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# THE SECOND AMENDMENT IN A CARCERAL STATE

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**ABSTRACT**—Is an armed citizenry consistent with a carceral state? Throughout the twentieth century, the Second Amendment cast no shadow on the U.S. Supreme Court as the Court crafted the constitutional doctrines that license America's expansive criminal legal system. Under the Court's interpretation of the Fourth Amendment, the fact or mere possibility that an individual is armed can generate broad powers for police officers, including the power to disarm. But since the Court embraced an individual right to bear arms in 2008, a few scholars and lower courts have begun to worry that this right contradicts contemporary understandings of police authority. In this Essay, I acknowledge these apparent doctrinal contradictions but argue that Fourth and Second Amendment doctrines actually share a common conceptual foundation: carceral political theory. Carceral political theory divides people into "criminals" and "law-abiding citizens" and does so according to intuitions about natural criminality rather than through positive law. The supposed distinction between the criminal and the law-abiding is used to rationalize unequal distributions of political power, social goods, and exposure to violence. In the United States, the naturalized conception of criminality has long been racialized. Unless we identify and reject the carceral assumptions that underlie both Fourth and Second Amendment doctrine, the new (or newly recognized) right to bear arms is likely to further exacerbate racial inequality in the United States.

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## INTRODUCTION

In the early years of the new millennium, Americans (or at least some of them) seemed to awaken and recognize two previously overlooked legal truths. The first realization concerned criminal law; the second, the Constitution. Although imprisonment rates had been climbing for a few decades before 2000 and racial disparities in criminal law enforcement had existed for even longer, the early years of the twenty-first century saw the first widespread recognition of racialized "mass incarceration."[1] Legal elites and then the public more broadly identified a "crisis" in criminal justice.[2] Though it was not the first time such a crisis had been identified, the scale of the crisis and the degree of consensus about it seemed new.[3]

The second moment of realization came in 2008 with the Supreme Court's determination that the Second Amendment protects an individual right to bear arms. Of course, there is an ongoing dispute about whether *District of Columbia v. Heller* really was, as the majority opinion claimed, simply a belated recognition of a right that had existed since the eighteenth century or even earlier.[4] The *Heller* dissenters, and many commentators, argued that five Justices of the Court crafted a new right in 2008 rather than

[1] *See* JONATHAN SIMON, MASS INCARCERATION ON TRIAL 3 (2014) (noting that incarceration rates began to rise in the 1970s, and the increases were easily discernible by the 1980s, but it took about twenty-five more years for critiques of mass incarceration to "gain some traction politically"). For more on the connotations of the term mass incarceration, see *infra* note 14 and accompanying text.

[2] *See* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 2000–06 (2019) (examining shifting ideas of "crisis" in criminal law in the late twentieth and early twenty-first centuries).

[3] *See id.* at 2004–06; *see also* Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 550 (2016) ("The turning point in the conversation about mass incarceration came around the turn of the century . . . .").

[4] 554 U.S. 570, 625–26 (2008) (claiming to adopt "the original understanding of the Second Amendment" and claiming that "[i]t should be unsurprising that such a significant matter has been for so long judicially unresolved").

recognized an old one.[5] Whether or not an individual right to bear arms existed outside of constitutional doctrine before *Heller*, it is clear that *Heller* is the Court's first direct affirmation of such a right.

These two realizations have prompted new questions about whether both truths can endure. Are the expansive powers of American police forces, which are one of several factors enabling racialized mass incarceration, compatible with an individual right to bear arms? In Fourth Amendment doctrine, the prospect that a person may be armed often expands police authority to conduct searches and seizures and to use force.[6] Can such authority be sustained after *Heller*, or do we face, as one commentator has put it, a possible collision "at the intersection of Second and Fourth"?[7] Are doctrinal adjustments—to police authority, gun rights, or both—necessary to avoid the collision, as several commentators have suggested?[8]

This Essay acknowledges these apparent doctrinal conflicts but suggests that they may be an illusion. There is, in fact, an underlying conceptual consistency across the laws that enable mass incarceration and the post-*Heller* constitutional law of gun rights. Both areas of law license violence as a response to "criminals," with a specific conception of criminality that has less to do with one's acts and more to do with one's status. In the way of thinking that I will describe as "carceral political theory," criminality serves as a principle of political organization, dividing the populace into "law-abiding citizens" and "criminals." Political goods and power are distributed according to that organizing principle; so too is the license to do violence and protection from it. Inequality of rights and power is critical to the model, and thus "a carceral state" is distinct from a police

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[5] *Id.* at 637 (Stevens, J., dissenting) ("Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution."); *see, e.g.*, Dennis Baron, *Corpus Evidence Illuminates the Meaning of* Bear Arms, 46 HASTINGS CONST. L.Q. 509, 510 (2019) (arguing that "Justice Scalia was wrong" to conclude in *Heller* that the Founders intended the Second Amendment to encompass an individual right to bear arms unconnected to militia service); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192 (2008) ("*Heller*'s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century . . . .").

[6] *See infra* Section II.A.

[7] J. Richard Broughton, *Danger at the Intersection of Second and Fourth*, 54 IDAHO L. REV. 379, 379, 381–82 (2018).

[8] *See* Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 6, 34–42 (2015) ("[T]he transforming gun-rights landscape undermines the Fourth Amendment validity of . . . gun-oriented policing."); Broughton, *supra* note 7, at 404–06 (discussing possible changes to Fourth Amendment law in light of *Heller*); Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1679–81 (2018) (suggesting changes to Fourth Amendment doctrine in light of *Heller*). *But see* Nirej Sekhon, *The Second Amendment in the Street*, 112 NW. U. L. REV. ONLINE 271, 273 (2018) (suggesting that the apparent "doctrinal collision" is unlikely to make a significant difference to police power "on the streets" given existing Fourth Amendment doctrine).

state or a totalitarian state, each of which is usually understood to leave all citizens equally subjugated or at least roughly equally vulnerable to subjugation.[9] In a carceral state, those classified as law-abiding citizens are in fact less vulnerable to domination through criminal law. Indeed, those classified as law-abiding citizens enjoy some rights of resistance or even rights of domination: the right to deploy violence as a private citizen against the purported criminal. Conflicts between, and different rules for, the law-abiding citizen and the criminal are part of the governance model of a carceral state.

On this theoretical conception, the word "criminal" is not merely an adjective that modifies laws or behavior but a noun that names a certain type of person. As an attribute of persons rather than acts, criminality becomes understood in terms of character, personality, genetics—and often, race. Similarly, the term "law-abiding citizen" is used as an assessment of character and personality rather than a straight description of one's conduct. Eschewing conduct identified in criminal statutes is neither necessary nor sufficient to be a "law-abiding citizen," and engaging in such conduct is neither necessary nor sufficient to be a "criminal." More important than positive law, legal process, or factual proof are vague intuitions about what or who is criminal by nature.

To be sure, the U.S. Constitution contains promises of equal protection, and limitations of penal power, that seem at odds with carceral political theory. But the Constitution as interpreted (and in some instances, even as written) excludes criminals from its broad promises of equality.[10] In criminal procedure decisions throughout the twentieth century, the Supreme Court often assumed that the Constitution provides different levels of protection to criminals and law-abiding citizens.[11] And when the Court took up the Second Amendment in *Heller*, it made clear that the right to bear arms belonged to law-abiding citizens but not to criminals—and indeed, the right was necessary so that law-abiding citizens could defend themselves against criminals.[12] Amid all the attention given to the question of whether the Second Amendment protects an individual or collective right, there has been too little scrutiny of the Court's choice to embrace a *selective* right. This Essay seeks to illuminate the extent to which existing doctrine protects a

[9] *See, e.g.*, Thomas Crocker, *Dystopian Constitutionalism*, 18 U. PA. J. CONST. L. 593, 633–34 (2015) (citing the Oxford English Dictionary in support of an account of a "police state" as a dystopian state in which broad and discretionary police powers are used to control the population at large).

[10] U.S. CONST. amend. XIII (prohibiting slavery, except "as a punishment for crime"); *id.* amend. XIV, § 2 (providing that a state's denial of the right to vote would reduce the state's representation in Congress, unless voting rights were denied "for participation in rebellion, or other crime").

[11] *See infra* Section II.A.

[12] *See infra* Section II.B.

selective right to do violence, and it invites reflection about the possibility of more egalitarian interpretations.

Part I introduces the political principles and ideas that I call carceral political theory. It asks what it means to describe America as "a carceral state," with particular emphasis on the process by which a conception of natural criminality supplanted slavery as the primary rationalization of political inequality. Part II turns to Supreme Court decisions, showing that principles of carceral political theory underlie constitutional criminal procedure as well as *Heller* and its progeny. With regard to Second Amendment doctrine, it is particularly illuminating to contrast the Court's theory of a selective right of self-defense to a universal and truly egalitarian right of self-preservation. To that end, Part III looks closely at two influential theories of an individual right to use force in self-defense, both from roughly the same period of English history in which the Court finds the intellectual roots of the American right to bear arms. Thomas Hobbes articulated a universal and inalienable right of self-preservation, a right so robust that even once a state was established, individuals would possess a right to resist punishment. John Locke amended Hobbes's theories to reduce or eliminate their radical egalitarianism, in part by naturalizing both criminality and punishment to rationalize a selective right to use violence. In Locke's state of nature, equality turns out to be an equal right of all "innocent" persons to punish all "offenders." Indeed, for Locke, self-defense comes as an afterthought, arising only once the state of nature has devolved into a state of war. It is of little surprise that Locke's carceral political theory inspires many contemporary efforts to theorize the Second Amendment. And it will not be surprising if the right to bear arms, conceived as a selective right of the law-abiding to do violence against criminals, proves easily reconcilable with the expansive police authority of a carceral state.

The political theory of a carceral state has been operative in the United States for decades, but it has not yet been recognized and scrutinized. Theories of the Second Amendment that would make it a right to be shared by all—a right to possess guns for hunting and recreation, for example, or to enable universal vigilance against tyranny—are increasingly obscured by a carceral theory that empowers some citizens to hold guns for the purpose of doing violence to others. As the country is confronted once again with its failures to achieve its promise of equality, attention is overdue for the carceral principles that have been incorporated into constitutional doctrine to legitimize inequality.

## I. CARCERAL POLITICAL THEORY

"Carceral political theory" is not a widely used term, but the phrase "carceral state" has proliferated in the last decade.[13] By looking closely at the usage of the latter term, we may begin to identify the principles and practices that carceral political theory tries to explain or rationalize. Some effort at specificity is worthwhile, as demonstrated by debates about "mass incarceration" that sometimes feature different scholars using the same term to mean different things: is mass incarceration a description of prison populations specifically, or a reference to a much wider array of criminal and even ostensibly civil interventions?[14] My own interest is in the broad expansion of America's criminal legal system across many types of custodial and noncustodial legal interventions. Ideas influence practices, and thus this Part examines the ideas that seem to underlie America's distinctively severe and interventionist penal practices.

