No. 22-915

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ZACKEY RAHIMI.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PROFESSOR LORIANNE UPDIKE TOLER IN SUPPORT OF NEITHER PARTY

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November 2, 2023

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME

Pursuant to Supreme Court Rule 37.3, amicus curiae Professor Lorianne Updike Toler requests leave to file the following brief in support of neither party in the above-captioned matter. In support of that motion, Amicus would show the following:

1. Movant is an assistant professor at Northern Illinois University College of Law specializing in constitutional legal history. Amicus Curiae has an interest in the Court having an informed understanding of the constitutional history of the Second Amendment.

2. Amicus briefs in support of neither party in this case were due August 21, 2023. And while Rule 37.3 provides that motions to extend the time will not be entertained,

Movant hopes the Court will make an exception for the academic project represented by the proposed brief and allow this brief to be filed in advance of the argument that is scheduled for November 10, 2023. Movant and her counsel have been working diligently to prepare the brief with the assistance of law students in Professor Updike Toler's constitutional history class. Because of the press of Prof. Updike Toler's academic responsibilities and her students' schedules, the brief has only recently been completed.

3. Both the Petitioner and the Respondent take no position on the relief requested in this motion.

4. Movant's proposed brief would assist the Court in resolving this case. In *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the test that the Court applied "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." Movant's proposed amicus brief provides a unique form of neutral historical background on domestic violence and disarming of dangerous citizens before and during the Founding as well as the possible gloss provided by the "rule of thumb" (limiting the size of the implements of domestic violence to the width of a man's thumb) on the Second Amendment.

Accordingly, Movant respectfully requests leave to file the enclosed amicus curiae brief in support of neither party.

Respectfully submitted,

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, has any historical analogues under *NY State Rifle Assoc. v. Bruen*, 597 U.S. ___ (2022) and thus violates the Second Amendment on its face?

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BRIEF AMICUS CURIAE PROFESSOR LORIANNE UPDIKE TOLER IN SUPPORT OF NEITHER PARTY

STATEMENT OF INTEREST[1]

Amicus Curiae Lorianne Updike Toler is an assistant professor at Northern Illinois University College of Law who specializes in constitutional legal history. Amicus has an interest in ensuring that the Court has an informed understanding of the constitutional history of the Second Amendment.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

The short answer to the question presented in this case is "no." History has not been kind to wives trapped in dangerous marriages. A husband's "ancient" right to beat his wife was limited beginning in the 1500s by a "reasonableness" standard under British Common Law. Contemporaneous colonial laws prohibited husbands from committing acts of physical violence against wives, but these were frequently unenforced. After the Revolution, the "rule of thumb" was introduced in 1782 in England, supplementing the "reasonableness" standard with a bright line rule allowing husbands to beat wives with sticks smaller than the diameter of a judge's thumb. There is some doubt whether the infamous and widely-ridiculed "rule of thumb" nevertheless became the law in England thereafter, but the rule was introduced into the antebellum South and was prevalent during Reconstruction. The rule of thumb could potentially provide a gloss on the incorporated Second Amendment in preventing husbands from using firearms in domestic violence, which were, on average, thicker than a man's thumb.

History predating the Founding Era suggests a difference in punishments for those who posed a threat of violence against the community as compared to those who posed a threat of individual violence against specific individuals. English law allowed the seizure of firearms from certain groups of people who were deemed "dangerous to the peace of the kingdom." However, in Colonial America, surety bonds were often required of criminal offenders who posed harm or threats of harm to others. Those who posed a threat to the community were subject to harsher punishment such as disarmament, imprisonment and

forced fines. This compared to those who posed a threat to individuals were merely fined.

Comprehensively, there are no pre-Founding laws directly on point which disarmed perpetrators of domestic violence. However, on a broader level of generality, because domestic violence was considered a crime against the community, British and pre-Founding history may be construed to support disarming those who posed a harm or threat of harm against an individual.

Founding Era sources provide less support for disarmament. Non-association laws were enacted to effectuate the disarming of those who refused to take an oath of allegiance to the United States. These laws suggest that those who refused to take an oath of allegiance to the rebel cause were considered dangerous to public safety and therefore were disarmed. However, this was the only context in which individuals were disarmed during the Founding.

In all, the sources presented in this brief do not evidence any history directly on point supporting disarmament of domestic abusers, but it may be possible to broadly interpret the rule of thumb or disarmament laws for crimes against the community as providing translatable historical analogues for disarming domestic abusers, but this must be done on a higher level of generality.

ARGUMENT

I. A Husband's Right to Beat His Wife was Limited by Reasonableness under British Common Law, Colonial Law, and the Antebellum South by the Rule of Thumb

A. British Common Law Between 1500-1776 Prevented Husbands From *Unreasonably* "Chastising" Wives, Including Killing Them or Causing Serious Bodily Injury

William Blackstone recognized an "antient privilege" of husbands to beat their wives.[2] Dating back to Roman and Biblical times, this "privilege" was based in the conception of wives as property "subject to control."[3] The privilege of "wife beating" persisted, but began to be limited beginning in the early modern period.[4] One shift undergirding this change was "public condemnation of husbands killing or using extreme forms of violence towards their wives."[5] Gradually, this condemnation took on the imprimatur of

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[2] Sir William Blackstone, 1 & 4 COMMENTARIES ON THE LAW OF ENGLAND at 433 (1765-1769) (1979 reprint).

