CROSSCURRENTS

MENTAL ILLNESS, THE SECOND AMENDMENT AND GUN VIOLENCE

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The second amendment states that "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.[1] But what does this awkwardly worded statement really mean? Many Americans think it means that except for criminals and the mentally ill, we the people, have a constitutional right to own a firearm be it a handgun, a semi-automatic rifle or an AK 47. For many Americans, the 2nd amendment right to own a gun has the same hallowed status as the other nine amendments enshrined in the Bill of rights of the Constitution of the United States in 1791, including the right to free speech, to freedom of the press, to freedom of assembly, to be protected from unreasonable search and seizure, the right not to be deprived of life, liberty or property without due process, the right to a speedy public trial by an impartial jury of one's peers and the right to be protected from cruel and unusual punishment. If there is to be a fruitful dialogue between Gun Rights advocates and Gun Control advocates, both groups must appreciate, empathize and respect the powerful emotions on both sides of the gun divide.

Many people feel that gun violence is primarily due to criminals and the mentally ill and that if we had stricter criminal laws, longer sentences, stricter mental health regulations, better treatments for the mentally ill and more counselling for troubled people, we could reduce gun violence in the United States. This is true to an extent, but there is more to it than that. Our nation's gun violence is a public health epidemic. All

nations in the world including advanced industrial countries have similar rates of mental illness and emotionally troubled people, yet they vastly differ in the number of shootings compared to the United States. According to the massive database maintained by the University of Washington which tracks lives lost in every country, in every year by every possible cause of death, gun deaths in the United States is 27 times higher than Denmark and, excluding terrorism, at least 10 times higher than Britain, Germany, Canada and Japan. Mental Illness and troubled people are everywhere—Gun violence is not!

Only a small percentage of mentally ill people are more prone to violent acts than the general population. The majority of violent acts, by sheer number are committed by people who would not meet psychiatric criteria for mental illness and a significant number have no previous criminal record. Instinctively, people think that most violent criminal acts must be a product of mental illness, but criminality is not tantamount to mental illness. Politicians have avoided taking positions on gun control reform by using an expanded category of mental illness in which troubled people are included, as a convenient and politically safe explanation for gun violence. While there may be troubled, unhappy, frustrated and angry people in the United States because of their socio-economic and domestic circumstances, and such people may be more prone to gun violence, to label these people mentally ill is a self-serving metaphorical stretch. Problems in living are not mental illness.

One of the few legally enforceable restrictions on *individual* gun ownership in every state involves diagnosed mental patients involuntarily hospitalized for potentially violent behavior where access to guns is assessed and suitable restrictions on gun ownership are imposed. Where there is reasonable concern about risk of violence in a person with mental illness, laws in virtually every state mandate that mental health professionals take responsibility to competently and thoroughly assess that risk and make clinical and legal recommendations about how best to deal with it, including hospitalizing the patient, warning potential victims and taking the patient's guns away. This requirement is memorialized as "The Tarasoff Principle"[2] based on a case that was adjudicated by the California Supreme Court and is known as the duty to protect.

Could mental health laws be stricter in terms of criteria for involuntary hospitalization and involuntary assessment and treatment of

potential dangerous mental patients on an outpatient basis. Yes. But then how do we contend with conflicting constitutional concerns about liberty and privacy. Where do we draw the line?

In focusing on the Second Amendment, this article will attempt to show whether and to what extent there is a connection between the second amendment and gun violence in the United States. The history of second amendment begins with an obvious question. Why was it adopted? In 1791, the states threatened to refuse to ratify the Constitution of the United States if their right to keep their state militias was infringed. There was concern that the Federalists would allow the national government to dismantle or disarm the state militias. The purpose of the second amendment was to address those concerns and prevent that from happening. That was precisely why James Madison drafted the second amendment and that is why the second amendment begins with the statement, "A well-regulated militia being necessary to the security of a free state. . ."

