

The Woollard Decision and the Lessons of the Trayvon Martin Tragedy

Dennis A. Henigan

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Second Amendment Commons](#)

Recommended Citation

Dennis A. Henigan, *The Woollard Decision and the Lessons of the Trayvon Martin Tragedy*, 71 Md. L. Rev. 1188 (2012)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss4/14>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**THE WOOLLARD DECISION AND THE
LESSONS OF THE TRAYVON MARTIN TRAGEDY**

DENNIS A. HENIGAN*

I. INTRODUCTION

On March 2, 2012, Judge Benson Everett Legg of the United States District Court for the District of Maryland ventured where other courts repeatedly had refused to go and became the first federal judge to hold there is a Second Amendment right to carry a gun outside the home. He therefore found unconstitutional Maryland's statutory requirement that an individual must have a "good and substantial reason" for the issuance of a permit to carry a handgun in public. Judge Legg's opinion in *Woollard v. Sheridan*¹ goes to extraordinary lengths to read into the Supreme Court's landmark 2008 opinion *District of Columbia v. Heller*² imagined evidence of a constitutional right to carry lethal weapons in public, while ignoring the repeated indications in *Heller* that the Court was presented with, and deciding, only the issue of a right to gun possession in the home.³

Copyright © 2012 by Dennis A. Henigan.

* Vice President, Brady Center to Prevent Gun Violence, and author of *Lethal Logic: Exploding the Myths That Paralyze American Gun Policy* (2009). The author is grateful for the helpful suggestions of Jonathan Lowy and Daniel Vice of the Brady Center's Legal Action Project, and for the research assistance of Robyn Long.

1. No. L-10-2068, 2012 WL 695674 (D. Md. Mar. 2, 2012).

2. 554 U.S. 570 (2008).

3. In recent years, numerous courts, both federal and state, have refused to find in *Heller* a Second Amendment right to carry guns in public. See, e.g., *Baker v. Kealoha*, No. 11-00528 (D. Haw. Apr. 30, 2012); *Piszczatsoski v. Filko*, No. 10-06110 (WHW), 2012 WL 104917 (D.N.J. Jan. 12, 2012); *Moore v. Madigan*, No. 11-cv-03134, 2012 WL 344760 (C.D. Ill. Feb. 3, 2012); *United States v. Laurent*, No. 11-CR-322, 2011 WL 6004606 (E.D.N.Y. Dec. 2, 2011); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011); *Richard v. County of Yolo*, 821 F. Supp. 2d 1169 (E.D. Cal. 2011); *Gonzalez v. Vill. of W. Milwaukee*, No. 09CV0384, 2010 WL 1904977 (E.D. Wis. May 11, 2010); *United States v. Hart*, 726 F. Supp. 2d 56 (D. Mass. 2010); *United States v. Tooley*, 717 F. Supp. 2d 580 (S.D.W.Va. 2010); *Williams v. State*, 417 Md. 479, 10 A.3d 1167 (2011); *People v. Dawson*, 934 N.E.2d 598 (Ill. App. Ct. 2010); *State v. Knight*, 218 P.3d 1177 (Kan. Ct. App. 2009). Of these rulings, perhaps the most intriguing is the unpublished opinion in *Jennings v. McCraw*, No. 5:10-CV-141-C (N.D. Tex. Jan. 19, 2012) (order granting defendant's motion for summary judgment). In upholding the Texas statute setting twenty-one as the minimum age for carrying a concealed weapon in that state, Judge Sam R. Cummings held that the relief sought by plaintiffs, the right to carry a handgun outside the home, "seems to be beyond the scope of the core Second Amendment concern articulated in *Heller*." *Id.*, slip op. at 9. He re-

Only days before Judge Legg's ruling, an unarmed Florida teenager named Trayvon Martin was shot and killed by a citizen on neighborhood watch who was legally carrying a loaded and concealed semi-automatic pistol. Although there is no reason to believe Judge Legg knew of the Trayvon Martin shooting when he issued his unprecedented ruling, the shooting provided the nation with dramatic evidence of the human cost of Judge Legg's newly discovered constitutional right.

Although much about Trayvon Martin's tragic shooting has become a matter of national controversy, certain key facts are clear at this writing. Martin's killer, George Zimmerman, was legally carrying a loaded and concealed semi-automatic pistol as he performed his neighborhood watch duties on February 26.⁴ Around seven o'clock that evening, Zimmerman called police to report a "suspicious" person in the gated community Retreat at Twin Lakes in Sanford.⁵ That person was Trayvon Martin. After telling the police dispatcher that he was following Martin, Zimmerman was told "we don't need you to do that."⁶ He defied this advice and continued to pursue Martin. An altercation occurred, during which Martin was shot dead.⁷

It turned out that Martin was returning from a convenience store where he had purchased a bag of Skittles and a can of iced tea.⁸ He

fused to extend the *Heller* right beyond the home "[a]bsent further guidance from controlling authority" and found the proper remedy for plaintiffs to be "legislative in nature, not judicial." *Id.*, slip op. at 11–12. Judge Cummings, it turns out, is no faint-hearted defender of Second Amendment rights. In 1999, he became the first federal judge to hold that the Second Amendment guarantees an individual right to gun possession, not simply a militia-related right, a position ultimately adopted by the Supreme Court in *Heller*. See *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd in part*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002). See also Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012) (reviewing lower court decisions on gun regulations after *Heller* and *McDonald* and finding that lower courts have been "highly deferential to legislative determinations" and have upheld "all but the most drastic restrictions on guns").

