

FIREARMS FOR FELONS? A PROPOSAL TO PROHIBIT FELONS FROM POSSESSING FIREARMS IN VERMONT

*“[The NRA] is committed to preserving the right of all law-abiding individuals to purchase, possess and use firearms for legitimate purposes as guaranteed by the Second Amendment to the U.S. Constitution.”*¹

*“We [the Brady Campaign] should make it harder for convicted felons, the dangerously mentally ill, and others like them to get guns in the first place.”*²

INTRODUCTION

These two statements from opposite sides of the gun control debate demonstrate that, despite a great deal of disagreement about gun control in this country, there is fairly wide consensus that felons should not own guns. This is because it is well established that felons are more likely to commit crimes in the future.³ The federal government bans possession of firearms by almost all felons because of the link between past crimes and future violence.⁴ In contrast, Vermont has no state law that bans firearms for felons. Vermont prosecutors can take no action (besides referral to federal agencies) against felons who illegally possess guns. This Note proposes that Vermont pass a law similar to the federal law to ban felons from owning guns, which would keep Vermont safer as well as protect Vermonters’ gun rights. This Note also proposes such a statute.

Federal restrictions on gun ownership by felons date back to the 1930s.⁵ Since then, federal firearm legislation has expanded to restrict the sale of guns to various prohibited classes of people such as the mentally ill.⁶ The law aims to prevent guns from falling into the wrong hands and to

1. NAT’L RIFLE ASS’N – INST. FOR LEGISLATIVE ACTION, <http://www.nraila.org/About/> (last visited Mar. 28, 2011) (emphasis added).

2. BRADY CAMPAIGN TO END GUN VIOLENCE, <http://www.bradycampaign.org/about/> (last visited Mar. 28, 2011) (emphasis added).

3. See, e.g., PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (1994), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (stating that 67.5% of prisoners released in 1994 were re-arrested within three years); see also Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, N.Y. TIMES, Apr. 28, 2006, www.nytimes.com/2006/04/28/nyregion/28homicide.html (noting that 90% of convicted killers in New York City between 2003–2005 had criminal records).

4. LANGAN, *supra* note 3, at 4 (showing link between past convictions and future crimes).

5. Alfred M. Ascione, *The Federal Firearms Act*, 13 ST. JOHN’S L. REV. 437, 438–39 (1939); Federal Firearms Act of 1938, 15 U.S.C. § 901 (repealed 1968).

6. 18 U.S.C. § 922(g) (2006).

diminish gun violence.⁷ Many states also passed separate laws restricting who can own guns. However, Vermont has no law banning any adult from owning firearms, and all citizens are allowed to carry concealed weapons without a permit.⁸ There are no restrictions on felons, or those adjudicated mentally incompetent, from owning or buying firearms.⁹

A Vermont statute restricting firearm ownership would serve two major purposes. First and most importantly, it would help keep guns away from individuals who are likely to commit gun crimes. Second, it would provide a more selective and targeted approach to a prohibited persons law than the current federal framework. The proposed statute has fewer restrictions on some classes of people who do not pose as much of a threat for future violence (i.e., not all felons would be banned for life).

Part I of this Note discusses current federal firearms law and the development and rationale behind the different categories of people prohibited from gun ownership. Part II examines the different state approaches in prohibiting felons from possessing firearms. Part III discusses the current legal culture in Vermont and proposes a statute restricting gun ownership for felons and other narrowly defined classes. The proposed statute bans most felons and those convicted of domestic violence crimes from owning firearms for a period of time after their conviction. The proposed statute also prohibits certain individuals with a history of mental illness from owning firearms for a period after their illness has subsided.

I. FEDERAL GUN CONTROL LAWS

The U.S. Constitution guarantees the right to bear arms under the Second Amendment.¹⁰ However, the exact meaning of the amendment has long been disputed, and as early as 1939 the Supreme Court upheld restrictions on gun ownership stemming from the National Firearms Act.¹¹ More recently, the Court held in *Heller* that the Second Amendment provides for an individual

7. Gun Control Act of 1968, Pub. L. No. 90-618, § 101 (“[T]he purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence. . .”).

8. See *Frequently Asked Questions*, VERMONT STATE POLICE, <http://www.dps.state.vt.us/vtsp/faq1.html#VermontGun> (last visited Mar. 28, 2011) (“Vermont does not at this time require or issue gun permits.”).

9. See OFF. OF THE ATT’Y GEN. OF VT., SELECTED VERMONT LAWS GOVERNING THE USE AND POSSESSION OF FIREARMS, <http://www.atg.state.vt.us/issues/gun-laws.php> (last visited Feb. 16, 2011) (showing no such laws).

10. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

11. See *United States v. Miller*, 307 U.S. 174 (1939) (upholding a tax on short-barreled shotguns); see also National Firearms Act of 1934, 26 U.S.C. § 1132 (1934).

right to bear arms.¹² The *Heller* Court also stated that this right was not unlimited.¹³ In fact, the Court explicitly mentioned several types of regulations that are constitutionally permissible, such as regulating felons and the mentally ill.¹⁴

The federal government first banned felon possession of firearms in 1938 with the passage of the Federal Firearms Act.¹⁵ Congress passed the Act in the wake of increased gangster violence during Prohibition.¹⁶ Federal laws also expanded to forbid the mail order of firearms, and the importation of certain guns.¹⁷ The next law regulating prohibited classes was the Gun Control Act of 1968.¹⁸ The law was passed after high profile assassinations (including those of President John F. Kennedy and Martin Luther King, Jr.) raised awareness of the problems with guns in the hands of dangerous individuals, and it expanded the categories of individuals denied gun ownership.¹⁹ Among the stated goals of the law is to “keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background or incompetency, and to assist law enforcement authorities in the States . . . in combating the increasing prevalence of crime in the United States.”²⁰

The most recent federal comprehensive firearms law dealing with prohibited classes of individuals is the Firearms Owners Protection Act.²¹ This Act modified much of the previous federal gun control legislation and consolidated previous lists of prohibited persons.²² The current law provides

12. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”). The Court has also incorporated the Second Amendment to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3050 (2010).

13. *Heller*, 554 U.S. at 595.

14. *Id.* at 626. “Like most rights, the right secured by the Second Amendment is not unlimited. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.” *Id.*

15. Federal Firearms Act of 1938, 15 U.S.C. § 901 (repealed 1968).

16. David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 590 (1986).

17. *Id.* at 596–97.

18. Gun Control Act of 1968 (codified as amended at 18 U.S.C. §§ 921–929 (2006)); see also Daniel Brenner, *The Firearms Owners’ Protection Act and the Restoration of Felons’ Right to Possess Firearms: Congressional Intent Versus Notice*, 2008 U. ILL. L. REV. 1045, 1051–57 (2008) (listing the classes of people prohibited from possessing a firearm by the Gun Control Act).

19. Brenner, *supra* note 18, at 1050–51; Symposium, Sen. Richard J. Durbin, *Taking Guns Seriously: Common Sense Gun Control to Keep Guns Out of the Hands of Kids and Criminals*, 18 ST. LOUIS PUB. L. REV. 1 (1999).

20. S. REP. No. 90-1097, at 2–3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113–14.

21. Firearms Owners’ Protection Act (FOPA), Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. §§ 921–929 (2006)).

22. Hardy, *supra* note 16, at 641–42.

as part of the Congressional Findings and Declaration that “it is not the purpose of this title to place any undue or unnecessary Federal restrictions or [b]urdens on law-abiding citizens with respect to t[h]e acquisition, possession, or use of firearms.”²³ However, the law sets out a long list of people who are prohibited from possessing and selling firearms—not all of whom have broken any laws.²⁴ The list of categories for prohibited persons is long, and the categories are broad.²⁵ It includes: felons (those convicted of a crime “punishable by a term of imprisonment exceeding one year”),²⁶ fugitives, users or addicts of illegal drugs, those adjudicated mentally defective, illegal aliens, anyone dishonorably discharged from the military, those who have renounced their U.S. citizenship, anyone subject to certain types of restraining orders, and anyone convicted of a misdemeanor domestic violence charge.²⁷ The prohibition on felon gun ownership is especially broad, covering anyone convicted of almost any felony, whether violent or not, and the prohibition lasts for life.²⁸ The only exceptions to the statute are for certain white-collar crimes and crimes punishable by less than two years imprisonment that a state classifies as a misdemeanor.²⁹

Recently, Congress added a new category of prohibited person to the law. This amendment to Title 18 disqualifies anyone with a domestic violence misdemeanor record, or who is subject to a restraining order, from possessing a gun.³⁰ This so-called Lautenberg Amendment expands the reach of the law to non-felons.³¹ The rampant domestic violence problem in the United States inspired the passage of the provision.³² Specifically, there is strong evidence that links the presence of guns in a domestic violence situation with an increased probability of homicide.³³

Current federal law requires a defendant to “knowingly” engage in illegal possession in order to achieve a conviction.³⁴ This means that one must be aware that one is a felon and know that one is in possession of a

23. Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. §§ 921–929) (quoting Pub. L. No. 90-618, § 101).

24. See § 922(g) (prohibiting certain types of aliens from owning guns).

25. *Id.*

26. § 922(g)(1).

27. *Id.*; see also Hardy, *supra* note 16, at 639 (discussing what constitutes prohibited persons).

28. § 922(g).

29. § 921(a)(20).

30. The Domestic Violence Offender Gun Ban, § 922(g)(9).

31. *Id.*

32. Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 823 (2000) (noting more women are injured by domestic violence than by car accidents, muggings, and stranger rapes combined).

33. *Id.* at 824.

34. Hardy, *supra* note 16, at 646–47.

firearm. This is a departure from the strict liability standard of the older statutes that made illegal possession of a firearm a strict liability offense.³⁵ The statute proposed here also includes a knowledge requirement.