Again, "carceral state" is a useful point of departure. It may help to begin by noticing articles, definite or indefinite. Many commentators attach a definite article to the phrase: "*the* carceral state." With the definite article, "the carceral state" is often used to refer only to the sprawling entirety of public institutions and practices related to criminal law, including prisons but extending far beyond them.[15] The carceral state encompasses all of what has

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[13] *See, e.g.*, Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 559 (2015) (noting that "a tenacious carceral state has sprouted in the shadows of mass imprisonment" despite widespread "criticism of the country's extraordinary incarceration rate"); Naomi Murakawa, *Mass Incarceration Is Dead, Long Live the Carceral State!*, 55 TULSA L. REV. 251, 251–52 (2020) (book review) (discussing differences between mass incarceration and the carceral state).

[14] *Compare, e.g.*, John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265, 265 (2014) (focusing mostly on prison and sentencing statistics to argue that Michelle Alexander is "categorically wrong" to identify drug crimes as "the primary source of prison growth"), *with* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2010) (explaining that she uses "mass incarceration" to refer not simply to prison populations but all of "the criminal justice system [and] also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison"). For still another perspective on the term "mass incarceration," see Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1583–84 (2019), which suggests that the term mass incarceration obscures the racialized, gendered, and colonialist aspects of U.S. criminal law.

[15] *See, e.g.*, Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANN. REV. L. & SOC. SCI. 433, 434–35 (2020) (distinguishing among "mass imprisonment," referring specifically to prison populations; "mass incarceration," referring to prison and jail populations together; and "the carceral state," referring to a broader array of criminal interventions including policing practices); Murakawa, *supra* note 13, at 251–52 ("As the infrastructure of criminalization, the carceral state includes police, criminal courts, probation and parole, criminal records databases and risk-assessment tools, brick-and-mortar incarceration, and 'e-carceration' with electronic shackles.").

long been called "the criminal justice system." Used in this way, the carceral state can exist alongside (though it may dominate) other unwieldy collections of government institutions and practices loosely joined by common policy concerns, such as "the welfare state" or "the national security state." I take no strong position for or against the phrase "the carceral state," though I share some commentators' concern that the phrase (with the definite article) can conjure a misleading image of unity and coherence among criminal legal institutions—notably, a concern also raised about the phrase "the criminal justice system."[16]

With an indefinite article rather than a definite one, the phrase "*a* carceral state" calls to mind something slightly different. Here, the adjective "carceral" seems to modify the entire political structure of a given nation, not simply a subset of state institutions. I don't want to overemphasize the distinction; some commentators use the formulation "the ___ state" to identify a "form of governance" if not quite a type of government.[17] But I do think there is value in asking whether a carceral state, like a police state, a totalitarian state, or an authoritarian state, is a distinctive type of political system.[18] Like the concepts of a police state or an authoritarian state, the concept of a carceral state is an ideal type, and there may be disagreement whether and how much any given existing state corresponds to the ideal type.

I believe most invocations of "carceral state" use the phrase in the first sense, with the definite article. But the second usage drew considerable

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[16] *See* Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 THEORETICAL CRIMINOLOGY 422, 428 (2017) (expressing a concern that references to "the carceral state" or "the penal state" can "imply singularity, coherence, and state-centeredness rather than conflict and multiplicity"); *see also* Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 60 (2018) (noting that the discourse of a "criminal justice system" can limit the scope of critique of criminal law).

[17] *See, e.g.*, Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008) ("[T]he United States began developing a new form of governance that features the collection, collation, and analysis of information about populations both in the United States and around the world. This new form of governance is the National Surveillance State."). Political scientists Vesla Weaver and Amy Lerman were early adopters of the term "the carceral state" with the specific aim of describing a "system of governance." *See* Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010).

[18] David Garland has raised this question and expressed doubts that "a penal state" (or a carceral state) is a useful term to describe an entire type of government. He states: "In my use, the term 'penal state' is not a critical term: It is used in a neutral, nonevaluative sense to describe the agencies and authorities who make binding penal rules and direct their implementation. All developed nations have 'penal states,' whether their penal policies are lenient or draconian. And no state 'is' a penal state—penality is only ever one state sector among many and, rarely, a dominant one." David Garland, *Penality and the Penal State*, 51 CRIMINOLOGY 475, 495 (2013). I think criminal law has far more political significance than Garland suggests (and separately, I am less confident than he seems to be about the possibility of "neutral, nonevaluative" theories of criminal legal institutions).

attention in Justice Sonia Sotomayor's dissent in *Utah v. Strieff*,[19] in which she denounced several lines of Fourth Amendment doctrine that together subject persons to expansive surveillance and policing.[20] This opinion raises, but does not resolve, a question of equality that I see as central to the concept of a carceral state—namely, is "carcerality" merely a matter of the scale or scope of criminal interventions, or does the concept also emphasize an unequal distribution of those interventions? The *Strieff* dissent does not resolve that question because Justice Sotomayor both emphasized racial disparities in enforcement and depicted a world in which all citizens were subject to aggressive policing:

> The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. . . . [T]his case tells everyone, white and black, guilty and innocent . . . that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.[21]

As a rhetorical strategy to persuade Americans of all racial identities that current Fourth Amendment doctrine is flawed, the emphasis on universal vulnerability to police domination makes sense.[22] But I suspect (and Justice Sotomayor might agree) that the U.S. criminal legal system would not have reached its current scale if the burdens of criminal law were in fact roughly equally shared by all. Racial disparities in enforcement have made possible, if not motivated, the vast expansion of scale. The conception of carcerality that seems most useful is one that captures both the overall scale of criminal interventions *and* the deeply inegalitarian distribution of those interventions.[23]

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[19] 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

[20] *Id.* at 2069–70 (criticizing Fourth Amendment doctrine).

[21] *Id.* at 2070–71 (internal citations omitted).

[22] One could interpret Justice Sotomayor's dissent as reflective of Derrick Bell's interest-convergence thesis that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[23] I have not yet mentioned Michel Foucault, the thinker most responsible for bringing the adjective "carceral" to legal and political discourse. Foucault did use "carceral" to refer to a type of governance, but he emphasized the panoptic surveillance of modern prisons and the adaptation of these surveillance strategies to other settings, such as schools, workplaces, and urban spaces. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 293–308 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). Though Foucault recognized that carceral strategies are often deployed along racial lines, racial inequality or other forms of inequality do not appear to be intrinsic to his conception of "the carceral" (in contrast to, for example, his account of "biopolitics"). However, one dimension of Foucault's account of "the carceral" is critical to my own account: his claim that "the most important effect of the

Indeed, a number of commentators have begun to use the term "carceral state" to draw specific attention to criminal law as a regime of racial inequality.[24] This usage is more precise and more revealing than the use of the term to refer to all of criminal law, or to emphasize merely the scale of American criminal law. The emphasis on the unequal distribution of criminal interventions helps explain why many Americans are unimpressed by warnings of the rise of a police state, even warnings as eloquent and evocative as Justice Sotomayor's *Strieff* dissent. Many Americans simply don't believe that they will be subjected to heavy-handed policing and punishment—and as "law-abiding citizens," they are probably right.

A carceral state, as I use the term, is one that uses criminality to rationalize and naturalize the unequal distribution of political power and social goods. It "manag[es] a political community by subdividing it."[25] A carceral state is hardly the only form of inegalitarian state, but it offers a distinctive rationalization of inequality: it asserts that some individuals *deserve* reduced political power and public goods because they are "criminals." It is important to notice that "criminal" becomes a noun that names a category of person, rather than simply an adjective that modifies a type of law or legal sanction. The classification of a *person* as a *criminal* is a crucial exercise of political power; it allows the state to deny to that person a vast range of goods and entitlements, nominally independent of criminal law.[26] And the status criminal is more salient, and more devastating, precisely because not all citizens are criminals.[27] In a carceral state, criminal law is used strategically to manage social divisions or political conflicts. That means that the content of criminal law is likely to look different in a carceral

carceral system and of its extension well beyond legal imprisonment is that it succeeds in making the power to punish natural and legitimate, in lowering at least the threshold of tolerance to penality." *Id.* at 301.

[24] *See, e.g.*, Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 19 (2019) (noting that prison abolitionists "trace the roots of today's carceral state to the racial order established by slavery"); Rodríguez, *supra* note 14, at 1576 (describing "the carceral state" as "a statecraft that institutionalizes various forms of targeted human capture" and "carceral power" as "a totality of state-sanctioned and extrastate relations of gendered racial-colonial dominance").

[25] Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 568 (2018).

[26] *Id.* at 605–06 (discussing ostensibly civil collateral consequences of a felony conviction and noting that some of these consequences apply to nonfelony convictions as well).

[27] This is part of what separates a carceral state from a police state and why the specific terms are important. Policing is typically conceived as a generalized supervision of all persons, and a police state is one in which all or most citizens are subject to arbitrary police intervention. Incarceration and criminal prosecution have been comparatively more limited practices, targeted to specific individuals while others remain "law-abiding" and unincarcerated. *Cf.* Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 851–52 (discussing the intersection of "the carceral state," defined as "the personnel and institutions that comprise our system of mass incarceration," and "the police state in the political sense of the term, where authorities can pick up and remove opponents").

state, for state actors will need ample discretion to decide who is "law-abiding" and who is "criminal."

Criminal law is not the only mode of governance in a carceral state, since the model presumes some class of citizens deemed "law-abiding," and the state needs to govern these citizens too. *The* carceral state, as a set of public institutions and practices, may exist alongside the welfare state, the administrative state, and so forth.[28] But one distinctive feature of *a* carceral state, as a type of government, is that crime structures the state's relationships even with those citizens classified as law-abiding. With law-abiding citizens, the state uses the fear of crime as a governance strategy,[29] but it may also reassure that privileged group that it will enjoy strong protections from the state's penal power, such as those found in the U.S. Bill of Rights. And of particular importance to this Essay, a carceral state may even offer law-abiding citizens the opportunity to participate in the subjugation of criminals. Hence *Heller*, as explained in more detail in the next Part.

I have so far focused on the adjective carceral and said relatively little about what constitutes a state. On that question, it is worth noting that Max Weber's famous definition of the modern state—that entity with a monopoly of legitimate violence over a given jurisdiction[30]—is sometimes thought to be inconsistent with the private right to bear arms under the Second Amendment.[31] As others have ably demonstrated, the perceived conflict between Weber and a private right to bear arms is overstated if not imagined, since Weber did not claim that the state must hold a monopoly on all means of violence but instead a monopoly on legitimate violence.[32] Moreover,

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[28] *See, e.g.*, Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18, 20 (2015) (discussing "the carceral state"); Julilly Kohler-Hausmann, *Guns and Butter: The Welfare States, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 88–89 (2015) (suggesting that "the carceral state" and "the welfare state" should be treated as "deeply integrated").

[29] *See* JONATHAN SIMON, GOVERNING THROUGH CRIME 4–5 (2007) (arguing that crime is used strategically by political and other authority figures to legitimize actions not necessarily motivated by the desire to prevent crime, ultimately resulting in a form of governance that operates through fear of crime).

