
A Public Health Approach to Gun Violence, Legally Speaking

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Public health law has garnered little attention as a model for addressing firearm regulations, despite the fact that the state justification for infringing on the Second Amendment right is typically, if not always, public safety. In one of the few articles to address gun violence from a public health perspective, Hemenway and Miller outline a framework for tackling gun violence by analogizing the risk-reducing, public health-based approach used to reduce automobile accidents.¹ Rather than rely simply on changing driver behavior, reductions in motor vehicle deaths resulted from a multi-pronged approach that focused on auto manufacturers and highway design, in addition to drivers. A similar approach is needed to address gun violence, rather than relying strictly on “law-abiding citizens” with firearms to ensure their safe use. A critical question, largely unaddressed in the call for a public health approach, is what role the law, and specifically nascent Second Amendment jurisprudence, will play in helping or hindering necessary changes. Other than holding that the Second Amendment protected an individual right, *District of Columbia v. Heller* provided little clarity in terms of the scope of the right and how regulations infringing on the right should be evaluated.² As the Second Circuit put it bluntly, “in many ways, [*Heller*] raises more questions than it answers.”³ Therefore, it is little surprise that lower courts would look to more established doctrine to find guidance. Jurists and scholars alike have predominantly turned to First Amendment free

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speech jurisprudence to find a helpful analogy. However, this article contends that public health law may provide a more apt framework.

A Contagion Theory for the Gun Violence Epidemic

According to the CDC, during 2015-2016 firearm homicide claimed the lives of 27,394 people while another 44,955 individuals died from firearm suicide.⁴ During the same timespan, over 200,000 people sustained nonfatal firearm injuries.⁵ Firearms were used in 74% of homicides and 87% of youth homicides, increases over previous years.⁶ Firearm deaths are particularly troubling given the disparate racial impacts, with black men 14 times more likely to die of firearm homicide than white men.⁷ Meanwhile, firearm suicide rates among youth have been on the rise. In fact, suicide is the second leading cause of death among 15 to 24 year olds,⁸ with a majority of those suicides committed using firearms.⁹ Given their lethality, firearms represent a particularly effective means of suicide, with the “completion rate” estimated between 80 and 95%.¹⁰

Though firearm related research lags behind due to federal statutes imposing funding constraints, emerging data suggests gun violence has similarities with the spread of contagious disease. According to one study, “the greater the extent to which one’s social network is saturated with gunshot victims, the higher one’s probability of also being a victim.”¹¹ These effects were found to be larger for blacks and Hispanics, perhaps helping to explain the drastic disparities in firearm homicides for male minorities compared to white males.¹²

These data were confirmed by another study which found “the diffusion of gun violence follows an epidemic-like process of social contagion that is trans-

mitted through networks by social interactions.”¹³ This research contradicts the notions that gun violence is random and that firearm regulations will provide little help in reducing the spread of gun violence. Indeed, a “contagion-based approach could detect strategic points of intervention that would enable measures to proactively reduce the trauma associated with gun violence rather than just react to past incidents.”¹⁴

A Public Health Law Approach: The Public Carry Case Study

The police power is the inherent authority of the state to enact laws that protect the public health and safety of its citizens, even if they may infringe on individual rights. However, the state has less authority to restrict an individual’s fundamental rights when the state is acting strictly for the benefit of that individual. Though public health regulations are inherently

expose the community or the child to communicable disease.”¹⁶ Lower courts have confirmed that these constitutional protections, fundamental as they may be, “are subordinated to society’s interest in protecting against the spread of disease.”¹⁷

In *Jacobson*, the Supreme Court made it clear that “the liberty secured by the Constitution...does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint.”¹⁸ This point was even echoed in *Heller*, which recognized that the individual right to keep and bear arms was “not unlimited.”¹⁹

The most restrictive state response to protecting the public from contagion is the use of involuntary confinement, whether it be isolation or quarantine, which has been used for centuries. There are several key similarities between involuntary confinement and restricting firearms in public. First is the predictive

While the probability of any particular individual’s firearm to be used to harm others may be low, the magnitude of the potential harm is great. Given evidence that relaxed public carry laws are associated with higher rates of firearm related homicide, a state would be within its police power authority to restrict public carry broadly due to the increased probability and high magnitude of harm from a population perspective.

paternalistic, the implied social contract of organized society provides a greater foundation for infringing on individual rights when the exercise of those rights puts others at risk of harm. Given this principle, it is useful to examine a contentious area of Second Amendment rights currently playing out in the lower courts: public carry laws, which restrict an individual’s ability to carry a firearm in public.

