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# Journal on Firearms & Public Policy

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Volume 19

Fall 2007

## **Federal Appellate Cases: 2003-2006**

Elizabeth Cooke 1

## **The District of Columbia Gun Ban: Where the Seductive Promise of Gun Control Meets Reality**

Robert J. Endorf, Jr. 43

## **Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence**

Don Kates & Gary Mauser 93

## **Armed Resistance to the Holocaust**

David B. Kopel 143













# FEDERAL APPELLATE CASES 2003-2006

By Elizabeth Cooke

*This article summarizes federal cases decided over the past three years that have affected the right to keep and bear arms. Although some of the cases do not directly involve the Second Amendment, they each have at least some bearing on the rights protected by it.*

*Several cases analyze the federal felon-in-possession statute, and notably, the Supreme Court's clarification of that statute's provisions. Many other cases consider the debate concerning the Second Amendment as an individual or a collective right.*

*The cases discussed were decided by the federal circuit courts of appeal, or by the Supreme Court. The circuit courts interpret federal law for their particular region, until such time as the Supreme Court clarifies laws for the entire federal system. The cases are organized by circuit and include those that were decided between January 1, 2003 and December 31, 2006.*

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## SUPREME COURT OF THE UNITED STATES

In *Groh v. Ramirez*,<sup>1</sup> the Court dealt with a suit against agents of the Bureau of Alcohol, Tobacco, Firearms, and Explosives for a Fourth Amendment violation. Without a valid warrant, BATFE officers searched respondent's home for allegedly illegal firearms. The firearms included automatic rifles, grenades, a grenade launcher and a rocket launcher, which if unregistered, would be illegal under 18 U.S.C. § 922(o)(1) and 26 U.S.C. § 5861.

The affidavit for the search was based upon information from a witness, and was, according to the magistrate, sufficient to provide probable cause to search the respondent's home.<sup>2</sup> However, in preparing the warrant, the officer failed to describe any of the items that





were intended for seizure. Although the warrant was facially invalid, it was signed by a magistrate. The agents uncovered no illegal weapons or explosives when searching the respondent's house. The Court found that there was no description of the items to be searched on the warrant. In the space reserved for such a description was, "a single dwelling residence...blue in color."<sup>3</sup> It found the description blatantly deficient.

The lower courts held that the agents who performed the search were eligible for qualified immunity, with the exception of Agent Groh. Qualified immunity is an exemption from civil liability for a public official performing a discretionary function. Agent Groh, who led the search and was therefore responsible for satisfying himself that the warrant was not defective in some obvious way, was found ineligible for qualified immunity because he violated Ramirez' civil rights.<sup>4</sup>

At the time of the search, there was a Bureau directive in force which stated: "Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate."<sup>5</sup> The internal guideline alone did not negate Agent Groh's qualified immunity, but it did strengthen the Court's view that the agent should have been aware that he should not execute a facially invalid warrant. The Agent stated that his actions were merely negligent and that more than mere negligence should be required to deprive him of qualified immunity.<sup>6</sup> The Court found that the agent could not have reasonably believed that the warrant was valid and therefore should not have relied on it.

In dissent, Justice Kennedy and Chief Justice Rehnquist argued that the lack of description was simply a clerical error, and that while it would have been unreasonable to rely on a warrant missing the description, it was not unreasonable to make such a mistake. The dissent advocated qualified immunity for the agent based on the view that the agent did not realize the warrant contained a clerical error, that his mistake was a reasonable mistake, and that the mistake should not nullify his qualified immunity.

Another dissent, by Justices Thomas, Scalia and Chief Justice Rehnquist, contended that the precise relationship between the Fourth Amendment's Warrant Clause and its Unreasonableness





Clause is unclear. Because of the ambiguity, the dissenters looked to reasonableness of the search, the text of the Fourth Amendment and a number of exceptions in precedent to the warrant requirement. Because the items to be seized were clearly specified in the warrant application and in the affidavit, and because both these documents were provided to the magistrate, the dissent concluded that despite the defective warrant, the search itself was reasonable and the agent should have been eligible for qualified immunity.