[3] Christina Vogel, *Mapping the Language of Male Partner Violence: An Historical Examination of Power, Meaning, and Ambivalence*, 29 VIOLENCE AGAINST WOMEN 2787, 2793 (2023).

[4] *Id.*

[5] *Id.*

law as judges began penalizing *unreasonable* violence against wives.[6]

On the eve of the Revolution, Blackstone confirmed both the antiquity of the wife-beating privilege and its more modern limit of reasonableness. Blackstone's language (translated from the Latin where necessary) on point is as follows:

> The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children; for whom the master or parent is also liable

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[6] Anthony Fitzherbert, THE NEW NATURA BREVIUM 80F, 179 (London, 1704 (permitting wives to obtain a writ against husbands if he threatens to beat or kill her); REVISED CROMPTON: LOFFICE ET AUCTORITIE DE JUSTICES DE PEACE…(London: 1617) (permitting husbands to correct his wife "reasonably"); *Sir Thomas Seymor's Case*, MOORE (K.B.) 875, 72 Eng. Rep. 966 (1615 (permitting a wife to divorce her husband "pur unreasonable correccõn"); *Wife of Cloburn against Her Husband*, HETLEY 150, 124 Eng. Rep. 414 (C.P. n.d.) (1630) (rejecting husband's contention that boxing his wife's ear, spitting in her face, and calling her a damn whore was not unreasonable cruely); *Manby v. Scott*, SIDERFIN 109, 82 Eng. Rep. 1000, 1001 (Ex. 1659) (prohibiting a husband from killing, beating, and starving his wife); *The King against the Lord Lee*, 2 LEVINZ 127, 83 Eng. Rep. 482 (K.B. n.d.1675)(Limiting recovery of wife for hsuband's "unkindnesses" to sureties); *Dominus Rex v. Lister*, 1 STRANGE 478, 93 Eng. Rep. 645 (K.B. 1721)(limiting husband's privilege to restrain wife when required to "preserve his honour and estate" inapplicable here); 1 A TREATISE OF THE PLEAS OF THE CROWN 127, 130 (1724) (2nd. ed.) (recognizing the right of a wife to a surety of peace as against her husband when he chastises her unreasonably).

> in some cases to answer. But this power of correction was confined within reasonable bounds; and the husband was prohibited to use any violence to his wife, aliter quam ad virum, ex causa regiminis et castigationis uxoris Suae, licite et rationabiliter pertinet [for the reason of the rule and chastisement of the wife, belongs otherwise to the husband lawfully and reasonably]. The civil law gave the husband the same, or a larger, authority over his wife; allowing him, for some misdemesnors, flagellis et sustibus acriter verberare uxorem [to beat his wife severely with whips]; for others, only modicum castigationem adhibere [to apply a little chastisement]. But, with us, in the politer reign of Charles the second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their antient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.[7]

Blackstone here recognized that the "old law" permitted a husband to control his wife through violence, but that more modern law recognized limits of reasonableness and proportionality based on provocation. Blackstone further opines that the influence of "polite" civilization limited

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[7] 1 Blackstone, *supra* n. 2 at 432-33.

wife-beating to the lower classes. While domestic violence was *not* limited to the lower classes in 1765 (wealthier women were actually more vulnerable[8]), Blackstone's summation of the common law and its evolution in 1765 was otherwise accurate.

B. Colonial Laws Placed Similar Limits on Husband's Privileges, but were Frequently Unenforced

British limits on domestic violence found analogues in colonial America. In 1641, Massachusetts passed one of the first laws regarding domestic abuse.[9] That law states that "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault."[10] Essentially no married woman should face physical violence ("bodilie correction" or "stripes") from her husband unless her husband was defending himself from the wife's attack.[11] Because the Massachusetts' "Body of Liberties" specifically entitled a section "Liberties of Women," it could be interpreted that the legislature intended to give women safety in the home.[12] Yet court records from colonial Massachusetts indicate that a very limited number of offenders received

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[8] Vogel, *supra* n. 3.

[9] Liberties of Women, COLONIAL LAWS OF MASSACHUSETTS REPRINTED FROM THE EDITION OF 1672, WITH THE SUPPLEMENTS THROUGH 1686, 51 (1686).

[10] *Id.*

[11] *Id.*

[12] Elizabeth Pleck, *Criminal Approaches to Family Violence*, 1640-1980, 11 CRIME AND JUST. 19, 23 (1989).

any type of punishment other than admonition or fines.[13] On occasion, offenders were appointed "supervisors," or ordered to submit a bond to ensure good behavior.[14] Given the infrequency of enforcement and narrow range of enforcement mechanisms, such protections provided little more than parchment barriers for wives to withstand violent partners.[15]

C. The Rule of Thumb as Found in the Antebellum South at the time of the Fourteenth Amendment's Ratification May Limit the Use of Arms by Domestic Abusers

After the break with England and at the close of the Revolutionary War, British limits on domestic violence took on a different form. The test of "reasonableness" was replaced by at least one judge with a more bright-line rule regarding the size of the instrument of violence. At the assizes of September 1782 in Westminster, Sir Francis Buller, appointed as the youngest-ever English judge to the King's Bench at 32 in 1778,[16] infamously introduced the "rule of thumb" into British Common Law.[17] A man was

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[13] Lyle Koehler, A SEARCH FOR POWER: THE WEAKER SEX" IN SEVENTEENTH-CENTURY NEW ENGLAND. Urbanda: University of Illinois Press, 140-141 (1980).