[30] *See* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth & C. Wright Mills eds., 1948).

[31] *See, e.g.*, DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT 5 (2003) ("This [Weberian] school further argues that the [Second] [A]mendment refers to a state militia, not a private one of the sort that has appeared on the American cultural landscape."); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989) (noting the difference between the Weberian definition and the Second Amendment's link to conceptions of republican political order).

[32] *See, e.g.*, Robert J. Spitzer, *Don't Know Much About History, Politics, or Theory: A Comment*, 73 FORDHAM L. REV. 721, 724–26 (2004) (arguing that Weber's assertion that the modern state monopolizes the legitimate use of force "does not mean that citizens are stripped of any recourse to

Weber apparently contemplated that a monopolist could subcontract some of the work of violence; he allowed that the state may designate as legitimate some uses of force by private citizens.[33] In this Essay, I rely on a notion of a state as constituted by its authority to use violence and its authority to distinguish between licit and illicit violence. But I do not think that notion is exclusively Weberian, nor do I think it resolves questions about the scope of an individual right to bear arms.

There are tensions between a carceral state, as I've just described one, and a democracy premised upon the equality of all citizens. But a naturalized conception of criminality helps manage these tensions. By a naturalized conception, I mean one in which to be "criminal" is understood as a matter of nature, necessity, natural law, or some combination thereof, rather than state prerogative. The naturalized conception of criminality denies that public officials choose who is a criminal; it asserts instead that public officials and positive law merely vindicate dictates of natural law.[34] In the United States, this naturalized conception of criminality has long been racialized.[35]

One more note about the concept of a carceral state. I have offered a general model that is clearly based upon the specific history and practices of the United States. It may be that no other country in the world fits this model. That does not diminish the utility of the model. Perhaps the United States invented a new form of government—not just once, with the Founding, but also a second time, after the Civil War.[36]

Though I cannot trace carcerality in American history in full detail, I am not sure that carcerality, as I have defined it, shaped the country from the Founding. In fact, although concerns about abusive penal power may not

justifiable violence," providing as an example that "a citizen acting for personal self-defense acts as an individual, but is nevertheless accountable to the state's judgment under the law"). Note also that notwithstanding *Heller*'s claim that the Second Amendment codified a right of self-defense, the right to bear arms and the right to self-defense are easily distinguishable. Persons convicted of felonies may lose their right to bear arms, but no court has suggested that they are also categorically barred from a self-defense claim if they use force (by other means) against an imminent threat. Thus, a Weberian could embrace a right of self-defense even should he or she choose to reject a right to bear arms.

[33] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947).

[34] *See* Ristroph, *supra* note 25, at 566–67, 617.

[35] *See* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS 1–8 (2010); Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625, 1626 (2017) (addressing "the racial underpinnings of the carceral state").

[36] As David Garland notes, "[S]ocieties that have imposed punishment on a massive scale have generally been illiberal, undemocratic societies governed by absolutist or authoritarian states. . . . America's distinctive combination of liberal democracy and penal intensity seems anomalous and poses an explanatory problem of some importance." Garland, *supra* note 18, at 479.

have been central to the drafters of the original Constitution (the Articles), such concerns were paramount among many Antifederalists and other influential critics whose skepticism helped produce the first set of Amendments.[37] The Bill of Rights reflects acute concern with the government's power to turn persons into criminals.[38]

To be sure, the United States was founded as a racially inegalitarian state, one that embraced and protected race-based chattel slavery. And slavery was sometimes rationalized on the grounds that enslaved persons constituted a class of inherently dangerous people with criminal tendencies. Still, it was slavery rather than criminal law that first served as the organizing institution for racial inequality. Only once slavery, or at least its official constitutional endorsement, ended did the country begin to reconstitute itself as a carceral state. Some of this work was done in the Reconstruction Amendments, which ended slavery and promised equality but with an asterisk: slavery was abolished "except as a punishment for crime," and states would be penalized for abridging the right to vote "except for participation in rebellion, or other crime."[39] These criminality carve-outs to the new guarantees of equality would soon prove useful to help constitute a carceral state.[40]

It did not take long for Southern states to take the next steps by designating as "criminal" those persons formerly classified as slaves. After the Civil War, Southern states quickly replaced the lost labor of enslaved persons with a system of convict leasing, in which persons convicted of crimes could be leased to private businesses and forced to work.[41] To ensure a sufficient supply of workers and to preserve antebellum racial hierarchies, Southern states first used Black Codes, and then vaguely defined offenses such as vagrancy, to select thousands of formerly enslaved persons for conviction and forced labor.[42] Convict leasing was a distinctively Southern

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[37] The Antifederalists were themselves a diverse group, and the Amendments ultimately ratified reflected shared concerns of moderate Antifederalists and some Federalists. *See* Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 214–18 (2000).

[38] *See infra* notes 41–42 and accompanying text.

[39] U.S. CONST. amend. XIII, § 1; *id.* amend. XIV, § 2.

[40] *But see* Hernandez et al., *supra* note 28, at 21 (arguing that "the carceral state . . . was first consolidated during the early nineteenth century").

[41] *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 7–8 (2008) (discussing the correlation between labor demands and arrest rates of Black people for inconsequential charges as well as the crossover between slave-leasing practices and convict-leasing practices).

[42] *See id.* at 53. Black Codes were laws enacted after the Civil War directed at Black Americans and intended to restrict their freedom and preserve a system of forced labor. *See* Michele Goodwin, *The*

practice, but a broader campaign to link all Black Americans to criminality was a nationwide effort, one that helped Northern states and the federal government tolerate the Southern practice.[43] By the time the federal government finally forced the end of convict leasing in the 1940s and 1950s, the racialized conception of "the criminal" was sufficiently entrenched to survive on its own.[44]

There still remained the problem of the federal Constitution, with a Bill of Rights that seemed to include constraints that would make a carceral state difficult if not impossible. But as the federal government insisted Southern states end their most transparently racialized uses of criminal law, the Supreme Court was in the early years of its efforts to determine the scope of constitutional protections for criminal defendants. As discussed in the next Part, interpretations of those rights have increasingly adopted a carceral presumption of naturalized criminality, so that the Bill of Rights can provide some protections for "law-abiding citizens" without getting in the way of prosecution of "criminals."

## II. CARCERAL PRINCIPLES IN CONSTITUTIONAL DOCTRINE

The Bill of Rights, the textual evidence of the country's commitment to individual liberty, is the pride of many Americans. Among the varied protections in the first ten Amendments, protections for criminal defendants take prominence—so much so that a new law student once asked me in bewildered consternation, "Why did our Founders care so much about *criminals*?" That is a very twenty-first-century question, a manifestation of contemporary obliviousness to the fact that, under the positive law of British authorities, the Founders were themselves "criminals."[45] The Founders knew that criminal law was a standard tool of tyrants, but the Founders' deep suspicion of penal power did not survive many generations. The text of the Bill of Rights did survive, however, and so the Supreme Court has faced the

*Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 935–941 (2019). Evoking the prior practice of slave patrols and foreshadowing the later theory of the Second Amendment as a means for the law-abiding to combat criminals, white persons as private citizens were invited and expected to assist with vagrancy enforcement against Black persons. *See* Darrell A.H. Miller, *Racial Cartels and the Thirteenth Amendment Enforcement Power*, 100 KY. L.J. 23, 34 (2011).

[43] *See* MUHAMMAD, *supra* note 35, at 74–75.

[44] *See* BLACKMON, *supra* note 41, at 377–82; MUHAMMAD, *supra* note 35, at 50–55 (describing manipulation of crime data by white authors to cultivate a nationwide perception of Black people as criminals).

[45] *Cf.* John D. Bessler, *The Death Penalty in Decline: From Colonial America to the Present*, 50 CRIM. L. BULL. 245, 250 (2014) (discussing interest in restrictions on penal power among American Founders and noting that the act of signing the Declaration of Independence put each signer "at risk of execution for treason").

challenge of making the Bill of Rights safe for a carceral state.[46] This Part explains how the Court has met the challenge, looking first at constitutional criminal procedure and then at Second Amendment doctrine.

### *A. Rights for the Innocent, but Not for "Criminals"*

For just over a century after the adoption of the Bill of Rights, its provisions relating to criminal prosecutions were rarely invoked or adjudicated.[47] The Bill of Rights was initially understood to apply only to the federal government, and most prosecutions occurred in state courts.[48] But early in the twentieth century, Prohibition prompted unprecedented levels of federal criminal enforcement, and soon after, the Supreme Court began to develop the doctrines of "incorporation" that would apply the Bill of Rights to state governments.[49] Thus, over the past century, the Court has issued hundreds of opinions that interpret and apply the Fourth, Fifth, and Sixth Amendments. Given space constraints, I will not attempt to wade into the sprawling case law in great detail. Rather, I want to highlight three related features of these doctrines that have been documented elsewhere (including in my own work) but which may take on new salience as we try to comprehend the concept of a carceral state. Specifically, consider the Court's protection of enforcement discretion, the circumstances that make discretion necessary, and the underlying assumption of a pre-procedural line between the "guilty" and the "innocent."

I will begin with discretion. As many commentators have noted, the granting and protection of police and prosecutorial discretion has been a major theme of constitutional criminal procedure.[50] Of course, the Fourth and

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[46] *Cf.* Sara Mayeux, *Youth and Punishment at the Roberts Court*, 21 U. PA. J. CONST. L. 543, 551 (2018) ("[E]ach of the successive state-building projects of modern United States history—the administrative and regulatory state, the welfare state, and the surveillance state—initially posed challenges to constitutional culture and the rule of law, though (for better or worse) the 'Constitution-in-practice' ultimately found ways to accommodate each of them.").

[47] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 290–91 (1998).

[48] *See id.* at 291. *But see* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1124 (1996) (noting that the Bill of Rights initially applied only to the federal government but also tracing the Supreme Court's initial neglect of criminal procedure rights to its lack of appellate jurisdiction in federal criminal cases).

[49] *Cf.* Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 748 (1981) ("[F]or practical purposes the law of the fourth amendment begins not in 1791 . . . but rather with the Prohibition Experiment in the 20th century.").

