

OLDER MINORS, THE RIGHT TO KEEP AND BEAR (ALMOST ENTIRELY) NONLETHAL ARMS, AND THE RIGHT TO DEFEND LIFE

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INTRODUCTION

I am delighted and honored to have been invited to Justice O'Connor's 80th birthday celebration; the Justice has long been one of the people I most admire. And I'm particularly happy to be able to write on a topic which Justice O'Connor has often written—the constitutional rights of minors.¹

In several states and cities, minors are barred from possessing and carrying stun guns² or irritant sprays.³ New Jersey, New York, Rhode

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1. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (O'Connor, J., dissenting); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 468–70 (1983) (O'Connor, J., dissenting).

2. ARK. CODE ANN. § 5-73-133 (2005); IND. CODE ANN. § 35-47-8-5(a) (1985); MINN. STAT. ANN. § 624.731 subdiv. 3(a) (2009); MISS. CODE ANN. §§ 97-37-1, -15, 45-9-101 (2007) (“deadly weapon[s]”); NEV. REV. STAT. § 202.357(3) (2005); N.H. REV. STAT. § 159:22 (1986); 21 OKLA. STAT. ANN. §§ 1272, 1273 (2007) (“offensive weapon”); BLACK HAWK COUNTY, IOWA CODE §§ 3-4-5, -9(A) (2004); OAKLAND, CAL. CODE §§ 9.36.070.B, 9.36.130 (2010) (“weapon which launches or propels a projectile by means other than the force of an explosion or other form of combustion with sufficient force to cause injury to persons or property,” expressly including “dart guns”); PORTLAND, OR. CITY CODE §§ 14A.60.030.A.3, .B, .B.7 (2002); CITY & COUNTY OF S.F., CAL. POLICE CODE §§ 4501(b), 4507 (2011) (same as in Oakland). Generic terms such as “offensive weapon,” “dangerous weapon,” or even “deadly weapon” have generally been interpreted broadly enough to likely cover stun guns and irritant sprays, see Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 238–44 (2009), though the matter varies in some measure from jurisdiction to jurisdiction.

Island, Wisconsin, the Annapolis/Baltimore area, Honolulu, Washington, D.C., and likely Oklahoma and Cincinnati ban minors from possessing and carrying both kinds of devices,⁴ thus leaving under-eighteen-year-olds entirely disarmed (except in the home, where older minors may generally⁵ possess guns, but not stun guns or irritant sprays). Illinois bars under-eighteen-year-olds from carrying both stun guns and irritant sprays outside the home, though it does not bar minors from possessing them within the home.⁶

I treat a law that only allows minors to possess a certain weapon under an adult's *supervision* as a ban, since it leaves minors unable to defend themselves with that weapon when they're by themselves. But I do not so treat a law that allows minors to possess such a weapon only with a parent's *permission* (*see, e.g.*, FLA. STAT. ANN. §§ 790.18, 790.22 (2010)), because that leaves parents able to authorize their minor children to possess such weapons even when the minors are by themselves.

3. CAL. PENAL CODE §§ 12401, 12403.7(d) (1995); MD. CODE, PUB. SAFETY § 5-134(d)(1)(ii)(3) (2003); DOTHAN, ALA. CODE OF ORDINANCES § 62-137(a), (f) (1998); FEDERAL HEIGHTS, COLO. MUNICIPAL CODE § 38-161 (2010); N. BRECKENRIDGE, COLO. CITY CODE § 6-3E-10(B) (2009).

