And Reagan's rhetorical model of race-neutral language and its resulting legislation is precisely what has allowed for "mass incarceration in the age of colorblindness" as Michelle Alexander terms it.

In terms of a citizen's access to self-defense through the possession of firearms, it was this same period from the 60s into the 80s that laid the foundation for the nation's current rhetorical, political, and

322. *Id.* at 56 ("The success of law and order rhetoric among working-class whites and the intense resentment of social reforms, particularly in the South, led conservative Republican analysts to believe that a 'new majority' could be created by the Republican Party . . . .").

323. *Id.* at 59.

324. *Id.* at 60.

325. *Id.*

326. *Id.* at 62.

327. *Id.* at 61 (citing EDSALL & EDSALL, CHAIN REACTION 138 (paperback ed. 1992)); JEREMY MAYER, RUNNING ON RACE 71 (N.Y. Random House ed., 2002)).

legal relationship with the Second Amendment. The National Rifle Association ("NRA") underwent a "political transformation" during this time period that saw the organization go from initially supporting the 1968 Gun Control Act (though that was "in large part to subdue the perceived threat of armed Black militancy") to becoming "a reactionary social movement against all forms of gun regulation" that championed "unrestricted gun access" and, in so doing, invoked "the Second Amendment as a call for armed citizenship."[328] The NRA "seized the opportunity to build on the momentum of . . . [the] Republican 'Southern Strategy' [which] appealed to racism and status anxiety to court Southern white voters beginning in the 1960s."[329] At the core of this "ideological shift were deepening concerns about big government, violent crime, and perceived threats to white lives and property."[330]

The NRA's lobbying arm, the Institute for Legislative Action, was established in 1975 and a new motto was adopted in 1977 by taking language directly from the Second Amendment itself.[331] The organization began running ads in the late '70s advocating protective gun possession for women.[332] Those ads began to intensify and carry an antigovernment tone in the 1980s. As this was the time period that directly correlated with the War on Drugs, the "racial implications of the imagery" used in NRA ads "were implicit invocations of 'urban violence' and dangerous city streets" that urged "'law-abiding' citizens to take their personal safety into their own hands." By the 90s, NRA ads urged Americans to "take back your government and save your guns." Collectively, and throughout its self-reinvention, "the NRA portrayed a law-abiding, white citizen at risk for violent crime, and armed self-defense as an urgent need."[333]

The trend clearly continues. Into the 2000s, many states enacted legislation which have become collectively known as "Stand Your Ground" laws and allow for lethal force outside of the home. As discussed above, Tennessee first changed its statutory language to no longer require a duty to retreat in 1989. Florida passed its version in 2005, and that statute came under national scrutiny in 2012 in the

328. LIGHT, *supra* note 4, at 150.

329. *Id.* at 151.

330. *Id.* at 150.

331. *Id.*

332. *Id.* at 149.

333. *Id.* at 151.

shooting death of Trayvon Martin.[334] Now, the majority of states in the nation have such laws on their books.[335]

Correspondingly, the United States has witnessed an increase in gun ownership. Though "Americans account for only 5 percent of the world's population," they "possess 40 to 50 percent of its guns," and the main reason for gun ownership is personal protection.[336] As the *Heller* Court noted, handguns are the most popular type of firearm in America for self-defense. The *Heller* decision gave Americans the right to possess such a weapon for the sole purpose of self-defense within one's home. But desiring to extend their ability to possess a handgun for personal protection outside of the home, millions of Americans are licensed to carry concealed firearms.[337] Now, states like Tennessee and others that follow the "Constitutional Carry" legislative trend are seeking to further liberalize a citizen's access to handgun possession outside of the home.

But as discussed in Section I, this legislation will not function to liberalize the ability to carry a handgun for the law-abiding citizen as much as it will continue to deter and punish firearm possession by a criminal, especially a drug felon. It does not create a new right, but merely a new exception to an ever-present prohibition to firearm possession, and that prohibition includes the carrying of a firearm for the purpose of self-defense. Working within the current state of citizenship that is the law-abiding citizen/felon dynamic, Constitutional Carry continues our nation's pattern of espousing essential human rights, community safety, and equal protection while ensuring that the ability to inflict immediate death in self-defense by readied use of a handgun is reserved for white citizens while nonwhite citizens, specifically Black men, are either disarmed or risk their liberty while being burdened with the archaic duty to retreat.

