Essay

Refining the Dangerousness Standard in Felon Disarmament

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INTRODUCTION

To some, 18 U.S.C. 922(g) is a necessary safeguard that keeps guns out of the hands of dangerous persons.[1] To others, it strips classes of non-violent people of their natural and constitutional rights.[2] This statute makes it a crime for certain classes of individuals to transport, receive, or possess firearms or ammunition.[3] These include felons,[4] fugitives,[5] unlawful users of

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1. Dru Stevenson, *In Defense of Felon-In-Possession Laws*, 43 CARDOZO L. REV. 101, 166–67 (2021) ("Felon-in-possession laws serve larger policy goals than merely preventing convicted criminals from committing more gun crimes, though that is certainly a valid policy goal on its own. Disarming felons helps reduce the constant influx of firearms into the most vulnerable communities, thereby disrupting underground gun markets and limiting the supply of weapons available to other would-be criminals—not just the felons themselves.").

2. *See, e.g.*, C. Seth Smitherman, *Rights for Thee But Not for* Mai*: As-Applied Constitutional Challenges to 18 U.S.C. § 922(G)(4)*, 25 TEX REV. L. & POL. 515 (2021) (arguing that 18 U.S.C. § 922(g)(4)'s prohibition on firearm ownership by the mentally ill is unconstitutional if it disarms individuals who are no longer mentally ill).

3. 18 U.S.C. § 922(g). Specifically, the statute ties these actions to interstate or foreign commerce (i.e., "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce"). *Id.*

4. 18 U.S.C. § 922(g)(1).

5. 18 U.S.C. § 922(g)(2).

controlled substances,[6] the mentally ill,[7] illegal aliens,[8] veterans with dishonorable discharges,[9] those who renounce their U.S. citizenships,[10] those subject to restraining orders,[11] and convicted perpetrators of domestic violence.[12] Prior to *Bruen*,[13] the first prong—which applies to felons—was upheld against numerous challenges at the circuit court level.[14] However, the two-step interest balancing test used to uphold this provision was rejected in *Bruen* and was replaced with a history and tradition test opening the door to renewed challenges.[15] Under this new standard, if conduct falls within the plain text of the Second Amendment, the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[16] Since *Bruen* was decided, courts have chipped away at 18 U.S.C. 922(g), either rejecting provisions of the law entirely,[17] or narrowing the permissible scope of their application.[18]

A notable provision that largely escaped enjoinment by the courts, however, is 18 U.S.C. 922(g)(1), which disarms any person "who has been convicted in any court of[] a crime *punishable* by imprisonment for a term exceeding one year."[19] In the second half of 2022, a Third Circuit panel considered the

6. 18 U.S.C. § 922(g)(3).
7. 18 U.S.C. § 922(g)(4).
8. 18 U.S.C. § 922(g)(5).
9. 18 U.S.C. § 922(g)(6).
10. 18 U.S.C. § 922(g)(7).
11. 18 U.S.C. § 922(g)(8).
12. 18 U.S.C. § 922(g)(9).
13. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).
14. Stevenson, *supra* note 1, at 103 ("Federal appellate courts that have considered Second Amendment challenges to the felon prohibitor, before and after *Heller*, have upheld the constitutionality of the statute . . . .").
15. *Bruen*, 597 U.S. at 13 (2022) (applying a "methodology centered on constitutional text and history").
16. *Id.* at 15.
17. United States v. Rahimi, 59 F.4th 163 (5th Cir. 2023) (enjoining as unconstitutional 18 U.S.C. § 922(g)(8) (which disarms those subject to restraining orders) because it was not consistent with the history and tradition of firearm regulations at the founding).
18. *See* United States v. Harrison, 654 F. Supp. 3d 1191 (W.D. Okla. 2023) (finding 18 U.S.C. § 922(g)(3) (which disarms unlawful users of controlled substances) unconstitutional as applied to someone who was not *actively* intoxicated).
19. 18 U.S.C. § 922(g)(1) (emphasis added).

constitutionality of this so called "felon-in-possession law." In *Range v. Att'y Gen. United States*, the appellant Range had been convicted in 1995 of obtaining $2,458 through welfare fraud.[20] Although the crime was classified as a misdemeanor and Range received no jail time, because the crime was *punishable* by up to five years' imprisonment he was caught in the reach of 18 U.S.C. 922(g)(1) and forever barred from owning a firearm.[21] The panel, in a *per curiam* opinion, found that 18 U.S.C. 922(g)(1) satisfied *Bruen*'s historical mandate because it comported with "legislatures' longstanding authority and discretion to disarm citizens unwilling to obey the government and its laws, whether or not they had demonstrated a propensity for violence."[22]

