WHAT WE CAN LEARN FROM *BRITT V. STATE*:

HOW OVERCRIMINALIZATION IS ERODING A FUNDAMENTAL RIGHT

INTRODUCTION

In *Britt v. State*,[1] the North Carolina Supreme Court held that the 2004 version of North Carolina General Statute section 14-415.1 was unconstitutional as applied to Barney Britt, a convicted felon who regained his right to bear arms seventeen years before the statute's enactment. The statute, as it remains today, prevents all convicted felons—regardless of the date of conviction or the nature of the crime—from possessing *any* firearms *anywhere* at *any time*.[2] The North Carolina Supreme Court held that the statute was unconstitutional *as applied* to Barney Britt, noting that Britt did not commit a violent felony and had become a fully productive member of society in the years following his conviction. It is significant that the court did not make a determination as to the constitutionality of the statute on its face, as this will likely lead (and in fact has already led) to a host of constitutional challenges from individual plaintiffs who wish to have their right to keep and bear arms restored.[3] Despite this certainty of numerous appeals, the North Carolina Supreme Court showed discretion by not holding section 14-415.1 unconstitutional on its face as this allowed the General Assembly time to correct the overbreadth of the statute through the legislative process. On July 20, 2010, the General Assembly of North

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[1] 363 N.C. 546, 681 S.E.2d 320 (2009).

[2] *See infra* notes 20–22 and accompanying text.

[3] *See, e.g.*, State v. Whitaker, No. 21A10, 2010 N.C. LEXIS 737, at 14 (N.C. Oct. 8, 2010) (holding that the plaintiff in that case was not entitled to have his right to possess firearms restored and stating that N.C. GEN. STAT. § 14-415.1 was not an unconstitutional ex post facto law or Bill of Attainder). *See infra* Part IV.B for a more thorough examination of *Whitaker*.

Carolina responded to the court's holding in *Britt* by enacting Session Law 2010-108, which provides for a small number of convicted felons to petition the court to have their right to keep and bear arms restored twenty years after their other citizenship rights have been restored.[4] This Recent Development will argue that the General Assembly's proposed solution to the issue presented in *Britt* does not adequately protect the fundamental right of convicted felons to keep and bear arms in accordance with the North Carolina Constitution and the United States Constitution.[5] Additionally, this Recent Development will suggest several reasons why section 14-415.1 should be modified to allow some convicted felons (namely, non-violent offenders) to possess firearms, at least in their homes for the purpose of self-defense, without having to petition the courts and without waiting twenty years as the General Assembly's "fix" to this problem requires.

This Recent Development will proceed in four parts. Part I surveys the legislative history of North Carolina General Statute section 14-415.1 and examines the reasoning of the North Carolina Supreme Court's decision in *Britt v. State*. Part II outlines how the recent decisions of the United States Supreme Court in *District of Columbia v. Heller*[6] and *McDonald v. Chicago*[7]

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[4] 2010 N.C. Sess. Law 108 (to be codified at N.C. GEN. STAT. § 14-415.4). See *infra* Part IV.A for a more detailed discussion of this enactment.

[5] The United States Constitution provides that "the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II, § 2. Similarly, the North Carolina Constitution asserts that "the right of the people to keep and bear arms shall not be infringed." N.C. CONST. art. I, § 30.

[6] 554 U.S. ___, 128 S. Ct. 2783 (2008).

[7] ___U.S.___, 130 S. Ct. 3020 (2010).

serve to reinforce the holding of *Britt*. Part III further draws out the implications of *Heller* and *McDonald* and sets forth several reasons why the General Assembly's blanket ban on the rights of convicted felons to keep and bear arms is unconstitutionally overbroad; more specifically, Part III will show how the General Assembly's determination that all convicted felons are presumptively dangerous is not only unjustified but utterly baseless in light of the vast overcriminalization of both state and federal law. As follows, there is not even a rational basis for restricting the rights of *all* convicted felons after they complete their sentences and their other civil rights have been restored. Part IV then addresses the General Assembly's attempt at ameliorating the statute's overbreadth but shows that it falls far short of preserving the fundamental rights of convicted felons; moreover, Part IV proposes a solution to the overbreadth of section 14-415.1 that will serve to vindicate the rights of convicted felons while at the same time imposing reasonable restrictions to protect the public from harm. Specifically, Part IV will argue that the rights of non-violent convicted felons should be restored following completion of their sentences and that even some violent offenders should have the opportunity to have their rights restored after they have completed their sentences, after a specified time elapses without further incident, and after a hearing before a judge who would ultimately determine if the convicted felon's rights should be restored.

I. THE ROAD TO *BRITT*: FROM REASONABLE RESTRICTION TO OUTRIGHT BAN

A. The Legislative History of General Statute section 14-415.1

The General Assembly of North Carolina first passed the Felony Firearms Act ("Act") in 1971. Since that time, the Act has undergone several significant changes. In 1971, the Act provided:

> It shall be unlawful for any person who has been convicted in any court in this State, in any other state of the United States or in any federal court of the United

> States of a crime, punishable by imprisonment for a term exceeding two years, to purchase, own, possess or have in his custody, care or control, any handgun or pistol.[8]

Significantly, the Act's initial prohibition on the possession of handguns and pistols was subject to the exception that any convicted felon who completed her sentence and regained her other civil rights was not bound by the Act.[9] The General Assembly eliminated this exception in 1975 by repealing section 14-415.2;[10] moreover, the General Assembly made its first substantial revision to the text of section 14-415.1 during that same legislative session.[11] Specifically, after the 1975 amendment, convicted felons were subjected to a five-year waiting period after completing their sentences and regaining their other civil rights before they could regain their

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[8] N.C. GEN. STAT. § 14-415.1 (1971). The General Assembly further modified the Act in 1973 in order to clarify any ambiguity over what constituted a "pistol." Specifically, the legislature replaced the words "or pistol" with "any other firearms with a barrel length of less than 18 inches or an overall length of less than 26 inches." 1973 N.C. Sess. Law c. 1196, s. 1.

[9] N.C. GEN. STAT. § 14-415.2 (1971).

[10] 1975 N.C. Sess. Law c. 870, s. 3.

[11] The amended statute read, in pertinent part:

> It shall be unlawful for any person who has been convicted in any court in this State, of any other state of the United States or of the United States of feloniously violating any provision of Articles 3,4,6,7,8,10,13,14,15,17,30,33,36,36A,52A or 53 of Chapter 14 of the General Statutes to purchase, own, possess, or have in his custody, care, or control any hand gun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.

1975 N.C. Sess. Law c. 870, s. 1.

right to keep and bear arms.[12] Notably, however, the Act did not apply to all convicted felons (only those convicted of crimes enumerated in the Act), and it in no way limited the rights of felons (even those convicted of violent felonies) to possess any firearm not restricted by the Act, including rifles and shotguns. Furthermore, the General Assembly also enacted another provision in 1975 that allowed felons who were subject to the Act to own and possess handguns (and other restricted firearms) within their own homes and businesses.[13]

Following the 1975 amendment, the General Assembly did not adopt any substantial changes to section 14-415.1 for nearly twenty years; in 1995, however, the statute was once again amended. The 1995 version of section 14-415.1 replaced the enumerated felonies in the Act with the words "a felony," thereby bringing all felons within the ambit of the Act regardless of the nature of the crime committed.[14] More specifically, the Act provided that "[p]rior convictions which cause disentitlement under [the Act] shall only include [f]elony convictions in North Carolina that occur before, on, or after December 1, 1995" [15] and "[v]iolations of criminal

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[12] *See id*.