[14] *Id*. at 141 (1980).

[15] Jordan J. Al-Rawi, *The Case for Relaxing Bruen's Historical Analogues Test: Rahimi, 18 U.S.C. §922(g)(8), and Domestic Violence Regulation in Colonial and Post-Enactment America*, 39 BERKLEY J. GENDER L. & JUST. 1, 14 (forthcoming Spring 2024).

[16] William Prideaux Courtney, *Francis Buller*, 7 DICTIONARY OF NATIONAL BIOGRAPHY, 1855-1900, 248-49 (1921-22).

[17] HAMPSHIRE CHRONICLE (Sep. 23, 1782), *infra* at addendum 1.

tried for beating his wife with a faggot (a stick used for firewood), "value one farthing," killing her.[18] Counsel for the defense argued that a husband had a common law right to chastise his wife, citing scripture and the example of "all wise nations."[19] If chastisement was legal, so too, argued the defense, was the consequence (here, death).[20] At this point, instead of objecting to the death of the wife,

> "[t]he Judge laid down the law—He said the great point for consideration was, the instrument used by the husband—had it been a whip, had it been a switch, any thing that bent and could break no bones, it would have been different—but the prisoner had beat his wife with a faggot. Here the council for the prisoner asked, what sized stick a man might chastise his wife with? The learned Judge thrust forth his thumb…"[21]

According to the most widely-published account of the trial, Justice Buller then said "of the size of my thumb."[22]

The response was electric. Within the Courtroom, which was "full of women," a Dublin reporter observed women mocking the judge, who asked each other if anyone could

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[18] DUBLIN EVENING POST (Sep. 28, 1782), *infra* at addendum 2.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] HAMPSHIRE CHRONICLE, *supra* n. 17; the same account was published in the following newspapers, SALISBURY AND WINCHESTER JOURNAL (Sep. 23, 1782), NORFOLK CHRONICLE (Sep. 21, 1782), BATH CHRONICLE AND WEEKLY GAZETTE (Oct. 3, 1782).

be "kept under" by a stick so thin; "if we are to be beaten" they said, "let us be beaten by something we can feel."[23] Ladies outside of the Courtroom sent messages to his lodgings, to "obtain the exact measure of his Lordship's thumb," presumably to know the legal limits of their abuse.[24]

The mocking continued for months thereafter. By mid-October, an advertisement was run for the publication of "The Thumb-stick, a judicial poem, addressed to new married men, with a few thoughts on the nature of faggots, by Sir F. Buller, Knt."[25] Prominent caricaturist James Gillray sketched two cartoons of Justice Buller in November 1782 for publications, both attached as addendums to this brief.[26] The first depicts Justice Buller selling a bundle of "thumb sticks" for wife-beating. The second, entitled "Mr. Justice Thumb in the Act of Flagellation" wherein the judge is beating his wife with a thin stick depicts a scroll in the corner with the words, "a Husband may chastise his wife with a stick the size of his thumb. COKE."[27] The publication of this cartoon was heavily advertised throughout England as an enticement to purchase *The Rambler*,

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[23] DUBLIN EVENING POST, *supra* n. 18.

[24] HAMPSHIRE CHRONICLE, *supra* n. 17.

[25] ABERDEEN PRESS AND JOURNAL (Oct. 14, 1782).

[26] *See* addendums 3-4.

[27] *See* addendum 5. No such reference to a rule of thumb or even any reference to the "reasonableness" standard limiting wife-beating appears in Sir Edward Coke's INSTITUTES ON THE LAWS OF ENGLAND (1628-1644).

newly published in 1783.[28] The entire country was in on the joke.

There is some doubt whether the infamous and widely-ridiculed "rule of thumb" nevertheless became the law in England thereafter. In the initial report of the case, "the lawyers have given their opinion, that if a husband should use a stick, differing in dimensions from Judge [Buller]'s thumb, an action will lie, and heavy damages be recoverable by the wife."[29] In the European Magazine and London Review of November 1, another Lord's thumb was "inadmissible, as the Size of a Cane or Stick, with which a Man may lawfully correct his Wife, was settled by Judge Buller."[30] Historians differ as to the effect of Judge Buller's pronouncement upon the law, but most indicate that the "rule of thumb" made its way into the common law after 1782.[31]

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[28] See., e.g., CHESTER COURANT (Dec. 24, 1782); HAMPSHIRE CHRONICLE (Dec. 30, 1782); BATH CHRONICLE AND WEEKLY GAZETTE (Jan. 2, 1783), all of which ran the advertisement, "On Wednesday, the First of January, 1783, will be published, Price 6d. to be continued the first of every month….Also an Engraving in caricature, in the manner of Hogarth, of Mr. Justice Thumb, in the Act of Glagellation, Number 1 of The Rambler's Magazine; or, the Annals of Gallantry, Glee, Pleasure, or the Bon Ton…"

[29] HAMPSHIRE CHRONICLE, *supra* n. 17.

[30] *Answers to Correspondence*, EUROPEAN MAGAZINE AND LONDON REVIEW, frontispiece (Nov. 1782).

[31] *Cf.*, Henry Ansgar Kelly, *"Rule of Thumb" and the Folklaw of the Husband's Stick*, 44 JOURNAL OF LEGAL EDUCATION 341 (1994); Vogel, *supra* n. 3 at 2794; Nan Oppenlander, *The Evolution of Law and Wife Abuse*, 3 LAW & POL. Q. 382, 387 (1981).