*Small. v. U.S.* addressed what is commonly referred to as the felon-in-possession statute.<sup>7</sup> This section of the Gun Control Act of 1968, 18 U.S.C § 922(g), prohibits particular persons, among them felons, from possessing firearms. The GCA defines a felon as any person, “who has been convicted in any court, of a crime punishable for a term exceeding one year.” In *Small*, the Court ruled that convictions from foreign courts do not count, for purposes of the felon-in-possession statute.

The defendant had been convicted in a Japanese court of three offenses that were punishable by more than one year incarceration. The Court recognized that laws, crimes and punishments in foreign countries are not always proportional to their U.S. counterparts; accordingly, application of foreign convictions to the felon-in-possession statute would be difficult and inconsistent.<sup>8</sup>

The Court concluded: “We...assume a congressional intent that the phrase ‘convicted in any court’ applies domestically, not extraterritorially. But at the same time, we stand ready to revise this assumption should statutory language, context, history, or purpose show the contrary.”<sup>9</sup>

Previously, different circuit courts had different opinions as to whether Congress meant to include foreign courts in the “in any court” language. The Second Circuit in *U.S. v. Gayle* reversed and remanded a district court conviction based on the defendant’s prior conviction in a Canadian Court.<sup>10</sup> The Second Circuit found that 18 U.S.C § 922(g)(1), was ambiguous,<sup>11</sup> and upon consulting Congressional history, concluded that the Legislature had not meant for “in any court” to include foreign courts. In contrast, in *U.S. v. Small*,<sup>12</sup> the case that was eventually decided by the Supreme Court, the Third Circuit decided that the Japanese conviction, comporting with the court’s idea of fundamental fairness, sufficed for application of





the U.S. felon-in-possession statute.<sup>13</sup>

The Supreme Court backed away from a case detailed more fully in the discussion of the Seventh Circuit, below. In *City of Chicago v. U.S. Department of Treasury*, the City of Chicago sued to obtain firearms trace and multiple sales database information from federal government records. Although the Court had granted a petition for a writ of certiorari, before the case was argued Congress passed appropriations legislation which affected the relevant statute in the case. The Court therefore reversed the judgment of the Seventh Circuit and remanded the case back to the Circuit Court.

In a case more thoroughly discussed in the Sixth Circuit section, *U.S. v. Oliver*,<sup>14</sup> the Court vacated the judgment of the district court and remanded the case for consideration in light of *U.S. v. Booker*.<sup>15</sup> The *Booker* decision concerned the application of the Sixth Amendment right of a jury trial to sentencing.

The Court denied a petition for certiorari for a gun show case arising from the Ninth Circuit, *Nordyke v. King*.<sup>16</sup> The case is discussed in detail in the Ninth Circuit section.

In *U.S. v. Shepard*,<sup>17</sup> the Court considered a sentence enhancement under the Armed Career Criminals Act (ACCA).<sup>18</sup> The defendant had pled guilty to being a felon-in-possession and the government sought to increase his sentence from the 37-month maximum under the federal sentencing guidelines to the ACCA's 15-year statutory mandatory minimum. The ACCA applies to felons who have three prior convictions for violent felonies or drug offenses. In *Shepard*, the defendant's prior offenses were guilty pleas to burglary in Massachusetts. The question in *Shepard* was whether the defendant's offenses constituted generic burglary, which among other things, means that the burglary was committed inside or in an enclosed space. The Court had ruled in *Taylor v. U.S.*<sup>19</sup> that only generic burglary, as opposed to burglary committed inside a motor vehicle or boat, is considered a violent crime in accordance with the ACCA. The First Circuit imposed the sentence enhancement.

Normally, a court sentencing under the ACCA will consider statutory elements, charges, and jury instructions to determine whether the conviction was for generic burglary, because definitions of burglary can vary from state to state. However, the defendant in *Shepard* pled guilty, rather than being found guilty by a court or jury. The





Court found that in determining whether a guilty plea included all the elements of the generic burglary offense, a sentencing court may look to the terms of the charging document, the terms of the plea agreement, transcript of the colloquy between the judge and defendant in which the defendant states the basis for the plea, or to some similar judicial record.<sup>20</sup> The Court expressly held that a sentencing court may not look to police reports or victim complaints in making the determination. The Court reversed the sentence enhancement.