[50] *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425–26 (2016) (noting that some violent and abusive police conduct is specifically authorized by the Court); David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1070–74 (1999) ("[T]he Supreme Court has consistently watered down constitutional restrictions on police activity . . . ."); Nirej S. Sekhon,

Fifth Amendments are written as constraints on state power, and the Supreme Court sometimes describes itself as limiting enforcement discretion.[51] Notwithstanding this rhetoric, the doctrinal protections of enforcement discretion are so many and so wide that it is reasonable to see constitutional criminal procedure as power-conferring law, granting police (and prosecutors) various legal powers rather than imposing duties or constraints upon them.[52] Most of these powers are triggered by the officer's or prosecutor's articulation of suspicion. Once an officer has a certain degree of suspicion that "criminal activity may be afoot," he has the power—but not the duty or obligation—to detain the individual he finds suspicious.[53] Once an officer suspects that an individual may pose a threat to the officer or others, the officer has the power—but not the duty or obligation—to frisk the individual, take any weapon, and even to use force to subdue the threat.[54] Once an officer has a slightly higher degree of suspicion ("probable cause") to believe the individual has actually committed a specific crime, the officer has the power—but not the duty or obligation—to make an arrest and to use force if necessary to do so.[55] And with the same degree of suspicion, a

*Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1171 (2012) ("[C]ourts do virtually nothing to constrain [police] departmental discretion."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 49–52 (1997) ("[C]onstitutional law leaves intact a high level of discretion on the part of legislature, prosecutors, police officers, and defense attorneys.").

[51] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (finding that "[i]n the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government"). *But see id.* at 886–87 (finding that stops near the border require only reasonable suspicion, which can be based in part on the "Mexican ancestry" of the person stopped).

[52] Law often operates by imposing constraints and threatening sanctions, but as legal theorists emphasize, it also sometimes operates quite differently to confer powers rather than impose obligations. Standard examples are laws that create the powers to contract, bequeath property, or marry. *See* H.L.A. HART, THE CONCEPT OF LAW 27–33 (2d ed. 1994). Much of Fourth and Fifth Amendment law is best understood as conferring powers on police, rather than imposing constraints on them. *See* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1191 (2017) ("[Constitutional] doctrine grants officers broad powers to stop or arrest, and . . . the power to stop [easily] becomes the power to use force, even deadly force."); *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 199–200 (1983) (discussing rules of criminal procedure as allocations of power).

[53] Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

[54] *Id.*; Graham v. Connor, 490 U.S. 386, 396 (1989) ("[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."); Adams v. Williams, 407 U.S. 143, 146 (1972) (noting that police authority to frisk for weapons is not contingent on whether the weapon violates state law).

[55] Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *see also Graham*, 490 U.S. at 396; *cf.*

prosecutor has the power—but not the duty or obligation—to bring formal charges and pursue conviction.[56] Both reasonable suspicion and probable cause are, as interpreted by the Court, very low thresholds that are easy for enforcement officials to satisfy.[57]

Next, why do police and prosecutors need so much discretion? Why would a conception of a "reasonable" search or seizure not include uniform enforcement of all criminal prohibitions, or at least some criteria beyond a bare assertion of suspicion?[58] From their earliest years, American police forces have encountered law-breaking too widespread to make uniform enforcement practically, or politically, feasible.[59] Though "overcriminalization" is often portrayed as a late-twentieth-century phenomenon, American criminal law has always prohibited much ordinary, commonplace conduct.[60] Especially during Prohibition and the early years of automobility, when traffic laws were newly codified and promptly disobeyed, police encountered the specific problem of the purportedly "law-abiding citizen" who nonetheless breaks a law.[61] That is the second theme of criminal procedure of importance here, but it is not set forth in judicial opinions as plainly as the straightforward grants of discretion discussed above. However, historical studies of early and midcentury legal thought reveal an ongoing concern to balance two aims: empowering the police to investigate and apprehend "criminals," while ensuring that police did not interfere too much with "respectable" or "law-abiding" citizens who,

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Castle Rock v. Gonzales, 545 U.S. 748, 760 (2005) (finding that a restraining order with mandatory enforcement language did not create a constitutionally cognizable police duty to enforce the order and noting that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes").

[56] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[57] *See* Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269, 277 (2020) (characterizing the prevailing interpretation of probable cause as "[a]n extremely low threshold"); *id.* at 293 (noting that reasonable suspicion is a standard even lower than probable cause).

[58] *See, e.g.*, Whren v. United States, 517 U.S. 806, 810–13 (1996) (considering and rejecting an argument that police stops should not be considered "reasonable" unless the professed rationale for the stop met an objective standard of reasonableness beyond bare suspicion that an offense has been committed).

[59] *See* Ristroph, *supra* note 2, at 1966–68 (noting that American police officers "have never been expected to detect every violation and apprehend every violator"); Alice Ristroph, *What Is Remembered*, 118 MICH. L. REV. 1157, 1164–65, 1168–69 (2020) (noting that since their earliest days, American police have encountered lawbreakers frequently and have "always had a great deal of discretion").

[60] Ristroph, *supra* note 2, at 1965.

[61] *Id.* at 1961, 1969; *see also* LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 71, 80–81, 119 (2016); SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 31 (2019).

inconveniently, did seem to break the law rather frequently.[62] Enforcement discretion was the solution to this problem.

The Supreme Court may have been reluctant to grant such broad discretion if it lacked confidence that enforcement officials would wield that discretion wisely, in accordance with some principle. But the third feature of constitutional doctrine to emphasize here is the Court's assumption that there is indeed an available principle to guide enforcement discretion: a pre-procedural, or pre-enforcement, line between true criminals and the morally innocent. By pre-procedural, I mean that the Court assumes that before any investigative or adjudicative process begins, an individual's status as "criminal" is already fixed. One stark illustration of this conception can be found in a favorite judicial critique of an exclusionary remedy for constitutional violations. If evidence seized in violation of the Constitution is excluded from legal proceedings, the Court worries that "[t]he criminal is to go free because the constable has blundered."[63] But what makes us sure that the person going free is indeed a "criminal"? Clearly, adjudication by an appropriate factfinder (who has considered lawfully obtained evidence) is not necessary to confirm criminality in the Court's view. Nor is guilt or criminality simply the trivial or "technical" fact of statutory violation, made obvious by (possibly illegally seized) evidence, but instead the Court assumes that the persons that constables choose to target are in fact dangerous persons whom we should not want to set free.[64] Technical violation of a statute can't serve as a principle to help enforcers decide which persons, among the many who may have violated a statute, are appropriately targeted. But a deeply felt, if ill-defined and usually racialized, conception of the true criminal may do the work.[65]

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[62] SEO, *supra* note 61, at 156–200 (discussing the Supreme Court's effort to balance the interests of "respectable" drivers with police authority to enforce traffic laws as well as other criminal laws).

[63] The Supreme Court frequently quotes this line from *People v. Defore*. *See, e.g.*, Herring v. United States, 555 U.S. 135, 148 (2009) ("[T]he criminal should not 'go free because the constable has blundered.'" (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926))).

[64] Josh Bowers is correct to observe that, in the context of an arrest, the Court has found "any and all considerations beyond technical guilt accuracy" to be "constitutionally meaningless." Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 991 (2014). My suggestion is that the Court has been willing to leave arrests and other enforcement intrusions minimally regulated by constitutional standards because it has been confident that officials will be guided by extraconstitutional standards—a highly intuitive, natural law sense of who is really a criminal.

[65] Empirical evidence about how officials choose to exercise their enforcement discretion supports the thesis that "black men are the prototypical criminals in the eyes of the law." Butler, *supra* note 50, at 1426; *see id.* at 1448 tbl.1 (presenting statistical evidence that Black people are disproportionately targeted by police for stop and frisks); *see also* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*,

Throughout constitutional criminal procedure we find traces of a natural law theory of criminality. Law enforcement officials need discretion because the plain terms of criminal statutes cannot be trusted to sort reliably the true criminals from respectable, law-abiding citizens. Indeed, policing has increasingly been freed from the particulars of statutes, perhaps most significantly by *Terry v. Ohio*.[66] *Terry* authorized police to make seizures on the basis of what's come to be known as "reasonable suspicion," and as interpreted by most courts, reasonable suspicion doesn't require a belief that a particular statute has been violated.[67] *Terry* launched a regime of "general criminality," one in which investigations and interventions could begin on suspicion that "criminal activity may be afoot" rather than a belief that some specified crime had been committed.[68] Of course, prosecution itself still requires a specified offense, but *Terry* gave officers license to rummage on suspicion of undefined criminality, in the hopes of finding something that could be plausibly prosecuted. In *Terry* itself, the basis of the eventual prosecution was not attempted robbery or burglary, as one might have expected given the officer's claim that he thought the defendant was "casing a job" in preparation for a "stick-up."[69] Rather, the actual charged offense was carrying a concealed weapon.[70] And that makes *Terry* interesting in Second Amendment terms: why didn't John Woodall Terry have a right to bear arms?

In fact, the possibility of lawful gun possession did briefly worry the prosecutor at Mr. Terry's pretrial hearing, but it did not trouble the trial judge.[71] More generally, at least until 2008, the Second Amendment cast no

51 U.C. DAVIS L. REV. 745, 748–49 (2018) (noting racial disparities in arrest and pretrial release decisions as well as sentencing).

66 392 U.S. 1 (1968).

67 *See, e.g.*, United States v. Pack, 612 F.3d 341, 357 (5th Cir. 2010) ("[P]olice do not have to observe the equivalent of direct evidence of a particular specific crime . . . ."), *opinion modified upon denial of reh'g*, 622 F.3d 383 (5th Cir.); *see also* United States v. Mastin, No. 2:16-cr-542, 2018 WL 1005158, at *6–7 (M.D. Ala. Jan. 2, 2018) (declining to follow *Pack* but noting that many jurisdictions "have concluded that police need not have a particularized suspicion of any specific crime" to conduct a *Terry* stop, and citing cases); *id.* at *6 (noting that the Supreme Court has not directly addressed the question).

68 *See, e.g.*, United States v. Bonilla, 357 F. App'x 693, 703 (6th Cir. 2009) ("It is well-settled that reasonable suspicion that 'criminal activity may be afoot' does not require suspicion of a specific crime, but rather criminal activity in general." (quoting *Terry*, 392 U.S. at 30)).

69 *Terry*, 392 U.S. at 6.

70 *Id.* at 7.