The ultimate result is a precarious situation for many Black Americans. The War on Drugs remains the driving force behind our nation's current state of mass incarceration, including its racially disproportionate results. Understanding that all races commit drug offenses at the same rate, the question becomes reasonable: is the

334. *Id.* at 7–8.

335. *Id.* at 2.

336. *Id.* at viii.

337. *Id.* at 2.

disarmament of the Black community intentional? The answer, as with any doublespeaking two-headed monster, is probably both yes and no.

Many of the founding fathers understood that any form of oppression did not comport with the ideals of the Revolution. Nonetheless, they made conscious decisions to remain silent about the issue of slavery at the Constitutional Convention. Likewise, certainly no current member of Tennessee's General Assembly or member of Governor Lee's administration would admit that it is their "conscious objective or desire" to continue our nation's pattern of racially based legislation that empowers and privileges white Americans while disarming Black Americans and burdening them with additional duties.

But the numbers remain the same. Mass incarceration is real, and it has grotesquely disproportionate results racially. Michelle Alexander published her groundbreaking work over a decade prior to Tennessee's passing of its Constitutional Carry law. In that light, it seems reasonable to conclude that Tennessee's legislators were at least "aware of . . . the circumstances" created by the War on Drugs and, therefore, that their legislation would be "reasonably certain to cause the result" that is the disarmament of Black Tennesseans.[338] Regardless of intentions, the results have always been the same in our country when it comes to the access to citizenship, especially as expressed through the ability to defend oneself with lethal force. The results of Tennessee's legislation will undoubtedly be the same.

Herein lies the truest and most direct connection of our current Second Amendment-based legislation with that of our nation's origin and the biggest cause for concern in the ongoing fight for equal access to human rights. Ultimately, the right to bear arms has always been about the reinforcement of a power-based class structure built and enforced on the threat and exercise of violence. The *Heller* Court discussed a number of such constitutional provisions that clearly seek to keep a faction of society in power and another faction of society out of power through the ability, and corresponding lack thereof, to possess firearms.[339] After all, firearms are in and of themselves the handheld ability to take life. Ignoring some larger, problematic issues with these

338. *See* TENN. CODE ANN. § 39-11-106(a)(20), (a)(22) (defining the terms "intentional" and "knowing" under Tennessee law); TENN. CODE ANN. § 39-11-302(a), (b) (defining culpable mental states of "intentional" and "knowing" under Tennessee law).

339. District of Columbia v. Heller, 544 U.S. 570 (2008).

clearly discriminatory provisions in terms of equal protection under the law, the majority pointed to these provisions in concluding that the right to bear arms was individually bestowed to the people as opposed to collectively.[340]

And this is why we should be concerned. We are repeating our history while telling ourselves that we are doing something different, something racially neutral and therefore racially just. The Tennessee Constitution as originally ratified clearly stated that only "the free white men of this State have a right to Keep and to bear arms for their common defense."[341] Of course, that language has been amended as the country has collectively experienced an evolving standard of decency regarding race. But how far have we really come in terms of practically allowing equal access to the most ultimate and necessary form of self-sovereignty—self-defense?

By continuing to operate within the LAC/FD we really have not come very far. The LAC/FD is a litmus test that requires nothing for citizenship yet strips nearly all rights from a person for a single act. In the age of the War on Drugs, the reality is that Black Americans are overwhelmingly stripped of their rights for committing non-violent drug offenses though those offenses are committed at the same rate across all races. The result is a tiered class structure based on race. And in terms of access to self-defense through lethal force, one head of the snake continues to espouse the most natural, basic, and necessary human right of all, while the other head works scrupulously to ensure that the right of self-defense and the accompanying privilege to stand one's ground remain reserved for white people, as they historically have been.