Regardless of the impact of the "rule" on the British Isles, it was clearly embraced as a common law rule in the antebellum south. This may have been facilitated by the late eighteenth century practice of aristocratic slave-owning families sending their sons to England for their legal education. Beginning the very year that Judge Buller made his infamous pronouncement, Middle Temple's registry from 1782-1813 lists 49 enrolled American students from Boston down to the Caribbean islands, most from slave-holding states.[32]

The "rule of thumb" made its American debut in an 1824 Mississippi case, *Bradley v. State*, wherein the court recognized that a whip or rattan "no bigger than my thumb" was considered part of the "reasonable" allowance permitted a husband to "give his wife moderate correction."[33] It reappeared during Reconstruction in an 1867 North Carolina case and in an 1871 Alabama case, but was finally rejected in North Carolina in 1874.[34]

In all, the presence of the infamous "rule of thumb's" limit on the instrumentalities of domestic violence in the South at the time of the Fourteenth Amendment's ratifi-

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[32] 2 REGISTER OF ADMISSIONS TO THE HONOURABLE SOCIETY OF THE MIDDLE TEMPLE 394-427 (1782-1909), https://drive.google.com/file/d/1GD19MSLSsu3oryaqkoKy-SYieWYqPiB5y/view (last visited Oct. 28, 2023).

[33] *Bradley v. State*, 1 MISS. 156, 1 WALKER 156 (1824).

[34] *State v. Rhodes*, 61 N.C. 453 (1868); *Fulgham v. State*, 46 Ala. 143 (1871); *State v. Oliver*, 70 N.C. 60 (1874) ("The doctrine of years ago, that a husband had the right to whip his wife, provided, he used a switch no larger than his thumb, no longer governs the decisions of our Courts").

cation may provide a gloss on the incorporation of the Second Amendment. If instrumentalities or weapons of domestic abuse were limited to those no bigger than a judge's thumb, it would likely prohibit the use of guns against wives, which were, at that stage, larger thicker in diameter than a thumb.[35] Though nothing in this pre-founding, founding, and ratification history of domestic violence laws speak to disarmament, at a higher level of abstraction, the rule of thumb limit could also be viewed as a prohibition on a domestic abuser's access to such arms.

II. British and Colonial Sources Punished Those Who Posed a Threat of Violence Against the Community with Disarmament and Those Who Posed a Threat of Violence Against Specific Individuals with Fines

A. English Law Permitted Seizure of Firearms from Certain Dangerous Groups

The English Militia Act of 1662 enabled the Crown to "seize all arms in the custody or possession of any person" who were deemed "dangerous to the Peace of the Kingdom."[36] Two interpretations of this Act follow: first, that

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[35] Bertram Barnett, *Small Arms in the Civil War*, Anchor, A North Carolina History Online Resource, https://www.ncpedia.org/anchor/small-arms-civil-war https://perma.cc/3H5Q-9FNG, (*last visited* Oct. 30, 2023) (The popular rifles and pistols carried during this time had a wide range of calibers; the diameter of the bores of barrels and the ammunition used were mostly larger than the diameter of an average man's thumb.).

[36] An Act for Ordering the Forces in the Several Counties of this Kingdom, STATUTES OF THE REALM (1662), *in* 5 STATUTES OF THE REALM 360 (John Raithby ed., 1628-80).

England had established a well-practiced tradition of disarming dangerous persons who were deemed a threat to the Crown,[37] and second, that the Act was created to suppress political enemies by disarming them.[38] Regardless, the government's ability to seize arms led to the grievance that Protestants were being disarmed while papists were "armed and employed contrary to law" in the English Bill of Rights of 1689.[39] As a corrective, the English Bill of Rights secured to Protestants the right "have arms" [40] while presumably permitting the government to seize Catholics' arms deemed "dangerous to the Peace of the Kingdom."[41]

B. Disarmament and Surety Bonds in Colonial America Were Often Required of Criminal Offenders Who Posed Harm or Threats of Harm to Others

Colonial laws permitted the forfeiture of arms in a limited subset of crimes, both violent and non-violent.[42] These

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[37] Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Firearms*, 20 WYO. L. REV. 249, 261 (2020).

[38] Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 8 (1996).

[39] THE BILL OF RIGHTS (1689).

[40] *Id.*

[41] An Act for Ordering the Forces, *supra* n. 36.

[42] Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous,"* 25 TEX. REV. L. & POL. 245, 284 (2021) (*Citing* An Act for the Punishing of Criminal Offenders (1692), ch. 11, § 6, *reprinted in* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 237, 240 (T. B. Wait & Co. 1814)).

crimes included the use of any menaces or threatening speech,[43] threatening another person to "wound, kill or destroy him,"[44] or harm a person or his estate.[45] Simultaneously, offenders were required to post a surety bond in order to maintain their arms. This tracked British law: Blackstone's *Commentaries* provided that if a party could demonstrate he had "just cause to fear" another or that there was suspicion that a crime was foreseeable, they could "demand surety of the peace against such a person."[46] This applied to wives vis-à-vis husbands and vice versa.[47] Colonial laws permitted the disarmament of convicted criminals as well as requiring surety bonds of those who posed harm or threat of harm.

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[43] An Act for Punishment of Criminal Offenders 1692-1693, *in* 1 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVIDENCE OF MASS. BAY 51-55 (1869).