4. *Timeline of Events in Trayvon Martin Case*, CNN JUSTICE, CNN.COM, (Apr. 23, 2012), http://articles.cnn.com/2012-04-23/justice/justice_florida-zimmerman-timeline_1_gated-community-gunshot-martin-punches?_s=PM:JUSTICE [hereinafter CNN Timeline]. Although a legal gun carrier under Florida law, Zimmerman was armed in violation of the neighborhood watch program rule that members "shall not carry weapons." Beth Kassab, *Trayvon Martin Would Be Alive if Neighborhood Watch Rules Followed*, ORLANDO SENTINEL, Mar. 14, 2012, available at http://articles.orlandosentinel.com/2012-03-14/news/os-trayvon-martin-beth-kassab-031512-20120314_1_orlando-police-block-captains-zimmerman.

5. CNN Timeline, *supra* note 4.

6. *Id.*

7. *Id.*

8. Lizette Alvarez, *Justice Department Investigation Is Sought in Florida Teenager's Shooting Death*, N.Y. TIMES, Mar. 17, 2012, at A10.

was unarmed.⁹ Zimmerman, who has claimed he acted in self-defense after he was attacked by Martin, has been charged with second-degree murder.¹⁰

The criminal justice system will sort through the competing accounts of this tragedy. But one conclusion seems inescapable regardless of which account prevails in court: If George Zimmerman had not had a gun when he encountered Trayvon Martin, the young man likely would be alive today. It is improbable that an unarmed Zimmerman would have ventured into the night to follow a man he deemed suspicious enough to warrant a call to the police. It is therefore likely that Zimmerman would have followed the dispatcher's advice against following Martin and the police presumably would have handled the situation. Even if Zimmerman had followed Martin, and even if a confrontation had occurred between them, without the gun it probably would not have been fatal.

Moreover, George Zimmerman had a gun because Florida law allowed it.¹¹ Although Zimmerman had once been subject to a restraining order and had been involved in an altercation with police,¹² he was able to get a concealed weapons permit in Florida. It also seems safe to say that, were it not legal for him to do so, Zimmerman would not have carried a gun. In spite of his violent past, his involvement in a neighborhood watch program suggests he saw himself as a "law abiding citizen" responsible for protecting his community. It is hardly an overstatement to say that Trayvon Martin lost his life because Florida has created a statutory right to carry guns in public, precisely the right Judge Legg's ruling would constitutionalize.

II. A CALL FOR CAUTION IGNORED

There is no reason to believe Judge Legg knew of the Trayvon Martin shooting when he issued his unprecedented ruling. What is extraordinary about his decision is that the higher court whose decisions Judge Legg is bound to follow—the United States Court of Appeals for the Fourth Circuit—had issued, one year earlier, a powerful call for judicial restraint on the issue of public gun carrying, precisely

9. CNN Timeline, *supra* note 4.

10. Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-Degree Murder in Shooting of Martin*, N.Y. TIMES, Apr. 12, 2012, at A1.

11. See FLA. STAT. § 790.06 (West 2011) (making it lawful to carry concealed weapons or firearms if granted a license by the state, a fairly simple process).

12. Chris Francescani, *George Zimmerman: Prelude to the Shooting of Trayvon Martin*, REUTERS, Apr. 25, 2012, available at <http://www.reuters.com/article/2012/04/25/us-usa-florida-shooting-zimmerman-idUSBRE83O18H20120425>.

because the issue is literally one of life and death. In his determination to expand gun rights, Judge Legg ignored the Fourth Circuit's wise counsel, as he distorted the *Heller* ruling beyond recognition.

The Fourth Circuit's commentary about judicial restraint in Second Amendment cases arose in *United States v. Masciandaro*,¹³ in which a three-judge panel of the court upheld a conviction for possessing a loaded handgun in a motor vehicle in a national park. Although the panel unanimously upheld the conviction, a two-judge majority found it unnecessary to decide whether the *Heller* right extends beyond the home, concluding that the federal statute barring possession of guns in national parks would be constitutional even if the Second Amendment applied.¹⁴ Judge Niemeyer wrote separately to argue his minority view that such a right to carry outside the home exists under *Heller*.¹⁵

Judge J. Harvie Wilkinson III, writing for the majority position that the scope of *Heller* need not be resolved in the case at hand, concluded that "[o]n the question of *Heller's* applicability outside the home environment, we think it prudent to await direction from the [Supreme] Court itself."¹⁶ In a remarkable passage, written a year before the Trayvon Martin shooting, yet prescient in light of that tragedy, Judge Wilkinson recognized the high stakes in Second Amendment litigation:

There simply is no need in this litigation to break ground that our superiors have not tread. To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts that we cannot foresee. *This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-fetched to think the Heller Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square.*¹⁷

13. 638 F.3d 458 (2011).