4. N.J. STAT. ANN. §§ 2C:39-1.r(4), -5.d (2002) (banning possession of such weapons "under circumstances not manifestly appropriate for such lawful uses as it may have," which *State v. Kelly*, 571 A.2d 1286, 1289, 1291–92 (N.J. 1990), interpreted as banning possession for general self-defense purposes); N.J. STAT. ANN. § 2C:39-6.i (2008) (exempting irritant sprays but only for people who are eighteen or older); N.Y. PENAL LAW §§ 265.01, .20(a)(1)(f)(14)(b)(i), 270.05 (2010); R.I. GEN. LAWS. § 11-47-57 (1981); WIS. STAT. ANN. § 941.26(1)(b), (4)(a), (4)(k) (2007); REV. ORDINANCES OF HONOLULU §§ 40-2.3, 41-37.3(d) (2001); D.C. CODE §§ 7-2501.01(7)(C), -2502.01, -2502.13, -2502.14 (2009); BERKLEY, MICH. CODE OF ORDINANCES § 82-282(c) (2010); *see also* 21 OKLA. STAT. ANN. §§ 1272(A), 1273(C) (2007) ("offensive weapon[s]"); CINCINNATI, OHIO CODE OF ORDINANCES §§ 708-1-A (1988), -1-B (1988), -3(A)(1) (1994) ("any instrument, device or thing capable of inflicting death, and designed or specifically adapted for use as a weapon"); ADA, OKLA. CITY CODE §§ 50-76(a), -77 (2010) ("offensive or defensive weapon"); DUNCAN, OKLA. CITY CODE §§ 10-306, -307 (2010) (same); MOORE, OKLA. CODE OF ORDINANCES §§ 10-405, -406 (2010) (same); PRYOR CREEK, OKLA. CITY CODE § 5-4C-7 (2010) ("dangerous or deadly weapon"); Volokh, *supra* note 2, at 244–45 (citing the total bans on possession of stun guns in Hawaii, Massachusetts, Michigan, New Jersey, New York, Rhode Island, Wisconsin, the Annapolis/Baltimore area and Washington, D.C.).

5. In New York City and Washington, D.C., all minors are barred from having unsupervised access to guns even in the home. N.Y.C. ADMIN. CODE § 10-312; D.C. CODE § 7-2507.02, *amended by* D.C. Legis. Act. 17-422 (July 16, 2008).

6. 720 ILL. COMP. STAT. § 5/24-1(a)(3) (2010) (banning "carr[ying]" of irritant sprays by minors, with no exclusion for carrying in the home); *id.* § 5/24-1(a)(4) (specifically making it unlawful for any person to "[c]arr[y] or possess[] in any vehicle or concealed on or about his person *except when on his land or in his own abode . . . or fixed place of business . . . any pistol, revolver, stun gun or taser or other firearm,*" which further suggests that no such exclusion is present in subsection (3)) (emphasis added); *see also* SCOTT COUNTY, IOWA CODE §§ 18-2 to -4 (2007) (banning possession by minors of "any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed," outside the home only).

Young children shouldn't possess stun guns or irritant sprays. They are likely to use these devices irresponsibly, which may lead to severe and unnecessary pain for the child himself or a playmate. Young children are unlikely to know when to use the devices defensively, and unlikely to use them effectively when they do realize the need. And, for very young children, the child's risk of being the target of violent crime is much less than an adult's risk.

Yet it does not follow that older minors, such as sixteen-year-olds, should be denied these defensive tools. I will briefly discuss these tools in Part I, and then argue in Part II that the rule in most states—which don't bar older minors from possessing such almost entirely nonlethal weapons—is correct, and bans on such possession by older minors are mistaken.

I will also argue, in Part III, that the ban on older minors' possession of nonlethal weapons may even be unconstitutional under rights to bear arms (whether under the Second Amendment or under the at least forty-two state constitutional provisions that secure a right to bear arms in self-defense). Older minors should be seen as having the right to possess nonlethal arms, even if they don't have the right to possess deadly arms. I will make a similar argument as to the twenty-one state constitutions that explicitly recognize a right to defend life.

I also hope this analysis will help shed light on the broader debate about minors and constitutional rights. Minors have some constitutional rights but not others; as I'll suggest in the Conclusion, the right to bear nonlethal arms and the right to defend life are two extra test cases for any general rule about what rights minors should have.