[44] An Act About Binding the Peace 1700, *in* 2 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 23 (1700-1809).

[45] An Act About Binding the Peace 1700, *in* 1 LAWS OF THE STATE OF DELAWARE FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED, TO THE EIGHTEENTH DAY OF AUGUST, ONE THOUSAND SEVEN HUNDRED AND NINETY-SEVEN, 52 (1797).

[46] 4 BLACKSTONE, *supra* n. 2 at 252 (1769) (1979 Reprint).

[47] *Id.* at 251.

C. Under Colonial Law, Those Who Posed a Violent Threat to the Community as Opposed to Individuals Could Be Disarmed, Imprisoned and Fined

In 1692, Massachusetts passed a law entitled: An Act for the Punishment of Criminal Offenders.[48] This Act empowered each judicial figure to arrest all "affrayers, rioters, disturbers or breakers of the peace…"[49] "Affray" here is defined as "the fighting of two or more persons in some public place to the terror of the people."[50] Upon confession or conviction, the Act authorized imprisonment until he "f[ound] sureties for the peace and good behavior."[51] Additionally, the Act called for the seizure of the offender's "armor or weapons," which were then forfeited to the King.[52] Although this Act goes on to punish "breach of the peace in any person that shall smite or strike another," the language of this Act limits disarmament to people who participated in more serious disorderly conduct which involved disruption of the community and could lead to potential uprisings.[53] It is possible to infer that because the legislature was willing to disarm those who were a threat

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[48] An Act for Punishment of Criminal Offenders (1692-1693), *supra* n. 43.

[49] *Id.*

[50] *Affraye*, John Comwell, THE INTERPRETER, OR, BOOKE CONTAINING THE SIGNIFICATION OF WORDS, 32 (Cambridge: Printed by John Legate 1607)

[51] An Act for Punishment of Criminal Offenders, *supra* n. 43 at 51-55.

[52] *Id.*

[53] An Act for Punishment of Criminal Offenders (1692-1693), *supra* n. 43. (Requiring only a fine or a surety for peace and good behavior for striking another).

to the community, they were deemed too dangerous to have firearms, as compared to those who may individually cause harm to another.

The New Hampshire legislature passed an Act in 1771 entitled "An Act for Punishing Criminal Offenders."[54] The language of this act is nearly identical to the 1692 statute from Massachusetts.[55] This law committed the offender to prison until they paid some form of surety bond and enabled the government to seize and to sell the arms used by offenders.

Virginia's analogue varied the language of the statute slightly: "[N]o man . . . [shall] go [ ] or ride armed by night or by day, in fairs or markets, or in other places, in terror of the country, upon pain of being arrested and committed to prison by any justice on his view, or proof of others, there to a time for so long a time as a jury, to be sworn for that purpose by the said justice, shall direct, and in like manner to forfeit his armour to the Commonwealth . . . ."[56] These laws targeted those who posed a threat to society by disarming them, in addition to fines and potential jail time.

A similar statute in North Carolina required constables to "arrest all such persons as, in your sight, shall ride or

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[54] An Act for Punishing Criminal Offenders (1696), *in* ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE: IN NEW-ENGLAND; WITH SUNDRY ACTS OF PARLIAMENT, 16-19 (1771).

[55] *Id.*

[56] An Act Forbidding and Punishing Affrays (1786), *in* REVISED CODE OF THE STATE OF VIRGINIA 554 (1819).

go armed offensively, or shall commit or make any riot, affray, or other breach of his Majesty's peace . . ."[57] This statute did not provide for forfeiture of firearms, yet its goal was still to suppress threats of violence to the community.

In contrast, Rhode Island passed an Act in entitled "An Act for Punishing Criminals."[58] This Act calls for imprisonment for twelve months or a fine of ten pounds if a person is convicted of rioting.[59] This Act separates the offenses of rioting and breach of the peace from assault and battery.[60] Although disarmament of offenders is not discussed, there is a stark difference in the punishment. A conviction of rioting elevated the monetary punishment by tenfold, as compared to a conviction of breaching the peace. The significant difference in the value of the fine tracks the 1692 Massachusetts law. There, the harsher punishment of disarmament was reserved for those who posed a threat to the community, as compared to those who posed a threat to an individual, resulting in the payment of a fine.[61]

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[57] An Act to Appoint Constables (1751), *in* 1 REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE (1773).

[58] An Act for Punishing Criminal Offenders (1662), *in* 1 THE CHARTER GRANTED BY HIS MAJESTY KING CHARLES THE SECOND, TO THE COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS, IN AMERICA 4-9 (1719).

[59] *Id.*

[60] *Id.*

[61] An Act for Punishment of Criminal Offenders (1692 -1693), *supra* n. 43 (Allows for disarming of offenders who breach the peace and cause fear in King's subjects but requiring only a fine or a sureties for peace and good behavior for striking another).

These statutes underly a distinction with a difference: only offenders who threatened or disturbed the public were punished with disarmament; private violent offenders received the lesser punishments of fines and payments of sureties. Some states' laws that punished offenders who threatened specific individuals with imprisonment effectively disarmed the offenders while in prison; however, many laws do not speak to whether firearms were taken away after the prison sentence nor of the return of firearms once the surety bond was paid. In all, these statutes provide historical evidence for reserving the harsher punishment of disarmament for those who posed a threat to the community.