14. *Id.* at 459–60.

15. *Id.* at 463 (Niemeyer, J., concurring).

16. *Id.* at 475 (majority opinion).

17. *Id.* at 475–76 (emphasis added).

He concluded, “If ever there was an occasion for restraint, this would seem to be it. There is much to be said for a course of simple caution.”¹⁸

This passage is not simply an argument that a constitutional issue should be avoided because it is not necessary to the resolution of a particular case. It also is an argument that the public safety consequences of extending the *Heller* right to the public square may be so dire that only the Supreme Court should undertake such a far-reaching step. One cannot escape the thought that tragedies like the Trayvon Martin shooting may be exactly the “mayhem” Judge Wilkinson feared.

Remarkably, though the *Woollard* opinion purports to be “mindful” of the admonitions of the *Masciandaro* majority,¹⁹ Judge Legg proceeded to defy Judge Wilkinson’s call for “caution” and “restraint.” Instead, Judge Legg relied on Judge Niemeyer’s minority opinion in *Masciandaro* to find a new Second Amendment right to carry guns outside the home.²⁰ In *Woollard*, Judge Legg found Judge Niemeyer’s *Masciandaro* concurrence “both sound and persuasive” in concluding that the *Heller* right “does not stop at one’s front door.”²¹ Judge Niemeyer’s *Masciandaro* opinion is neither “sound” nor “persuasive,” and Judge Legg’s reliance on it was badly misplaced.

III. JUDGE NIEMEYER’S MISREADING OF *HELLER*

In attempting to extend the *Heller* right to carrying guns in public, Judge Niemeyer at no point acknowledges the express statements in *Heller* defining the narrow issue posed, and resolved, in that case. Dick Heller brought suit challenging the District of Columbia’s refusal to issue him a registration certificate “for a handgun that he wished

18. *Id.* at 476.

19. See *Woollard v. Sheridan*, No. L-10-2068, 2012 WL 695674, at *6 (D. Md. Mar. 2, 2012) (“[T]his Court is mindful of Judge Wilkinson’s admonition that one should venture into the unmapped reaches of Second Amendment jurisprudence ‘only upon necessity and only then by small degree.’” (quoting *Masciandaro*, 638 F.3d at 475)).

20. *Id.* (“In undertaking this imposing task, the Court finds a ready guide in Judge Niemeyer’s analysis in *Masciandaro*. While a majority of the panel found that Judge Niemeyer’s reasoning was not essential to disposition of the case, it is both sound and persuasive.”). Although the *Woollard* court was the first federal court to find a Second Amendment right to carry a gun in public, subsequently the court in *United States v. Weaver* similarly relied on Judge Niemeyer’s *Masciandaro* opinion and ignored Judge Wilkinson’s majority opinion in that case, to extend the *Heller* right beyond the home. No. 2:09-cr-00222, 2012 WL 727488, at *4 (S.D.W. Va. Mar. 6, 2012) (“[T]he Court finds entirely persuasive Judge Niemeyer’s separate opinion . . .”).

21. *Woollard*, 2012 WL 695674, at *6.

to keep *at home*,”²² thus denying him the right to possess a handgun in his home. In addition, he challenged the District’s separate licensing requirement “insofar as it prohibits the carrying of a firearm *in the home* without a license.”²³ The Supreme Court held “that the District’s ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense.”²⁴ The Court thus ordered the District to permit Heller “to register his handgun and . . . issue him a license to carry it *in the home*.”²⁵

The issue posed, and resolved, in *Heller* was the right to have an operable handgun in the home. At no point did the Court state it was deciding the constitutional status of carrying guns in public places. As Justice Scalia’s majority opinion put it, the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*.”²⁶ He concluded that “enshrinement of constitutional rights necessarily takes certain policy choices off the table . . . includ[ing] the absolute prohibition of handguns held and used *for self-defense in the home*.”²⁷

Despite *Heller*’s express definition of the issue as involving only the keeping and bearing of arms in the home, Judge Niemeyer relies on the thinnest of reeds to find a broader right embedded in Justice Scalia’s majority opinion. He notes, for example, Justice Scalia’s reference to the right as “protecting against both public and private violence” and infers that such language extends the right “to wherever a person could become exposed to public or private violence.”²⁸

Surely this reads far too much into Justice Scalia’s phrase. There is no indication that Justice Scalia was speaking of the physical location of where the right would be exercised; that is, whether it could be exercised only on private property or “in public” as well. Rather, the reference occurs in Part II of the *Heller* majority opinion, which concerns the question of whether the Second Amendment protects only a militia-related right—involving “public violence”—or rather in-

22. *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008) (emphasis added).

23. *Id.* at 576 (emphasis added).

24. *Id.* at 635 (emphasis added).

25. *Id.* (emphasis added).

26. *Id.* (emphasis added). It is surely significant that, in arguing for the unique self-defensive value of handguns, Justice Scalia relied on the “many reasons that a citizen may prefer a handgun for home defense.” *Id.* at 629. No mention was made of their value for self-defense in public places.