Shortly thereafter, the Third Circuit reconsidered the case *en banc*. The court first found that Range was included in "the people" protected by the Second Amendment and that his conduct of possessing a rifle and shotgun was covered by the amendment's plain text.[23] Turning to *Bruen*'s second step, the court took a narrow view of the relevant history, requiring a showing by the government that traditional regulations were analogous to 922(g)(1) *as applied to* Range.[24] The court rejected analogies to historical disarmaments of Loyalists, Catholics, Black individuals, and similar groups, because they were not analogous to Range's "individual circumstances."[25] However, the court specifically declined to adopt a standard for what class of individuals could categorically be disarmed under *Bruen*'s historical test,[26] opting instead for a narrow analysis tailored to Range's circumstances.[27]

Range opened the door for nonviolent felons to escape 922(g)(1)'s reach, but other courts have sought to close that door

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20. Range v. Att'y Gen. United States, 53 F.4th 262, 266 (3d Cir. 2022).

21. *Id.*

22. *Id.* at 269.

23. Range v. Att'y Gen. United States, 69 F.4th 96, 99 (3d Cir. 2023) (en banc) (unless otherwise noted, subsequent references to *Range* refer to the en banc decision).

24. *Id.* at 104 ("[T]he Government does not successfully analogize [historically disarmed] groups to Range and his individual circumstances.").

25. *Id.*

26. *Id.* at 104 n.9 ("We need not decide this dispute today because the Government did not carry its burden to provide a historical analogue to permanently disarm someone like Range, whether grounded in dangerousness or not.").

27. *Id.* at 105 ("Our decision today is a narrow one.").

in their jurisdiction. The Eighth Circuit, in *United States v. Jackson*, conducted a similar historical analysis but concluded that "Congress acted within the historical tradition when it enacted [section] 922(g)(1) and the prohibition on possession of firearms by felons."[28] The Tenth Circuit, on the other hand, punted on the historical question and concluded that because *Bruen* did not explicitly abrogate its prior 922(g)(1) caselaw, that precedent applied.[29] Relying on this precedent, the Tenth Circuit upheld 922(g)(1).[30] *Range*'s refusal to speak categorically, and its variance from the Eighth and Tenth Circuits, leaves the question open for future courts: under this nation's tradition, what class of people can be categorically disarmed?

Part I of this essay briefly discusses the history of disarmament laws in the United States, drawing out the tension between their general theme of dangerousness and their problematic applications. In Part II, this essay traces the Second Amendment back to its first principles to outline the boundaries for whom it does—and does not—protect the right to keep and bear arms. Part III applies these principles to the issue of felon disarmament and proposes an evidence-backed standard that fulfills the Second Amendment's principle of defense while protecting individual rights against the potentially discriminatory discretion of judges and lawmakers.

I. THE PROBLEM WITH THE HISTORY

Disarming classes of people is not a new concept in American history. During the seventeenth and early eighteenth centuries, the colonial governments denied arms-related rights to Black individuals,[31] Catholics,[32] and Native Americans.[33]

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28. United States v. Jackson, 69 F.4th 495, 505 (8th Cir. 2023).

29. Vincent v. Garland, 80 F.4th 1197, 1200 (10th Cir. 2023).

30. *Id.* at 1201.

31. *See, e.g.,* 1715 Md. Laws 117, An Act For The Speedy Trial Of Criminals, And Ascertaining Their Punishment In The County Courts When Prosecuted There, And For Payment Of Fees Due From Criminal Persons, chap. 26, § 32 ("That no negro or other slave within this province shall be permitted to carry any gun . . . .").

32. *See, e.g.*, An Act for the better securing the Government by disarming Papists and reputed Papists, 1 W. & M. ch. 15 (1689).

33. *See, e.g.,* 1633 Va. Acts 219, Acts Made by the Grand Assembly, Holden At James City, August 21st, 1633, An Act That No Arms or Ammunition Be Sold To The Indians, Act X.

