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**Journal of Scholarly Perspectives**

**Title**

Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life

**Permalink**

<https://escholarship.org/uc/item/64r2v5wp>

**Journal**

Journal of Scholarly Perspectives, 6(01)

**Author**

Volokh, Eugene

**Publication Date**

2010

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## Eugene Volokh

Gary T. Schwartz Professor of Law

Eugene Volokh is a nationally recognized expert on the First Amendment, cyberspace law, harassment law and gun control. Before joining UCLA School of Law, he clerked for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit and Justice Sandra Day O'Connor of the U.S. Supreme Court.

Professor Volokh is the author of *The First Amendment: Problems, Cases, and Policy Arguments* (3d ed. 2007); *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* (4th ed. 2010); more than 60 law review articles; and more than 80 op-eds. He is a member of the American Law Institute and the *American Heritage Dictionary* Usage Panel, an academic affiliate for Mayer Brown LLP, and the founder and co-author of The Volokh Conspiracy (<http://volokh.com>), a Weblog that gets more than 25,000 unique visitors per weekday.

His most recent major articles are *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights To Keep and Bear Arms and Defend Life*, 62 *Stanford L. Rev.* 199 (2009); *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 *UCLA L. Rev.* 1443 (2009); *Symbolic Expression and the Original Meaning of the First Amendment*, 97 *Georgetown L.J.* 1057 (2009); and *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 *Harvard L. Rev.* 1813 (2007).

# NONLETHAL SELF-DEFENSE, (ALMOST ENTIRELY) NONLETHAL WEAPONS, AND THE RIGHTS TO KEEP AND BEAR ARMS AND DEFEND LIFE\*

Eugene Volokh\*\*

**O**wning a stun gun or Taser is a crime in seven states and several cities. Carrying irritant sprays, such as pepper spray or Mace, is probably illegal in several jurisdictions. Even possessing irritant sprays at home is illegal in Massachusetts if you're not a citizen.

Yet in most of these jurisdictions, people are free to possess guns in the same situations where stun guns or irritant sprays are illegal. So people who have deadly devices are fine. But those who have a nonlethal weapon—perhaps because they have religious, ethical, or emotional compunctions about killing, or because they worry about killing someone by mistake, or because they worry about a family member misusing the gun—are criminals.

Other jurisdictions ban some people (such as felons and minors) from possessing not just stun guns and irritant sprays but also firearms. Others bar all people from possessing all three kinds of weapons in all public places, in public universities, in public housing, or on public transportation systems. People there are entirely stripped of the ability to defend themselves with any of the devices that are most effective for self-defense.

I will argue below that such regulatory schemes are generally bad policy. And I will argue that they are unconstitutional, perhaps under the Second Amendment and in any event under those state constitutions that secure a right to bear arms or a separate right to self-defense.

**LAWS THAT RESTRICT  
NONLETHAL  
WEAPONS WHEN  
GUNS ARE ALLOWED**

**S**tun guns and irritant sprays might sometimes be abused in situations where firearms wouldn't be (though each such abuse would likely be much less harmful). Robbers might be likelier to stun or spray victims than shoot them,

precisely because this won't expose the robber to a murder charge. People looking for nondeadly revenge, or trying to pull a prank, might stun or spray their victims even if they wouldn't have tried to kill them.

But bans focused on nonlethal weapons are likely to be unproductive or counterproductive. First, nonlethal weapon bans, especially city- and state-level ones, are likely to have only modest effects on stun gun or irritant spray crime, precisely because much such crime would be perpetrated by serious criminals. Someone who is not stymied by the laws against robbery or rape is unlikely to be much influenced by laws against carrying stun guns or sprays.

It's possible that total possession and sales bans might make nonlethal weapons harder to get. But many criminals would have no trouble visiting a neighboring city or even neighboring state to buy the weapon. And if the nonlethal weapons prove to be useful enough for criminals, a lively black market would likely develop.

Second, a crime committed with a stun gun or irritant spray will often otherwise have been committed with a gun or a knife. Thus, banning nonlethal weapons might decrease painful stunnings or pepper spray attacks, but might increase knife and gun crimes that cause death, serious injury, and psychological trauma. And even if the stun gun crime or irritant spray crime would otherwise have been committed using only manual force, that too could have led to serious pain, lasting injury, or even death.

Third, banning nonlethal weapons is likely to decrease self-defense by law-abiding citizens much more than it would decrease attacks by criminals. A woman who wants a nonlethal weapon for self-defense is much more likely to be deterred by the threat of legal punishment for illegally buying, possessing, or carrying the weapon than a criminal would be. And if she can't get the nonlethal weapon that works best for her, she might be less able to protect herself against robbery, rape, abuse, or even murder.