27. *Id.* at 636 (emphasis added).

28. *United States v. Masciandaro*, 638 F.3d 458, 467 (2011) (Niemeyer, J., concurring) (quoting *Heller*, 554 U.S. at 594) (alteration omitted).

cludes an individual right to use arms to defend against “private”—that is, non-public—“violence.”²⁹ Indeed, Justice Scalia’s reference to “public and private violence” is immediately followed by a brief discussion of violence involving the State—specifically actions by the Crown in the 1760s and 1770s to “disarm the inhabitants of the most rebellious areas” that “provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.”³⁰ Since Justice Scalia had previously defined “keep arms” as equivalent to “have weapons,”³¹ his reference to “public violence” seems to refer to efforts by a tyrannical government to disarm the people (which, according to Justice Scalia, is how “tyrants eliminated a militia”),³² rather than to violence in public places, as opposed to private homes.

Judge Niemeyer also cites language in *Heller* referring to “the individual right to possess and carry weapons in case of confrontation,”³³ but this sentence also occurs in Part II of the majority opinion to support Justice Scalia’s conclusion that the right guaranteed by the Second Amendment was an individual right to have guns for self-defense, as opposed to being entirely a militia-related right.³⁴ At no point does the *Heller* opinion hold that the right extends to any place a “confrontation” might occur.³⁵

Judge Niemeyer’s concurrence further characterizes *Heller* as holding that the Second Amendment right was “understood to exist not only for self-defense, but also for membership in a militia and for

29. See *Heller*, 554 U.S. at 593–94 (“It was clearly an individual right, having nothing whatever to do with service in a militia. . . . Thus, the right secured in 1689 . . . was by the time of the founding understood to be an individual right protecting against both public and private violence.”).

30. *Id.* at 594.

31. *Id.* at 582.

32. *Id.* at 598.

33. *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring) (citing *Heller*, 554 U.S. at 592).

34. See *supra* note 29 and accompanying text.

35. Likewise, Judge Niemeyer reads far too much into the *Heller* Court’s observation that the home is “where the need for defense of self, family, and property is most acute,” which he reads as “suggesting that some form of the right applies where that need is not ‘most acute.’” *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring) (quoting *Heller*, 554 U.S. at 628). Once the context is understood, however, Judge Niemeyer’s inference falls apart. The Supreme Court’s reference to the “acute” need for self-defense in the home is part of its explanation of why the District of Columbia handgun law is unconstitutional; that is, the Court found the handgun ban unconstitutional because it “extends . . . to the home, where the need for defense of self, family, and property is most acute.” *Heller*, 554 U.S. at 628. In no way does this suggest a constitutional right to carry a gun for self-defense where the need is less acute; indeed, the Court’s words underscore that, for the *Heller* Court, the fatal flaw in the D.C. handgun ban is that it applied to the possession of handguns at home.

hunting, neither of which is a home-bound activity.”³⁶ As to “membership in a militia,” according to *Heller*’s definition of “militia,” this can be entirely a home-bound activity. Indeed, *Heller* defines the militia simply as the pool of “all able-bodied men” from which Congress has the power to organize an effective fighting force should it choose to do so.³⁷ Under this view, one can be an armed militiaman without ever leaving one’s home. The impetus for the codification of the right to keep and bear arms in the Constitution, according to Justice Scalia, was the lesson of history “that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms.”³⁸ The Second Amendment assures the preservation of this unorganized armed militia, according to *Heller*, by guaranteeing the right to have a gun in the home, and the “central component” of that right is self-defense.³⁹

Likewise, Judge Niemeyer’s reference to hunting gives the misleading impression that *Heller* found a constitutional right to use guns in hunting activities, whereas *Heller* held nothing of the kind. Actually

36. *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring) (citing *Heller*, 554 U.S. at 599).

37. *Heller*, 554 U.S. at 596. Although this is the concept of the militia adopted in *Heller*, Justice Scalia’s opinion is deeply flawed in its conclusion that the “well regulated Militia” referenced in the Second Amendment is nothing but the unorganized pool of able-bodied men. In fact, as I have argued elsewhere, during the Founding Era the militia existed only to the extent it was organized and the Second Amendment guarantees a right to be armed only in service to a militia organized and administered under government authority. See Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1190 (2009). The deficiencies in the *Heller* majority’s conception of the “well regulated Militia” are skillfully presented in Justice Stevens’s dissent. See *Heller*, 554 U.S. at 641–44, 647–62 (Stevens, J., dissenting). My argument here is that, under *Heller*’s historically erroneous concept of the militia, one can keep and bear arms as a member of the militia without ever leaving one’s home.

38. *Heller*, 554 U.S. at 598 (majority opinion).