During the Revolutionary War, the colonies disarmed Loyalists.[34] After the founding, the young United States continued to deny Second Amendment rights to Black individuals, slaves, and Native Americans.[35] 18 U.S.C. 922(g)(1) is simply a new page in the American story of disarmament.

These historical laws have been analyzed in depth by other scholars,[36] and such analysis need not be repeated here. However, what becomes clear from the history is that an underlying purpose of these laws was to take arms from those the governments thought to be dangerous.[37] Catholics were disarmed during the French and Indian War because of feared sympathies toward the Catholic nation of France.[38] The colonies and early states disarmed Black and enslaved people due to fears of slave

34. Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Act at 31–32, 35; Act of May 5, 1777, ch. 3, *in* 9 HENING'S STATUTES AT LARGE 281, 281-82 (1821); 1778 Pa. Laws 123, An act for the further security of the government, ch. LXI, §§ 1–3, 5, 10.

35. Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force; with a New and Complete Index. To Which are Prefixed the Declaration of Rights, and Constitution, or Form of Government, 187 (The Making of Modern Law: Primary Sources through 1803) ("No negro or mulatto whatsoever shall keep or carry any gun . . . ."); 1797 Del. Laws 104, An Act For the Trial Of Negroes, ch. 43, § 6.; 1798 Ky. Acts 106, § 5 ("No negro, mulatto, or Indian whatsoever, shall keep or carry any gun . . . ."); 1799 Miss. Laws 113, A Law For The Regulation Of Slaves ("No negro or mulatto shall keep or carry any gun . . . ."); 1804 Ind. Acts 108, A Law Entitled a Law Respecting Slaves, § 4.

36. *See, e.g.*, Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249 (2020).

37. *Id.* at 286 ("While many of these bans have been unjust and discriminatory, the purpose was always the same: to disarm those who posed a danger."); Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting) ("The historical evidence does, however, support a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness.").

38. Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 DREXEL L. REV. 1, 35–36 (2023) ("Protestants at the time expressly stated that they disarmed Catholics to prevent violence. The French and Indian War was a 'global war' between the United Kingdom and France that 'pitted Protestant versus Catholic.' American Protestants worried that their Catholic neighbors were plotting with Catholic France to impose Catholic rule throughout America. Indeed, the English in America had long viewed French Catholicism as part of France's goal of establishing a 'Universal Empire, or, in other words, Universal Slavery.'").

insurrections.[39] During the Revolutionary War, Loyalists were disarmed because of the danger they posed to the colonial armies.[40]

The history of disarmament laws in America suggests that, in order for new ones to be valid, they must limit their scope to disarming *dangerous* individuals.[41] But what does it mean for one to be "dangerous" enough to be disarmed? Under one conception, they must have committed a violent offense.[42] However, many of the historical disarmament laws do not require such a high threshold—instead, they disarm based upon a probabilistic evaluation of potential *future* violence. Catholics were disarmed because of fears that they *would* side with the French in the French and Indian War, not because they already had.[43] Slaves were disarmed because of a presumption that if provided with full Second Amendment rights, they would employ those rights to resist the tyranny of their owners.[44] Under this standard in today's world, perhaps a showing that certain nonviolent crimes were correlated with increased rates of violence would suffice.[45]

So if the history and tradition of disarmament laws shows that their targets must be *dangerous*, what standard should a court apply? The history here would seem indeterminate, for there is no clear standard to be drawn from the laws that disarm *potentially* dangerous individuals. I propose that the takeaway from history should be the tradition of "dangerousness" more broadly, rather than a particular conception thereof. Relying too heavily on particular conceptions strays into giving traditional weight to a line of laws deemed by *Bruen* to be discriminatory

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39. *Id.* at 27 ("These laws rested upon White fears that armed Blacks, especially freemen, might conspire to carry out a slave revolt." (internal quotation marks omitted) (citing Nicholas Johnson et. al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 440 (3d ed. 2021))).

40. *Id.* at 53 (discussing how the threats Loyalists posed in each state that disarmed them reveals how dangerous they were).

41. Greenlee, *supra* note 36, at 257 (showing that when it comes to disarmament laws, there is "a historical justification for violent or otherwise dangerous felons [] but there is no historical basis for denying nonviolent felons the right to keep and bear arms.").

42. *Id.*

43. Greenlee, *supra* note 38, at 30.

44. *Id.* at 21.

45. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 448 (7th Cir. 2019) (Barrett, J., dissenting) (citing evidence that certain nonviolent prior offenders commit violent crimes at a significant rate).

and not worthy of consideration.[46] Particularly today, when people of color may face a sterner justice system than white people,[47] straying into probabilistic dangerousness evaluations may lead us back into a discriminatory framework for denying the rights of entire classes.[48] Instead, the principles that underly the Second Amendment itself may provide a solution that remains faithful to a tradition of protecting the rights of all but the most dangerous, while not providing lawgivers with potentially discriminatory discretion.

II. DANGER AND THE PRINCIPLES BEHIND THE SECOND AMENDMENT

A key principle behind the Second Amendment is that of defense against *danger*.[49] Generally, this danger takes three forms.

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46. Greenlee, *supra* note 38, at 2 ("*Bruen* makes clear that discriminatory laws cannot form a historical tradition."). The Third Circuit in *Range* also declined to apply racist analogies because they "would be unconstitutional under the First and Fourteenth Amendments." Range v. Att'y Gen. United States, 69 F.4th 96, 104 (3d Cir. 2023) (en banc).

47. Besiki Kutateladze, Whitney Tymas & Mary Crowley, *Race and Prosecution in Manhattan*, VERA INST. OF JUST. 8 (July 2014), https://www.vera.org/publications/race-and-prosecution-in-manhattan [https://perma.cc/B4J4-L4RX] (describing how, in Manhattan, Black individuals are "15 percent more likely to be imprisoned" for misdemeanor offenses).

48. *See* 1804 Miss. Laws 90–91, An Act Respecting Slaves, § 4 ("No negro or mulatto shall keep or carry any gun."); Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force; with a New and Complete Index. To Which are Prefixed the Declaration of Rights, and Constitution, or Form of Government, 187 (The Making of Modern Law: Primary Sources through 1803) ("No negro or mulatto whatsoever shall keep or carry any gun."); 1731-43 S.C. Acts 168, § 23 ("It shall not be lawful for any slave, unless in the presence of some white person, to carry or make use of firearms."); 1715 Md. Laws 117, An Act For The Speedy Trial Of Criminals, And Ascertaining Their Punishment In The County Courts When Prosecuted There, And For Payment Of Fees Due From Criminal Persons, chap. 26, § 32 ("That no negro or other slave within this province shall be permitted to carry any gun . . . ."); The Colonial Laws Of New York From The Year 1664 To The Revolution, Including The Charters To The Duke Of York, The Commissions And Instructions To Colonial Governors, The Dukes Laws, The Laws Of The Dongan And Leisler Assemblies, The Charters Of Albany And New York And The Acts Of The Colonial Legislatures From 1691 To 1775, 687 (The Making of Modern Law: Primary Sources through 1894) ("[I]t shall not be lawful for any slave or slave to have or use any gun, pistol, sword, club or any other kind of weapon whatsoever . . . .").

49. Jamie G. McWilliam, *A Classical Legal Interpretation of the Second Amendment*, 28 TEX. REV. L & POL. 125 (2023).

First are threats of immediate personal violence, such as murder, battery, or rape.[50] Second is the danger posed by foreign actors committing acts of war.[51] Third and finally is the danger posed to the community by a tyrannical or unjust ruler.[52] Each of these poses a unique threat and requires a unique defense, but for the purposes of evaluating 18 U.S.C. 922(g)(1), the most relevant danger is that of personal violence—the kind most likely to be perpetrated by a felon.[53]

The natural right of personal self-defense is implicit in the very nature of humanity.[54] A person's natural inclination is to preserve their own life, and they are compelled by reason and their very nature to do so.[55] If one stands in a cross walk and sees a car barreling towards them with no indication of stopping, they should not merely stand there and let the car run them over. If one falls into a body of water and feels their lungs burn as oxygen evades them, instinct will instruct them to kick to the surface. Similarly, if one is attacked, one is urged by their very nature to attempt to repel their aggressor.[56]

It is from this compulsion that the natural law derives its approval of self-defense.[57] Life is a natural good and so to preserve it serves the common good of the individual and their political community.[58] To commit violence against their aggressor, however, must not be the self-defender's primary intention, but rather merely a side-effect of the just goal of preserving an

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50. *Id.* at 151–53.

51. *Id.* at 153–54.

52. *Id.* at 154–58.

53. This assumes, of course, that the felon is not a war criminal or abusive head of state, as these are relatively rare compared to the perpetrator of everyday violent crime.