[13] 1975 N.C. Sess. Law c. 870, s. 2. This exception for possession in one's home or business comports with the United States Supreme Court's rationale set forth in its recent decisions. *See infra* Part II.

[14] 1995 N.C. Sess. Law c. 487, s. 3.

[15] The North Carolina Supreme Court has rejected arguments that § 14-415.1 is an unconstitutional ex post facto law or Bill of Attainder. *See* State v. Whitaker, No. 21A10, 2010 N.C. LEXIS 737, at *14–16 (N.C. Oct. 8, 2010). A more detailed discussion of these constitutional arguments is beyond the scope of this Recent Development. For more

laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar to the crimes covered in subdivision (1) which are punishable where committed by imprisonment for a term exceeding one year."[16] The amended Act also removed the five-year waiting period, making the ban on handguns and other short firearms permanent for anyone who is ever convicted of a felony.[17] Significantly, however, the 1995 amendment still only restricted the possession of handguns and other short firearms, and it preserved the right of all convicted felons to possess any firearm (including handguns) within their homes or lawful places of business.[18]

In 2004, the General Assembly amended the statute once more, this time imposing a blanket ban on the possession of any and all firearms[19] by any person ever convicted of a felony. The 2004 amended statute states, in pertinent part:

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information, see Plaintiff Appellant's New Brief at 17–74, *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (2009) (No. 488A07).

[16] N.C. GEN. STAT. § 14-415.1(b)(1), (3) (1995).

[17] 1995 N.C. Sess. Law c. 487, s. 3.

[18] *Id.*

[19] An exception to the blanket ban was put forth by the General Assembly in 2006 in the form of an "antique firearm" exception. *See* 2006 N.C. Sess. Law c. 259, s. 7. In short, "antique firearms" can be described as "[a]ny muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder substitute, and which cannot use fixed ammunition." N.C. GEN. STAT. § 14-409.11(a)(3) (2010). To be sure, any firearm that cannot use fixed ammunition is almost entirely useless for the purpose of self-defense in today's society due to the time it takes to load and reload weapons that cannot fire fixed ammunition.

> It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (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, or its frame or receiver, or (ii) any firearm muffler or firearm silencer.[20]

It is this version of the statute that completely divested Barney Britt of his right to keep and bear arms for the purpose of self-defense, and it is this version of the statute that the North Carolina Supreme Court held unconstitutional "as applied" to Barney Britt.[21]

B. The Facts and History of Britt v. State

Barney Britt was convicted of felony possession with intent to sell and deliver a controlled substance in 1979, a crime for which he served four months of active imprisonment and underwent two years of supervised probation.[22] Britt completed his probation in 1982 and had his right to possess arms fully restored in 1987 pursuant to the 1975 version of section 14-415.1 that remained in force until 1995.[23] Britt's fully restored rights were again restricted in 1995 with another amendment to the statute; specifically, Britt was no longer permitted to possess handguns or other short firearms (except in his home or place of business), but he maintained his right to possess shotguns and rifles without restriction.[24] Finally, Britt was

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[20] N.C. GEN. STAT. § 14-415.1(a) (2004).

[21] Britt v. State, 363 N.C. 546, 547, 681 S.E.2d 320, 321 (2009).

[22] *Id.* at 547, 681 S.E.2d at 321.

[23] *See supra* Part I.A.

[24] 1995 N.C. Sess. Law c. 487, s. 3.

divested of his right to possess any type of firearm—even in his home or place of business—following the 2004 amendment to section 14-415.1.[25]

After the General Assembly passed the 2004 amendment, Barney Britt initiated a conversation with the Sheriff of Wake County (where Britt resided) to ask if the amendment applied to him.[26] The Sheriff informed Britt that the amended statute did apply to Britt and, as a result, Britt voluntarily divested himself of all of his firearms so that he would be in compliance with the statute.[27] Britt then brought a civil action against the State of North Carolina, claiming that section 14-415.1 unconstitutionally infringed his right to keep and bear arms.[28] The district court rejected his claim, and the court of appeals affirmed, reasoning that "[a] convicted felon is prohibited from possessing a firearm if the State shows a rational relation to a legitimate state interest, such as the safety and protection and preservation of the health and welfare of the citizens of this state."[29] Moreover, the court of appeals held that section 14-415.1 was not an unconstitutional ex post facto law or Bill of Attainder,[30] and it rejected Mr. Britt's contention that the restriction "violate[d] the Second Amendment to the United States Constitution and Article I, section 30 of the North Carolina State Constitution."[31] Judge Elmore dissented, stating

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[25] N.C. GEN. STAT. § 14-415.1(a) (2004).

[26] *Britt*, 363 N.C. at 548, 681 S.E.2d at 322.

[27] *Id.*

[28] *Id.* at 549, 681 S.E.2d at 322.

[29] Britt v. State, 185 N.C. App. 610, 613, 649 S.E.2d 402, 405 (2007).

[30] *Id.* at 614–17, 649 S.E.2d at 406–07.

[31] *Id.* at 617–18, 649 S.E.2d at 407.

that the 2004 amendment to section 14-415.1 was not a "reasonable regulation."[32] Furthermore, Judge Elmore contended that "[t]he exceptional broadness of the statute serves to undermine the legislature's stated intent of regulation and serves instead as an unconstitutional punishment."[33]

The North Carolina Supreme Court overturned the holding of the court of appeals, stating that General Statute section 14-415.1 was "unconstitutional as applied" to Barney Britt.[34] In making this determination, the court made much of the fact that Britt had taken every reasonable step to abide by the law in the thirty years since the commission of his one and only felony and that he responsibly possessed firearms for seventeen years before the 2004 amendment divested him of his right to keep and bear arms.[35] Moreover, the court extolled his "uncontested lifelong non-violence toward other citizens."[36] The court also pointed to the fact that the 2004 version of the statute "functioned as a total and permanent prohibition on possession of any type of firearm in any location," going far beyond the reasonable regulation of the 1995 version of section 14-415.1.[37] Finally, the court concluded that "it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety."[38]

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[32] *Id.* at 621, 649 S.E.2d at 410 (Elmore, J., dissenting).

[33] *Id.* at 621, 649 S.E.2d at 409.

[34] Britt v. State, 363 N.C. 546, 547, 681 S.E.2d 320, 321 (2009).

[35] *Id.* at 550, 681 S.E.2d at 323.

[36] *Id.*

[37] *Id.*

[38] *Id.*

In a dissenting opinion, Justice Timmons-Goodman opined that "this Court has 'consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation.' "[39] The dissent argued further that the General Assembly may justifiably "regulate—to the point of absolute restriction—certain *classes* of persons reasonably deemed by the legislature to pose a threat to public peace and safety."[40] The dissent cited *District of Columbia v. Heller* for support of this assertion, noting that *Heller* did not cast doubt on the "longstanding prohibitions on the possession of firearms by felons and the mentally ill."[41] The dissent concluded by stating that the General Assembly has a "compelling interest" in protecting the public and that the legislature reached the reasonable conclusion that "those convicted of felonies pose an unacceptable risk with regard to firearm possession."[42]

II. RESTRICTING A FUNDAMENTAL RIGHT: THE SECOND AMENDMENT AFTER *HELLER* AND *MCDONALD*

While the dissent in *Britt* correctly observed that *Heller* did not foreclose the ability of the federal government to prohibit felons from possessing firearms,[43] this assertion must not be separated from the overarching theme of the Court's decision in *Heller*. *Heller* was preeminently concerned with establishing that the right of individuals to keep and bear arms was

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[39] *Id.* at 551, 681 S.E.2d at 323–24 (Timmons-Goodman, J., dissenting) (quoting State v. Dawson, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968)).