Under the federal statute, it is not the amount of time that is actually served that matters, but the potential sentence for the crime.³⁶ For example, if a person is convicted of a crime that carries a maximum sentence of two years, but only spends a month in prison, that person can be banned from firearms possession for life. The language of the statute also invites uncertainty over what types of convictions count for purposes of the statute.³⁷ After a circuit split, the decision in *Small v. United States* established that convictions in foreign countries do not count as predicate convictions.³⁸ However, problems can still arise over what qualifies as a conviction.³⁹

Ordinarily, the prohibitions for disqualified individuals never expire.⁴⁰ However, there is a mechanism for the return of rights to a released felon: he or she can petition for a restoration of rights, and if this is granted, he or she is allowed to possess firearms again.⁴¹ This mechanism restores rights to individuals who can demonstrate that they do not pose a threat to public safety.⁴²

Some problems also arise with the federal law due to its broad scope. In several instances, the law criminalizes a large swath of the population without a compelling rationale. For instance, the prohibition against all felons sounds compelling, but the prohibition covers a huge range of possible predicate offenses.⁴³ The law excludes some felonies, such as antitrust violations, but generally includes almost all other felonies.⁴⁴ Therefore, some offenses will

35. *Id.* at 647.

36. See § 922(g)(1) (prohibiting firearm possession for any person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year”).

37. *Id.*

38. *Small v. United States*, 544 U.S. 385, 391 (2005) (“The statute’s language does not suggest any intent to reach beyond domestic convictions.”). *But see* John N. Pantazis, *A Small Step Backwards: Foreign Convictions After the Supreme Court Decision in Small v. United States*, 92 IOWA L. REV. 271 (2006) (disagreeing with the conclusion in *Small*).

39. Hardy, *supra* note 16, at 640–41.

40. C. Kevin Colombo, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 695–96 (2009) (stating that a ban is for life unless the Attorney General lifts the disability).

41. Brenner, *supra* note 18, at 1069.

42. See § 925 (“[T]he Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety.”).

43. See § 922(g) (prohibiting anyone convicted of a crime punishable by more than a year of incarceration from possessing a firearm).

44. § 921(a)(20)(A).

disqualify a person from exercising their Second Amendment rights while bearing no apparent relation to firearms violence.⁴⁵

The broad scope of the law is also apparent in the provision barring anyone “who is an unlawful user of or addicted to any controlled substance.”⁴⁶ This approach would criminalize the possession of a firearm by the high proportion of Vermont’s citizens who use some form of illegal drugs, especially marijuana.⁴⁷ At the same time, the law does nothing to prohibit alcoholics from owning firearms even though consumption of alcohol is clearly linked with increases of gun violence.⁴⁸

Admittedly, certain prohibited categories in the federal law are more appropriately enforced by federal authorities. This is especially true for aliens, those who have renounced their citizenship, and those dishonorably discharged from the military.⁴⁹ Since immigration law and the military are governed by federal law and regulation, it makes sense to leave enforcement in this area to federal authorities.

One area of the federal law reflected in the proposed state statute is the prohibition against mentally unsuitable individuals possessing weapons.⁵⁰ Some evidence suggests that individuals adjudicated mentally defective can pose a threat to local communities.⁵¹ There have also been recent high profile shootings by individuals suffering from mental illnesses.⁵² The proposed statute for Vermont also prohibits gun possession for certain mentally ill individuals, but the restriction is narrower than the current federal statute, barring only those committed for serious mental illness as an adult.

45. Adam Winkler, *Scrutinizing the Second Amendment*, 165 MICH. L. REV. 683, 721 (2007).

46. § 922(g)(3).

47. OFF. OF NAT’L DRUG CONTROL POLICY, STATE OF VERMONT PROFILE OF DRUG INDICATORS (2008), available at www.whitehousedrugpolicy.gov/statelocal/vt/vt.pdf.

48. See, e.g., *Reducing Gun Violence by Addressing Heavy Drinking and Off-Premise Alcohol Outlets*, SCIENCE DAILY, Mar. 10, 2009, www.sciencedaily.com/releases/2009/03/090310161422.htm (linking gun violence to alcohol consumption); *Sheriff to Deputies: Don’t Mix Alcohol, Guns*, ASSOCIATED PRESS, Nov. 11, 2008, available at <http://www.msnbc.msn.com/id/27658642/> (noting that a large number of sheriffs misbehaved with guns while under the influence).

49. § 922(g).

50. *Id.*

51. Marvin S. Swartz et al., *Violence and Severe Mental Illness: The Effects of Substance Abuse and Nonadherence to Medication*, 155 AM. J. PSYCHIATRY 226, 226 (1998), available at <http://ajp.psychiatryonline.org/cgi/reprint/155/2/226.pdf>.

52. Rich Daly, *People with Mental Illness Target of New Gun Law*, PSYCHIATRIC NEWS, Feb. 1, 2008, at 1, available at <http://pn.psychiatryonline.org/content/43/3/1.1.fullm> (mentioning recent incidents, such as the Virginia Tech shootings); see also Katie Pickard & John Cloud, *If You Think Someone is Mentally Ill: Loughner’s Disturbing Warning Signs*, TIME, Jan. 11, 2011, available at www.time.com/time/nation/article/0,8599,2041733-2,00.html (discussing possible signs that the Tucson Arizona shooter was mentally ill).