39. *Id.* at 599 (emphasis omitted). Under Justice Scalia’s view of the militia, it would seem obvious that once Congress organizes the militia into an actual “fighting force,” performance of militia activities would occur largely outside the home. However, carrying a gun in public as part of such a government-organized fighting force surely cannot be regarded as a private right to be enforced against government intrusion. Indeed, such public carrying of guns would be undertaken as a duty owed the government, subject to plenary regulation by the government under the provisions of the Militia Clauses of the Constitution, which divide authority over the militia between Congress and the states. U.S. CONST. art. I, § 8, cls. 15, 16. As one commentator on the *Heller* right has put it, “the Second Amendment contemplates a people’s militia composed of all citizens, who each have an individual right to bear arms,” but “[o]nce the people have begun to gather in the streets,” they become subject to the Militia Clauses and other provisions of the Constitution, which “require that the people’s militia be regulated and subordinated to state or federal officials.” Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1319–20 (2009). Nothing in the *Heller* majority opinion is in tension with this view.

the passage in *Heller* cited in the Niemeyer concurrence⁴⁰ merely says that Americans of the Founding Era valued the “ancient right of individuals to keep and bear arms” not only to preserve the citizen militia, but also for purposes of “self-defense and hunting.”⁴¹ This passage makes the obvious point that guns kept in the home as an exercise of the Second Amendment right may well be useful for both self-defense and hunting. But this is far from holding that there is a constitutional right to use a gun to hunt, particularly since, as explained above, the only issue posed and resolved in *Heller* was the right to have a handgun in the home for self-defense. Mr. Heller never asserted that the District’s handgun ban limited his hunting activities. Moreover, the *Heller* Court’s analysis of whether handguns are constitutionally protected turned entirely on their utility for self-defense in the home, with no mention of their utility for hunting.⁴²

Perhaps the least defensible part of Judge Niemeyer’s opinion is his reliance⁴³ on a portion of the *Heller* decision in which the Supreme Court provides assurances that a host of gun restrictions are entirely compatible with the Second Amendment right. The Court begins this discussion with the observation that the Second Amendment right “is not unlimited.”⁴⁴ Marshaling historical support for the limited nature of the right, the Court finds that “[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in

40. *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring).

41. *Heller*, 554 U.S. at 599.

42. One may also argue that the Supreme Court’s subsequent decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), incorporating the Second Amendment as a restraint on the states through the Fourteenth Amendment, contains passages suggesting a right extending beyond the home. For example, at one point in Justice Alito’s plurality opinion, he describes the holding of *Heller* in these terms: “the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense.” *Id.* at 3044. The *Woollard* opinion seems to suggest that this language “most notably” supports a right broader than a home-based right. See *Woollard v. Sheridan*, No. L-10-2068, 2012 WL 695674, at *6 (D. Md. Mar. 2, 2012) (arguing that the proposition that the Second Amendment right “does not stop at one’s front door . . . finds additional support in *McDonald*”). However, by its words, this passage from *McDonald* does not address whether the right to keep and bear arms for self-defense is confined to the home. It may simply be suggesting that guns possessed in the home for self-defense may also have other lawful purposes. At various other points, the *McDonald* plurality describes the *Heller* right narrowly: “In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.” *McDonald*, 130 S. Ct. at 3050. Moreover, as in *Heller*, the law challenged in *McDonald* was a city ordinance banning the possession of handguns in the home; no issue was raised as to restrictions on guns in public places. *Id.* at 3026–27.

43. *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring).

44. *Heller*, 554 U.S. at 626.

any manner whatsoever and for whatever purpose.”⁴⁵ The Court then furnishes a historical example of the limited nature of the right, noting that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”⁴⁶ Disavowing any intention of undertaking “an exhaustive historical analysis today of the full scope of the Second Amendment,” the Court nevertheless cautioned:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁴⁷

The Court added in a footnote: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”⁴⁸

According to Judge Niemeyer, however, because the *Heller* Court found that laws restricting the carrying of firearms in “sensitive places such as schools and government buildings,” are presumptively lawful, this must mean there is a right to carry guns in non-sensitive places. “If the Second Amendment right were confined to self-defense *in the home*,” he wrote, “the Court would not have needed to express a reservation for ‘sensitive places’ outside of the home.”⁴⁹

This inference would be valid only if the *Heller* Court, in the relevant passage, was providing an exhaustive list of gun restrictions that continue to be valid under the newly recognized right, with the implication that restrictions not on the list are now constitutionally suspect. But, of course, the Court expressly cautions that its list “does not purport to be exhaustive.”⁵⁰ Judge Niemeyer simply ignores that language and reads *Heller* as stating precisely the opposite. It also is significant that the Supreme Court specifically references laws banning the carrying of concealed weapons—a substantial restriction on guns outside the home—as a historical example of the kind of gun restriction put in no jeopardy by the newly recognized Second Amendment

45. *Id.*

46. *Id.*

47. *Id.* at 626–27.

48. *Id.* at 627 n.26.

49. *United States v. Masciandaro*, 638 F.3d 458, 468 (2011) (Niemeyer, J., concurring).

50. *Heller*, 554 U.S. at 627 n.26.

right. This explicit reference to concealed carry bans also is ignored by Judge Niemeyer.