[40] *Id.* at 552, 681 S.E.2d at 324 (citations omitted).

[41] *Id.* (quoting District of Columbia v. Heller, 554 U.S. ___, ___, 128 S. Ct. 2783, 2816–17 (2008)).

[42] *Id.* at 553, 681 S.E.2d at 324–25.

[43] *See supra* notes 39–40 and accompanying text.

a fundamental right and that, as a result, the District of Columbia's outright ban on the possession of handguns was unconstitutional.[44] *McDonald* elaborated further on the Court's rationale in *Heller* and incorporated the fundamental right to bear arms such that it is also protected from unconstitutional regulation by the states.[45] Consequently, a more complete analysis of both *Heller* and *McDonald* is essential to understanding the extent to which the right to bear arms may be constitutionally restricted.

A. The Nature of the Right in Heller

In *District of Columbia v. Heller*, the Supreme Court held that individuals have a fundamental right to possess operable handguns in their homes for the purpose of immediate self-defense.[46] The Court thus invalidated a District of Columbia statute that prohibited individuals from possessing unregistered firearms while simultaneously preventing registration of handguns within the District.[47] Writing for the Court, Justice Scalia began by meticulously explaining that the Second Amendment secures an individual right of all citizens to keep and bear arms and that this right is not limited by the "prefatory clause" of the Amendment.[48]

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[44] *See* District of Columbia v. Heller*,* 554 U.S. ___, ___, 128 S. Ct. 2783, 2799, 2821–22 (2008).

[45] McDonald v. Chicago, ___ U.S. ___, ___, 130 S. Ct. 3020, 3050 (2010).

[46] *Heller*, 554 U.S. at ____, 128 S. Ct. at 2821–22.

[47] *Id.* at ___, 128 S. Ct. at 2788.

[48] *Id.* at ___, 128 S. Ct. at 2801–02. The prefatory clause states: "A well regulated Militia, being necessary to the security of a free State . . . ." *Id.* at ___, 128 S. Ct. at 2799. Justice Scalia's full analysis of the text of the Second Amendment is beyond the scope of this Recent Development; for the complete discussion of the Second Amendment's text, see *id.* at ___, 128 S. Ct. at 2788–2802.

Specifically, the Court concluded that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons' " and that "bear" most readily means "carry";[49] moreover, the Court stated that " 'bear[ing] arms' was not limited to the carrying of arms in a militia."[50]

Having established that the Second Amendment secures an individual right to bear arms, the Court went on to discuss the nature of this individual right. The Court noted that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects."[51] To be sure, the English Bill of Rights stated "[t]hat the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law";[52] significantly, the Court explained that this right has long been viewed as the "predecessor to our Second Amendment."[53] Indeed, this was the view espoused by Justice Story in 1833 and reiterated in 1840.[54] The Court also discussed how the Second Amendment was viewed in the years before and after the Civil War. "Antislavery advocates," the Court explained, often "invoked the right to bear arms for self-defense."[55] Congress also decried the disarmament of blacks in many

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[49] *Id.* at ___, 128 S. Ct. at 2792–93.

[50] *Id.* at ___, 128 S. Ct. at 2794.

[51] *Id.* at ___, 128 S. Ct. at 2798 (citations omitted).

[52] *Id.* at ___, 128 S. Ct. at 2798 (quoting 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)).

[53] *Id*.

[54] *Id.* at ___, 128 S. Ct. at 2806–07.

[55] *Id.* at ___, 128 S. Ct. at 2807.

Southern States after the Civil War, stating that this disarmament "infringed" the right of the people to keep and bear arms.[56] Congress was even more explicit:

> [I]n some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freemen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that "the right of the people to keep and bear arms shall not be infringed."[57]

Thus, the Court concluded that, like the other rights protected by the Bill of Rights, the Second Amendment right to keep and bear arms is fundamental because the "inherent right of self-defense [is] central to the Second Amendment right."[58]

B. The Scope of the Right in Heller

Heller established that the Second Amendment secures the fundamental right of individuals to bear arms for the purpose of self-defense; however, the Court in *Heller* also explained that, like other rights guaranteed by the Constitution, the right to bear arms is not

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[56] *Id.* at ___, 128 S. Ct. at 2810 (citing H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236).

[57] *Id.* at ___, 128 S. Ct. at 2810 (quoting Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p 229 (1866) (Proposed Circular of Brigadier General R. Saxton)).

[58] *Id.* at ___, 128 S. Ct. at 2817. While the Court took great pains to avoid stating that the right was fundamental such that the Court will apply strict scrutiny in determining the constitutionality of restrictions placed on the right, the Court nevertheless held that restrictions on the right will require more than an "interest-balancing inquiry." *Id.* at ___, 128 S. Ct. at 2821. To be sure, the Court compared the First and Second Amendments, stating that they are both the "*product* of an interest balancing by the people" at the time of ratification. *Id*. Furthermore, the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*.

absolute.[59] First, *Heller* recognized that the right extends "only to certain types of weapons" and does not protect weapons "not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[60] Conversely, *Heller* also recognized that the Second Amendment protects the rights of citizens to possess not only rifles and other long guns but also handguns, noting that most Americans consider the handgun to be "the quintessential self-defense weapon."[61] Second, the *Heller* Court iterated several instances in which the government could lawfully restrict the right to bear arms:

> 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, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[62]

Significantly, the Court stated that these "presumptively lawful" regulations are not an exhaustive list.[63] In contrast, however, the Court concluded that restrictions on the right of individuals to possess handguns in the home for self-defense "would fail constitutional muster" under "any of the standards of scrutiny that [the Court] has applied to enumerated constitutional

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[59] *Id.* at ___, 128 S. Ct. at 2816.

[60] *Id.* at ___, 128 S. Ct. at 2814–16 (citations omitted).

[61] *Id.* at ___, 128 S. Ct. at 2818.

[62] *Id.* at ___, 128 S. Ct. at 2816–17. It is this statement that the dissent in *Britt* relies upon in its assertion that Barney Britt's rights were not unconstitutionally restricted. For a counterargument to the dissent's contention, see *infra* Part IV.

[63] *Id.* at ___, 128 S. Ct. at 2817 n.26.

rights."[64] Thus, while the right to bear arms may be regulated in some circumstances, the "enshrinement of constitutional rights necessarily takes certain policy choices off the table."[65]

C. Applying the Right to the States: McDonald v. Chicago

Two years after *Heller*, the Supreme Court in *McDonald v. Chicago* reaffirmed its determination that the Second Amendment affords a fundamental right to keep and bear arms for the purpose of self-defense.[66] *McDonald* struck down a Chicago handgun ban similar to the ban the Court ruled unconstitutional in *Heller*, explaining that the right recognized in *Heller* was incorporated through the Due Process Clause of the Fourteenth Amendment and is thereby made applicable to the States.[67] As follows, the Second Amendment now limits the extent to which States may restrict the possession of firearms, notwithstanding any greater deference that State constitutions may afford their respective governments.