III. During the Founding itself, Only Those Who Refused to Take an Oath of Allegiance Were Considered Dangerous enough to the Public to be Disarmed

During the Founding, the types of individuals posing a threat to society shifted to those disloyal to the rebel cause. Under British rule, free white colonists were disarmed only if they refused to take a test of allegiance that defined membership in the body politic.[62] Before the Revolution, this meant allegiance to King George III.[63] One

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[62] Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW AND HIST. REV., 139, 158 (2007). In contrast to free whites, slaves and Native Americans were not permitted guns during this period; *See* An Act Directing the Trial of Slaves Committing Capital Crimes; and for the More Effectual Punishing Conspiracies and Insurrection of Them; and For the Better government of Negros, Mulattoes, and Indians, Bond or Free (1751), *in* 1 ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 349 (1752).

[63] *Id.*

such act is New Jersey's 1752 An Act for the Security of His Majesty's Government of New Jersey.[64] This law provided that "[W]hereas some persons…disaffected to His Majesty's Person and government…to the great Hurt of His Majesty's faithful and loyal subjects inhabiting within the same…will, if not prevented, prove dangerous to the Government of this Providence." [65] Under this law, oaths of allegiance were administered to "any person or persons whatsoever who they shall or may suspect to be Dangerous or disaffected to his Majesty or his Government."[66] If a person refused to take the oath, they were deemed a "Popish Recusant Convict," and were subjected to any forfeiture, and legal process that the Laws of England permitted. [67] A refusal to take an oath of allegiance to the King of England was interpreted to be a crime against the King's people, which in turn resulted in being labeled dangerous and led to a criminal conviction. Although this particular law does not specifically state that those who refused to take the oath led to disarmament, it effectively disarmed them, as it permitted a "popish recusant" conviction, which prevented disabled offenders from owning any "arms or weapons" unless a special allowance was made.[68] Each state had analogous laws which required

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[64] An Act for the Security of His Majesties Government 1722, *in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY… 92-98 (1752).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] An Act for Disarming Papist and Reputed Papist, Refusing to Take the Oaths to the Government Statutes at Large (1756), *in* BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST

proof of loyalty to the King of England by taking an oath of allegiance to the King, or face disarmament.[69]

The battles of Lexington & Concord and the later siege of Boston provided a turning point; thereafter, colonists required allegiance to the rebel cause. Those who actively assisted the British were imprisoned and those who libeled or defamed acts of the Continental Congress were disenfranchised and ultimately prohibited from keeping arms, holding office, or serving in the military.[70]

The Continental Congress recommended that colonies disarm persons "who are notoriously disaffected to the cause of America, or who have not associated, and shall

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SESSION OF THE LEGISLATURE 35-39 (1820) (No Papist, may have, or keep in any arms, weapons, gunpowder or ammunition).

[69] An Act Declaring that All Persons of Foreign Birth, Heretofore Inhabiting Within This Colony and Dying Seizes of Any Lands, Tenements, or Hereditaments, Shall Be Forever Hereafter Deemed, Talem, and Assumed to Have to Been Naturalized and For Naturalizing all Protestants of Foreign Birth, Now Inhabiting this Colony 1715, *in* LAWS OF NEW-YORK, FROM THE YEAR 1691, TO 1773 INCLUSIVE 97-100 (1774); An Act Requiring All Persons to Take the Oaths Appointed to Be Taken Instead of Allegiance and Supremacy, ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE: IN NEW-ENGLAND; WITH SUNDRY ACTS OF PARLIAMENT 1-2 (1771); The Oaths of Fidelity to his Majesty and the Lord Proprietor of the Providence of New Jersey (1675), *in* GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY: THE ACTS PASSED DURING THE PROPRIETARY 51 (1753).

[70] G.A. Gilbert, *The Connecticut Loyalists,* 4 AM. HIST. REV. 273, 282 (1899); An Act for the Punishment of High-Treason and Other Atrocious Crimes Against the State, in 1 ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 251 (1784).

refuse to associate, to defend, by arms, these United Colonies."[71] Committees of Correspondence were created in Massachusetts which inspected and determined the safety of an individual and determined if a person should be deemed dangerous.[72] Massachusetts then took disarming citizens who were "notoriously disaffected to the cause of America . . . and [ ] appl[ied] the arms taken from such persons . . . to the arming of the continental troops."[73] Non-associators, as they were called, were considered dangerous, and disarmed.

Other states followed suit. New Hampshire's non-associator law specified that those who conspired against the United States of America or in any way "aid[ed] the enemies [ ] of the United States," were imprisoned at a term not exceeding five years, where they forfeited all real and personal property, presumably including guns.[74] Rhode Island's law predating the Revolution called for death and

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[71] 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 285 (Way and Gideon ed., 1823) (declaration and resolves of the First Continental Congress on March 14, 1776).

[72] An Act for the Executing in the Colony of the Massachusetts Bay, In New England, One Resolve of the American Congress, Dated 14, 1776, Recommending the Disarming Such Persons As are Notoriously Disaffected to the Cause of America… 1775-1776, *in* 5 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 479 (1886).