Given that the *Heller* Court was presented only with the issue of the right to have and carry guns within the home, the Court's references to the continued presumptive validity of laws banning concealed weapons and laws forbidding carrying guns in sensitive places may be taken as meaning only that such restrictions are not put in jeopardy by the guarantee of a right to be armed in the home. Further, given that the *Heller* Court repeatedly described its holding as recognizing a right to be armed in the home for self-defense, it would be passing strange for the Court also to have extended the right to the public square through the subtle indirection discerned by Judge Niemeyer. As the Court of Appeals of Maryland stated in upholding the same Maryland statute at issue in *Woollard*, "[i]f the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly."⁵¹

In addition to adopting the reasoning of Judge Niemeyer's minority opinion in *Masciandaro*, the *Woollard* decision makes an argument for a broad reading of the Second Amendment based on *Heller*'s textual analysis of the Second Amendment. Judge Legg asserts that *Heller*'s definition of "bear" as meaning "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person" itself supports a broader right.⁵² But this definition does not address where the wearing or carrying must occur to receive constitutional protection. As noted, *Heller* itself contemplates the possibility of carrying a gun only within the home because it ordered that Mr. Heller receive a license to do just that.

Therefore, contrary to the conclusions of Judge Niemeyer in *Masciandaro* and Judge Legg in *Woollard*, there is no sound basis to read *Heller* as standing for a right to be armed outside the home.

IV. THE IMPLICATIONS OF A RIGHT TO BE ARMED IN PUBLIC

In *Masciandaro*, writing for the majority, Judge Wilkinson spoke of the possibility that the danger of mayhem from gunfire could "rise exponentially as one moved the right from the home to the public

51. *Williams v. State*, 417 Md. 479, 496, 10 A.3d 1167, 1177 (2011).

52. *Woollard v. Sheridan*, No. L-10-2068, 2012 WL 695674, at *6 (D. Md. Mar. 2, 2012) (quoting *Heller*, 554 U.S. at 584) (alterations in original) (internal quotation marks omitted).

square.”⁵³ In fact, as a matter of both public policy and history, extending the *Heller* right to the public square would be a radical step with far-reaching consequences for public safety and for the nature of the communities in which we live.⁵⁴

The fundamental problem is that there is no way to guarantee that guns will be used only for the salutary purpose of self-defense. Indeed, there is compelling empirical evidence that the exercise of the *Heller* right to keep a gun in the home for self-defense actually increases the risk of harm to individuals exercising the right, to their families, and to others who may visit the home. One study shows that, for every time a gun in the home is used in a self-defense shooting, there are four unintentional shootings (often involving young children), seven criminal assaults (often involving domestic disputes), and eleven completed or attempted suicides.⁵⁵ Moreover, since guns are undeniably more lethal than other weapons,⁵⁶ it is hardly surprising that the presence of a gun in the home is associated with a threefold increase in the risk of homicide⁵⁷ and a fivefold increase in the risk of suicide.⁵⁸

53. *Masciandaro*, 638 F.3d at 476.

54. In arguing that extending the *Heller* right to public places would be a radical step, it should be recognized that there may be some limited public carrying of guns that is regarded as essential to the exercise of the more limited right to have and use a gun in the home for self-defense. This could include transporting the gun from a gun store to home, taking a gun to be repaired, and so on. These activities may well be constitutionally protected as a necessary corollary to the *Heller* home-based right. Thus, for example, the Seventh Circuit struck down Chicago’s ban on firing ranges within the city on the ground that the city itself had made granting a license to possess a gun in the home conditioned on completion of a firearm-safety course that included range-training. *Ezell v. Chicago*, 651 F.3d 684 (7th Cir. 2011). Thus, “[t]he effect of the ordinance is another complete ban on gun ownership within City limits.” *Id.* at 712 (Rovner, J., concurring). *Ezell* did not call into question restrictions on public gun carrying, as long as residents are able to transport guns to a range in order to fulfill the requirements for exercising the *Heller* right to a gun in the home for self-defense.

55. Arthur L. Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. TRAUMA 263, 265 (1998).

56. Linda Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AMER. MED. ASS’N 3043, 3044 (1992) (domestic assaults with firearms are more than twelve times more deadly than assaults with all other weapons or bodily force). See generally DENNIS HENIGAN, *LETHAL LOGIC: EXPLODING THE MYTHS THAT PARALYZE AMERICAN GUN POLICY* 23–30 (2009).

57. Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1087 (1993). See also Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 AGGRESSION & VIOLENT BEHAV. 417, 422 (2004) (“[H]ouseholds with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership.”).

58. Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 470 (1992). See also DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 39 (2004) (discussing ten studies in the previous twenty years that “all find that

As dangerous as the exercise of the *Heller* right is, at least the threat posed by guns kept in the home is largely confined to their owners, family members, friends, and houseguests. However, firearms carried in public—whether carried concealed or openly—constitute a threat to a far greater universe of individuals, including law enforcement officers, random passersby, and other private citizens. The risk from an individual's decision to carry a gun in public is borne almost entirely by persons who had no say in that decision and, if the carrying is concealed, no knowledge of the decision. It is axiomatic that if the gun carrier accidentally discharges his gun in public, decides to settle an argument with his gun in public, makes a mistake in judgment with his gun in public, or commits a crime with his gun in public, the community-at-large is at risk of death or serious injury from those actions. To return to the Trayvon Martin case, if George Zimmerman had left his gun at home that fateful night, the Florida teenager might have been questioned by the police as a result of Zimmerman's neighborhood watch activity, but he would be alive today. It should be obvious that, as legitimate as the community's interest in regulating guns to be possessed at home,⁵⁹ the public interest in regulating guns in public is even more fundamental.