The proposed statute also defines firearms in the same way as federal law, thus leaving muzzle loading rifles and modern hunting bows mostly unregulated.⁵³ This approach carries the risk of felons and others committing violence with these types of weapons. However, violence from muzzleloaders has historically been low.⁵⁴ Furthermore, the availability of muzzleloaders and bows to felons enables them to hunt without breaking the law, which can decrease their motivation to obtain illegal firearms.⁵⁵ This could also eliminate any legal challenge in Vermont based on the right to hunt outlined in the Vermont Constitution.⁵⁶

To the extent that the proposed statute mirrors the federal law, it adds enforcement abilities for local police in areas where they have more at stake in prosecutions than federal authorities. Otherwise, the statute attempts to present a more narrowly tailored list of individuals who police should target in their efforts to keep firearms out of the hands of dangerous individuals.

II. HOW NEIGHBORING STATES DEAL WITH FELONS AND GUNS

States regulated firearms before the federal government. Georgia passed the first such state law in 1837, which related to the carrying of pistols.⁵⁷ The U.S. Supreme Court recognizes that state laws regulating firearms are constitutional.⁵⁸ Most states have some form of statute prohibiting certain classes of individuals from owning firearms.⁵⁹ These statutes take varying forms, but contain common prohibitions against felons and other violent criminals from possessing firearms.⁶⁰ Similarities in the state laws include: 1) the statutes are more specifically tailored than the federal statute; 2) the focus is primarily aimed towards felons; and 3) the felony provisions are broad. These statutes reflect real concerns about the states' ability to prevent felons from possessing firearms and the ability to

53. § 921(a)(3).

54. See CRAIG PERKINS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: NATIONAL CRIME VICTIMIZATION SURVEY 1993–2001: WEAPON USE AND VIOLENT CRIME (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/wuvvc01.pdf> (showing vast majority of crimes are committed by conventional firearms).

55. See VT. FISH & WILDLIFE, VERMONT HUNTING, FISHING, AND TRAPPING DATES, http://www.vtfishandwildlife.com/calendaritems/2011_Calendar/Seasons_List_2011.pdf (2010) (listing Vermont hunting seasons including bow and muzzleloader seasons).

56. VT. CONST. ch. 2, § 67.

57. Hardy, *supra* note 16, at 589 n.20.

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

59. U.S. DEP'T JUSTICE, SURVEY OF STATE PROCEDURES RELATED TO FIREARM SALES, 2005 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ssprfs05.pdf>.

60. *Gun Laws Prohibited Persons by State, Definition, Graph and Map*, STATEMASTER.COM, http://www.statemaster.com/graph/gov_gun_law_pro_per-government-gun-laws-prohibited-persons (last visited Dec. 2, 2009).

enforce these provisions. This Note does not attempt a 50-state survey of the laws regarding prohibited persons. Instead, this Note focuses on the laws in the states surrounding Vermont to give an idea of the different approaches taken by neighboring states.

In New Hampshire, it is a felony for a convicted felon to possess a firearm.⁶¹ The statute applies broadly to any person convicted of a variety of felonies, whether committed in New Hampshire or any state or territory under U.S. jurisdiction.⁶² There is also a separate statute providing stiff penalties for “armed career criminals” who possess guns.⁶³ Additionally, New Hampshire has penalties for attempting to purchase a gun if the purchaser is the subject of a protective order.⁶⁴

In Massachusetts, where a license is required to possess a firearm, a license may not be obtained by any person who is:

an alien, a minor, a person who has been adjudicated a youthful offender . . . including those who have not received an adult sentence or a person who has been convicted of a felony . . . or of the unlawful use, possession or sale of narcotic or harmful drugs.⁶⁵

The Massachusetts prohibited persons law is one of the broader state prohibitions, and Massachusetts has some of the most restrictive gun laws in the nation.⁶⁶ The Massachusetts prohibited persons law explicitly includes several classes of persons not covered by the federal law, such as individuals who committed crimes as juveniles, and those who committed certain misdemeanors.⁶⁷

In New York, possession of firearms by any person convicted of a felony, or “serious offense” is also prohibited, as is possession by non-U.S. citizens.⁶⁸ Furthermore, in some instances (like obtaining a handgun license), a past mental illness can prevent firearm ownership.⁶⁹ Many other states also bar certain mentally ill individuals from owning firearms.⁷⁰

61. N.H. REV. STAT. ANN. § 159:3 (2002).

62. *Id.*

63. § 159:3-a.

64. § 159-D:3.

65. MASS. GEN. LAWS CH. 140, § 122 (2008).

66. See BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, STATE SCORECARD MASSACHUSETTS, <http://www.bradycampaign.org/stategunlaws/scorecard/MA> (last visited Feb. 18, 2011) (ranking Massachusetts the third most restrictive after California and New Jersey).

67. § 122B.

68. N.Y. PENAL LAW § 400.00 (McKinney 2008); N.Y. PENAL LAW § 265.01(5) (McKinney 2008).

69. § 400.00.

70. Joseph R. Simpson, *Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by*

These restrictions often track the federal prohibition regarding mental illness.⁷¹ However, New York's standard is much more restrictive for some firearms licenses, barring individuals who have suffered from "any mental illness or been confined to any hospital or institution, public or private, for mental illness."⁷²

These state statutes show that states commonly enact laws to regulate firearm possession as they see fit. Furthermore, these laws can vary based on the nature and character of the state. All states bordering Vermont in some way prohibit gun ownership by potentially dangerous classes of people. Vermont may not need the same firearm laws as more densely populated states like New York or Massachusetts. The federal system allows Vermont to regulate firearm possession in a way that is appropriate for its particular values and heritage. The statute proposed below suggests a way for Vermont to regulate firearm possession by certain classes of people while still protecting Vermonters' rights.