Why then do some jurisdictions treat nonlethal weapons—especially stun guns—worse than firearms? Not, I think, because allowing stun guns is indeed more dangerous than allowing only firearms. Rather, it's because firearms bans draw public hostility in ways that stun gun bans do not.

There is no well-organized National Stun Gun Association with millions of members who fight proposed stun gun bans. There is no stun gun culture in which people

remember their fathers' taking them to the woods to Taser a deer. There is no stun gun hunting, target-shooting, or collecting that makes people want to protect stun gun possession even when they feel little need to have stun guns for self-defense.

Relatedly, because irritant sprays and stun guns are still fairly uncommon compared to guns, laws that partly deregulate guns are sometimes enacted with little thought given to other weapons. And the state stun gun bans date back to before Taser International started widely marketing guns to the public. When the bans were enacted, stun guns might well have seemed like exotic weapons that were rarely used for self-defense by law-abiding citizens. But today stun guns are practically viable self-defense weapons, owned by nearly 200,000 people. The self-defense interests of prospective stun gun owners and of prospective irritant spray owners ought not be ignored.

Much of this, of course, is speculation. There is no available data about how often stun guns or irritant sprays are used either criminally or defensively. But for the reasons I mentioned above, I think such speculation strongly points toward the choice selected by forty-three states (minus a few cities) as to stun guns and by all states (minus some restrictions in a few states) as to sprays: allowing stun gun and irritant spray possession, and criminalizing only misuse.

This is especially so given the value of self-defense, a value that is constitutionally recognized. (Irritant sprays and stun guns are largely banned in other English-speaking Western countries, but this seems to be part of those countries' generally more restrictive view of self-defense rights.) If there is uncertainty, we should resolve this uncertainty in favor of letting law-abiding people use nonlethal tools to defend themselves and their families.

**LAWS THAT  
RESTRICT BOTH  
NONLETHAL  
WEAPONS AND  
HANDGUNS**

**I**n several states, even law-abiding adults generally can't get licenses to carry concealed handguns, and can't possess or carry stun guns. In some other states, eighteen-to-twenty-year-olds are restricted this way. In some jurisdictions, both handguns and irritant sprays are likewise unavailable to all people in public places, or to some people anywhere. And many universities, as well as some public housing systems and some public transportation systems, ban handgun, stun gun, and irritant spray possession on the premises, even when the premises are residences (such as university dorm rooms). Law-abiding citizens in those states

or places are thus entirely barred from defending themselves in public using the most effective defensive weapons.

Legislatures that impose such broad weapons bans can at least say they are worried about the criminal uses of weapons generally, not just about the relatively rare situations where a stun gun or irritant spray would be misused but a handgun would not be. And indeed nonlethal weapons can be used both for crime and for self-defense.

But this is likewise true for the criminal law justification of self-defense: Allowing lethal self-defense lets some deliberate murderers get away with their crimes by falsely claiming self-defense. The killer is alive, and able to claim he was reacting to a threat from the victim. The victim is dead, and can't rebut the killer's claim. The killer doesn't have to prove the victim had a weapon, since it is enough for him to claim that the victim said something threatening and reached for his pocket. And the prosecution has to disprove the killer's claims beyond a reasonable doubt.

Sometimes the jury will see through the killer's false claims of self-defense, and conclude the claims are false beyond a reasonable doubt. But sometimes it won't, and the killer will be acquitted. And sometimes a killer will be emboldened to kill by the possibility that he might get away on a self-defense theory. The self-defense defense, like a weapon, is crime-enabling as well as defense-enabling—and yet it still allowed, and rightly so.

Irritant sprays are likewise crime-enabling as well as defense-enabling; yet they are now legal nearly everywhere in the United States, with the narrow exceptions noted above. The same is true of the skills taught in fighting classes, whether the classes focus on street fighting (such as Krav Maga), Asian martial arts, or boxing. Yet these classes are not only lawful, but generally seen as socially valuable, even when they focus chiefly on self-defense and not just on physical fitness.

Likewise, stun guns and irritant sprays should generally be legal to possess and to carry, because of the protection they offer to law-abiding citizens and despite the modest extra risk of crime they pose. The few jurisdictions that ban such weapons should largely repeal the bans, even for older minors and nonviolent felons. (Young children and violent felons seem especially likely to misuse the weapons, so bans on their possessing such weapons do make sense.) The many jurisdictions that don't have such bans shouldn't enact them.