Moreover, as much as the gun lobby and its allies would like to pretend that legal gun carriers are inherently "law-abiding" and therefore pose little risk to others, the examples of legal gun carriers committing irresponsible and criminal acts with their guns in public are legion.⁶⁰ One ongoing tabulation shows that in the last four years alone, legal holders of concealed carry permits from various states have shot and killed over 400 people, including eleven law enforcement officers.⁶¹

firearms in the home are associated with substantially and significantly higher rates of suicide").

59. Although the risk of lethal violence from guns in the home is borne most directly by gun-owning households and those who visit them, it also is borne, in the aggregate, by communities with a high incidence of gun ownership. See, e.g., Matthew Miller et al., *State-Level Homicide Victimization Rates in the U.S. in Relation to Survey Measures of Household Firearm Ownership, 2001–2003*, 64 SOC. SCI. & MED. 656, 660 (2007) ("States with higher rates of firearm ownership had significantly higher homicide victimization rates."); Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 387 (2006) ("[A]n increase in gun prevalence causes an *intensification* of criminal violence—a shift toward greater lethality, and hence greater harm to the community.").

60. See generally HENIGAN, *supra* note 56, at 127–31.

61. *Concealed Carry Killers*, VIOLENCE POLICY CENTER, <http://vpc.org/cckillers.htm> (last visited Apr. 23, 2012). These are just the instances that can be discerned from publicly available material. The gun lobby has successfully worked for legislation in the states that blocks public access to the identities of concealed carry license holders, making it impossible to determine, in many cases, whether someone who committed a violent or irres-

Even apart from examples of mayhem by legal carriers of weapons, an impressive body of empirical evidence now shows that state laws making it easier to carry concealed weapons in public not only have not decreased crime rates as promised by their proponents, but actually have had the net effect of making those states more dangerous. Ian Ayres and John J. Donohue III of Yale Law School found, for example, that “the evidence is most supportive of the claim that [right-to-carry] laws *increase* aggravated assault.”⁶² Another study found that laws liberalizing concealed carry “have resulted, if anything, in an *increase* in adult homicide rates.”⁶³ A third study found, similarly, “[f]or robbery, many states experience increases in crime” after concealed carry laws are enacted.⁶⁴ There is now a robust research literature debunking the claims made, primarily by economist John Lott, Jr., that concealed carry laws have led to substantial decreases in homicides, rapes, and aggravated assaults.⁶⁵

It may well be that increased legal carrying of guns in public is leading to increased illegal gun carrying as well. After all, two-thirds of prisoners incarcerated for gun offenses reported that the chance of encountering an armed victim was very or somewhat important in their own choice to use a gun.⁶⁶ In any event, the research indicates that even the person in possession of a gun, whether at home or in public, derives no net safety benefit. Researchers at the University of Pennsylvania found that individuals in possession of a gun were four to five times more likely to be shot in an assault than those not in pos-

possible act with a gun was a concealed carry license holder. See Michael Luo, *Guns in Public, and Out of Sight*, N.Y. TIMES, Dec. 26, 2011, <http://www.nytimes.com/2011/12/27/us/more-concealed-guns-and-some-are-in-the-wrong-hands.html?pagewanted=all> (noting “a dwindling number of states where the identities of permit holders remain public”).

62. Ian Ayres & John J. Donohue III, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977–2006*, 6 ECON. J. WATCH 218, 220 (May 2009). See also John J. Donohue III, *The Impact of Concealed-Carry Laws*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 289–90 (Jens Ludwig & Philip J. Cook eds., 2003) (“[S]hall-issue laws are associated with uniform *increases* in crime.”).

63. Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT’L REV. L. & ECON. 239, 241 (1998).

64. Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, 88 AM. ECON. REV. 468, 472 (1998).

65. For a summary of the myriad scholarly attacks on Lott’s work, coming from more than a dozen researchers from the fields of economics, criminology, and public health, see HENIGAN, *supra* note 56, at 131–34. Lott also contributed to this symposium. John R. Lott, Jr., *What a Balancing Test Will Show for Right-to-Carry Laws*, 71 MD. L. REV. 1205 (2012).

66. Philip Cook et al., *Gun Control After Heller: Threats and Sideshowes from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1081 (2009).

session of a gun.⁶⁷ Their study suggests several possible reasons for this result, including the fact that “a gun may falsely empower its possessor to overreact and instigate conflicts” or increase the owner’s risk of assault by entering dangerous environments that could have been avoided.⁶⁸ This description cannot help but remind us of George Zimmerman, although in his case Trayvon Martin paid the ultimate price for the armed Zimmerman’s aggressive conduct leading directly to the confrontation with the unarmed teen.