At the time of the adoption of the Second Amendment, continuing in the 19th century and up to and including the present, states could and did regulate *individual* ownership of various kinds of guns. Adam Winkler, professor of Constitutional law at the University of California and a respected constitutional scholar, gives many such examples of states over the years, regulating and restricting individual gun ownership including an Alabama court ruling that it was a state's right to regulate where and how a citizen could carry a gun, Louisiana upholding its ban on concealed carry of a gun and Kentucky adopting an amendment to its Constitution to specify that the state was within its rights to regulate or prohibit concealed carry of guns.[3]

While prior to the 2008 Supreme Court decision, the 2nd amendment did not confer a federal constitutional right for an individual to own and keep guns, forty-three state constitutions did protect the right of an individual to own and keep guns, many of these provisions dating back to the nation's founding. However, it was understood that this right was subject to state regulation and as indicated above, states did pass laws regulating individual gun ownership.[4]

Although the framers of the second amendment were not concerned with establishing a federal constitutional right for *individuals* outside of a militia to own and keep guns, people during the revolutionary period

certainly were concerned about an individual constitutional right to own guns, which is why most state constitutions protected that right. Where did this idea about a constitutional right of individuals to own guns come from? It came from The English Declaration of Rights of 1689 which stated, "Whereas King James the Second, by the assistance of [many] evil counsellors, judges and ministers employed by him, did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom, all Protestants have the right to bear arms for their defense, suitable to their conditions and as allowed by law." But did the English Declaration of Rights actually give individuals the right to own and use guns? According to Lois Schwoerer, Professor of History and author of the book, *The Declaration of Rights, 1689,*[5] The English Declaration of 1689 did not give individuals the right to own and use guns and did not say that the government couldn't restrict individual gun ownership (everyone accepted that it could and did), but rather who could do so, King or Parliament. Parliament passed laws and the King was obliged to respect Parliament's law-making authority. The Declaration of 1689 stated that the Catholic King James II of England was attempting to "subvert and extirpate the Protestant religion and the laws of the Kingdom" by disbanding Protestant militias, taking guns away from Protestants and re-establishing Catholic rule as it was in England prior to Henry VIII. This was considered an Insurrection! The purpose of the English Declaration was to suppress that insurrection by providing guns to upper class, land-owning Protestants-– not to establish the legal right of individuals, to own guns. In fact, members of the lower socio-economic classes were prohibited from owning most kinds of guns. None the less, American Gun advocates, influenced by the English Declaration of 1689, were determined to try to use the second amendment as a vehicle to establish a constitutional right for individuals to own and use guns, even though that was not the purpose of the second amendment.

It should be noted that the phrase "suitable to their conditions and as allowed by laws" in the English Declaration of Rights, referred to laws already on the books that limited gun ownership to upper-class Englishmen, so that in effect, only a relatively small minority of Englishmen had a legal right to own guns reflecting the fear of arming the lower classes by a hierarchical British society.

For over 200 years after the adoption of the Second Amendment, it was uniformly understood that the second amendment did not say that an individual, who was not a member of the militia had a constitutional right to keep and bear arms. No court had ever found that an individual had a federal constitutional right to own a gun. In fact the Supreme court ruled three times on this issue, in 1876,[6] 1886,[7] and 1939 [8]and on each occasion held that it granted the people a right to bear arms only within a militia as defined in Article 1, section 8 of the Constitution of the United States.

All that changed in 2008 when the Supreme Court of the United States, led by Justice Antonin Scalia in Columbia v. Heller, held that the Second Amendment does protect an individual's right to possess a firearm, and disconnected this right with service in a militia. This was the first Supreme Court case in history to decide that the Second Amendment protects an *individual's* right to own a gun. But did the Supreme Court in 2008 re-interpret the second amendment or did it simply validate America's gun affirming culture?

The Holding of Columbia v. Heller was that, "The Second Amendment guarantees an individual's constitutional right to possess a firearm unconnected with service in a militia, and to use that arm for lawful purposes." The case was decided by a 5 to 4 vote. Voting in the majority lead by Scalia, were Roberts, Kennedy, Thomas and Alito. Voting in the Dissent were Breyer, Souter, Ginsberg and Stevens.