The arguments above aren't just policy arguments. They are also constitutional arguments. To begin with, the right to keep and bear arms in self-defense is secured by the Second Amendment, and by at least forty state constitutions, including those of many states that restrict nonlethal weapons.

And stun guns and irritant sprays should be treated as “arms” for constitutional purposes. *District of Columbia v. Heller* rightly rejected the view “that only those arms in existence in the 18th century are protected by the Second Amendment.” Instead, *Heller* held, “Just as the First Amendment protects modern forms of communications [such as the Internet], and the Fourth Amendment applies to modern forms of search [such as heat detection devices], the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”<sup>1</sup>

*Heller* does limit “arms” to weapons that are “of the kind in common use.”<sup>2</sup> Many state constitutional cases have used similar definitions. But this definition arose in cases involving weapons that were seen as unusually dangerous, not unusually safe. In particular, *Heller* reasons that the “limitation [to weapons in common use] is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>3</sup> This suggests that uncommon weapons that are less dangerous than the common and protected weapons should indeed be outside the limitation, and should thus be constitutionally protected.

Moreover, twenty-one state constitutions, including several in states that ban stun guns or contain cities that ban stun guns, expressly secure a right to “defend[] life.” To quote one such provision, “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”<sup>4</sup> And the “defending life” and “protecting property” provisions have been read as securing a judicially enforceable right.

Nonlethal weapon bans substantially burden people’s right to “defend[] life and liberty,” because they take away a device without which defending life and liberty becomes much harder. And as with other constitutional rights, such a substantial burden should be treated as presumptively unconstitutional.

Consider, for instance, contraceptive bans, which deny people devices for preventing contraception but leave people free to use device-less techniques such as the rhythm method. Despite the availability of the rhythm method, the bans remain substantial burdens on people's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>5</sup> The right to control one's reproduction is implicated not just by overt prohibitions on begetting or not begetting a child, such as the mandatory sterilization at issue in *Skinner v. Oklahoma*.<sup>6</sup> It is also implicated by bans on devices that are especially useful for avoiding pregnancy, since such bans substantially burden the exercise of the right to control reproduction. The same logic should apply to bans on those devices that are especially effective at defending life.

Likewise, the freedom of speech includes the freedom to use physical devices, such as telephones, the Internet, loudspeakers, and the like in order to speak, because they too are important devices for making speech effective. And, similarly, the right to defend property—a close cousin of the right to defend life—has been read by courts to include the right to use devices to kill wild animals that have been destroying one's property. No one suggests that the right to defend property lets one defend one's crops against moose, but only with one's bare hands, just as no one suggests that the right to control one's reproduction protects only device-free contraceptive techniques and not condoms. The right to defend life should likewise presumptively include the right to use those devices needed to make self-defense especially effective.

Of course, these rights are not unlimited in scope. For instance, though courts have held that the right to speak often includes the right to use loudspeakers, it might not include the right to use loudspeakers that are used at night or are too loud, and are thus excessively distracting. Similarly, one can argue that the right to defend life does not include the right to possess deadly weapons, precisely because those weapons pose special dangers of death well beyond the dangers inherently posed by the recognition of self-defense as a defense to a charge of homicide. A court may conclude that such a dangerous right must be expressly secured through a right-to-bear-arms provision, rather than being implicitly found in a provision protecting the defense of life.

But when it comes to nonlethal weapons, the extra danger of crime posed by their possession is not particularly great, and the burden on the right to defend



life posed by bans on nonlethal weapons is great indeed. So the general principle outlined above should apply: the right to defend life should include the right to possess the nonlethal weapons needed for effective self-defense, much as other rights include the right to possess and use devices needed to effectively exercise those rights.

\* \* \*

There are powerful arguments for limiting deadly defensive tools, especially firearms, given the grave harms that gun misuse routinely causes. I don't generally endorse such arguments, partly because I think gun bans will do little to stop the misuse but much to stop lawful defensive use. But I see the force of those arguments.

Yet the crime control arguments for gun bans do not apply with anywhere near the same force to stun guns and to irritant sprays. And the self-defense arguments against gun bans do apply to such nondeadly weapons. On balance, people's right to defend themselves nonlethally with stun guns ought to be protected—both as a matter of sound policy and as a matter of our nation's and states' constitutions.

\* This excerpt is based on *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009).

\*\* Gary T. Schwartz Professor of Law, UCLA School of Law, volokh@law.ucla.edu.

1 128 S. Ct. 2783, 2791 (2008).

2 *Id.* at 2815-16.

3 *Id.* at 2817.

4 PA. CONST. art. I, § 1.

5 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

6 316 U.S. 535 (1942).