54. John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 46 (2010).

55. McWilliam, *supra* note 49, at 151.

56. Merriam, *supra* note 54, at 50.

57. *Id.* ("A man's strongest inclination is the preservation of his own life, and thus the natural law compels man to do those things that preserve his life and thwart those things that would threaten it."); 3 WILLIAM BLACKSTONE, COMMENTARIES *4 ("[Self-defense] is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.").

58. McWilliam, *supra* note 49, at 34 ("Bearing arms for the defense of self and community is deeply rooted in the *ius naturale* . . . . In doing so, they perform[] a natural good.").

innocent life.[59] This idea, as expounded by St. Thomas Aquinas, has come to be known as the theory of "double effect."[60] Further, such violence must only be performed in situations lacking alternatives that would reasonably achieve the same goals of defense.[61] Even then, the force used must not be "out of proportion to the end."[62]

The Second Amendment was a determination by the Founders that the best way to fulfill this principle of self-defense was for citizens to keep and bear arms.[63] This way, they might carry weapons of a type sufficient to resist a spontaneous attack.[64] However, a corollary could be that the Second Amendment does not protect such a right for those who have *actually* committed the types of crimes that necessitate violent self-defense in the first place. As discussed further below, the Second Amendment would fulfill its primary principle—that of defense of the

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> I answer that, Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above . . . . Accordingly the act of self- defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. There this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible.

Thomas Aquinas, *Summa Theologiae, II-II, Q64*, NEW ADVENT (2017), https://www.newadvent.org/summa/3064.htm [https://perma.cc/8Z29-A55T].

60. *See* David B. Kopel, *The Catholic Second Amendment*, 29 HAMLINE L. REV. 519, 562 (2006) (describing how Aquinas laid the foundation for natural law thinking in this area).

61. McWilliam, *supra* note 49, at 28 (discussing Hugo Grotius' theory that "it was the lack of alternatives in situations involving immediate violence that made it naturally right for one to resort to violent defense").

62. Aquinas, *supra* note 59.

63. McWilliam, *supra* note 49, at 152.

64. *See id.* at 160 (arguing that, because "in order to defend oneself against immediate harm, the tool of defense must be immediately available," the Second Amendment protects the rights of citizens to carry arms "of a type minimally necessary to defend against immediate personal violence"); McDougall v. Cty. of Ventura, 23 F.4th 1095, 1112 (9th Cir. 2022) ("This is especially true in the Second Amendment context, where the need for armed protection can arise at a moments' notice and without warning. People don't plan to be robbed in their homes in the dead of night or to be assaulted while walking through city streets. It is in these unexpected and sudden moments of attack that the Second Amendments' rights to keep and bear arms becomes most acute.") (opinion vacated, 26 F.4th 1016 (9th Cir. 2022)).

individual and the community[65]—by arming those in need of protection while allowing for the disarmament of proven aggressors.

III. A REFINED "DANGEROUSNESS" STANDARD

As discussed in Part I above, the problem with the relevant history is picking out a determinate conception of "dangerousness" that courts can apply. History shows that disarmament laws were traditionally aimed at removing arms from the hands of dangerous individuals.[66] But does dangerous mean actually violent? Or does it mean that the person has a higher probability of being dangerous in the future?

The defense principle may aid in crafting a judicially administrable standard. The personal self-defense aspect of this principle is intended to allow citizens to defend against discreet acts of personal violence.[67] The Second Amendment obviously implements this principle by recognizing a right to bear arms sufficient for such defense.[68] However, disarmament could take a similar standard, inverse to that for the appropriateness of violent self-defense. This would accomplish the principle behind the Second Amendment in two ways: first, by allowing nonviolent citizens to defend themselves from the violence of others; second, by disarming those proven to commit such violence. To put it simply, to be disarmed, an individual must have committed a discreet act of personal violence of the type that the victim would have been justified in resorting to violent self-defense against.

This standard satisfies the general tradition of only disarming "dangerous" individuals. In fact, the danger feared by those drafting the historical disarmament laws was always physical violence.[69] Catholics might have raised arms alongside the French against Protestant England. The Loyalists may have attacked their fellow colonists during the Revolutionary War. Slaves and Indians may have inflicted violence on the white

65. McWilliam, *supra* note 49, at 160 ("The [Second Amendment] right protects self-defense at every level of society: from immediate personal harm, from external invasion, and from an unjust ruler.").