#### DISTRICT OF COLUMBIA CIRCUIT

In *Seegars v. Gonzales*,<sup>21</sup> the D.C. Circuit affirmed a district court ruling that plaintiffs lacked standing to challenge the constitutionality of District firearms ordinances. The particular ordinances (1) prohibit possession of a firearm in the District of Columbia unless validly registered;<sup>22</sup> (2) prohibit registration of pistols which were not already registered before September 24, 1976;<sup>23</sup> (3) prohibit carrying a pistol either openly or concealed on or about one's person without a license within the District;<sup>24</sup> and (4) require firearms be kept unloaded and disassembled or bound by a trigger lock or similar device.<sup>25</sup> These laws effectively bar anyone who did not own a handgun in the District from purchasing or possessing a handgun.

The plaintiffs were a woman who owns a shotgun which she stored at her home and who wished to remove the trigger lock when she felt endangered, a man who owns a pistol, but stores it outside the District in order to avoid violating the law, and several plaintiffs who would like to lawfully possess pistols in the District.

Although the plaintiffs maintained that fear of violating the law kept them from purchasing or possessing pistols in the District, and the defendant stated that the ordinances in question were enforced regularly,<sup>26</sup> the Court held that under *Navegar, Inc. v. United States*,<sup>27</sup> the threat of prosecution to the plaintiffs for violating the statutes was insufficiently imminent to create standing to litigate.

In a separate decision, the D.C. Circuit rejected another challenge to the same ordinances. In *United States v. Maple*, the defendant was convicted by the United States District Court for the District of Columbia of carrying a firearm without a license in the District.<sup>28</sup> On appeal in the D.C. Circuit Court, the defendant contended that





the ordinances infringed upon his rights under the Second Amendment.

The D.C. Circuit stated that because the defendant did not raise this issue in the district court, it could not be addressed, and that the exception to this rule that there has been “a plain error affecting substantial rights which seriously affects the fairness, integrity, or public reputation of judicial proceedings” was not met.<sup>29</sup>

#### FIRST CIRCUIT

In *U.S. v. Coccia*, the court ruled that the prohibition on possession of a firearm while subject to a domestic restraining order did not require that the restraining order expressly state that the use of physical force was prohibited.<sup>30</sup> The defendant had been subject to a domestic restraining order which prohibited him from, “abusing, harassing, or threatening his wife or children, and from ‘possessing, transferring, or acquiring any weapons’ for one year from the date of the order.”<sup>31</sup> He was convicted under 18 U.S.C. § 922(g)(8), which outlaws possession of a firearm by anyone subject to a domestic restraining order.

The defendant argued that because the domestic restraining order did not use the same wording as the felon-in-possession statute, it was insufficient to meet the requirements of the federal statute. The federal statute prohibits possession of a firearm by anyone, “who is subject to a court order that...(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) 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.”<sup>32</sup> However, the court found that the word “abuse” in the domestic restraining order included injuring a person mentally or physically and violent acts involving physical force; therefore the restraining order was sufficient.

The defendant also attacked the conviction on Second Amendment grounds, asserting that the federal statute violated the individual right to bear arms because “(1) the rights may be lost too quickly and (2) restraining order forms that provide clearer notice are available.”<sup>33</sup> The court rejected these arguments, finding that even





the one circuit which has recognized an individual right protected by the Second Amendment had concluded that the procedural requirements which precede enforcement of the federal statute safeguard the right to keep and bear arms.

Additionally, the court determined that the defendant had notice of his hearing, attended his hearing and that the restraining order itself clearly prohibited the defendant from possessing any weapons. Therefore the defendant's argument that the notice he received was unclear was rejected.