71 *See* John Q. Barrett, *Appendix B:* State of Ohio v. Richard D. Chilton *and* State of Ohio v. John W. Terry*: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, 1414–17 (1998). The prosecutor wanted to ask the police officer whether he had inquired of Terry's employment circumstances at the time of arrest, noting that the Ohio statute permitted the carrying of a concealed weapon when engaged in a "legitimate business or occupation with large sums of money." *Id.* at 1414. The trial judge apparently viewed this question as irrelevant. *Id.* at 1417.

shadow on Fourth Amendment doctrine, under which the mere suspicion that an individual is armed triggers expansive police powers.[72] Just a few years after *Terry*, another stop-and-frisk case produced what is apparently the only pre-*Heller* opinion to contemplate the possibility that a constitutional right to bear arms might limit the "reasonableness" of a search or seizure. *Adams v. Williams* involved a stop based on an informant's tip that a person in a nearby car was carrying a gun and narcotics.[73] The officer approached Robert Williams and asked him to open his car door; when Williams rolled down the window instead, the officer reached inside and removed a gun from Williams's waistband.[74] The applicable state law allowed individuals to carry concealed weapons with the right permit, but the officer made no effort to find out whether Williams had a permit before placing him under arrest for weapons possession.[75] The majority found no constitutional violation, characterizing the removal of the gun as a frisk that was permitted "whether or not carrying a concealed weapon violated any applicable state law."[76] The Court found the subsequent arrest to be based on adequate probable cause, which "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."[77]

For purposes of this Essay, *Adams* is significant for Justice William O. Douglas's dissent, which noted that an individual-right conception of the Second Amendment—which neither Justice Douglas nor the Court had endorsed, but which was urged by "a powerful lobby"—would clash with the Court's interpretation of the Fourth Amendment.[78] Justice Douglas's dissent is noteworthy as an anomaly, apparently the only pre-*Heller* opinion from the high Court that contemplates a clash between the Second Amendment and the powers granted to police under Fourth Amendment doctrine. Otherwise, Fourth Amendment doctrine and constitutional criminal procedure more broadly have reconciled defendants' rights with a carceral state, giving nominal recognition to constitutional protections but interpreting those protections to grant broad enforcement discretion. And

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[72] "[T]he underpinning of the Court's entire Fourth Amendment jurisprudence . . . [is] that the safety of law enforcement officials justifies restrictions on liberty." Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 966 (2011). Fourth Amendment doctrine grants police much broader authority in public spaces than in private homes. If the Court decides that the Second Amendment protects a right to bear arms in public, much of this Fourth Amendment law will come into question. *See infra* note 81.

[73] 407 U.S. 143, 144–45 (1972).

[74] *Id.* at 145.

[75] *Id.* at 158–60 (Marshall, J., dissenting).

[76] *Id.* at 146 (majority opinion).

[77] *Id.* at 149.

[78] *Id.* at 149–51 (Douglas, J., dissenting).

underlying the doctrine, I have argued, is a conception of naturalized criminality and confidence that enforcement officials will use discretion to target the true criminals.

*Heller* did raise some doctrinal puzzles that hadn't previously troubled the Court. Since 2008, numerous defendants have raised Second Amendment challenges to stops, frisks, and other police conduct that is doctrinally authorized when an officer suspects gun possession.[79] There is presently a circuit split concerning *Terry*'s requirement that a frisk be based on reasonable suspicion that an individual is "armed and dangerous." Is "armed and dangerous" one single concept, with the premise that any armed individual is therefore dangerous, or must the officer conducting a frisk have independent suspicion of dangerousness, based on something other than the presence of a weapon?[80] The new salience of these and other doctrinal questions has led some commentators to suggest that Second Amendment law may place new constraints on the police authorities granted in Fourth Amendment doctrine.[81]

My aim here is not to look closely at the details of any potential doctrinal conflict nor to propose specific resolutions of them.[82] Rather, I want to emphasize continuity, not conflict. Like constitutional criminal procedure, the new Second Amendment law launched by *Heller* is motivated by a law-and-order vision that seeks the suppression of "criminals."

### *B. Arms for the Law-Abiding, to Be Used Against "Criminals"*

America's turn toward a carceral state began at least by the late nineteenth century,[83] and the principles of carceral political theory ran deep

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[79] *See* Bellin, *supra* note 8, at 28–29; Fields, *supra* note 8, at 1696–98.

[80] *Compare* United States v. Robinson, 846 F.3d 694, 698, 701 (4th Cir. 2017) (finding possession of a firearm to be itself sufficient to establish the requisite suspicion of dangerousness for a *Terry* frisk), *with* Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015) (noting that evidence that a person is (legally) armed is not itself sufficient to warrant suspicion that the same person is dangerous). For a more comprehensive overview of the case law on this issue as of 2019, see Alexander Butwin, Note, *"Armed and Dangerous" a Half Century Later: Today's Gun Rights Should Impact* Terry*'s Framework*, 88 FORDHAM L. REV. 1033, 1047–53 (2019).

[81] *E.g.*, Bellin, *supra* note 8, at 43 ("[W]e may be witnessing the beginning of the end of a form of proactive gun policing long viewed by city residents and their police chiefs as essential to public safety."). So far, the Supreme Court has not decided whether the Second Amendment protects a right to "public carry," or bearing arms in public spaces rather than private homes. But the Court has recently agreed to hear a case that raises this question. N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. Apr. 26, 2021), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html [https://perma.cc/V2JA-ME2E]. A right to public carry could conflict with *Terry* doctrine, but the significance of any conflict depends in part on who holds the right to bear arms in public.

[82] For proposed doctrinal adjustments related to *Terry* frisks, see Broughton, *supra* note 7, at 397–405, and Fields, *supra* note 8, at 1687–94.

[83] *See* BLACKMON, *supra* note 41, at 53.

in constitutional doctrine by the time the Court recognized an individual right to bear arms in *Heller*. It is not surprising that the specter of criminality would structure the decision, which recognizes an individual right of "law-abiding, responsible citizens" to bear arms for self-defense.[84] But it is only the specter of criminality: though the *Heller* Court mentioned "self-defense" at least eighty-three times, it usually did so without specifying the threat against whom the defender would use arms.[85] Many, but not all, of the references to self-defense referred specifically to the home.[86] One brief passage refers to "an attacker" and "a burglar," and shortly thereafter there is a reference to "intruders."[87] Otherwise, though, self-defense is taken as self-explanatory, as though the threats that create the occasions for self-defense are obvious to all. *Heller* was soon followed by *McDonald v. City of Chicago*, where the litigants and the Court were more direct about the threats that occasioned self-defense: "The Chicago petitioners and their amici . . . argue that the handgun ban has left them vulnerable to criminals."[88] Second Amendment doctrine has been launched with a carceral logic: the right to bear arms is not simply a right that belongs to some members of the political community but not others. It is a right that some individuals possess *for the purpose of* doing violence to other members of the community—those labeled "criminals."[89]

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[84] District of Columbia v. Heller, 554 U.S. 570, 635 (2008). Dick Heller, the petitioner, was a police officer who wished to keep a handgun at home. *Id.* at 575.

[85] *See* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 64 (2020) (noting that the *Heller* Court referenced self-defense eighty-three times); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1294 (2009) (noting that *Heller* protects a right of self-defense but "does not specify against whom, when, or where").

[86] *See Heller*, 554 U.S. at 635 ("[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.").

[87] *Id.* at 629–30.

[88] 561 U.S. 742, 751 (2010).

[89] Different rationales for a right to bear arms imagine different targets of the weapons: if individuals bear arms to hunt or for recreation, nonhuman animals or inanimate objects are the targets; if we bear arms to protect against tyranny, would-be tyrants are the targets; if we bear arms for self-defense, threatening "criminals" are the targets. *Heller* relies primarily on the last rationale, thus imagining violence as constitutive of a political community and assuming that some community members will be the legitimate targets of others. Relatedly, David Williams has noted that even "outgroup theories" of the Second Amendment, or vigorous calls for gun rights from historically disempowered groups, "argue that the Constitution itself assumes that the world will always be filled with hatred." David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 392 (1999); *see also* Kate Masters, *Fear of Other People Is Now the Primary Motivation for American Gun Ownership, A Landmark Survey Finds*, TRACE (Sept. 19, 2016), https://www.thetrace.org/2016/09/harvard-gun-ownership-study-self-defense/ [https://perma.cc/Y8FY-YHW4] (noting that gun owners increasingly cite self-defense as the reason to own firearms, whereas two decades ago recreation and hunting were more frequently cited reasons).

Born as it was in an already-carceral regime, *Heller*'s carceral logic has not drawn much commentary. In the remainder of this Essay, I note three blind spots in Second Amendment doctrine and commentary. First, the case law and commentary has given relatively little attention to criminal law and its doctrines of self-defense. Second, the intense debate over whether the right to bear arms is an individual right or collective right has eclipsed another dichotomy that is equally or more important: is the underlying right of self-defense a universal and inalienable one enjoyed by all individuals, or a selective (and possibly defeasible) one? Third, what would be the political implications of an individual right of self-defense that is equally enjoyed by all members of a political community? I take up the first two issues in the remainder of this Section and the third in Part III below.

Though much Second Amendment commentary notes the contrast between "law-abiding citizens" and "criminals" (placing quotation marks around the terms), there have been few efforts to scrutinize the theory of criminality that underlies this contrast.[90] Unlike *felon* or *misdemeanant* or *arrestee* or *burglar*, the noun "criminal," as a category of person, has no precise legal meaning. Criminals could conceivably include all persons who have engaged in conduct that violates a criminal statute, whether they are ever charged or convicted. This definition likely would include most Americans and probably isn't what Justice Samuel Alito had in mind in his *McDonald* majority opinion. Instead, the right to bear arms is necessary for encounters with sufficiently violent and dangerous persons—but use a gun against a threat later determined not sufficiently dangerous, and you may be the criminal.[91] In court, self-defense claims often fail, for criminal statutes and judicial interpretations offer an affirmative defense only in narrow

[90] Jacob Charles and Brandon Garrett note that federal gun enforcement strategies seek to protect gun rights for the "law-abiding" while imposing severe penalties on "thugs" and "gangsters" who possess guns. Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, U. PA. L. REV. (forthcoming 2022) (manuscript at 46–50), https://papers.ssrn.com/a=3685910 [https://perma.cc/3AA6-3LLG]. For a pre-*Heller* critique of the phrases "law-abiding citizen" and "criminal," see Steven R. Morrison, *Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power Structure Creates Itself as Law Abiding Citizen Through the Creation of Black as Criminal*, 2 NW. J.L. & SOC. POL'Y 63, 80–85 (2007).

[91] That is, many persons who display or actually fire weapons in purported self-defense then become criminal suspects and criminal defendants. Whether they ever become convicted persons depends on the legal evaluation of their self-defense claim. *Cf.* Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 101, 101–03 (2020) (providing examples of criminal charges for brandishing or otherwise displaying weapons but noting that the law "falls woefully short of effectively regulating gun displays"); Ruben, *supra* note 85, at 82–88 (describing basic requirements of self-defense doctrine).

circumstances.[92] Happily, some recent scholarship has scrutinized criminal doctrines of self-defense in relation to the Second Amendment.[93] But more generally, I think much of the American populace, even or especially the legal profession, subscribes to a simplistic and false view of criminality (and the threats sufficient to license violence in self-defense) as intuitive and self-evident.[94] This is the naturalized view of criminality discussed above, and it helps Second Amendment doctrine conjure images of violent criminals without paying much heed to actual criminal doctrines or practices.[95]

Second Amendment case law and commentary have given more attention to the question of criminality in one specific context: constitutional challenges to bans on weapon possession for certain classes of convicted persons.[96] *Heller* specifically made room for "longstanding prohibitions on the possession of firearms by felons" but did not say why felons should be excluded.[97] (Again, for natural law theorists, the answer may seem obvious—but for those aware of positive American law, the range of crimes classified as felonies and the enormous prosecutorial discretion to choose between felony and misdemeanor charges may suggest that the Court needs to explain why felons are so easily excluded from this right.)[98]

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[92] Typically, a self-defense claim requires showings of imminence, necessity, and proportionality. *See* Ruben, *supra* note 85, at 82–88; State v. Steinle, 2012-53, p. 7 (La. App. 3 Cir. 10/3/12); 98 So. 3d 973, 979 (upholding denial of self-defense claim on grounds that use of deadly force was disproportionate); People v. Lopez, 199 Cal. App. 4th 1297, 1305–06 (2011) (upholding murder conviction after denial of self-defense claim and finding no error in jury instruction that fear of future harm did not satisfy imminence requirement).