1. Reaffirming Heller*: The Nature of the Right*

In addition to incorporating the Second Amendment, *McDonald* reaffirmed and expounded upon the rationale put forth in *Heller*. *McDonald* reasserted that the Second Amendment protects the "right to possess a handgun in the home for the purpose of self-defense,"[68] affirming that the Second Amendment protects a fundamental right. The Court stated: "Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to

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[64] *Id.* at ___, 128 S. Ct. at 2817–18.

[65] *Id.* at ___, 128 S. Ct. at 2822.

[66] McDonald v. Chicago, ___ U.S. ___, ___, 130 S. Ct. 3020, 3026 (2010).

[67] *Id*. at ___, 130 S. Ct. at 3050.

[68] *Id*. at ___, 130 S. Ct. at 3050.

the Federal Government and the States."[69] This assertion is woven throughout the Court's opinion in *McDonald*. For example, *McDonald* asserts that *Heller* was "unmistakably" clear that "[s]elf-defense is a basic right" and that "individual self-defense is 'the *central component*' of the Second Amendment."[70] *McDonald* also stated that the Second Amendment protects a right that is "deeply rooted in this Nation's history and traditions";[71] specifically, the American colonists viewed the right as fundamental, and the right was "considered no less fundamental by those who drafted and ratified the Bill of Rights."[72] Furthermore, the Court noted that

> [a] clear majority of the States in 1868 . . . recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government. . . . In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.[73]

Finally, the Court made much of the fact that fifty-eight U.S. Senators and 251 Members of the House of Representatives submitted an *amicus* brief urging that the right was fundamental, thereby indicating that a significant majority of our nation's elected representatives hold the right to keep and bear arms in very high regard.[74]

2. Reaffirming Heller*: The Scope of the Right*

McDonald reiterated *Heller's* assertion that "such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill' " still pass

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[69] *Id*. at ___, 130 S. Ct. at 3050.

[70] *Id*. at ___, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at ___, 128 S. Ct. at 2783).

[71] *Id*. at ___, 130 S. Ct. at 3036 (citations omitted).

[72] *Id*. at ___, 130 S. Ct. at 3036–37.

[73] *Id*. at ___, 130 S. Ct. at 3042.

[74] *Id*. at ___, 130 S. Ct. at 3049.

constitutional muster.[75] As follows, *McDonald* does not purport to bestow an absolute right to keep and bear arms and thus does not foreclose the right of states to regulate the possession of firearms in a manner consistent with the recognition of the right as fundamental.

III. Regulating the Right Out of Existence: The Effects of Overcriminalization on the Right to Keep and Bear Arms

The Supreme Court's decisions in *Heller* and *McDonald* clearly establish that the right of individuals to keep and bear arms for the purpose of self-defense is fundamental. What is more, because *McDonald* incorporated this right against the states, any law enacted by the General Assembly of North Carolina must respect this fundamental right. Notwithstanding the Supreme Court's recognition in both *Heller* and *McDonald* that states may constitutionally restrict the possession of firearms by felons, the 2004 version of General Statute section 14-415.1 is nevertheless unconstitutionally broad. This Part will set forth several reasons in support of this conclusion.

The dissent in *Britt* argued that there is a "heightened risk and public concern associated with convicted felons possessing firearms" and consequently approved of the General Assembly's determination that convicted felons "pose an unacceptable risk with regard to firearm possession."[76] Moreover, the dissent contended that section 14-415.1 was reasonably related to "preserving peace and public safety" because "[f]elonies constitute our most serious offenses"[77] and felons are "presumptively risky people."[78] To be sure, these assertions would

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[75] *Id*. at ___, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at ___, 128 S. Ct. at 2816–17).

[76] Britt v. State, 363 N.C. 546, 552, 681 S.E.2d 320, 324 (2009) (Timmons-Goodman, J., dissenting) (quoting State v. Jackson, 353 N.C. 495, 501, 546 S.E.2d 570, 573–74 (2001)).

[77] *Id.* at 552, 681 S.E.2d at 324.

certainly be valid if overcriminalization were not so rampant in the United States; however, that is not the case.

Before the advent of the regulatory state and the subsequent increase in *malum prohibitum*[79] offenses, criminal law was in many respects limited to *malum in se* offenses—acts that are wrong in and of themselves.[80] Under this conception of criminal law, only the most serious crimes[81]—for example, rape, robbery, and murder—were categorized as felonies.[82] During the past 100 years, however, legislatures have begun to classify many regulatory offenses, negligent acts, and various strict liability crimes as felonies.[83] Concurrent with the expansion of these *malum prohibitum* offenses has been the decreased emphasis in criminal law

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[78] *Id.* at 553, 681 S.E.2d at 324 (quoting Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983)).

[79] *Malum prohibitum* refers to conduct that is "not wrongful prior to or independent of law." DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 104–05 (2008).

[80] Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, THE HERITAGE FOUNDATION, at i (Apr. 17, 2003), *available at* http://www.heritage.org/research/reports/2003/04/the-over-criminalization-of-social-and-economic-conduct.

[81] "Serious crimes" in this context refer to those offenses that are viewed by society as a whole to be heinous, evil, and immoral. These offenses are vastly different from the dissent's conception of "serious offenses" (i.e., whatever the General Assembly classifies as a felony). *See supra* notes 76–78 and accompanying text.

[82] Rosenzweig, *supra* note 79, at i.

[83] *Id.* at 4.

on the requirement of mens rea.[84] As follows, the relaxed requirement of criminal intent for many felony offenses necessarily leads to the conclusion that those who are convicted of felonies are not necessarily as "dangerous" or "bad" as the felony stigma indicates. This is especially true as our society moves "ever closer to a world in which the law on the books makes everyone a felon."[85] Thus, a more narrowly tailored classification is necessary in order to preserve the fundamental rights of those who do not pose a threat to society.

A. The Exponential Increase in Federal and State Crimes

Before one can fully apprehend the absurdity of banning all felons from possessing any type of firearm, even in their homes for the purpose of self-defense, an examination of the dramatic increase in felony offenses during the past 100 years is necessary. In 1873, the Federal Revised Statutes contained only 183 separate offenses.[86] Today, there are nearly 4500 separate Federal crimes, and that number increases at a rate of approximately fifty-six crimes per year.[87] Not surprisingly, the rate of incarceration in the United States has also grown exponentially. In 1970, the rate of imprisonment was 144 inmates per 100,000 residents; by 2005, the rate had

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[84] *Id*. at 12.

[85] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

[86] *Id.* at 514.

[87] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 3 (July 22, 2009) [hereinafter *Over-Criminalization Hearing*] (statement of Rep. Louie Gohmert, Ranking Member, Subcomm. on Crime, Terrorism, and Homeland Sec.).

soared to 737 per 100,000 residents—an increase of over 500%.[88] Significantly, the 2005 rate represents approximately 2.2 million people who are currently serving time in state and federal prisons; concurrently, about five million others were on probation or parole in 2005.[89]

The substantial growth of criminal law is not limited to the federal level; state criminal codes have also expanded over the past 100 to 150 years. For example, Virginia's criminal code contained 170 separate offenses in 1849; in 1996, there were 495 offenses on the books.[90] Similarly, Illinois criminalized 131 separate offenses in 1856, but that number had increased threefold by 2000 for a total of 421 separate offenses.[91] The number of crimes in Massachusetts also increased substantially over that same period: 214 in 1860 versus 535 in 1998.[92] It may seem trivial to note the numerical growth of statutes in the United States over the past 150 years, especially taking into account the many and varied technological advances that would seemingly necessitate an expanded criminal code. To be sure, technology and other societal changes have necessitated some growth, but many (if not most) new crimes are inserted into criminal codes because of political pressure and other factors.[93]

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[88] HUSAK, *supra* note 79, at 4–5.