[73] *Id.*

[74] An Act Against Treason And Misprision Of Treason And For Regulating Trials In Such Cases And For Directing Modes Of Executing Judgements Against Persons Convicted Of Those Crimes 1777, *in* PERPETUAL LAWS OF THE STATE OF NEW-HAMPSHIRE, FROM THE SESSION OF THE GENERAL-COURT, JULY 1776, TO THE SESSION IN DECEMBER 1788, CONTINUED INTO THE PRESENT YEAR 1789, 226-231 (1789).

the forfeiture of all land, goods and chattel for those who were convicted of high treason and petit treason.[75] In 1798, the law empowered Justices of the Peace to require "sureties for the good behavior of all dangerous and disorderly" people who had committed treason and simultaneously permitted the sheriff to levy warrants on the offender's goods and chattels.[76] One interpretation of this law is that committing treason made one dangerous and thus permitted disarmament through the levying of chattels. Another interpretation is that sheriffs had power to disarm, but only through legal means. The Pennsylvania legislature deemed it "improper and dangerous" to allow non-associators to possess any firearms, weapons or gunpowder and thereby empowered lieutenants in the military to disarm anyone who had not taken an oath to the state.[77] New Jersey's legislature similarly empowered its Council of Safety "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess."[78] North Carolina's non-associator law held that "all Persons failing or refusing to take the Oath

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[75] An Act for Punishing Criminal Offenders 1662, *supra* n. 58.

[76] An Act for Establishing Justices of the Peace and Vesting Them With Certain Powers 1798, *in* PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS PASSED SINCE THE SESSION OF THE GENERAL ASSEMBLY IN JANUARY, A.D. 1798, 6-7 (1798-1813).

[77] An Act for Repealing Part of An Act, Entitled "A Further Supplement to the Act, Entitled 'An Act for Further Security of Government; and For Disarming Person Who Shall Not Have Given Attestations of allegiance And Fidelity to This State or Some Other of The United States'" 1778 *in* 9 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 346-348 (1776-1779).

[78] 1777 N.J. Laws 90, ch. 40 § 20.

of Allegiance…shall not keep Guns or other Arms within his or their house, but the same may be seized by a written Order of a Justice of the County in which he or they reside…"[79] The choice in all of these states was between taking the oath of allegiance or facing punishment which almost certainly included disarmament.

Disarmament for dangerously affiliating with the wrong side of history persisted after the Revolution. During Shay's Rebellion, General Benjamin Lincoln relayed to George Washington that he intended to use government troops to "break the little knots of those in arms which were collected in various parts of the Counties."[80] In a letter the following month, James Madison later details how General Lincoln had disarmed and disenfranchised disaffected debtors before they were later pardoned to Thomas Jefferson.[81]

Maintaining arms required first allegiance to the rebel cause and then the establishment. Disarmament was justified again on the basis of danger to the community.

CONCLUSION

Throughout the British, colonial, and founding history discussed above, disarmament was exercised only on individuals considered dangerous to the community as a whole. Those who committed violent crimes on individuals were fined or received some lesser type of punishment.

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[79] 24 THE COLONIAL AND STATE RECORDS 84-89, 85 (1777).

[80] Letter From Benjamin Lincoln to George Washington (Dec. 4, 1786), *in* THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (2008).

[81] Letter From James Madison to Thomas Jefferson (Mar. 19, 1787), *in* THE PAPERS OF JAMES MADISON DIGITAL EDITION (2010).

Domestic violence was unfortunately permitted but limited by a reasonableness standard, though these limits were infrequently enforced. The only limit on the instruments of domestic violence was found in the common law rule of thumb, which limited the width of the wife-beating stick to no bigger than a judge's thumb. Though there is some doubt as to this infamous rule being implemented in England, it was clearly adopted in the antebellum South, presumably by southerners who studied law in England. It is found in Court rulings contemporaneous to Reconstruction and the ratification of the Fourteenth Amendment in 1868. This rule could potentially provide a gloss on the incorporated Second Amendment by limiting the size of the weapons and arms used in domestic violence.