It is a frightening factual and legal landscape for many. A Black Tennessean is ten times more likely to have no Second Amendment rights due to a felony conviction, ten times more likely to be subjected to violence without recourse in a time and place where there are more firearms than ever before—where the legislature espouses the necessity of easy access to handguns outside of the home to protect our human rights. Black citizens are ten times more likely to risk liberty for exercising what has been deemed a fundamental, human right, ten times

340. *Id.* at 593, 611, 614 (citing to the 1689 English Bill of Rights stating "That the Subjects which are Protestants, may have Arms for their Defence . . . ." and other pre- and post-Civil War state provisions that "routinely disarmed" black Americans).

341. TENN. CONST. of 1834, art. I § 26.

more likely to be forced to retreat in the face of a reasonable threat if exercising that right, yet again unable to be considered a "true man" under the law.

CONCLUSION

What, if anything, can be done to stop this terrible pattern of racially based oppression enforced through deprived access to self-defense? Of course, any meaningful and sustainable changes to the nation's legislative patterns will have to be driven by larger conversations concerning the nation's identity and relationship with race and lethal force. We should end the War on Drugs, at least as it is currently applied, and rethink the tough-on-crime initiative that placed drug crimes atop the law enforcement priority list in light of data showing that drug offenders are not as dangerous as violent offenders.

Barring larger, overarching changes such as those, there are a couple of smaller, more practical and more local things that states such as Tennessee could do to even the playing field—or the standing ground, if you will. First, the Tennessee Supreme Court should revisit the issue left unresolved in *Perrier* and require a nexus to some sort of current, illegal activity before requiring the duty to retreat as opposed to allowing a status offense to qualify as being "engaged in illegal activity." And second, the General Assembly should simply remove "notwithstanding 39-17-1322" from its 39-11-611 subsections, thus allowing everyone to stand their ground in exercising their fundamental, human right to defend themselves if deemed to have done so justifiably. These two, small changes would result in increasing access to the essential, human right of self-defense—the right deemed the necessary condition of the right to life. Perhaps today is the right time. Perhaps changes like these are possible in times of societal conversation surrounding Black Lives Matter and the notion of white privilege.

Only time will tell in which directions Tennessee and states like it will take their future gun legislation. But one thing is certain: the table has been set for the conversations and legal debates to continue. Shortly after the *Heller* decision, the Supreme Court made it clear that the Second Amendment applied to all states through the Fourteenth Amendment.[342] And most recently, it extended the *Heller* decision

342. McDonald v. City of Chicago, 561 U.S. 742, 765 (2010).

beyond the hearth and home and into public spaces.[343] In so doing, the Court abandoned means-end scrutiny in the Second Amendment context and announced a new test wherein the government must prove that the current firearms regulation under question "is part of the historical tradition" of the nation's firearm prohibitions.[344]

This historical analysis will force courts across the land to look back through our nation's history and analyze how we have historically prohibited firearm possession. It will be interesting to see how courts grapple with this issue. Many courts are already receiving new Second Amendment challenges post-*Bruen*.[345] This may prove to be a tough burden for the government considering the first federal firearm prohibitions, included in the Federal Firearms Act, were not enacted until 1938. The lifeblood has been reinjected into many Second Amendment-related arguments that had previously been considered but denied regarding prohibited classes of people possessing firearms.[346] It remains to be seen as to what rhetoric will be employed and what remedies will be conjured when the inevitable conclusion is reached: much of our nation's legal history, especially regarding firearm regulation and class- or status-based prohibition, is no longer constitutionally permissible.

343. N.Y. State Rifle and Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

344. *Id.* at 2127.

345. *See* United States v. Price, No. 2:22-cr-00097, 2022 U.S. Dist. LEXIS 186571, at *17 (S.D. W. Va. Oct. 12, 2022) (striking down 18 U.S.C. 922(k) as unconstitutional post-*Bruen*); Columbia Hous. & Redevelopment Corp. v. Braden, No. M2021-00329-COA-R3-CV, 2022 WL 7275671, *3 (Tenn. Ct. App. Oct. 13, 2022) (striking down prohibition of firearm possession in public housing as unconstitutional).

346. *See* Kanter v. Barr, 919 F.3d 437, 451–69 (7th Cir. 2019) (Barrett, J., dissenting).