I. NONLETHAL WEAPONS

First, a few words about the technology (which I discuss in more detail elsewhere).⁷ Stun guns temporarily disable people through electrical pulses that make the target's muscles spasm; irritant sprays either interfere with breathing, or cause intense but temporary pain, and thus quickly but temporarily disable the target. And unlike a baton or a similar weapon, stun guns and irritant sprays generally stop the target with one blow, can be used

Many states generally ban the concealed carrying of dangerous weapons, which likely covers irritant sprays and stun guns as well. *See* Volokh, *supra* note 2, at 238–44. Some of these statutes exempt people who have concealed carry licenses; but concealed carry licenses are unavailable in all those states to people who are under eighteen, so minors in those states are barred from carrying concealed stun guns and irritant sprays.

7. *See* Volokh, *supra* note 2, at 204–07. Citations for the assertions found in this subsection can be found in that article.

even by people who are weak or disabled, and can work at a distance as well as in contact mode. For instance, modern “Taser”-type stun guns—chiefly sold by the TASER Corporation—shock people by shooting two wires tipped with barbed darts up to fifteen feet.

Stun gun shocks are almost never fatal; the risk of death appears to be no more than 0.01% per use.⁸ By way of comparison, the death rate from gunshot wounds caused in deliberate assaults on others is likely about 20%, and from knife wounds caused in deliberate assaults on others is likely about 2%.⁹ Of course, all attacks are potentially deadly; pushing someone may cause him to fall the wrong way and die. But stun guns and irritant sprays are so rarely deadly that they merit being labeled nonlethal, especially in comparison to firearms and knives. Irritant sprays are even less lethal: I could find only one mention of a confirmed case of irritant spray being a major cause of death.¹⁰

Stun guns are apparently more effective than irritant sprays in some ways and less in other ways, so some users may prefer one and others the other. Pepper spray (the most effective irritant spray in use today) may still leave the attacker able to attack, though he is distracted and in pain. It’s especially likely to be ineffective when the attacker is less sensitive to pain because he’s drunk or on drugs.

To be most effective, pepper spray requires a hit on the suspect’s face rather than, as with a stun gun, any part of the suspect’s body. Pepper spray may in part blow back at the defender, which can leave the defender especially vulnerable if the attacker isn’t entirely stopped. And pepper spray has an effective range of only about seven feet (about the average width of a car), as opposed to fifteen feet for modern stun guns.¹¹ Because an attacker can lunge seven feet in a split second, pepper spray gives a defender less time to react.

At the same time, pepper spray can be used at a distance more than once, which is useful when one misses the first time, or needs to fight off multiple attackers. It is also much cheaper than a typical stun gun. Some people might, therefore, reasonably find stun guns more useful for self-defense, while others might reasonably choose irritant sprays.

8. *Id.* at 204–05.

9. *Id.* at 205.

10. *Id.* at 206.

11. *Id.*

II. WHY THE LAW SHOULD NOT DENY OLDER MINORS ACCESS TO NONLETHAL WEAPONS

All American states allow adults to possess irritant sprays. All but seven states (and a few cities) allow them to possess stun guns, at least at home. The overwhelming (and, in my view, correct)¹² view throughout the country is that adults should be able to have access to nonlethal weapons.

To be sure, such weapons could be used for crime, and may even be used in some crimes in which the criminal would not have used a lethal weapon (for instance, if someone wants to rob another without the risk of a felony murder conviction if something goes wrong, or if someone wants to cause pain to another but not kill them). But on balance, the value of the weapons for self-defense—and the fact that crimes with nonlethal weapons are much less dangerous than crimes with lethal weapons—has correctly led to the weapons being broadly allowed to law-abiding adults.

Nor is there good reason to apply a different rule for older minors. Older minors need self-defense as much as adults, and perhaps more. Girls age fifteen to seventeen are three times more likely to be victims of rape or sexual assault than women eighteen and over.¹³ Likewise, boys age fifteen to seventeen are nearly three times more likely to be victims of serious violent crime generally than are adults.¹⁴

And older teenagers are likely about as able as adults to effectively use a defensive weapon, and to know when the need for self-defense arises. This may be why many states have no prohibitions on minors' possessing stun guns or irritant sprays, and why several other jurisdictions set the cutoff ages at fourteen, fifteen, or sixteen, at least when the minor has a parent's consent.¹⁵

12. *Id.* at 209–16 (explaining why I think this is indeed the correct policy).

13. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUVENILE VICTIMIZATION AND OFFENDING, 1993–2003, at 2 tbl. 1 (2005), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/jvo03.pdf>. The information in this table doesn't limit the data by sex, but the source dataset—the National Crime Victimization Survey data—reports that the overwhelming majority of rape victims are female. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES, at tbl. 6 (2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus06.pdf>. *See* Lanning, *supra* note *, at 20–21 (making a similar argument).

14. JUVENILE VICTIMIZATION AND OFFENDING, *supra* note 13, at 4 tbl. 8.

15. *See* CAL. PENAL CODE §§ 12403.7(a), .8, 12651 (2011) (prohibiting both stun gun possession and irritant spray possession by under-sixteen-year-olds); FLA. STAT. ANN. §§ 790.18, .22 (2010) (prohibiting stun gun possession by under-sixteen-year-olds); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B(1)(i)–(ii), 129C (2011) (prohibiting irritant spray possession by under-fifteen-year-olds); REV. CODE WASH. § 9.91.160(1) (1994) (prohibiting irritant spray possession by under-fourteen-year-olds); PULLMAN, WASH. CITY CODE §§ 8.30.010(4), (5), .030(1) (prohibiting stun gun possession by under-fourteen-year-olds).

Older teenagers are likely to be less mature and more impulsive than adults, and might thus be tempted to misuse stun guns and irritant sprays, for instance for juvenile pranks or for revenge.¹⁶ But we do have a benchmark for determining when teenagers should be treated as mature enough to possess such nonlethal devices: Throughout the United States, teenagers sixteen and above are routinely given access to *deadly* devices, despite the risk that they will misuse those devices, and despite the temptation that those devices offer for such misuse.¹⁷

Those devices, of course, are cars. Car accidents involving sixteen and seventeen-year-old drivers kill over 1500 Americans each year.¹⁸ Older minors are tempted to drive cars too fast, or even deliberately race them. Some such minors use their cars to further other crimes, for instance, to get to and away from a robbery, or to more effectively deal drugs.

Yet despite that, we are willing to run the risk—even the certainty—of death and crime by generally allowing sixteen- and seventeen-year-olds to drive. We prohibit car misuse, and regulate car use to diminish the risk of misuse. We often even regulate sixteen- and seventeen-year-olds' car use more heavily than adults' car use. But our model for dealing with older minors' use of these deadly devices is regulation, not prohibition.

Minors are allowed to drive because the aggregate benefits are seen as more important than the injuries and deaths that minors' driving causes. When minors may drive, they can much more easily hold jobs. Letting minors drive is more convenient for their parents, who no longer have to drive their older children to school or to meet friends. Letting minors drive gives the older minors more freedom to do things that they enjoy. And driving sometimes even makes minors safer from crime, for instance if the

16. See Lanning, *supra* note *, at 20 (noting this concern).

17. The age thresholds range from 14½ years to 17 years, but 33 states set the threshold at 16, and 46 set it between 15½ and 16½. INS. INST. FOR HIGHWAY SAFETY, LICENSING AGES AND GRADUATED LICENSING SYSTEMS (2011), available at http://www.iihs.org/laws/pdf/us_licensing_systems.pdf. The outlier states are South Dakota (14½), Montana (15), Idaho (15), and New Jersey (17). *Id.*

18. The National Safety Council reports that there were 700 sixteen-year-old drivers and 1100 seventeen-year-old drivers involved in fatal accidents in 2007. NAT'L SAFETY COUNCIL, INJURY FACTS 104 (2009). But the total number of deaths caused would be a little less than 1800 since the 1800 double-counts accidents in which two sixteen- or seventeen-year-old drivers were involved but only one fatality resulted, and presumably some of the fatalities might have happened even if the sixteen- and seventeen-year-olds were being driven by older drivers rather than driving themselves. The National Highway Traffic Safety Administration's National Center for Statistics & Analysis ran a similar report at my request (also using 2007 data), and reported a total of 844 "fatalities in motor vehicle traffic crashes involving at least one sixteen-year-old driver" and 1408 when at least one seventeen-year-old was involved. E-mail from Lyn Cianflocco, NHTSA, to Cheryl Kelly Fischer, UCLA Law Library (Mar. 24, 2009, 13:09 PST) (on file with author). I use the lower INJURY FACTS estimate to be on the safe side.

minor can drive to a nighttime job instead of walking down a dark street to and from a bus stop.