[89] *Id.* at 5.

[90] Stuntz, *supra* note 85, at 513–14.

[91] *Id.* at 514.

[92] *Id.*

[93] For example, technology has led to a host of computer-related offenses that were unforeseeable only a few decades ago. *See* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 233 (2007). Nevertheless, much of the increase in criminal statutes can be attributed to the political process. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*,

2. The Broadening of State and Federal Criminal Law

In addition to the overwhelming numerical growth of both state and federal criminal codes, the range and scope of the acts proscribed by these codes is mind-blowing. Many statutes border on the absurd, and countless others are so abstract that many people will violate the law without ever knowing. Perhaps more importantly, a vast array of specialized and regulatory offenses now comprise not only a large percentage of total proscribable offenses but account for a significant number of felonies. Thus, it is not inconceivable that many average citizens who have never committed anything more than minor traffic offenses will be caught in this ever-increasing web of felony offenses.[94]

To aid in understanding the increased breadth of criminal law (especially the scope of modern-day felonies), a brief sampling of some of the more abstract felonies currently in force is in order. The story of George Norris is a good place to start. Norris is an elderly retiree who developed an interest in orchids, and this interest grew into a small business that brought in a few

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54 AM. U. L. REV. 703, 718 (2005) ("[L]awmakers have a strong incentive to add new offenses and enhanced penalties . . . . Conventional wisdom suggests that appearing tough on crime wins elections regardless of the underlying justification."); Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248–1249 (explaining that because "legislators know well that no one can lose voter popularity for seeming to be tough on crime, the legislation sails through in a breeze").

[94] *See* Luna, *supra* note 93, at 711 ("Every augmentation provides officials a new legal instrument to apply against members of the so-called 'criminal class' (many of whom look remarkably similar to the class of 'normal' folks.").

thousand dollars a year.[95] In 2004, he was sentenced to seventeen months in federal prison for violating several provisions of the Endangered Species Act (ESA)—provisions that were incorporated from a foreign trade organization.[96] Specifically, Norris failed to ensure that he had the proper documentation for the orchids he imported into the United States.[97] In short, Norris is stigmatized as a convicted felon for "what amounts to incorrect paperwork."[98]

A second example of the reach of overcriminalization involves a violation of the Computer Fraud and Abuse Act. Lori Drew violated a section of a "federal anti-hacking statute" by registering an account with MySpace.com under a fictitious name.[99] Drew (and presumably

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[95] *See* Andrew M. Grossman, *The Unlikely Orchid Smuggler: A Case Study in Overcriminalization*, THE HERITAGE FOUNDATION 1 (July 27, 2009), *available at* http://www.heritage.org/research/reports/2009/07/the-unlikely-orchid-smuggler-a-case-study-in-overcriminalization.

[96] *Id.* at 3. The Convention on International Trade in Endangered Species (CITES) is the primary regulator of the orchid trade. Notably, CITES was initially enacted to protect endangered animals, such as elephants, but trade in flora now falls within the ambit of the treaty's regulation. *See id.* at 3–5.

[97] *See id.* at 1, 8–9.

[98] *Over-Criminalization Hearing*, *supra* note 87, at 4 (statement of Rep. Louie Gohmert, Ranking Member, Subcomm. on Crime, Terrorism, and Homeland Sec.).

[99] Andrew M. Grossman, *The MySpace Suicide: A Case Study in Overcriminalization*, THE HERITAGE FOUNDATION 4 (Sept. 17, 2008), *available at* http://www.heritage.org/research/reports/2008/09/the-myspace-suicide-a-case-study-in-overcriminalization#_ftnref13. The indictment charged Drew with violating 18 U.S.C. §

others) used this account to pose as a teenage boy (Josh Evans) in an attempt to find out why her neighbor's daughter had stopped associating with her own daughter.[100] Prosecutors wanted to press charges against Drew, but no statute adequately addressed her actions. Consequently, seeing no other way to get at Drew, prosecutors charged her under federal law for violating MySpace.com's Terms of Service.[101] The indictment alleged that the Terms of Service were "readily available" to the defendant, thus implying that Drew had fair notice of the crime with which she was charged.[102] In short, the myriad offenses on the books empowered prosecutors to make a case against Drew, even when the law did not proscribe what she purportedly "did wrong."

As these two examples show, criminal offenses are now so numerous that almost anyone could be convicted of a crime—often without even knowing that the act committed was a crime. As one legal researcher has noted, "If criminal-law experts and the Justice Department itself

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1030(a)(2)(C) (2008), which reads in pertinent part: "[whoever] intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains. . . . information from any protected computer." *Id.*

[100] *Id.* at 2. Drew, acting as Evans, subsequently befriended her neighbor's daughter and "dumped" her a month later, which resulted in the neighbor's daughter committing suicide. *See* Indictment at 6–8, United States v. Drew, No. CR-08-0582-GW (C.D. Cal. May 15, 2008). While Drew's actions are by no means commendable and the death of a teenage girl is horribly tragic, stretching the reach of criminal laws to punish particular bad acts reduces the liberty of all Americans.

[101] *Id.* at 4.

[102] *Id.* at 9–10.

cannot even count them, the average American has no chance of knowing what she must do to avoid violating federal criminal law."[103] What is more, some acts that most Americans know are deemed criminal are nevertheless committed everyday by countless individuals. For example, approximately ninety million living Americans have used an illegal drug, and about half of all Internet users between the ages of eighteen and twenty-nine illegally download music every month.[104] These crimes are not just petty offenses; rather, possession of illegal drugs, even in small amounts, is a felony in many states, and "music piracy" is a serious federal offense. These two categories of offenses alone would subject nearly half of all Americans to criminal sanctions if and when they are caught. And, because "criminal codes expand and don't contract," more and more ordinary people may be subjected to criminal punishment for seemingly "innocuous behavior."[105]

As with the numerical increase of felonies over the past 150 years, it would be easy to dismiss these seemingly innocuous felonies as anomalous or, at the very least, to think that they go unenforced and that they therefore have no impact on the general population. This view is flawed in two ways. First, even if many absurd felonies will never affect the general public as a whole, this sentiment does nothing to abate the effect of a particular felony on the few who are

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[103] *Exploring the National Criminal Justice Act of 2009: Hearing before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 14 (June 11, 2009) [hereinafter *Exploring Hearing*] (testimony of Brian W. Walsh, Senior Legal Research Fellow, The Heritage Institute), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3906&wit_id=8061.

[104] HUSAK, *supra* note 79, at 25.

[105] *See* Brown, *supra* note 93, at 223.

convicted of that felony. Second, while nitpicky felonies may not, by themselves, affect society in more than a nominal sense, the sheer number of these often-laughable offenses has the potential to impact the whole of society on a far larger scale. It is this collective impact that must be taken into account when assessing the effect that North Carolina General Statute section 14-415.1 has and will have on a larger number of citizens than the General Assembly would like to admit.