In order to get Justice Kennedy's crucial swing vote, Scalia agreed to include the statement that guns and gun ownership could still continue to be regulated. When asked, "who will do the regulating, Scalia answered, "the culture will determine how guns will be regulated in the future." In fact, given this "new interpretation" of the second amendment, the right of the culture to regulate gun ownership in the future will probably be curtailed.

This was born out when in February of 2019, the Bipartisan Background Checks Act of 2019, a bill that would require Federal background check for every firearm purchase, was approved by the U.S. House of Representatives. According to several independent polls done in the last two years, between 75-80% of Americans support uniform Federal background checks in every state for every gun purchase as well as other gun control laws and consider them to be reasonable.[9]

Gun advocates objected to the bill, fearing that such universal background checks will go beyond determining if people have a documented criminal or mental illness record, in order to take their guns away, but will target troubled people like gun-owning stalkers, jilted boyfriends and angry grudge holders who are thought to be at risk for gun violence (red flag laws) so that their guns can legally be removed. Trump advocates immediately stated that such a bill would be vetoed because it violates the constitutional right of an individual who is not charged as a criminal or certified as mentally ill, to own guns. Will the recent mass shootings in El Paso and Dayton change Trump's mind? Will conservative Supreme Court Justices like Gorsuch and Kavanaugh be less likely to use the second amendment as a justification for declaring unconstitutional gun control laws the culture considers to be reasonable?

Gun advocates often point out that the Second Amendment says the right of "the people" to keep and bear arms shall not be infringed? Doesn't this mean that an individual has a constitutional right to own and use guns. If the second amendment was referring only to the right of militia members to own guns, why didn't it just say, the right of state militias to keep and bear arms shall not be infringed?

According to Scalia "the people" literally meant individuals. That was his understanding based on his "originalism" doctrine which purports to determine what the original meaning of the second amendment was and states that the Constitution should be interpreted "as written." However, while the Harvard Law review points out that in the 4th amendment, the right of "the people" to be protected against unreasonable searches and seizures, clearly refers to individuals,[10] in the 2nd amendment "the people" clearly refers to the group of people who were members of a militia according to Paul Finkelman.[11] Finkelman also pointed out that James Madison. who drafted the 2nd amendment, was clearly referring to a "body of the people" who were members of a militia.

Consider Madison's first draft of the proposed 2nd amendment as modified by the committee of the House to which Madison's draft was referred: "A well-regulated militia composed of *the body* of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms." This suggests two points. The first point is that the framers clearly saw this draft as an amendment about the

militia, a military body: that any right to own weapons was a right of militia members as a collective body, derived from the right of each state to maintain a "well-regulated militia."

The second point referred to an exemption for pacifists or conscientious objectors. This suggests that the militias were composed of volunteers as well as draftees and the issue that concerned the framers of the second amendment, was whether pacifists should be exempt from military service in the militia not whether individuals had a constitutional right to bear arms. Furthermore, at the time of the writing of the second amendment, the term "bear arms" clearly referred to military service. Although gun advocates like to equate "bearing arms" with carrying a gun, to James Madison the term, "to bear arms" meant to render military service in a state militia or a national army.[12]

According to Gary Wills, noted Constitutional scholar and Professor at Northwestern University, Evanston, Illinois, the phrase, "keep and bear arms" in the second amendment was always used in a military context. You wouldn't say people had a right to keep and bear arms to protect themselves or to hunt rabbits or deer. You would say people had a right to own a pistol, shotgun or a rifle to protect themselves, and to hunt rabbits or deer. If the framers of the second amendment had intended to protect the individual right to own a gun, why didn't they simply say, "Congress shall have no power to prohibit private ownership of guns?"[13]

So how did Scalia, a brilliant constitutional scholar, who prides himself on interpreting the law as written and who railed against justices he accuses of legislating from the bench, explain his position that the second amendment gives individuals who are not Militia members, a constitutional right to own and keep guns in the face of three Supreme Court findings that the second amendment conferred a right to bear arms only within a militia?