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APPENDIX

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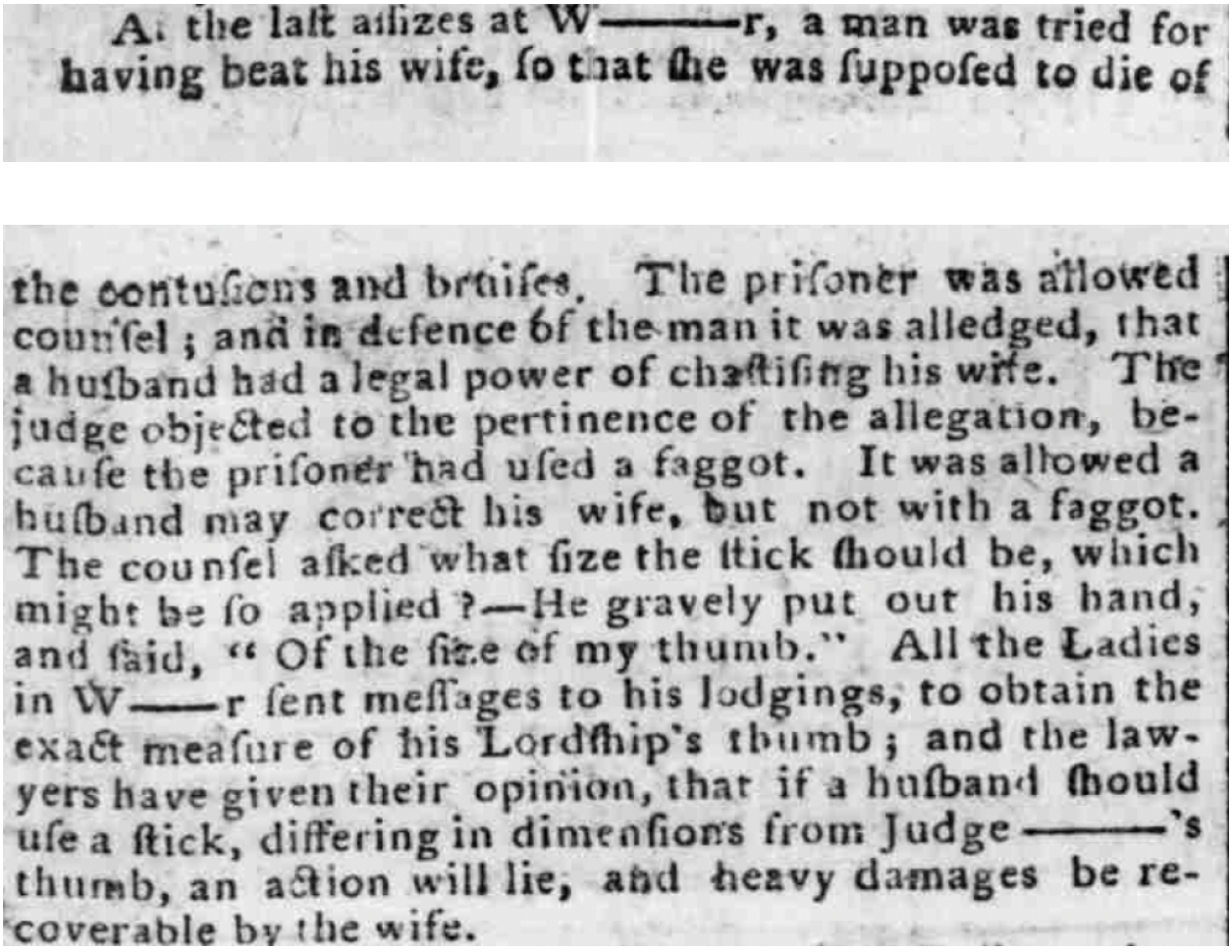
ADDENDUM I

HAMPSHIRE CHRONICLE (Sep. 23, 1782)



At the laſt aſſizes at W———r, a man was tried for having beat his wife, ſo that ſhe was ſuppoſed to die of the contuſions and bruiſes. The priſoner was allowed counſel; and in defence of the man it was alledged, that a huſband had a legal power of chaſtiſing his wife. The judge objected to the pertinence of the allegation, becauſe the priſoner had uſed a faggot. It was allowed a huſband may correct his wife, but not with a faggot. The counſel aſked what ſize the ſtick ſhould be, which might be ſo applied?—He gravely put out his hand, and ſaid, "Of the ſize of my thumb." All the Ladies in W——r ſent meſſages to his lodgings, to obtain the exact meaſure of his Lordſhip's thumb; and the lawyers have given their opinion, that if a huſband ſhould uſe a ſtick, differing in dimenſions from Judge ———'s thumb, an action will lie, and heavy damages be recoverable by the wife.

ADDENDUM II

DUBLIN EVENING POST (Sep. 28, 1782)

Law Intelligence Extraordinary.

THE priſoner was indicted, that he not having the fear of *God*, &c. but being inſtigated by the *Devil*, &c. did beat his wife with a certain *ſtick*, called a *faggot*, value one farthing, with which he gave her ſeveral bruiſes, contuſions, &c. whereby ſhe died.

The counſel for the proſecution opened the cauſe, by ſtating the facts in the indictment, and animadverting upon them; he foreſaw, he ſaid, that the priſoner would ſet up as defence, that every man had a common law right to *chaſtiſe* his wife, but the queſtion here was not *chaſtiſement*, but *death*; and allowing *chaſtiſement* to be *proper*, yet nothing could be clearer than that a *faggot* was an *improper inſtrument*.

The witneſſes being examined, the counſel on the other ſide very ably maintained, that the right of *chaſtiſement* certainly exiſted in the huſband *jure divino*, for which he cited ſeveral texts in Scripture. That all wiſe nations adhered to the cuſtom—the Ruſſian wife gave a *whip* to their huſbands—the Hottentots and many other nations practiſed it, and the common law of Ireland allowed it: if therefore the chaſtiſement was *legal*, the conſequence could not be *felonious*.

The Judge laid down the law—He ſaid the great point for conſideration was, the *inſtrument* uſed by the huſband—had it been a *whip*, had it been a *ſwitch*, any thing that bent and could break no bones, it would have been different—but the priſoner had beat his wife with a *faggot*.

Here the council for the priſoner aſked, what ſized *ſtick* a man might chaſtize his wife with?

The learned Judge thruſt forth his *thumb*—The court was full of women—Is that a ſize, ſaid the women to each other—what woman would be kept under by a ſtick of that dimenſions? Was there ever ſuch a Judge of *aſſize*—it is to be hoped he'll never come this circuit again. If we are to be beaten according to law, let us be beaten with ſomething we can *feel*.

ADDENDUM III

James Gilray, Judge Thumb, or Sticks of Lawful Size for Family Discipline (NOV. 21, 1782), in THE WORKS OF JAMES GILRAY FROM ORIGINAL PLATES, image 13 (1851)

ADDENDUM IV

James Gilray, Mr. Justice Thumb in the Act of Flagellation,

THE RAMBLER (Jan. 1783)