There are similar benefits to letting older minors have nonlethal defensive weapons. When minors can effectively defend themselves, they can much more easily hold certain jobs, because they can be more secure when going to and from work. Letting minors have nonlethal weapons gives them more freedom to do things that they enjoy, and lets them enjoy those things more because they worry less about being attacked.

And letting minors have nonlethal weapons makes them safer from crime. Important as parents' convenience and minors' freedom of movement might be, why should we treat minors' right to defend themselves, including against rape and murder, as less important?¹⁹

Moreover, allowing minors access to nonlethal weapons can protect them without being likely to cost 1500 lives, as driving by sixteen- and seventeen-year-olds does. At most, it might lead to some extra crime by immature older minors, something that is largely deterrable by criminal punishment for misuse of the weapons. And such misuse of nonlethal weapons is more likely to be deterred than the misuse of cars, because most injuries involving cars are accidental and thus harder to deter, while most misuses of nonlethal weapons would likely be deliberate.

Some readers of drafts of this paper have argued that cars should be treated differently from stun guns and sprays because the purpose of cars is

19. Some minors might sometimes react to the increase in safety provided by nonlethal weapons by becoming more willing to engage in risky activities—for instance, to go to more dangerous parts of town, or not flee confrontations as quickly. This would operate much like some people's tendency to drive faster because of the perceived extra safety provided by seat belts, or some people's willingness to engage in riskier sexual behavior (including behavior that risks sexually transmitted diseases) because of the availability of abortion. Jonathan Klick & Thomas Stratmann, *The Effect of Abortion Legalization on Sexual Behavior: Evidence from Sexually Transmitted Diseases*, 32 J. LEGAL STUD. 407 (2003).

But while this might diminish the safety benefits of having sprays and stun guns available, it seems unlikely to eliminate them. Nonlethal weapons, while useful defensive devices, are unlikely to be seen as panaceas. The very fact that the weapons are nonlethal reminds their owners that the weapons are fairly low on the weapons ladder, and that gun criminals and knife criminals still pose an extremely serious danger. A seventeen-year-old girl who gets pepper spray because she is worried about being raped is unlikely to start feeling so safe that she would recklessly go places where she might meet a rapist who has a more dangerous weapon, or who might still be able to disarm her even if he is himself unarmed.

To be sure, in some situations, a nonlethal weapon might lead its owner to take some extra risks, especially if there is an important benefit to running such risks—for instance, if it encourages the owner to take a job in a dangerous part of town. But even if the safety benefits of having a defensive weapon are outweighed by the safety costs of going into the more dangerous part of town, so there is no net increase in safety, there is a net increase in freedom of action: The weapon allowed the person to take a job that she otherwise would have been afraid to take. That too is valuable.

to travel and the purpose of weapons is to injure people. But this is not, I think, a sound approach.

First, in the hands of law-abiding people, nonlethal weapons have two purposes besides just injuring people—to prevent crime (often by merely threatening to use the weapon), and to give peace of mind to those who carry them (and their parents), which can happen even if the device is never used or even brandished. Second, even the purpose to injure people should not be condemned when the injury would be as a result of lawful nonlethal self-defense. Nonlethal weapons, like cars, have both lawful purposes and unlawful ones. There is no reason to treat the weapons' purposes as more suspect or less worthy than the vehicles' purposes.