III. PROPOSED STATUTE FOR VERMONT

A. Background for Legislation

Vermont is a unique place in terms of gun legislation for several reasons. To begin with, Vermont has some of the least restrictive firearms laws in the country. The Brady Campaign scored the state 8 out of 100 (100 being the strictest gun laws).⁷³ In addition, Vermont has a low population, a low crime rate, and few homicides.⁷⁴ Vermont also has a constitution that is very protective of personal liberties, with provisions in some areas that are

Individuals with a History of Treatment for Mental Illness, 35 J AM. ACAD. PSYCHIATRY LAW 330 (2007), available at <http://www.jaapl.org/cgi/content/full/35/3/330/T1>.

71. *Id.* at 333.

72. § 400.00(1)(d).

73. *Brady State Scorecard Vermont*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/stategunlaws/scorecard/VT> (last visited Feb. 17, 2011).

74. *See, e.g.*, VT. DEP'T OF PUB. SAFETY, VERMONT CRIME REPORT 2008 (2008), http://www.dps.state.vt.us/cjs/crime_08/homicide_08.htm (last updated Sept. 2, 2008) (showing between 8 and 17 homicides yearly between 1999 and 2008); VT. DEP'T OF PUB. SAFETY, VERMONT CRIME REPORT 2008: HOMICIDE, http://www.dps.state.vt.us/cjs/crime_08/weapon_08.htm (2008) (last updated Apr. 22, 2009) (showing nine firearm deaths in 2008); U.S. CENSUS BUREAU, STATE RANKINGS—STATISTICAL ABSTRACT OF THE UNITED STATES, VIOLENT CRIMES PER 100,000 POPULATION—2006, <http://www.census.gov/statab/ranks/rank21.html> (last visited Feb. 23, 2011) (showing Vermont ranked 48th in terms of violent crime); U.S. CENSUS BUREAU, STATE RANKINGS—STATISTICAL ABSTRACT OF THE UNITED STATES, RESIDENT POPULATION, <http://www.census.gov/compendia/statab/2011/ranks/rank01.html> (last visited Mar. 27, 2011) (showing Vermont ranked 49th in population).

more far reaching than the U.S. Constitution.⁷⁵ The Vermont Constitution is explicit in its protection of an individual's right to own guns, and Vermont has a relatively high rate of gun ownership.⁷⁶ The Vermont Constitution also guarantees the right to hunt and approximately 11% of Vermont's population hunts.⁷⁷

The constitutional protections for firearms combined with few firearms laws make Vermont one of only two states where any adult can carry a concealed weapon without a permit.⁷⁸ There is also no permit requirement for handguns or rifles.⁷⁹ However, there are some regulations on gun ownership, such as the prohibition on carrying loaded rifles (but not pistols) in vehicles, and these regulations have been upheld in the courts.⁸⁰ The lack of legislation may be due to the relatively low rate of gun violence in the state, as well as the rural tradition of firearms as tools for hunting and farm use.

Vermont is also different in its approach to felons' rights. For instance, Vermont is one of only two states that extend to felons the right to vote while incarcerated.⁸¹ This means that those convicted of felonies can vote

75. See, e.g., VT. CONST. ch. 1, art. 11 (describing Vermont restrictions on search and seizure, which are written more broadly than the U.S. Constitution); VT. CONST. ch. 1, art. 11 (granting protection for conscientious objectors).

76. VT. CONST. ch. 1, art. 16 (“[T]he people have a right to bear arms for the defence [sic] of themselves and the State.”); Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings from the Behavioral Risk Factor Surveillance System, 2002*, 116 PEDIATRICS 370, 372 (2005), available at <http://pediatrics.aappublications.org/cgi/content/full/116/3/e370/> (estimating 45% of adults in Vermont live in a house with a firearm).

77. VT. CONST. ch. 2, § 67 (“The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed [sic], and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.”); U.S. FISH & WILDLIFE SERV., NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION, VERMONT (2006), available at www.census.gov/prod/2008pubs/fhw06-vt.pdf.

78. VT. STAT. ANN. tit. 13, § 4003 (2009) (carrying concealed weapon only prohibited if one's “intent or avowed purpose” is to hurt another); *Alaska Concealed Handgun Permits*, ALASKA DEP'T OF PUB. SAFETY, <http://www.dps.state.ak.us/statewide/permitslicensing/concealedhandguns.aspx> (last visited March 25, 2011).

79. *Frequently Asked Questions*, VT. STATE POLICE, <http://www.dps.state.vt.us/vtsp/faq1.html#VermontGun> (last visited Feb. 18, 2011) (“Vermont does not at this time require or issue gun permits.”).

80. VT. STAT. ANN. tit. 10 § 4705(b) (2010); *State v. Duranleau*, 128 Vt. 206, 210, 260 A.2d 383, 386 (1969) (explaining that the statute prohibiting the carrying of loaded rifle or shotgun in automobiles does not violate the Vermont Constitution).