The conceptual and empirical distinction between guns kept in the home and guns carried in public is also reflected in the Anglo-American history of gun regulation. The assertion by “gun rights” proponents of a right to bear arms in public has led to the emergence of substantial contrary scholarship tracing the long history of laws—in Great Britain and America—prohibiting and otherwise strictly regulating the carrying of guns in public, whether openly or concealed. That tradition can be traced at least as far back as the 1328 Statute of Northampton, which provided that no person shall “go nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere.”⁶⁹ Indeed, Blackstone, cited frequently by the *Heller* majority, relied on the statute in noting that throughout England, “riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”⁷⁰

The tradition of restricting both the concealed and the open carry of firearms in public places traveled across the Atlantic and was reflected in various state laws immediately following the ratification of the Constitution,⁷¹ other state laws enacted throughout the nineteenth century,⁷² court decisions upholding those state laws,⁷³ and

67. Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AMER. J. PUB. HEALTH 2034, 2037 (2009).

68. *Id.* at 2037. Another highly relevant body of research suggests that people who carry guns outside the home are disproportionately likely to be aggressive. Two studies of drivers, in Arizona and across the nation, show that drivers who carried guns in their cars were far more likely to engage in “road rage” behaviors like making obscene gestures, cursing, tailgating, or blocking other drivers than drivers not carrying guns. Matthew Miller et al., “Road Rage” in Arizona: Armed and Dangerous, 34 ACCIDENT ANALYSIS & PREVENTION 807 (2002); David Hemenway et al., *Is an Armed Society a Polite Society? Guns and Road Rage*, 38 ACCIDENT ANALYSIS & PREVENTION 687 (2006).

69. 2 Edw. 3, c.3 (1328).

70. Miller, *supra* note 39, at 1318.

71. Patrick J. Charles, *Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. (forthcoming 2012), manuscript at 30, available at <http://ssrn.com/abstract=1938950>.

72. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 169 (2011).

even local laws in some of the most notorious cattle towns of the so-called “Wild West.”⁷⁴ A thorough exploration of the historical tradition of restrictions on public gun carrying is beyond the scope of this Essay, but suffice it to say that many “longstanding” restrictions on such public carrying went far beyond the “prohibitions on carrying concealed weapons” noted by Justice Scalia in *Heller*.

V. CONCLUSION

The stakes in Second Amendment litigation are inherently high. When it comes to the question of guns in public places, moreover, it is difficult to conceive of many constitutional issues with such profound consequences. A Supreme Court decision extending the *Heller* right to the public carry of guns could severely limit the authority of the people, through their elected representatives, to protect themselves against the threat of gun violence most likely to affect themselves and their families as they go about their daily lives. Particularly for the two-thirds of Americans who have chosen not to have guns in their homes,⁷⁵ their risk of death or injury from guns largely originates on public streets and in public places. It would be a radical step indeed were the courts to begin nullifying the judgments of communities as to how best to ameliorate that threat and ensure the safety of their citizens.

Trayvon Martin died because Florida’s elected leaders made the ill-considered choice to make it easy for individuals like George Zimmerman to carry a concealed and loaded gun in public. But at least it was a choice made through the democratic process and it is a choice the democratic process could one day change. States that have made different choices, opting for restrictive carrying laws that would never have allowed George Zimmerman to legally carry a concealed gun, should be entitled to have those choices respected by the courts. As noted above, nothing in our longstanding legal tradition suggests that

73. *English v. State*, 35 Tex. 473 (1871); *Hill v. State*, 53 Ga. 472 (1874); *Fife v. State*, 31 Ark. 455 (1876); *State v. Workman*, 35 W. Va. 367 (1891).

74. For example, it was not uncommon for towns of the “Wild West” to require visitors to check their guns at various entry points to town. There is, in fact, photographic evidence of a huge billboard posted in the middle of the main road to Dodge City around 1879 stating, “The Carrying of Firearms Strictly Prohibited.” WINKLER, *supra* note 72, at 165.

75. *A Shrinking Minority, The Continuing Decline of Gun Ownership in America*, VIOLENCE POLICY CENTER, <http://www.vpc.org/studies/ownership.pdf> (2011) (reporting 2010 General Social Survey results showing 32.3 percent of American households have guns, a 40 percent drop since 1977).

such a grave, life-and-death issue should be decided by courts instead of legislatures.

Moreover, it is not simply a matter of allowing our elected representatives to determine the best way to protect families and communities from harm. It also is a question of allowing the people to determine the kind of community, and indeed nation, in which they want to live. One national survey asked: "If more people in your community begin to carry guns, will that make you feel more safe, the same, or less safe?" Sixty-two percent said "less safe," and only 12 percent said "more safe."⁷⁶ Do we want to live in a nation where there are few, if any, places where we can take our families, including our children, and be free of loaded guns and the fear and risk they entail? Different people, and different communities, may come to different conclusions about that question, but it is a question best answered by the people's elected representatives, not by the judiciary.

That, ultimately, is the wise message sent by Judge Wilkinson in *Masciandaro* and ignored by Judge Legg in *Woollard*. It should be hoped that other courts, and ultimately the Supreme Court, will heed it well.

76. HEMENWAY, *supra* note 58, at 98.