The Supreme Court has held that even the most fundamental rights can be limited in the name of public health and safety. Indeed, in the foundational public health law case *Jacobson v. Massachusetts*,¹⁵ the vaccination requirement at issue infringed on the right to bodily integrity, a fundamental right repeatedly confirmed by the Supreme Court in key health-related decisions. In fact, courts have unanimously upheld vaccination requirements for over a century despite constitutional arguments regarding bodily integrity, due process, equal protection, parental rights, and religious freedom. The right to exercise religious freedom has received stringent protection from the courts over the years, but the Supreme Court held “the right to practice religion freely does not include liberty to

nature of each state action. Courts have upheld the authority of the state to subject individuals to involuntary confinement in circumstances where no harm has taken place.²⁰ Even when an infection has not been confirmed, courts have upheld confinement of individuals. Thus, the threat to the public is predictive but the state action can be justified by the risk of harm to the public. Similarly, public carry restrictions would seek to limit or prohibit public possession of firearms due to the risk of harm to the public when public carry is widely permitted, even for individuals who have neither committed a crime nor used their firearm in a risky manner.

Second, in both involuntary confinement and public carry restrictions the right impacted is a fundamental, constitutionally protected right. Involuntary confinement restricts the individual’s right to freely move from place to place. Though the right to move freely may not be specifically stated in the Bill of Rights, it is certainly clear in its protections of the individual from unjustified government detainment that physical liberty is one of its most important principles. Indeed, being held involuntarily in a confined space may be a

more significant infringement than one that prohibits an individual from carrying a firearm in public spaces. And in the case of confinement the restriction could be permanent. For example, if an individual in isolation refuses to take necessary medication to ensure that they no longer pose a threat to the public, they may be held indefinitely. Involuntary civil commitment for mental illness provides another example where a right may be permanently extinguished. Therefore, even a long-term or permanent denial of public carry cannot be described as beyond the infringements implemented against other constitutional rights in the name of public health and safety.

The use of emerging contagion theory in gun violence described earlier makes this analogy even more appropriate, helping to elucidate the ability of the state to address potential harm to the public that takes into account both of the essential elements of risk: probability *and* magnitude. The state has less authority to confine individuals for a disease that has a larger probability of being spread, such as seasonal influenza, but a lower magnitude of harm for much of the population. Conversely, a disease with a high mortality rate that can be spread when an individual is asymptomatic could enable involuntary confinement even for an individual who has not been proven to be infected.²¹ While the probability of any particular individual's firearm to be used to harm others may be low, the magnitude of the potential harm is great. Given evidence that relaxed public carry laws are associated with higher rates of firearm related homicide,²² a state would be within its police power authority to restrict public carry broadly due to the increased probability and high magnitude of harm from a population perspective.

Conclusion

In *Heller*, there is a lengthy discussion about the history of the individual right to bear arms and the limits it created on state authority to pass firearm regulations. However, the historical and theoretical foundation for the authority of the state to restrict individual rights in the name of public health and safety is equally robust. Police power authority follows closely with John Stuart Mill's harm principle, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others,"²³ while social contract theory suggests the government gains its legitimacy by securing the common good.²⁴ Given the public health threat that gun violence poses, including the drastic increase in mass shootings, more firearm regulations will be necessary to secure the common good.

A public health approach to gun violence must include a public health *law* approach to the evaluation of gun regulations. Justice Clarence Thomas has stated that lower courts have demonstrated a "general failure to afford the Second Amendment the respect due an enumerated constitutional right."²⁵ Yet, examination of public health law cases proves that subjugating a fundamental right to reduce the risk of harm to the public is not equivalent to ignoring the strength of that right. Indeed, fundamental rights have been restricted in the name of public health and public safety with some regularity when there is an identifiable risk to the health of the public sufficient to justify state action. To restrict the right to keep and bear arms under the same premise does not relegate it to a "second-class right."²⁶ Rather, it continues the tradition, long upheld by the courts in this country, that the right of the individual does not enable them to place other citizens at risk.

Note

The author has nothing to disclose.

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