[93] *See* Ruben, *supra* note 85, at 64–68; Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 96–97 (2017).

[94] *See* Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1689 (2020).

[95] *See supra* notes 61–66 and accompanying text.

[96] *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 447–48 (7th Cir. 2019) (rejecting argument that an individual convicted of a nonviolent felony (mail fraud) retains a Second Amendment right to bear arms). *Voisine v. United States* considered whether a state assault conviction counted as "a misdemeanor crime of domestic violence" for purposes of a federal weapons ban. 136 S. Ct. 2272, 2276 (2016) (quoting 18 U.S.C. § 922(g)(9)). Though the Court approached the question as a matter of statutory interpretation and did not address constitutional issues, Justice Clarence Thomas raised concerns in dissent that the majority's approach "relegate[ed] the Second Amendment to a second-class right." *Id.* at 2292 (Thomas, J., dissenting) (quoting Friedman v. Highland Park, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from the denial of certiorari)); *see also* Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS. 53, 62–69 (2020) (developing analytical framework to assess scope and defeasibility of Second Amendment rights).

[97] District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see also id.* at 721 (Breyer, J., dissenting) ("I am similarly puzzled by the majority's list . . . that in its view would survive Second Amendment scrutiny," including "prohibitions on the possession of firearms by felons." (quoting *id*. at 626–27 (majority opinion))).

[98] *See* Ristroph, *supra* note 25, at 591–92. Before her appointment to the Supreme Court, Justice Amy Coney Barrett, the newest member of the Supreme Court, expressed doubt about whether *all* felons

The question of which offenses are a legitimate basis for denial of gun rights is part of a larger inquiry into who constitutes "the people" who enjoy Second Amendment rights.[99] That debate preceded *Heller* and continues after it, with many commentators noting various groups that have historically been excluded from gun ownership and some urging a more universal application of Second Amendment rights, even to noncitizens.[100] In these discussions of who enjoys the right, however, there has been insufficient attention to the ways that the right itself might change if it is universally rather than selectively held. In other words, the "right to bear arms" held by a subsection of a society may simply not be the same "right to bear arms" held by all members of society.

To explain why, a few words about English history and English political theory are in order. The history is important because England never embraced a universal right to bear arms, and actual English practice could model for the Founders only a selective right. The political theory is important because one English thinker—Thomas Hobbes—did take seriously a universal right to self-preservation, with results that were too radically egalitarian for his time, and so far, also for ours.

First, the history. Academic commentary—again, both before and after *Heller*—often invokes the right to bear arms in English law as inspiration for the drafters of the Second Amendment.[101] For purposes of this Essay, I want

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are excluded from Second Amendment protections. *See Kanter*, 919 F.3d at 464–65 (Barrett, J., dissenting) ("History does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons.").

[99] The Second Amendment protects "the right of the people to keep and bear arms." U.S. CONST. amend. II. As Justice Stevens noted in dissent, the *Heller* majority gave the phrase "the people" in the Second Amendment an interpretation much narrower than the same phrase is given in First and Fourth Amendment doctrines. *See Heller*, 544 U.S. at 644 (Stevens, J., dissenting).

[100] *See, e.g.*, Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1524 (2010) (arguing that "the Second Amendment's text provides no basis for limiting arms bearing to citizens"); Williams, *supra* note 89, at 412–13 (discussing the claims of "outgroups" to Second Amendment rights).

[101] *See, e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT, at ix (1994) (asserting that the right to bear arms was "born in 1689" when included in the English Bill of Rights "and perpetuated, with modifications, in the American Bill of Rights a century later"); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 475 (1995) (characterizing Malcolm's work as representative of "[t]he mainstream scholarly interpretation" or "the Standard Model" of the Second Amendment); David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 210 (2018) (characterizing "English arms culture of the middle ages" as an "ancestor" of the American right to bear arms, though insisting that early Americans sought to broaden the right to bear arms beyond the English precedent); Diarmuid F. O'Scannlain, *Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms*, 95 NOTRE DAME L. REV. 397, 400–01 (2019) ("[T]he English historical experience really does matter because the newly independent Americans understood their rights against the backdrop of the English legal tradition.").

to avoid debates about which historical sources are most important or reliable. Instead, I simply accept as true the influential work of Professor Joyce Lee Malcolm, who is celebrated by champions of an individual right to bear arms as the scholar who brought historical legitimacy to that interpretation of the Second Amendment, and who is cited several times in the *Heller* majority opinion.[102] Malcolm's book *To Keep and Bear Arms* argues that the right to bear arms—"under vigorous assault in the United States" at the time of publication in 1994—was a right of individuals by the late seventeenth and eighteenth centuries in England.[103] "It was this heritage that Englishmen took with them to the American colonies and this heritage which Americans fought to protect in 1775."[104]

The English right began as an instrument of state violence, on Malcolm's telling—though she does not use quite that language. Instead, she emphasizes that the right to bear arms began as a duty to bear arms: a duty to help the King keep the peace and subdue his enemies. In feudal England, it was initially "freemen [and] the richer villeins" who "were ordered to be armed" for service in the King's militia, and eventually "unfree peasants were included as well."[105] This duty included the duty to supply one's own weapons, which caused considerable resentment.[106] The duty to bear arms extended quite broadly to "[a]ll able-bodied men between the ages of sixteen and sixty," but certain groups were excluded: clergy and Catholics were expected to help pay for the militia but not to participate in it, and Catholics were not allowed to keep weapons at home.[107]

Malcolm emphasizes repeatedly that before the seventeenth century, bearing arms was a duty and not a right. As such, the King could restrict weapons possession as he pleased, and he sometimes did so based on the type of person or the type of weapon—again, before the seventeenth century, Catholics were typically selected for disarmament.[108] "Although the general public was free to have arms, because there was no *right* to have weapons the government always had the power to disarm any individual or class of

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[102] *See Heller*, 554 U.S. at 592–93. For a discussion of Malcolm's influence, see William Glaberson, *Dueling Scholars Join Fray Over a Constitutional Challenge to Gun Control Laws*, N.Y. TIMES (Sept. 21, 2000), https://www.nytimes.com/2000/09/21/us/dueling-scholars-join-fray-over-a-constitutional-challenge-to-gun-control-laws.html [https://perma.cc/EQG7-HPYV]. For a summary of critiques of Malcolm's work, see Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1795–99 (2012).

[103] MALCOLM, *supra* note 101, at ix.

[104] *Id.* at 134.

[105] *See id.* at 3–4.

[106] *Id.* at 3–5.

[107] *Id.*

[108] *Id.* at 9–11.

individuals it considered dangerous to the peace of the realm."[109] But selective disarmament was used to protect more than peace or religious hierarchy: it was a strategy to protect property and class interests as well, especially the interests of the aristocracy in hunting for sport and protecting their game from poorer persons seeking actual nourishment.[110] And when Catholic monarchs held power in the seventeenth century, they reversed earlier religious exclusions and took care to disarm their Protestant enemies.[111]

In 1688, the Glorious Revolution ended the reign of the Catholic James II and installed William of Orange and his wife Mary (James II's daughter, and a Protestant) as rulers.[112] Relatively quickly, William and Mary summoned a "Convention" of elected representatives (because William and Mary were not yet King and Queen, and only a King could summon a true "parliament").[113] This Convention drafted and presented to William and Mary a Declaration of Rights identifying thirteen "true, ancient, and indubitable" rights of Englishmen, including a provision "[t]hat the Subjects, which are Protestants, may provide and keep Arms, for their common Defence."[114] As Malcolm puts it, "While the right of subjects to have arms had been singled out as one of the 'true, ancient, and indubitable' rights to be included in the Declaration of Rights, it was neither true, ancient, nor indubitable. The Convention members themselves were its authors."[115] After endorsing the Declaration of Rights and becoming King, William (and Parliament) began to disarm Catholics to reduce any risk of a Catholic counterrevolution.[116] Thus, in England, the *right* to bear arms was clearly man-made, born after decades of civil war and in anticipation of potential further conflict. And in England, if Malcolm's history is accurate, the right to bear arms was always a selective right, a right of some Englishmen to disarm and dominate others.

The drafters of the Second Amendment knew the English history but were not bound by it. They could, in theory, have established a new and distinctively American right to bear arms, one designed to give all citizens equal protection against government tyranny rather than one designed to allow some citizens to dominate others. I take no position here on what the

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[109] *Id.* at 11.

[110] *See id.* at 11–15.

[111] *See id.* at 31–53, 103–06; *see also* District of Columbia v. Heller, 554 U.S. 570, 592–93 (2008) (citing these passages for the same proposition).

[112] MALCOLM, *supra* note 101, at 111–13.

[113] *Id.* at 114.

[114] *Id.* at 115, 118.

[115] *Id.* at 115.

[116] *Id.* at 122–23.

actual drafters of the Second Amendment intended, though the next Part of this Essay explores what a universally held right to bear arms might entail. But whatever the Framers intended, when the Supreme Court interpreted the Second Amendment more than two centuries after its adoption, the Court ultimately followed English precedent, at least insofar as the Court declined to embrace a right to bear arms enjoyed equally by all. Like the English right, *Heller*'s right to bear arms would be selective, a right of some individuals to bear arms for the purposes of overwhelming other members of the community perceived to be dangerous. But unlike the English right, *Heller*'s principle of selection is not religion or class, nor indeed would modern constitutional doctrine allow any openly racial criteria to determine who would have the privilege of using force against whom.[117] Instead, criminality (natural, intrinsic criminality) could serve as the selection principle. The Court explicitly endorsed the exclusion of felons and implicitly endorsed the exclusion of any citizen not sufficiently "responsible" or "law-abiding."[118] Thus, the Second Amendment arrived in a carceral state and immediately accommodated itself.

I have been speaking of the right *to bear arms*, for that is what the text of the Second Amendment and the Court's recent decisions most explicitly protect. But *Heller* and many commentators view the right to bear arms as a necessary implication of a different, broader right: a right to self-defense or self-preservation.[119] Perhaps *Heller*'s embrace of a selective right to bear

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[117] The limitation of the English right to bear arms to Protestants is mentioned in *Heller* but is not treated as consequential; the Court found Malcolm's emphasis on the individual character of the right more notable than the religious restriction. *See* District of Columbia v. Heller, 554 U.S. 570, 593 (2008) ("To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants . . . . But it was secured to them as individuals . . . .").