C. A More Detailed Look at North Carolina's Criminal Statutes: Numerical Growth and Increased Breadth

Before returning to the constitutional analysis of section 14-415.1 and to the General Assembly's legislative response to *Britt*, this section will provide a brief survey of North Carolina law and its impact on North Carolina citizens. During fiscal year 2006/07, North Carolina imposed sentences for 30,905 felony convictions; for fiscal year 2008/09, that number was 32,266.[106] During 2006/07, non-trafficking drug offenses made up 36% of these felonies, and property offenses comprised another 34%.[107] Crimes against persons accounted for only 18% of these felonies; moreover, 68% of the felonies for which sentences were imposed were for Class H and I felonies—the least serious felony offenses in North Carolina.[108] The breakdown is similar for 2008/09: property offenses accounted for 36% of all felony convictions and non-

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[106] *See* THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, A CITIZEN'S GUIDE TO STRUCTURED SENTENCING (2010) [hereinafter 2010 CITIZEN'S GUIDE]; THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, A CITIZEN'S GUIDE TO STRUCTURED SENTENCING (2008) [hereinafter 2008 CITIZEN'S GUIDE].

[107] 2008 CITIZEN'S GUIDE, *supra* note 107.

[108] *Id*.

trafficking drug offenses comprised another 32%.[109] Crimes against persons made up 18% of the felony offenses for FY 2008/09, and 66% of all felonies for which sentences were imposed were Class H or I felonies.[110]

The foregoing breakdown of North Carolina felony offenses makes clear that a substantial majority of felonies are non-violent in nature. Consequently, these types of crimes do not provide an adequate basis for depriving an individual of her fundamental right to keep and bear arms. A few examples of these rather innocuous felonies prove that the presumption that all convicted felons are dangerous is invalid on its face. In North Carolina, it is a felony to remove shellfish from areas proscribed by law because of suspected pollution;[111] it is also a felony to forge a vehicle inspection sticker or to accept anything of value to pass a vehicle that failed inspection.[112] Various acts of voter fraud are also felonies in North Carolina,[113] and improper disposal of "hazardous waste" is a form of littering that is proscribed as a felony.[114]

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[109] 2010 CITIZEN'S GUIDE, *supra* note 107.

[110] *Id.*

[111] *See* N.C. GEN. STAT. § 113-209 (2010).

[112] N.C. GEN. STAT. § 20-183.8 (c)(1), (4) (2010).

[113] N.C. GEN. STAT. § 163-275 (2010).

[114] *See* N.C. GEN. STAT. § 14-399 (e) (2010). North Carolina defines hazardous waste as "solid waste, or combination of solid wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics . . . may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed." N.C. GEN. STAT. § 130A-290 (a)(8)(b) (2010). Presumably, then, anyone

Furthermore, bribing a sports official,[115] intentionally losing an athletic contest,[116] and disturbing or defacing tombstones of grave markers[117] are all felonies under North Carolina law. Stealing pine needles,[118] pointing a laser pen at an aircraft,[119] and operating a pyramid scheme[120] are likewise felonies in North Carolina. Finally, it is significant that many Class H and I offenses were punishable as misdemeanors not that long ago.[121] While the General Assembly

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who improperly disposes of batteries, tires, mercury thermometers, etc., could be held criminally liable under this section.

[115] *See* N.C. GEN. STAT. § 14-373 (2010).

[116] *See* N.C. GEN. STAT. § 14-377 (2010).

[117] *See* N.C. GEN. STAT. § 14-149 (2010).

[118] *See* N.C. GEN. STAT. § 14-79.1 (2010).

[119] *See* N.C. GEN. STAT. § 14-280.2 (a) (2010).

[120] N.C. GEN. STAT. § 14-291.2 (a) (2010).

[121] *Compare* N.C. GEN. STAT. § 14-32.2(b)(4) (2010) (patient abuse and neglect a Class A1 misdemeanor), *with* N.C. GEN. STAT. § 14-32.2(b)(4) (2007) (patient abuse and neglect a Class H felony). Similarly, N.C. GEN. STAT. § 97-88.2(c) (2010), which forbids threatening an employee with criminal prosecution in an attempt to coerce an employee's decision concerning worker's compensation, was formerly a Class A1 misdemeanor but was made a Class H felony as of 1997. *Cf.* N.C. GEN. STAT. § 97-88.2(c) (1997). Other examples include N.C. GEN. STAT. § 14-362 (2010) (cockfighting) and N.C. GEN. STAT. § 143-151 (2010) (willfully violating the Uniform Standards Code for Manufactured Homes). Cockfighting was formerly a Class 2 misdemeanor, *see* N.C. GEN. STAT. § 14-362 (2005), but was made a Class I felony in 2005. *See* § 14-362 (2010). Similarly, violating standards for manufactured homes was formerly a Class 1

undoubtedly had a rational basis for proscribing these acts, and while it is within the purview of the legislature to determine the gravity of these offenses and the need to declare them felonies, it cannot be reasonably said that the General Assembly has any rational basis for concluding that those who commit these acts are any more dangerous than citizens who commit similar acts that are codified as misdemeanors. There is simply no empirical evidence to show that those who are guilty of these offenses are more likely than other citizens to commit violent crime; the case of Barney Britt is a prime example.[122] In contrast, it would certainly be more rational for the General Assembly to restrict the rights of violent misdemeanants (e.g., those guilty of misdemeanor domestic violence) than of those who are guilty of non-violent and regulatory felonies.

D. A Plea for Narrow Tailoring: Making Reasonable Distinctions

As the foregoing analysis shows, the General Assembly's progressive restriction of the rights of convicted felons—culminating in the 2004 amendment to General Statute section 14-415.1—must be viewed in light of the vast expansion of criminal offenses on both the state and federal level. The categorization of all felons as "dangerous" for the purpose of restricting their fundamental right to keep and bear firearms for the purpose of self-defense is grossly overbroad. As the Supreme Court stated in *Heller*, restrictions on convicted felons' rights to possess firearms are "presumptively lawful."[123] The fact that these are "presumptively" lawful, however, does not mean that they are definitely lawful under all circumstances. The context of *Heller* is

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misdemeanor, *see* N.C. GEN. STAT. § 143-151 (1999), but was made a Class I felony as of 1999. *See* § 143-151 (2010).

[122] *See supra* Part I.B.

[123] District of Columbia v. Heller, 554 U.S. ___, ___, 128 S. Ct. 2783, 2817 n.26.

significant here. The Court stated: "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 . . . ."[124] The Seventh Circuit recently elaborated on the Court's statement:

> [T]he government does not get a free pass simply because Congress has established a "categorical ban"; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as applied challenge. . . . And to determine whether the presumption of lawfulness gives way in this case . . . . [we] examine his claim using the intermediate scrutiny framework without determining that it would be the precise test applicable to all challenges to gun restrictions.[125]

Other courts have also indicated that restrictions on the right to keep and bear arms are afforded (at least) intermediate scrutiny.[126] Thus, restrictions on an individual's Second Amendment rights must be "substantially related" to an important government interest.[127] This Recent

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[124] *Id.* at ___, 128 S. Ct. at 2816–17.