Consider also our attitudes towards martial arts classes, or for that matter towards self-defense fighting classes (such as Krav Maga). Knowing how to fight is useful for self-defense, but, as with a nonlethal weapon, such a skill can also be used in crime—whether robbery, bullying, revenge, an attack on a romantic rival, or many other things that an immature sixteen-year-old might want to do. While manual attacks only very rarely kill, the same is true for stun gun or irritant spray attacks. And manual attacks can inflict both serious pain (though probably less than with stun guns) and lasting injury (probably more likely than with stun guns or irritant sprays).

Yet our reaction to martial arts classes or self-defense fighting classes is not “save them for eighteen-year-olds, who are mature enough to use their training wisely.” Rather, we applaud minors' taking such classes, even when the minors are quite young.²⁰

This is partly because we think the classes are good exercise or teach discipline.²¹ But I take it that we would applaud a child's taking martial arts classes even if the child's purpose were expressly to learn self-defense, and even if the classes were designed for that rather than for more extended learning of martial arts as sport, philosophy, or fitness training.

We would recognize that self-defense is valuable enough that children should be able to learn to defend themselves even when that also teaches them to attack. Why shouldn't the same be true, especially as to older minors, for defensive tools as well as for defensive techniques?²²

20. Even children under ten can learn enough in martial arts classes to become much more able to hurt their peers, should they wish to; and children in their early teens can learn enough to become much more able to hurt adults.

21. The classes may also teach an ideology of responsibility and restraint in using martial arts techniques, but naturally some students can learn the techniques while rejecting the ideology.

22. We might also think that children who take martial arts classes are especially likely to be “good kids” because they are willing to work hard. But the main concern I've heard about older minors' possessing stun guns has to do with the minors' lack of maturity, and willingness

To be sure, these analogies are not perfect. Among other things, because nonlethal weapons are less lethal than cars it may be proper to let minors have nonlethal weapons even before they reach driving age. That is, in fact, the policy in most states, which put no age limit on stun guns and irritant sprays (as well as in Washington, which has set the irritant spray age limit at fourteen).²³

On the other hand, my suspicion about the likely rarity of children's misuse of nonlethal weapons is necessarily speculation. If an increase in legal nonlethal weapon possession by sixteen and seventeen-year-olds leads to thousands of stun gun or pepper spray pranks each year, and to very few defensive uses, the case for prohibiting such possession would be stronger.²⁴

But absent such evidence, we shouldn't dismiss older minors' need for self-defense, just as we shouldn't dismiss adults' need for self-defense. And our willingness to run what are likely much greater risks by letting older minors use lethal cars should further counsel in favor of running lesser risks by letting the older minors use nonlethal weapons.

III. OLDER MINORS' CONSTITUTIONAL RIGHTS OF MINORS TO BEAR ARMS AND TO DEFEND LIFE

At least forty-two states have clearly self-defense-based right to bear arms provisions in their constitutions,²⁵ and these include several of the states that limit minors from possessing stun guns or irritant sprays.²⁶ And the Supreme Court has held that the Second Amendment also protects the right to bear arms against state and local laws as well as federal ones.²⁷ I have argued elsewhere that the word "arms" in all these provisions should be interpreted to cover nonlethal personal defense weapons as much as lethal ones, and that the right to bear arms in self-defense should preclude stun gun bans and irritant spray bans.²⁸

to use such devices in anger or as a prank. Such lack of maturity is not inconsistent with willingness to work hard.

23. See REV. CODE WASH. § 9.91.160(1) (1994).

24. The analysis, however, would still have to weigh the degree to which stun gun possession deters attacks on older teenagers, and thus makes defensive uses unnecessary.

25. See KAN. CONST. bill of rights § 4 (amended 2010); DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 368 (Va. 2011); Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 196, 200 (2006).

26. For instance, Rhode Island, Wisconsin, and probably Oklahoma have right to bear arms provisions in their state constitutions, but leave minors unable to possess either stun guns or irritant sprays, whether at home or outside the home.

27. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

28. See Volokh, *supra* note 2, at 218–21; see also People v. Yanna, No. 10-10536-FH (Mich. Cir. Ct. Apr. 22, 2011), available at <http://volokh.com/wp/wp->

Moreover, at least twenty-one states have provisions that expressly secure a right to defend life and even to defend property—rights that have indeed been seen as being judicially enforceable.²⁹ As I argue in more detail elsewhere,³⁰ such rights should be read as including the right to possess devices that are necessary to effectively exercise the right.

The right to decide whether to beget children protects the right to use contraceptive devices to better implement one's decision. The right to protect property—which is expressly secured by all the states that also secure a right to defend life—has been read as including the right to use devices (such as weapons or traps) to stop animals that are consuming one's crops.³¹ The First Amendment presumptively protects the right to associate, to spend money, and to use technological devices (such as telephones, amplifiers, and the like) to make one's expression effective. Likewise, the right to defend life should protect the right to use nonlethal devices that help effectively defend life.

It seems quite likely—and sensible—that under-eighteen-year-olds³² would be seen as outside the scope of these rights where deadly weapons are concerned.³³ While no right-to-bear-arms provision expressly excludes

content/uploads/2011/04/yanna.pdf (holding state stun gun ban unconstitutional under the Second Amendment).

29. *Douglass v. Stephens*, 1 Del. Ch. 465, 471 (1821) (Ridgely, Ch.) (dictum) (“The right of enjoying and defending life consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and in resisting, even to the commission of homicide, where such resistance is necessary to save one’s own life.”); JOHN HOLMES, *THE STATESMAN, OR, PRINCIPLES OF LEGISLATION AND LAW* 179, 181 (Augusta, Severance & Dorr 1840) (treating the Maine Constitution’s “defending life” provision as securing a legally protected right to self-defense); TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* (Philadelphia, P.H. Nicklin & T. Johnson 1837) (likewise, as to “defending life” provisions more broadly); Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 *TEX. REV. L. & POL.* 399, 402–07 (2007) (citing the provisions, plus more than twenty cases that have held the provisions to be judicially enforceable); *see also* THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 35–36 (Boston, Little, Brown & Co. 1868) (enumerating the right “of . . . defending life” provisions as being related to the “fundamental rights of the citizen,” alongside provisions securing free speech, religious freedom provisions, freedom from unreasonable searches and seizures, and the like). *But see* *State v. Carruth*, 81 A. 922, 923 (Vt. 1911) (a rare case concluding that an expressly mentioned “defense of property” right is not judicially enforceable).

30. *See* Volokh, *supra* note 2, at 222–26.

31. *Id.* at 203.

32. As to people age eighteen to twenty, see Eugene Volokh, *Implementing the Right to Keep and Bear Arms in Self-Defense: An Analytical Framework and a Research Agenda*, 56 *UCLA L. REV.* 1443, 1510–12 (2009).

33. For an interesting exploration of the subject, see Katherine Hunt Federle, *The Second Amendment Rights of Children*, 89 *IOWA L. REV.* 609 (2004); *see also* Volokh, *supra* note 32, at 1508–09.

minors, it seems likely that such provisions were enacted with an understanding that minors did not have all the constitutional rights that adults have. This background understanding likely reflected a judgment that minors weren't mature enough to fully appreciate the consequences of their actions to themselves,³⁴ a judgment that would equally apply as to minors' potential dangerousness to others. And such a judgment particularly supports limits on minors' rights when the minors' immaturity could mean unnecessary death.

Nonetheless, the same general principle need not be applied to minors' access to *nonlethal* weapons. A minor's immature misuse of nonlethal weapons is much less dangerous than the minor's immature use of guns. And, as importantly, denying the minor the tools needed for self-defense is much more dangerous to the minor than is delaying the minor's ability to legally have sex, have children, or view pornography.

One reason that contraceptive rights and abortion rights—once accepted (however controversially) for adults—were extended to minors³⁵ is that denying minors such a right risks irreversible and harmful changes to the minors' lives:

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.

Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.³⁶

The same would apply to tools that defend against assault, rape, and murder, as well as to tools that defend against unwanted pregnancy and childbirth. Delaying the right to use such tools until the minor is eighteen

34. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977).