[118] *See id.* at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ."); *id.* at 635 ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

[119] *See, e.g.*, *id.* at 635 (holding that the District of Columbia's ban on the possession of handguns in the home for purposes of self-defense violates the Second Amendment); David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 237 (2008) (arguing that *Heller* vindicates a preexisting natural right to self-preservation or self-defense). Though Second Amendment doctrine and discourse treat self-defense and self-preservation as interchangeable, the two concepts are distinguishable from one another, and both are distinct from a right to bear arms. Self-defense is usually understood as actions against a specific threat, while self-preservation may entail preemptive protective actions even before a threat is manifest, or the infliction of harm on someone who does not pose a threat. If three sailors adrift on a lifeboat kill and eat an ailing and immobilized companion, the act is plausibly one of self-preservation but not one of self-defense. *See* Kimberly Kessler Ferzan, *Defending Imminence*, 46 ARIZ. L. REV. 213, 247–48 (2004) (distinguishing self-preservation from self-defense using the infamous facts of *Regina v. Dudley and Stephens*). Bearing arms can be a particular method of self-defense or self-preservation, but it does not precisely overlap with either

arms rests upon an underlying theory in which some persons, but not all, have a right of self-defense. My final Part explores two theories of self-defense—one universal, one selective—from English philosophers who lived and wrote in the decades when Englishmen transformed the bearing of arms from a duty into a right.

## III. WHICH LIVES MATTER? TWO THEORIES OF SELF-DEFENSE

Between Thomas Hobbes (1588–1679) and John Locke (1632–1704), there's little question who wears the laurels as the philosopher behind American constitutionalism. Among modern commentators, including Supreme Court Justices, Locke is seen as a champion of individual rights and limited government and, as such, is celebrated and cited frequently.[120] Hobbes is occasionally grudgingly acknowledged as the thinker who pioneered the idea that government legitimacy depends on the consent of the governed, but he is typically viewed as having betrayed any individualist or liberal principles by ultimately advocating a Leviathan—an undivided and seemingly absolute sovereign.[121] A few scholars have argued that Hobbes influenced the Founders much more than usually acknowledged, but I will

concept: there are ways of defending oneself without weapons, and there are ways of using weapons that are not defensive.

[120] Locke is invoked often both by those who endorse a strong individual right to bear arms and those who would restrict gun ownership. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 892 (2010) (Stevens, J., dissenting) (citing Locke for the proposition that individuals in society must give up many rights that they may have held in the state of nature); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 15–16 (1992) (noting influence of Locke on both Second and Ninth Amendment scholarship); *see also* Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 154–58 (2008) (outlining an argument for an individual right to bear arms based on principles of "Lockean . . . autonomy").

[121] Hobbes was an advisor to Charles II and an apparent enthusiast about the English monarchy. Perhaps for that reason, many contemporary commentators assume that Hobbes's sovereign is to be an absolute monarch, though in fact Hobbes contemplated that sovereignty could reside in many different sorts of institutions, including an elected assembly. *See* Richard Tuck, *Introduction* to THOMAS HOBBES, LEVIATHAN, at ix–x, xxxvii (Richard Tuck ed., 1991) (1651). Hobbes specialists note frequently the difference between Hobbes's actual arguments and "Hobbism," or the caricature of his work that pervades popular understandings. *See* Sterling P. Lamprecht, *Hobbes and Hobbism*, 34 AM. POL. SCI. REV. 31, 34–37 (1940). In numerous works, I have tried—without apparent success—to draw American legal scholars' attention to the radical egalitarianism in Hobbes's vision of individual rights. *See generally* Alice Ristroph, *Sovereignty and Subversion*, 101 VA. L. REV. 1029, 1030 (2015) (arguing that Hobbes is often mischaracterized or misread); Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 615 (2009) [hereinafter Ristroph, *Respect and Resistance*] ("Hobbes's radical egalitarianism committed him to the claim that in the absence of a reciprocally recognized third party to adjudicate disputes, each individual has an *equal* claim to preserve himself by whatever means he believes is necessary.").

not try to resolve that question here.[122] My focus in this Essay is the Second Amendment as understood by the Supreme Court today, and my inquiry in this Part is into conceptions of self-defense that could conceivably have informed *Heller*'s right to bear arms. I will suggest that it is no surprise that Locke's theories have been more influential, but we have not yet appreciated why Locke rather than Hobbes would be so attractive to the Founders as architects of an inegalitarian state, or a carceral one. Hobbes, the supposed absolutist, actually envisioned a universal right of self-preservation and a right to resist punishment; Locke, the supposed liberal egalitarian, articulated a selective right to self-defense and a natural right to punish.

Hobbes began his political theory by imagining humans without a polity—humans in a state of nature without an established political authority.[123] In such a condition, two features of human existence are of great significance: humans' equal physical vulnerability and the universal desire for self-preservation.[124] Hobbes emphasized that, though humans vary in intelligence and strength, no one is so smart or so strong that he can repel every assault or avoid eventual death. Each person, aware of his own vulnerability, will seek self-preservation: he will act to secure himself against danger as best he can. Notably, Hobbes's account of the state of nature is not simply a set of empirical claims but a normative argument: Hobbes claimed that each individual has not simply the desire but a natural *right* to self-preservation.[125] From this account, Hobbes derived two principles so radical for his era that he had to flee England for a time and yet so influential that today's liberals take them for granted. Hobbes argued that given humans' equal vulnerability and equal right to self-preservation, no one has a natural right to rule over others, and any legitimate government must be based on the consent of the governed.[126]

But Hobbes then went on to imagine the particular structure of government to which individuals should (and would, he claimed) give their consent. He argued that divided governments with meaningful limits on sovereign power would be unstable and that humans entering a social contract should establish a sovereign with absolute power.[127] Or more precisely, almost absolute power. The natural right of self-preservation was

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[122] *See* JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 71–72 (1992); Gary L. McDowell, *Private Conscience & Public Order: Hobbes &* The Federalist, 25 POLITY 421, 423 (1993).

[123] HOBBES, *supra* note 121, at 86–90.

[124] *Id.* at 87–89.

[125] *Id.* at 91.

[126] *See id.* at 117–19.

[127] *See id.* at 120.

inalienable on Hobbes's account.[128] It was not incompatible with political authority, even in the form of a very powerful sovereign; in most instances, submitting to authority was the best means of self-preservation. But in the event that a sovereign sought to destroy a subject rather than preserve him, Hobbes made clear that the subject's natural right to self-preservation gave him a right to resist the sovereign. This right to resist extended to all cases of punishment, including "Wounds, and Chayns, and Imprisonment," not simply capital punishment.[129] Hobbes reasoned that one who allowed himself to be physically restrained would put himself at the mercy of his captor, which was inconsistent with the natural right of self-preservation.[130] To be clear, Hobbes also recognized that sovereignty included a right to impose punishment, but subjects bore no duty to submit even to rightful punishment.[131] For Hobbes's contemporaries, these ideas were strange and radical. *Leviathan* was denounced as a "Rebells catechism," and Hobbes himself as "the Monster of Malmesbury."[132]

Contrast this account of self-preservation with the account from John Locke, who "discreetly [wove] strands of [Hobbes's] philosophy into . . . less noxious fabrics of thought."[133] How did Locke tame Hobbes for polite company? Today's commentators rarely understand that it was Hobbes's egalitarianism (and likely atheism) that made him the Monster of Malmesbury, not *Leviathan*'s then-unremarkable endorsement of an absolute sovereign.[134] Consequently, they tend to see the difference between Hobbes and Locke as lying in Locke's supposedly more genteel state of nature and his endorsement of limited rather than absolute government.[135] A better explanation of Locke's amendments to Hobbesian theory takes notice of the fact that seventeenth-century Englishmen, and eighteenth-century

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[128] *Id.* at 93.

[129] *Id.* at 93.

[130] *See id.* at 93–94.

[131] Thus, for Hobbes, rights do not imply correlative duties. For more on Hobbes's right to resist punishment, including a discussion of Hobbes's conception of rights, see Ristroph, *Respect and Resistance*, *supra* note 121, at 615–18.

[132] John Bramhall, *The Catching of Leviathan, or the Great Whale*, *in* LEVIATHAN: CONTEMPORARY RESPONSES TO THE POLITICAL THEORY OF THOMAS HOBBES 115, 145 (G.A.J. Rogers ed., 1995) ("Why should we not change the name of *Leviathan* into the *Rebells catechism*?"); ABRAHAM COWLEY, THE TRUE EFFIGIES OF THE MONSTER OF MALMESBURY, OR, THOMAS HOBBES IN HIS PROPER COLOURS (London 1680) ("But his *Leviathan*, and other Books of his are so full of *Madness* and *Folly*, that 'tis impossible they should be so *Taking* as they are . . . .").

[133] McDowell, *supra* note 122, at 424.

[134] *See* COWLEY, *supra* note 132.

[135] Ryan Patrick Alford, *Is an Inviolable Constitution a Suicide Pact? Historical Perspective on Executive Power to Protect the* Salus Populi, 58 ST. LOUIS L.J. 355, 363–64 (2014) (characterizing Hobbes as a theorist of "undivided and unlimited sovereignty" and contrasting his work to the "constitutionalist" theories of Locke and others).

American colonists, were in no way ready to embrace a comprehensive vision of natural human equality. These men were writing a Declaration of Rights with explicit religious preferences or writing a Constitution to accommodate slavery.[136] For themselves, they may have liked the idea of a social contract and government by consent, but they were not prepared to recognize in *every* human equal political standing.

Locke tamed Hobbes by embracing the language of equality even as he naturalized inequality. He characterized the state of nature as a "state of perfect equality,"[137] but it is worth looking closely at the basis for equality in Locke's state of nature. "Creatures of the same species and rank . . . should . . . be equal,"[138] but are all humans in that category? It rapidly becomes clear that in Locke's state of nature, there are "offenders" who need to be punished, and natural equality becomes, in fact, a right to *punish* enjoyed equally among "the innocent" to be exercised against "offenders."[139] Who are the offenders? Locke contemplated a law of nature ("no one ought to harm another in his life, health, liberty, or possessions") and assumed that transgressions of this law would be self-evident—or at any rate, evident to "the innocent" who would impose punishment.[140] Strikingly, Locke's chapter on the state of nature is primarily about punishment and inequality, an effort to explain why "in the state of nature, one man comes by a power over another."[141]

It bears emphasis that to naturalize a right to *punish* is to make inequality, not equality, the natural condition of humankind. There can be no

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[136] *See supra* Section II.B (discussing religious preferences in the English Declaration of Rights); Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 407 (2013) (discussing some of the protections the Constitution of 1787 gave to chattel slavery). Notably, many state constitutions also protected slavery, including one that Locke helped draft. THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA, DRAWN UP BY JOHN LOCKE, MARCH 1, 1669, *reprinted in* 1 THE COLONIAL RECORDS OF NORTH CAROLINA 187, 204 (W.L. Saunders ed., Raleigh, P.M. Hale 1886). On Locke's involvement in the Carolina constitution, his attitudes toward slavery, and the "mutually constitutive relationship between liberalism and colonialism," see David Armitage, *John Locke, Carolina, and the* Two Treatises of Government, 32 POL. THEORY 602, 602 (2004).