[125] United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010). Though her vote on this case carries no greater weight than that of the other Seventh Circuit judges, it is significant that Retired Justice O'Connor, sitting by designation, joined the Majority opinion in this case. *Id.* at 686.

[126] *See* United States v. Smith, No. 2:10-cr-00066, 2010 U.S. Dist. LEXIS 98511, at *34 (S.D. W. Va. Sept. 20, 2010).

[127] Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (applying intermediate scrutiny to Second Amendment rights and stating that "[i]f a rational basis were enough, the Second Amendment would not do anything"); United States v. Smith, No. 2:10-cr-00066, 2010 U.S. Dist. LEXIS 98511, at *19 (S.D. W. Va. Sept. 20,

Development argues, contrary to the dissent in *Britt*, that the conclusion that all felons are inherently dangerous is not rational.[128] Thus, while intermediate scrutiny does not require a "perfect fit,"[129] restricting the rights of *all* felons under the assumption that all felons are dangerous is far from a perfect fit—it is unconstitutionally overbroad. This same court admitted the lack of any rational relation: "Although some felonies involve violence, countless felonies do not, and thus, a generic felony conviction would not necessarily predict future violence, with a firearm or otherwise."[130] Finally, the Supreme Court's holding in *Heller*—the individual's right to keep and bear arms is fundamental—is therefore inconsistent with the Court's dicta that "nothing in our opinion . . . cast[s] doubt on longstanding prohibitions on the possession of firearms by felons."[131] Justice Stevens pointed out the Court's inconsistency in his dissent:

> The centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. . . . But the Court itself reads the Second Amendment to protect a "subset" significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to "law-abiding, responsible citizens" . . . . But the class of persons protected by the First and Fourth Amendments is not so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting

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2010) (holding that "intermediate scrutiny is the appropriate standard of review" for evaluating restrictions on Second Amendment rights).

[128] *See supra* notes 39–42 and accompanying text.

[129] *See* United States v. Tooley, No. 3:09-00194, 2010 U.S. Dist. LEXIS 58591, at *49 (S.D. W. Va., June 14, 2010).

[130] *Id*. at 50–51 & n.11.

[131] District of Columbia v. Heller, 554 U.S. ___, ___, 128 S. Ct. 2783, 2816–17 (2008).

pronouncements.[132]

Justice Stevens is correct. There is no way to harmonize the Court's finding of a fundamental right to keep and bear arms with restrictions on the rights of convicted felons unless these restrictions are substantially related to an important government interest. Section 14-415.1 must therefore be recast so that it satisfies not only rational basis scrutiny but intermediate scrutiny as well.

IV. THE AFTERMATH OF *BRITT V. STATE*: WHERE DO WE GO FROM HERE?

A. Session Law 2010-108

In response to the North Carolina Supreme Court's holding in *Britt v. State*, the General Assembly passed Session Law 2010-108, providing for the restoration of the firearm rights of some convicted felons under very limited circumstances. However, this attempt to correct the overbreadth of section 14-415.1 amounts to nothing but a political ploy and simply adds insult to injury. To be sure, it does little if anything to offer redress to many of the State's convicted felons who have been permanently divested of their fundamental rights. Specifically, the act is flawed in four distinct ways. First, the General Assembly's "fix" provides that after a period of twenty years, non-violent convicted felons (who have been convicted of only one non-violent felony and no violent misdemeanors) may petition the court in the district in which they reside to have their firearms rights restored.[133] To its credit, the General Assembly correctly distinguishes between violent and non-violent felons.[134] Nevertheless, twenty years is a very long time—so

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[132] *Id*. at ____, 128 S. Ct. at 2826–27 (Stevens, J., dissenting).

[133] N.C. GEN. STAT. § 14-415.4(b), (c) (2010).

[134] N.C. GEN. STAT. § 14-415.4(a)(2). According to the Act, non-violent felonies include Class C through Class I felonies that meet the following criteria: (1) assault is not an essential element of

long, in fact, that the ability to petition to have one's rights restored is nothing more than a nominal gesture, the result of political pandering.[135]

Second, section 14-415.4(k) requires that those who would petition to have their rights restored must pay a $200 fee to the clerk of court, in addition to any other expenses the Department of Justice may incur in conducting a criminal record check.[136] This fee will undoubtedly limit those who would be eligible to petition the courts, as $200 is more than a nominal fee. To be sure, this fee is the equivalent of a poll tax in that it serves to disenfranchise those whom the legislature has determined can have their fundamental right restored.[137]

Third, and perhaps most importantly, section 14-415.4 becomes effective on February 1, 2011 and only "applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the

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the offense; (2) the offender was not in possession of a firearm during the commission of the offense, and possession or use of a firearm or other deadly weapons is not an essential or non-essential element of the crime; (3) the offender did not use a firearm or other deadly weapon in the commission of the offense; and (4) the felony does not require that the offender register under Article 27A of Chapter 14 of the General Statutes. N.C. GEN. STAT. § 14-415.4(a)(2)(a) to (a)(2)(d).

[135] *See infra* Part IV.B.

[136] *See* N.C. GEN. STAT. § 114-19.28 (d) (2010).

[137] *See generally* MAYA HARRIS, ACLU OF N. CAL., MAKING EVERY VOTE COUNT: REFORMING FELONY DISENFRANCHISEMENT POLICIES AND PRACTICES IN CALIFORNIA (2008) (explaining how criminal disenfranchisement is the functional equivalent of a poll tax and noting the disproportionate adverse effect on minority voters).

statutes that would be applicable but for this act remain applicable to those prosecutions."[138] Barney Britt could never petition to have his rights restored under this Act, nor can anyone else convicted of a felony in 1979, or anyone convicted of a felony on January 31, 2011. It is difficult to see how individuals convicted of felonies *after* February 1, 2011 are any less dangerous and therefore entitled to have their rights restored than someone who was convicted of a felony thirty years ago. The fact that section 14-415.4 does not apply retroactively is highly significant because *no one* will even have the chance to petition to have her rights restored until at least February 1, 2031. This is why the General Assembly's "fix" is nothing but a nominal gesture. The General Assembly has substantially altered section 14-415.1 several times during the past thirty-five years;[139] what is to keep the legislature from amending section 14-415.4 sometime during the next twenty years so that even these convicted felons can never regain their rights?

Fourth, the General Assembly excepted individuals convicted of certain "white collar" crimes from losing their rights under section 14-415.1.[140] The disparate impact of this exception cannot be ignored. Much as the $200 fee adversely affects those with minimal financial resources, the exemption of white collar felonies serves to immunize one group of convicted felons (wealthy business people, many of whom are white) while doing nothing to abate the effect of section 14-415.1 on those convicted of "worse" felonies (who are frequently poor

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[138] 2010 N.C. Sess. Laws 108 § 7.

[139] *See supra* Part I.A.

[140] 2010 N.C. Sess. Laws 108 § 3 (to be codified at § 14-415.1 (e)).

minorities).[141] This exception makes little sense in light of the General Assembly's presumption that all convicted felons have a propensity for violence;[142] indeed, by not exempting all non-violent felonies but only those committed by the wealthy, the General Assembly has made an unjust distinction that cannot survive rational basis scrutiny, much less intermediate scrutiny. Thus, for all the foregoing reasons, the recent changes do not sufficiently ameliorate the constitutional defects of section 14-415.1.