81. See Deb Markowitz, *Opinions of Opinions*, OPINIONS OFF. OF THE VT. SEC'Y OF STATE, May 2009, at 6, available at http://www.sec.state.vt.us/secdesk/Opinions/2009/May_09.html (“Felons can vote in Vermont and serve in elected office.”); see also PROJECT VOTE, FELON VOTING RIGHTS BY STATE, available at http://www.projectvote.org/images/publications/Felon%20Voting/felon_voting_rights_by_state_05-11-2010.pdf (showing Vermont and Maine have no felon disenfranchisement).

both from jail and upon their release.⁸² Also, while in most states a felony is a crime punished by more than one year incarceration, in Vermont, misdemeanors can be punished by up to two years.⁸³ These combined factors suggest a state that is very protective of personal liberties and reluctant to take those liberties from any of its citizens. Accordingly, it is necessary to draft a statute compatible with existing Vermont laws and traditions.

The proposed law aims to respect the legal traditions of Vermont and leave its general approach to gun control unchanged. The law will not criminalize anything that is allowed under federal law. Instead, the goal of the law is to ensure that Vermont law enforcement have the power and flexibility necessary to enforce practical restrictions on felons possessing firearms.

B. Why a New Gun Law?

Given that Vermont currently has a fairly low rate of gun violence with minimal firearms legislation, why should the state pass a new law? There are two reasons. The first is to address the serious safety concern of firearms in the hands of dangerous individuals. Felons are simply more likely to commit crimes in the future than non-felons.⁸⁴ While there are other indicators, such as gender, which can also predict whether someone is likely to commit a crime, a prohibited persons law is useful because it spares the state from having to screen all individuals for the possibility of violent behavior.⁸⁵ States already record who commits felonies, and police can easily determine who may carry firearms and who may not. Courts have also upheld the right of the government to ban felons from owning firearms.⁸⁶ Therefore, courts would not likely overturn a prohibited persons law.

The second reason to enact this law is that state police and prosecutors are often in a better position to prosecute felon in possession laws. Felon in possession charges may not necessarily be a top priority for the Vermont U.S. Attorney's Office, especially when these charges are unrelated to more serious charges.⁸⁷ Felon in possession charges may possibly be more likely to

82. Markowitz, *supra* note 80, at 6.

83. VT. STAT. ANN. tit. 13, § 1 (2009).

84. *See supra* Introduction (discussing the likelihood that felons will commit further crimes).

85. *See, e.g.,* McGinty, *supra* note 3 (noting that men committed 93% of murders in 2003–2005).

86. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *United States v. Bass*, 404 U.S. 336, 349–50 (1971).

87. *See About Us*, U.S. ATTORNEY'S OFF., DIST. OF VT., http://www.justice.gov/usao/vt/about_us/index.html (last visited Feb. 17, 2011) (listing enforcement priorities of Vermont U.S. Attorney's Office; illegal gun possession is not listed).

be brought on the basis of resources and federal priorities as opposed to local needs. Local law enforcement may have far more interest in pursuing everyday felon in possession charges, and distributing this power to the local level could result in more consistent enforcement.

Currently, Vermont state prosecutors may not prosecute felons in possession of firearms.⁸⁸ Besides state prosecutions, there are currently three other options that Vermont law enforcement agents can employ to disarm a felon. The first option is to make a referral to the Bureau of Alcohol, Tobacco, Firearms & Explosives (BATFE), which is responsible for enforcing federal firearms laws.⁸⁹ In fact, federal firearms enforcement is the main law enforcement activity of the BATFE.⁹⁰ The BATFE can then decide whether to pursue an investigation and decide whether to refer the case to federal prosecutors.

Besides the BATFE, the only other two options currently available to law enforcement to keep guns away from felons are: 1) prohibit possession of firearms as a condition of parole, or 2) prohibit possession of firearms for a person who is on a program of community service.⁹¹ These two options are insufficient because they only cover very narrow classes of prohibited persons. Because these combined approaches are insufficient to keep guns away from felons, Vermont law should be changed to mirror some portions of federal law.

By proactively passing a law that restricts dangerous individuals from owning guns, Vermonters can protect both their freedom and safety. If a person prohibited from owning a gun were to commit a serious high-profile crime with a firearm, not only would innocent citizens be hurt unnecessarily, but the possibility for a reactionary gun control law would increase. While a law broader than the one proposed here would probably not add any new restrictions, because the federal law is already fairly broad, a law passed in the wake of a tragedy could be unnecessarily broad and punitive.⁹² This

88. See NAT'L RIFLE ASS'N – INST. FOR LEGISLATIVE ACTION, FIREARMS LAWS FOR VERMONT (2008), available at www.nraila.org/statelawpdfs/VTSL.pdf (showing no state law banning felons from ownership).

89. About, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <http://www.atf.gov/about/mission/> (last visited Feb. 18, 2011) (explaining the role BATFE plays in enforcing federal firearms laws).

90. William F. Couch & William J. Shughart II, *Crime, Gun Control, and the BATF: The Political Economy of Law Enforcement*, 30 FORDHAM URB. L. J. 617, 621 (2003).