66. Greenlee, *supra* note 36, at 257.

67. McWilliam, *supra* note 49, at 151–53.

68. District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("Putting all of these textual elements [of the Second Amendment] together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.").

69. *See supra* notes 31–41 and accompanying text.

settlers as revenge for their enslavement or for occupying their land. In each historical scenario, danger meant one thing: a violent attack.

By relying on past dangerous conduct, the standard outlined above provides an evidence-backed solution that leaves little room for judicial discretion. It also goes further than a mere nominal "violent crimes" standard, which may leave much discretion to either legislators or judges to define "violent" crimes—potentially steering towards crimes that are more commonly associated with different demographic groups. This standard avoids this issue by limiting it to only those instances of violence for which the Second Amendment's underlying principles protect a right of defense. By creating the very situation that would necessitate the carrying of arms for defense, one could lose their ability to do so.

To do otherwise—to support felon disarmament under reasoning similar to that used to disarm Black people, Catholics, or Loyalists—would require line-drawing based on probabilistic reasoning from necessarily incomplete data. This could open the door to egregious abuse and targeted disarmament by political groups. This abuse is not hypothetical. Time and time again throughout history governments have disarmed political groups in order to reinforce the power structures that subjugate them.[70] Today, if certain groups are more likely to be convicted of minor

70. *See supra* Part II for examples in American history that hit close to home. Abroad, Hitler famously disarmed the German populace to more easily subjugate religious and ethnic minorities. *See* HITLER'S TABLE TALK, 1941-1944, 321 (H.R. Trevor-Roper ed., Gerhard L. Weinberg trans., 2d ed. 2007) ("The most foolish mistake we could possibly make would be to allow the subjugated races to possess arms. History shows that all conquerors who have allowed their subjugated races to carry arms have prepared their own downfall by so doing. Indeed, I would go so far as to say that the supply of arms to the underdogs is a sine qua non for the overthrow of any sovereignty."). China has been accused of detaining over a million mostly-Muslim ethnic groups in camps (and shooting-to-kill any who try to escape). *Who are the Uyghurs and Why is China Being Accused of Genocide?*, BBC NEWS, https://www.bbc.com/news/world-asia-china-22278037 [https://perma.cc/TR7H-7VNK]. This comes after a long history of citizen disarmament by the Chinese Communist Party. *See* David B. Kopel, *Guns Kill People, and Tyrants with Gun Monopolies Kill the Most*, 25 GONZAGA J. INT'L L. 29, 51 (2021). In earlier periods, King James II of England disarmed the population in order to ensure control. *Id.* The Philistines disarmed the Hebrews shortly after conquering them. 1 *Samuel* 13:19-20.

crimes,[71] and if prior non-violent offenses are used as evidence of an increased likelihood of violence in the future,[72] then it would be a simple matter for judges to deem entire groups *dangerous* unless they are constrained by a requirement for an evidentiary history of actual violence of a type the Second Amendment was designed to defend against.

CONCLUSION

There is a history and tradition in America of disarming dangerous individuals. Yet the traditional standard for dangerousness is murky. The historical laws were often discriminatory and would not be enforced today, leaving a void in the search for an administrable dangerousness standard.

Looking only to the history, this void appears unavoidable. However, by tracing the Second Amendment to first principles—namely, the principle of defense against immediate personal violence—a solution appears. It is understood that the Second Amendment fulfills this principle, in part, by recognizing that arms may be possessed for self-defense against such violence.[73] However, the principle also suggests a corollary: that those who commit such violence can, consistent with the Amendment, be disarmed. By limiting disarmament to those who have actually committed violence—and only that violence against which a citizen could lawfully self-defend—this standard not only fulfills the Second Amendment's principles, but also provides practical protection against discriminatory discretion by judges and lawmakers.

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71. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, THE SENTENCING PROJECT 14 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/4TES-7WF3] (suggesting that Black defendants are more likely to face pre-trial detention and subsequently be convicted).

72. Kanter v. Barr, 919 F.3d 437, 448 (7th Cir. 2019) (Barrett, J., dissenting) (citing evidence that certain nonviolent prior offenders commit violent crimes at a significant rate).

73. *See Heller*, 554 U.S. at 635 (finding that the Second Amendment protects the possession of a firearm "for the purpose of immediate self-defense").