[137] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 272 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689) (different typeface and capitalization than original).

[138] *Id.* at 269.

[139] *See id.* at 271–72.

[140] *See id.* at 271 (different capitalization than original).

[141] *See id.* at 272 (different typeface and capitalization than original). Locke was fairly explicit in acknowledging that he placed a right to punish in the state of nature because he saw no other way to rationalize a sovereign's power to punish foreign nationals. *See id.* at 272–73. In addition to classifying violations of the law of nature as a "crime" in need of punishment, Locke argued that the individual injured by these violations could seek "reparation" from the offender. *Id.* at 273. It is only in the context of that right of reparation that Locke even mentions self-preservation as a natural right in this chapter. *See id.*

right to punish in Hobbes's state of nature, for who would hold that right if not everyone equally? Good guys and bad guys are not natural, self-evident categories for Hobbes; rather, disagreement about what is good, lawful, or desirable *is* a fundamental problem faced by mankind. In Hobbes's state of nature, without a shared authority to resolve these disagreements, each person has an equally valid claim to act in reasonable pursuit of his own self-preservation. In Locke's state of nature, in contrast, there are good guys and bad guys, "the innocent" but also "criminals" and "offenders."[142] The good guys (presumably) have the right to preserve themselves against the "criminals," but Locke doesn't even address self-defense until later; instead, Locke first grants the good guys the right to punish offenders. By contrast, Hobbes insists that crime is a category that existed only after the establishment of a sovereign. Thus, both thinkers contemplate violent conflict in the state of nature, but only Locke picks sides, granting moral authority to "punish" to a select set of persons and labeling the rest "criminals."

Locke does not mention a right of self-defense until he describes the state of war, which arises when one man has declared "by word or action, not a passionate and hasty, but a sedate setled design, upon another mans life."[143] In such circumstances, "the safety of the innocent is to be preferred," and he has the right to destroy any attacker "as beasts of prey."[144] Locke's theory of self-defense allows the "innocent" man a right to kill even "a thief, who has not in the least hurt him, nor declared any design upon his life, any farther then, by the use of force, so to get him in his power, as to take away his money."[145] In a distorted echo of Hobbes's right to resist even noncapital punishment, Locke argues that "I have no reason to suppose, that he, who would take away my liberty, would not when he had me in his power, take away every thing else. And therefore it is lawful for me to treat him, as one who has put himself into a state of war with me, i.e. kill him if I can . . . ."[146] Locke does not contemplate how the thief might respond, but he clearly does not view the thief as having an equal right to use force in response.

Thus, for Locke, the pre-political world is one in which some, but not all, individuals have a right to do violence to others. Writing not long after Hobbes and having studied his work,[147] Locke had surely encountered

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[142] *Id.* at 271–72.

[143] *Id.* at 278 (different capitalization than original).

[144] *Id.* at 278–79 (different capitalization than original).

[145] *Id.* at 279–80 (different typeface and capitalization than original).

[146] *Id.* (different typeface and capitalization than original).

[147] *See* Peter Laslett, *Introduction* to LOCKE, *supra* note 137, at 67–92 (discussing the influence of Hobbes on Locke).

Hobbes's claim that good faith disagreements about what is reasonable—what property is rightfully mine, what threats are sufficiently dangerous that I may reasonably respond, what degree of force is reasonable—are unavoidable problems faced by humans in the absence of political authority. But Locke seemed to dismiss this claim, assuming that reason would make itself known and the difference between the innocent and the aggressor would simply be self-evident. From this assumption arises the premise of natural inequality that shapes Locke's account—rights of violence that belong to some but not to others. In discussing self-defense, Locke writes that "force, or a declared design of force upon the person of another, where there is no common superior on Earth to appeal to for relief, is the state of war: and 'tis the want of such an appeal gives a man the right of war even against an aggressor, though he be in society and a fellow subject."[148] But what is punishment, endorsed by Locke with enthusiasm, but "force, or a declared design of force upon the person of another"?[149] Why would the target of punishment, whether in the state of nature or in civil society, not have equal claim to kill the "innocent" punisher?

It is not difficult to see whose theory better fits a Second Amendment for a carceral state: not Hobbes, the atheist, egalitarian Monster of Malmesbury, but Locke, that pious carceralist. For Hobbes, all lives matter equally; for Locke, the lives of the "innocent" are to be preferred, while the lives of "criminals" are as easily ended as those of "beasts of prey." For Hobbes, it is important to recognize that all government is artificial, all sovereignty the product of human agreement, and thus all classifications of conduct as criminal are the decisions of a recognized political authority. Hobbes insists that without a sovereign, the category "criminal" does not exist. Locke, in contrast, uses the language of criminality to sanctify a selective right to use violence, an inegalitarian world where, by nature, some individuals have power over others. And it is Locke's tradition that *Heller* endorses.

## CONCLUSION

Dick Heller was a policeman, and it would have been strange indeed if his efforts to secure his own right to bear arms had produced new constraints on police authority.[150] But *Heller* arrived in an already-carceral state, and it was decided by the same Court that has helped enable the development of

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[148] LOCKE, *supra* note 137, at 280 (different typeface and capitalization than original).

[149] *Id.*

[150] *See supra* note 84; *see also* JENNIFER CARLSON, POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE 6 (2020) (examining law enforcement support for gun rights and arguing that racialized ideas of criminality shape that support).

that state.[151] This Essay argues that *Heller* reaffirmed carceral principles rather than undermined them. Doctrinal tensions between an individual right to bear arms and broad police authority to disarm may occupy courts for some time, but courts are likely to resolve these tensions by reaffirming or even expanding a criminality exception to the Second Amendment. And the concept of criminality that informs this exception is likely to be as discretionary, naturalized, and racialized in this context as it is elsewhere in American law.

More interesting than doctrinal puzzles, in my view, is a cultural embrace of the contrast between "law-abiding citizen" and "criminal," a contrast that is increasingly visible outside the courts. In a number of widely reported incidents, self-appointed private guardsmen have identified unarmed men as purported criminals and shot and killed them, later raising claims of self-defense.[152] The racial dimensions are impossible to ignore, with the shooter usually white and the victim usually Black. But I think we need to give still more attention to the carceral logic of these encounters: the men who bear arms (and use them) in these situations communicate a view of society divided into law-abiding citizens and criminals. Not merely (or even) a regrettable inconvenience, the presence of criminals and the need to subdue them is constitutive of a carceral society. To bear arms and to use them is what it means to be American on this view. Actual positive laws are secondary to this logic, as evidenced on January 6, 2021, when protesters—mostly white, many armed—broke various criminal statutes and forced their way inside the U.S. Capitol.[153] President Donald Trump was initially reluctant to condemn this group[154]: "My people aren't thugs," he supposedly

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[151] The *Heller* majority did not imagine that police would become any less important in a world with an individual right to bear arms. Indeed, the majority found that the Second Amendment protected handguns in particular, noting that a handgun "can be pointed at a burglar with one hand while the other hand dials the police." District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

[152] *See* Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1641–46 (2019) (detailing many incidents of Black and brown persons being killed by private citizens who claim to have acted in self-defense); Seth Stoughton, *Ahmaud Arbery's Killing Puts a Spotlight on the Blurred Blue Line of Citizen's Arrest Laws*, CONVERSATION (May 29, 2020, 8:27 AM), https://theconversation.com/ahmaud-arberys-killing-puts-a-spotlight-on-the-blurred-blue-line-of-citizens-arrest-laws-139275 [https://perma.cc/3QEU-6SAN].

[153] *See* Sam Cabral & Roderick Macleod, *Capitol Riots: Five Takeaways from the Arrests*, BBC NEWS (Feb. 8, 2021), https://www.bbc.com/news/world-us-canada-55987603 [https://perma.cc/9GZ3-3P8B] (reporting that the rioters were predominantly white); Tom Dreisbach & Tim Mak, *Yes, Capitol Rioters Were Armed. Here Are the Weapons Prosecutors Say They Used*, NPR (Mar. 19, 2021, 5:06 AM), https://www.npr.org/2021/03/19/977879589/yes-capitol-rioters-were-armed-here-are-the-weapons-prosecutors-say-they-used [https://perma.cc/2JCW-UU32] (reporting that several rioters were armed).

[154] *See* Peter Baker & Maggie Haberman, *Capitol Attack Leads Democrats to Demand that Trump Leave Office*, N.Y. TIMES (Feb. 21, 2021, 2:34 PM), https://www.nytimes.com/2021/01/07/us/politics/

said.[155] The participants identified themselves as "law-abiding" citizens, and one explained afterward that though he took an envelope from Speaker of the U.S. House of Representatives Nancy Pelosi's office, he left a quarter behind as payment, proclaiming, "I'm not a thief."[156]

In the ongoing prosecutions of those who participated in the January 6 raid on the Capitol, we see an effort to reclaim the authority of positive law over these naturalistic ideas. But real progress toward racial equality will likely require a much broader and deeper effort to expose and then reject the naturalized conception of criminality that underpins so much of American constitutional doctrine, including the new jurisprudence of the Second Amendment.

trump-leave-office-resignation.html [https://perma.cc/ZT5J-XEEK] (reporting that President Trump did not condemn the Capitol rioters until he became aware that he could face criminal liability for inciting a riot).

[155] Ashley Collman, *Official Describes President as "Total Monster" Who Refused to Act as Congress Was Stormed*, BUS. INSIDER (Jan. 7, 2021, 4:20 AM), https://www.businessinsider.com/trump-total-monster-during-capitol-siege-aides-say-report-2021-1 [https://perma.cc/BC4Q-LDBL].

[156] Jon Swaine, *Man Who Posed at Pelosi Desk Said in Facebook Post That He Is Prepared for Violent Death*, WASH. POST (Jan. 7, 2021, 7:42 AM), https://www.washingtonpost.com/investigations/man-who-posed-at-pelosi-desk-said-in-facebook-post-that-he-is-prepared-for-violent-death/2021/01/07/cf5b0714-509a-11eb-83e3-322644d82356_story.html [https://perma.cc/8T8Z-6G5Y]; Sergio Olmos & Conrad Wilson, *At Least 3 Men from Oregon Protest Appear to Have Joined Insurrection at U.S. Capitol*, OPB (Jan. 10 2021, 1:31 PM), https://www.opb.org/article/2021/01/10/oregon-washington-protest-insurrection-david-anthony-medina-tim-davis/ [https://perma.cc/9UEJ-U2DJ] ("law abiding citizen"); *see also* Emily Birnbaum, *Trump Told Facebook's Oversight Board that His Supporters Were 'Law Abiding' During Capitol Riot*, YAHOO! FIN. (May 5, 2021, 7:08 AM), https://finance.yahoo.com/finance/news/trump-told-facebooks-oversight-board-120833307.html [https://perma.cc/5EKK-QQD2] (noting Trump characterized his supporters at the January 6 riot as "law-abiding").