91. VT. STAT. ANN. tit. 33, § 5552 (2001); VT. CODE R. § 13.130.014(C)(2)(a)(i); *Vermont Summary of State Firearm Policies*, LEGAL COMMUNITY AGAINST VIOLENCE, <http://www.lcav.org/states/vermont.asp> (last updated Apr. 19, 2010).

92. Examples of controversial wide-ranging laws passed in the wake of tragedies include Jessica's Law, FLA. STAT. § 948.061 (2005), and the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-

would unnecessarily restrict the rights of law-abiding Vermonters, and Vermont would miss the chance to pass a workable, pragmatic prohibited persons law.

The proposed statute is designed to prevent potentially dangerous individuals from possessing firearms while preserving the highest degree of freedom for Vermonters to engage in the lawful use of firearms, such as hunting, self-defense, and target shooting. To ensure the law only criminalizes possession for those who pose a danger, the law 1) only targets those who have committed either recent or serious crimes; 2) does not prohibit most felons from owning firearms indefinitely; and 3) sets up a liberal system by which felons can regain their rights. The law also poses no additional regulatory imposition on gun dealers or owners, since it in no way exceeds the prohibitions of the current federal law. Furthermore, for consistency and ease of enforcement, many of the definitions and sections are identical to federal law.⁹³

The proposed law sets out an enumerated list of felonies to specifically prohibit only felons with serious or violent criminal convictions. This list is similar to the original list used in drafting the National Gun Control Act.⁹⁴ These listed felons are forever suspended from future firearms possession absent either a state or federal restoration of rights. Other felons are only temporarily banned as a probationary measure to ensure that they refrain from future violent activities. Provided that non-violent felons comply with the law for five years they automatically have their rights restored. The idea behind this approach is to avoid forever criminalizing gun possession for non-dangerous individuals and to provide an incentive for future good behavior.

The language regarding prohibitions for mental illness closely tracks the federal law.⁹⁵ However, the proposed language only covers mental adjudications that occur after adulthood. The proposed statute also adopts language identical to the Lautenberg Amendment because guns are often used in situations of domestic violence. According to one study, “one in three female homicide victims and one in twenty male homicide victims are killed by current or former spouses or boyfriends each year; 60 percent of these homicides were committed using a firearm.”⁹⁶ Another study found that

56, 115 Stat. 272 (2001).

93. See 18 U.S.C. §§ 921–922 (2006) (defining firearms, felons, and qualifying domestic violence convictions).

94. See Hardy, *supra* note 16, at 639 (noting the Act “barred felons, fugitives from justice, drug users, and persons adjudicated ‘mental defectives’ or committed to an institution from the receipt of guns that had been shipped in interstate commerce”).

95. § 922(g)(4).

96. Judith Cutler, ABA Commission on Domestic Violence, 2005 Law Student Writing Competition, *Guns In the Green Mountains*, at 2 (quoting Elizabeth Richardson Vigador & James A.

access to firearms yields a more than five-fold increase in risk of intimate partner homicide when considering other factors of abuse, which “suggests that abusers who possess guns tend to inflict the most severe abuse” on their partners.⁹⁷ In Vermont, more than half of all homicides take place in situations of domestic violence.⁹⁸ Combined with the high rate of gun ownership, it makes sense to impose stricter limits on the ability of domestic abusers to own guns.⁹⁹ By providing police the ability to disarm abusers they gain another tool with which to prevent possible future violence.¹⁰⁰

However, there can be negative consequences to a law that imposes a perpetual ban on anyone convicted of a domestic violence misdemeanor. For instance, a firearm prohibition can impoverish the family by making it impossible for the batterer to retain his or her job and support the family.¹⁰¹ This is especially true if the abuser’s profession involves handling guns often, such as the military, law enforcement, or gun sales.¹⁰² In these instances, not only can a loss of the job be harmful for the family, but the prospect can create a disincentive to report such abuse out of fear of economic hardship.¹⁰³

The proposed law attempts to resolve some of these problems by allowing a judge to consider the economic impact of a conviction. The judge may then tailor the prohibition, based on these considerations. For example, the prohibition could prohibit guns at home but allow firearms while on the job. The law aims to balance the importance of preventing gun-related domestic violence with an acknowledgement that in some cases a strict application of the rule may do more harm than good. The proposed rule also acknowledges that some restraining orders can be obtained based only on a

Mercy, *Disarming Batterers: The Impact of Domestic Violence Firearm Laws*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 157 (Jens Ludwig & Philip J. Cook eds., 2003)).

97. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multi-Site Case Control Study*, 93 *AM. J. OF PUB. HEALTH* 1089, 1092 (2003).

98. VT. DEP’T OF PUB. SAFETY, *VERMONT CRIME REPORT* (2008), http://www.dps.state.vt.us/cjs/crime_08/circ_08.html (last updated Apr. 22, 2009) (showing 9 out of 16 murders committed with firearms).

99. Okoro, *supra* note 75, at 370–76.

100. Babak Lalezari, *Domestic Violence: Enough is Enough, Any Force is Enough*, 1 *PHOENIX L. REV.* 295, 295 (2008) (citing Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 *NEW ENG. J. MED.* 1084, 1090 (1993)).

101. See Mark M. Stravsky, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 *FORDHAM URB. L.J.* 1759, 1761 (2003) (showing strong negative effects of job loss based on 18 U.S.C § 922(g) disabilities).