Scalia's explanation was that he divided the second amendment into a prefatory clause ("well-regulated militia") and an operative clause ("right of the people to keep and bear arms"). Then, based on some laws with prefatory and operative clauses in which he claimed the prefatory clause did not limit the operative clause, he arbitrarily decided that the "militia" in the prefatory language expressed the 2nd amendment's purpose, but it did not limit the scope of the operative clause, "right of the people to keep and bear arms," which could be expanded to include an

individual not in the militia who would have a constitutional right to own a gun.

In addressing Scalia's explanation, William G. Merkel, a Constitutional Scholar, in a symposium on the second amendment commented that "Justice Scalia operates with the faith-based assumption that the framers must have intended to protect a private right to gun possession and then manipulated outlying evidence to dress up his claim in ill-fitting pseudo-academic garb. In the process he demonstrated conclusively that the originalist methodology he trumpeted in *A Matter of Interpretation* as the surest remedy against judicial injection of subjective values into constitutional adjudication was in fact nothing more than a hollow sham."[14] In other words, in District of Columbia v. Heller, Scalia was simply validating our gun affirming culture, a culture he identified with long before the District of Columbia v. Heller Supreme Court decision. While there is nothing inherently wrong with a gun affirming culture, the question remains, can you have a gun affirming culture without gun violence?

So, what does the second amendment have to do with gun violence? Actually, very little. As long as there are more guns in this country than there are people, as long as there are people who love guns and fear that the government wants to take away their guns, as long as people feel they need guns for their protection and resent gun regulation, gun violence will continue regardless of how the second amendment is interpreted or even if it is repealed as the late Justice John Paul Stevens suggested. Will future generations have the temerity to outlaw assault weapons, buy back those in circulation, and require individuals to qualify for a license to own a gun like we do to own a car, since both can be deadly weapons? Australia, New Zealand, England and other gun-owning, freedom-loving democratic countries did that. It drastically reduced gun violence in those countries. It could do the same in the United States.

Notes

1. The Constitution of the United States, Amendment II (1791) But
2. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal.Rptr. 14 (Cal 1976)
3. Winkler, Adam, *Gunfight: The Battle Over the Right to Bear Arms in America* (New York: W.W. Norton and Company, Inc., 2011), p. 166.
4. Ibid, p. 33.

5. Schwoerer, Lois, "To Hold and Bear Arms: The English Perspective," in *The Second Amendment in Law and History* (New York: The New Press, 2002), pp. 211-7.
6. U.S. v. Cruikshank, 92 U.S. 542 (1876)
7. Presser v. Illinois, 116 U.S. 252 (1886)
8. U.S. v. Miller, 307 U.S. 174 (1939)

The Miller Court wrote: The Constitution as originally adopted granted to Congress power "To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel invasions; To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, The appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S.C.A. Const, art 1,8. With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

U.S v. Miller, *supra* note 4, at 178.

9. The Economist (Print Edition United States, Los Angeles), *What Works to Reduce Gun Deaths,* March 22, 2018.
10. *Harvard Law Review*, 126, pp. 1079-80.
11. Finkelman, Paul, "A Well-Regulated Militia: The Second Amendment in Historical Perspective," in *The Second Amendment in Law and History* (New York: The New Press, 2002), p. 139.
12. Heyman, Steven J., "Natural Rights and the Second Amendment," in *The Second Amendment in Law and History* (New York: The New Press, 2002), p. 202.
13. Wills, Garry, *A Necessary Evil: A History of American Distrust of Government* (New York: First Touchtone Edition, 2002), pp. 191-260.
14. Merkel, William G., "The Second Amendment in Context: The Case of the Vanishing Predicate," *Chicago Kent Law Review* 76(1), pp. 403-4.