B. The Way Forward: A Reasoned Approach to Restricting Fundamental Rights

The court in *Britt v. State* showed discretion in not holding section 14-415.1 unconstitutional on its face.[143] The court also gave deference to the legislature in its most recent decision in *State v. Whitaker*.[144] The court's deference in these cases afforded the General Assembly the opportunity to address the inequities inherent in the statute, which the legislature did with Session Law 2010-108.[145] As Part IV.A above has shown, however, the General Assembly has failed to remedy the constitutional defects of section 14-415.1. As a result, many in this State are still prohibited from exercising their fundamental right to keep and bear arms. This subpart sets forth a reasoned approach to amending section 14-415.1 that will preserve the fundamental rights of convicted felons while still enabling the General Assembly to protect the

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[141] *See, e.g*., HARRIS*, supra* note 137, at 9 ("[A] disproportionate number of people of color (particularly African Americans) are arrested, prosecuted and convicted for drug offenses.").

[142] Britt v. State, 363 N.C. 546, 552–53, 681 S.E.2d 320, 324–25 (2009) (Timmons-Goodman, J., dissenting).

[143] *See supra* INTRODUCTION.

[144] No. 21A10, 2010 N.C. LEXIS 737 (N.C. Oct. 8, 2010).

[145] *See supra* Part IV.A.

public from harm.

In *State v. Whitaker*, the court held that section 14-415.1 was not an unconstitutional ex post facto law or Bill of Attainder and concluded that the General Assembly was justified in prohibiting the possession of firearms "by those who have shown a heightened disregard for our laws and who often have a propensity for violence."[146] Significantly, *Whitaker* emphasized the defendant's "multiple convictions over a lengthy period of time" in making its determination that section 14-415.1 was not unconstitutional as applied to the defendant.[147] In contrast, the court in *Britt* held the statute unconstitutional as applied to Britt, making much of the fact that Britt was convicted of a single non-violent felony.[148] Building on these distinctions, this Recent Development argues that individuals convicted of non-violent felonies should have their right to keep and bear arms restored immediately following the completion of their sentences; moreover, some violent offenders should also have the opportunity to petition the court to have their firearms rights restored (at least in their homes and businesses) after a specified time elapses following completion of their sentences, so long as no other violent crimes are committed.

The General Assembly has shown that it can differentiate between violent and non-violent felonies; it has done so under Session Law 2010-108.[149] Therefore, it cannot be argued that it is impossible to distinguish between violent and non-violent felons and continue to deprive all convicted felons of their fundamental right to keep and bear arms. As follows, the General Assembly should amend section 14-415.1 so that non-violent

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[146] *Whitaker*, 2010 N.C. LEXIS 737, at *11.

[147] *Id.* at *12.

[148] *See Britt*, 363 N.C. at 547–48, 681 S.E.2d at 321–22.

[149] *See supra* notes 133–34 and accompanying text.

felons regain their right to keep and bear arms immediately following the completion of their sentences—the same time that the state restores their other civil rights—in accordance with the definition of non-violent felons set forth in Session Law 2010-108. In the alternative, the General Assembly could revert to the 1975 version of section 14-415.1, which proscribes firearm rights when certain enumerated felonies are committed.[150] This Recent Development contends that restricting the firearm rights of all convicted felons is not a rational distinction;[151] indeed, it is entirely unreasonable to conclude that individuals convicted of regulatory felonies (e.g., failure to complete proper paperwork, as in the orchid case above)[152] are presumably more dangerous than someone who commits a non-violent misdemeanor (e.g., filing a false police report).[153]

While the State of North Carolina undeniably has a rational basis (indeed, a strong interest) for restricting the firearm rights of violent felons, the General Assembly should consider restoring the rights of some violent felons following a reasonable period of time if they commit no further acts of violence. More specifically, the General Assembly could return to the reasonable waiting period required by the 1975 version of section 14-415.1.[154] But, even if the General Assembly chooses a longer period—or no period at all—the legislature should allow violent felons, if they have completed their sentences and had their other rights restored, to possess a firearm in the home for self-defense. This

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[150] 1975 N.C. Sess. Law c. 870, s. 1.

[151] *See supra* Part III.D.

[152] *See supra* notes 95–98 and accompanying text.

[153] N.C. GEN. STAT. § 14-225 (2010).

[154] 1975 N.C. Sess. Law c. 870, s. 1.

was the fundamental right announced by the Supreme Court in *Heller* and *McDonald*, and, notwithstanding the Court's dicta that restrictions on the rights of convicted felons are presumptively valid, this does not mean that the right to restrict is absolute, just as the right itself is not absolute. The Court explicitly stated that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.' "[155] Justice Stevens elaborated in his dissent, pointing out that even felons still receive the protections of the First and Fourth Amendments and questioning how the Court could declare that convicted felons are not entitled to the protection of the Second Amendment.[156] It would certainly be easier (and presumably safer) for the government to restrict or ignore the fundamental rights of felons protected by the First and Fourth Amendments, but these rights, like those guaranteed by the Second Amendment, are "among those fundamental rights necessary to our system of ordered liberty" and thus may not be restricted absent (at the least) a substantial relation to an important government interest.[157]

These suggestions for the legislature may seem naïve; choosing to stand up for the rights of convicted felons will not be the most politically popular decision that a legislator could make. Nevertheless, when dealing with the fundamental rights of individual people, restrictions on these rights should *never* be taken lightly. Justice requires fairness. Fairness means not restricting the rights of others for the sake of political gain.

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[155] District of Columbia v. Heller, 554 U.S. ___, ___, 128 S. Ct. 2783, 2797 (2008).

[156] *Id.* at ___, 128 S. Ct. at 2826–27 (Stevens, J., dissenting).

[157] McDonald v. Chicago, ___ U.S. ___, ___, 130 S. Ct. 3020, 3042 (2010).

In the alternative, if the motivation to do what is right—even at the cost of political capital—is not enough to lead the General Assembly to reverse course and make reasoned distinctions concerning the right to keep and bear arms, then recognizing the ever-increasing reach of criminal law may at least give some pause. A growing number of good people are being caught in the web of overcriminalization, and public officials are not immune.

CONCLUSION

The General Assembly must make a rational judgment concerning those who pose a danger to society and should no longer rely on the social stigma of a felony conviction in determining when fundamental rights should be restricted. This Recent Development shows the far-reaching effects of overcriminalization on the fundamental rights of many Americans.[158] Innocuous felonies are steadily eroding the rights of individuals, not the least of which is the right to keep and bear arms. The rights of more and more citizens will inevitably be restricted as the number of regulatory felonies continues to increase. The North Carolina General Assembly must be proactive in addressing this liberty-eroding trend and should distinguish between violent and non-violent offenders in determining when and to what extent firearms rights should be restricted. If we lived in a society that reserved felonies for the most severe offenses, then the classification of all felons as "dangerous" for the purpose of upholding North Carolina General Statute section 14-415.1 in its current form would be more than reasonable. However, we no longer live in a society that reserves felony classification for the most severe offenses; instead we classify many "crimes" as felonies that are nothing more than regulatory violations. It is undeniable that we are quickly moving toward a "world in which the law on the books makes

[158] *See supra* Part III.

everyone a felon."[159] Consequently, the North Carolina General Assembly must act bravely to vindicate the rights of convicted felons and thereby preserve the liberty of all.

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[159] *See* Stuntz, *supra* note 85, at 511.