102. See Jason M. Fritz, Comment, *Unintended Consequences: Why Congress Tossed the Military-Family Out of the Frying Pan and Into the Fire When It Enacted the Lautenberg Amendment to the Gun Control Act of 1968*, 2004 *WIS. L. REV.* 157, 157–58 (2004) (describing potential problems for families with domestic violence who depend on a spouse in the military).

103. *Id.* at 158.

preponderance of evidence.¹⁰⁴ Because this standard is substantially lower than that required to prove a felony or obtain an involuntary mental commitment,¹⁰⁵ the prohibition automatically lapses after a period of five years—provided that no crime is committed in the interim.

Requiring that a person have knowledge of the possession is intended to prevent unnecessary convictions based on accidental possession. This intent element will not exculpate an individual merely because he is unaware of the law. However, should an individual be unaware he or she is in possession of a firearm (for instance one left in the back of a car by a friend) he or she may be able to avoid charges.

The goal behind a liberal acceptance of rights restoration is to avoid litigation over state/federal conflicts and to encourage case-by-case determinations for individuals who might no longer pose a threat to society. A liberal restoration standard is also consistent with Vermont law permitting felons to vote and run for office.¹⁰⁶

The proposed statute borrows heavily from the federal framework, but is more narrowly tailored than the current federal law. It is designed to be a preventive, rather than punitive measure. The law is not designed to add an additional measure of punishment for criminals in Vermont, but instead to prevent high-risk individuals from owning firearms.

C. Proposed Vermont Statute

1. Definitions.

a. A serious felony is a felony (as defined in this section) that includes one of the following crimes: murder, voluntary manslaughter, arson, aggravated assault, rape, kidnapping, armed robbery, extortion, sexual assault, assault with a deadly weapon, any felony involving domestic violence, drug possession with the intent to distribute, burglary, child abuse, conspiracy to commit murder, and human trafficking.

b. A felony is defined as any crime punishable by more than two years incarceration.

c. A firearm is defined as:

104. VT. STAT. ANN. tit. 15 § 1103(b) (2010) (“The plaintiff shall have the burden of proving abuse by a preponderance of the evidence.”).

105. See VT. STAT. ANN. tit. 18 § 7616(b) (2000) (“The state shall have the burden of proving its case by clear and convincing evidence.”).

106. See Markowitz, *supra* note 80, at 6 (“Felons can vote in Vermont and serve in elected office.”).

- i. any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
- ii. the frame or receiver of any such weapon;
- iii. any firearm muffler or firearm silencer; or
- iv. any destructive device. Such term does not include an antique firearm. All terms in this paragraph section shall be defined as under 18 U.S.C. § 921.

2. Possession by Prohibited Persons.

a. Any person convicted of a serious felony in any court of the United States shall not knowingly purchase, possess, or sell a firearm.

b. Any person convicted of a felony (not a serious felony) shall not knowingly possess a firearm for a period of five years after the completion of their sentence. This period shall start over if during the five year waiting period the felon is convicted for any other crime, excepting speeding tickets.

c. Any individual who, as an adult, has been adjudicated mentally incompetent or involuntarily committed to a mental institution shall not knowingly possess a firearm.

d. Any individual who: is subject to a court order that—

i. was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

ii. restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

iii. includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

iv. by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

v. who has been convicted in any U.S. court of a misdemeanor crime of domestic violence (as defined in 18 U.S.C. § 921), shall not knowingly possess a firearm for a period of ten years after the expiration of the court order or the completion of their sentence.

3. Penalty.

a. Violation of this law is a misdemeanor, punishable by up to two years in prison or a fine of \$5,000.

b. Judges are empowered to exempt or modify firearm prohibitions for individuals convicted of any of the predicate crimes. Such modifications may allow for occupational use of firearms or include other appropriate provisions.

4. Restoration of Rights and Extensions of Prohibition.

a. All Vermont residents prohibited from carrying a firearm may petition the Vermont Attorney General for a restoration of rights once every year. If such a request is granted, the Attorney General has the discretion to restrict the type, number, and manner of carry for the firearms that the resident is allowed to possess.

CONCLUSION

This Note proposes a Vermont statute that prohibits certain classes of dangerous individuals from possessing firearms. Enactment of this or a similar law will hopefully lower gun crimes stemming from dangerous individuals with guns. The law also respects Vermonters' rights. Vermont gun owners who already possess firearms legally will have nothing to fear from the new law, and they will not be subject to any new restrictions. Furthermore, gun shops and others who deal in firearms will not have to comply with any new regulations, as the proposed state law is narrower than the pre-existing federal law.

Keeping firearms out of the hands of felons and other potentially dangerous individuals is an area of broad consensus in the gun control debate.¹⁰⁷ By passing a pragmatic, non-punitive, targeted prohibited persons law Vermont can be safer and still maintain a great deal of freedom for lawful owners of firearms. Enactment of this or a similar law will likely decrease the danger of violence from criminals using guns and allow prosecutors more freedom to pursue cases they consider important in their communities. For these reasons, Vermont should consider promptly passing a prohibited persons law similar to the one suggested in this Note.

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107. *See supra* Introduction for quotes from Brady Campaign and NRA.

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