35. *Id.* at 693; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

36. *Bellotti v. Baird*, 443 U.S. 622, 642–44 & n.23 (1979) (Powell, J., writing for four Justices). The other four-Justice opinion, *id.* at 652–55 (Stevens, J., writing for four Justices), did not disagree on this score.

may deny the minor the right when she most needs it, and may likewise risk “grave and indelible” consequences.

This is especially true because the nonlethal weapon bans that I describe apply to minors even when their parents allow or even encourage the minors to get the weapons. In such a situation, we don’t have the difficult tension between parental rights and children’s rights that arises in cases where minors challenge parental notification or parental consent requirements.³⁷ And we do have the parent’s independent judgment that the minor is mature enough to use a nonlethal weapon for self-defense.

IV. USING THE QUESTION OF MINORS’ NONLETHAL WEAPONS RIGHTS TO THINK ABOUT MINORS’ CONSTITUTIONAL RIGHTS MORE BROADLY

The question whether minors have rights to bear arms or rights to defend life, when it comes to nonlethal weapons, is interesting for its own sake. But it can also help shed light on broader debates about minors’ constitutional rights.

Minors have many rights, like many aspects of the freedom of speech,³⁸ and the right to have the criminal charges against them proved beyond a reasonable doubt.³⁹ But they entirely lack other rights, such as the rights to marry, to exercise sexual autonomy, and to access highly sexually themed publications.⁴⁰ And they have weaker versions of other rights, such as the right to abortion.⁴¹

The Supreme Court has never adopted a comprehensive theory of which constitutional rights minors should be seen as having. The right to bear arms and the right to defend life are helpful additions to the set of cases against which the theory should be tested. As I’ve suggested, children probably shouldn’t have the same right to possess guns that adults enjoy, whether under the Second Amendment or under the at least forty-two state constitutional individual right to bear arms provisions that would exist even if *D.C. v. Heller* were reversed.⁴² But I have argued that they should have the right to bear nonlethal arms, and the right to defend life using nonlethal

37. See, e.g., *id.* I express no view here on whether a minor should have the right to some sort of judicial bypass of laws that ban the distribution of stun guns or irritant sprays to minors without parental permission. See, e.g., FLA. STAT. ANN. §§ 790.18, .22 (1994).

38. See, e.g., *McCConnell v. FEC*, 540 U.S. 93, 231–32 (2003).

39. *In re Winship*, 397 U.S. 358, 368 (1970).

40. See *Volokh*, *supra* note 32, at 1509 n.272.

41. See *Hodgson v. Minnesota*, 497 U.S. 417, 418 (1990) (abortion).

42. 554 U.S. 570 (2008).

arms. A general theory of minors' rights should be nuanced enough to reach sensible results in such cases.

And considering the right to bear arms and to defend life alongside other rights can help shift the minors' rights debate outside the standard left/right mold. Generally speaking, in many debates about minors' constitutional rights, the underlying constitutional claim itself is generally one that most strongly appeals to people on the left: the rights to abortion, contraception, and access to material related to sex are good examples. Moreover, since some of the most prominent debates involve children trying to assert rights without their parents' consent—abortion is the classic example—the minors' rights position is even more the preserve of political liberals, since it is in tension with parental rights, which are most closely linked to conservatives.

The one recent exception is the dispute in *McConnell v. FEC* about whether campaign finance law can restrict minors' right to contribute money to political candidates,⁴³ a right that conservatives these days tend to value more than liberals do. But this is a rare and low-profile exception.

The rights to bear arms and to self-defense are much more often associated with conservatives than with liberals. Many liberals are firm believers in such rights, but the rights are generally more part of a conservative legal agenda than a liberal one. Including such rights in thinking about minors and the Constitution may help people, both on the left and the right, see things that they would otherwise miss: They may help scholars and judges think more precisely about the special status of minors in a way that's less clouded by sympathy or antipathy for the underlying rights more generally.

43. *McConnell*, 540 U.S. at 231–32.