## SECOND CIRCUIT

In *Bach v. Pataki*,<sup>34</sup> the Second Circuit rejected Second Amendment and Privileges and Immunities challenges to a New York statute which prohibits non-residents from being licensed to carry a firearm within the state and does not recognize out-of-state licenses. Bach, a resident of Virginia, Naval Reserve officer, veteran Navy Seal and attorney with the Navy's Office of the General Counsel, challenged the New York statute because he wished to be able to carry a weapon in New York for protection of himself and his family while driving from Virginia to upstate New York to visit his parents. The petitioner feared predators on the road in areas of high crime.<sup>35</sup> However, the state police had informed him that as a non-resident, he was ineligible for a New York firearms license. Although preemptive federal law does allow for a firearm to be transported through any state for sporting purposes, that firearm must be out of the reach of the driver of whatever vehicle it may be in, and it must not be loaded.<sup>36</sup>

The court found that the Second Amendment does not apply to the states and is instead a right applicable only to the federal government. Bach's argument rested upon the assertion that the right to bear arms is a right of individual citizens. However, the court chose not to opine on that issue, holding instead, "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts."<sup>37</sup>

The Fourteenth Amendment's Privileges and Immunities Clause declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor





shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>38</sup>

Bach claimed his right to travel had been infringed because a component of that right was, “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in [a] second State.”<sup>39</sup> The court stated that a state may defeat a Privileges and Immunities claim by showing proper justification for the discrimination.<sup>40</sup>

The state of New York maintained that the restriction of licenses to residents and persons working within the state was to ensure that “only persons of acceptable background and character are permitted to carry handguns and to provide a method for reporting information on the identity of persons possessing weapons and the weapons themselves....”<sup>41</sup>

The New York licensing scheme affords great discretion to its licensers. Licensers have the ability to revoke licenses upon a demonstration of a broad range of objectionable behavior.<sup>42</sup> Because the licensing officers have very subjective authority, their need to monitor the behavior of licensees is heightened. New York argued that the localized nature of the licensing scheme was critical to the licensing system’s success, for localization “substantially increases the likelihood that a licensing officer will be alerted to facts that cast doubt on a licensee’s fitness to possess a firearm.”<sup>43</sup>

Bach provided suggestions as to how the State might allow non-residents to obtain licenses and be monitored to the same degree as residents. He asserted that sharing of information between counties, as happens in New York, is no different from sharing of information between states and that perhaps New York could require reference letters or certificates from a non-resident’s local authorities to fill any information gaps.<sup>44</sup>

The court rejected the suggestions as insufficient to monitor the behavior of a licensee, and stated that the ability to monitor licensees was essential to the State’s licensing regulations. It therefore rejected the Privileges and Immunities challenge to the statute.

In *U.S. v. Kavoukian*, the Second Circuit found that a conviction for making and possessing a silencer must be predicated upon the defendant’s knowledge that the device possessed the characteristics







to make it a silencer, but that actual knowledge that the device functioned as a silencer was irrelevant.<sup>45</sup> The defendant was convicted of making and possessing a silencer. He fashioned the item out of materials purchased at a home improvement store and had not actually used the device, nor did it fit any of the weapons in his possession. It was capable of muffling the volume of a shot from a 22-caliber firearm by approximately 3.2 decibels. The court upheld his conviction.

In *U.S. v. Jackson*,<sup>46</sup> the Second Circuit dealt with a case very similar to *U.S. v. Allen*<sup>47</sup> (discussed in the Seventh Circuit section). These cases involved defendants convicted of being a felon-in-possession of a firearm based upon a record of a prior conviction bearing the defendants' names. Both courts found that this record was not sufficient to support the conviction, because of the similarity and frequency of many common names.

### THIRD CIRCUIT

In *U.S. v. Grier*,<sup>48</sup> the defendant was convicted of conspiracy to possess, transfer and make machine guns, three counts of making firearms, two counts of possessing firearms, three counts of transferring firearms and one count of possession of firearms by a convicted felon, all in violation of the National Firearms Act.<sup>49</sup> (The National Firearms Act of 1934 applies to machine guns, short shotguns, and other relatively unusual firearms. It is distinct from the Gun Control Act of 1968, which regulates more ordinary firearms.)

The NFA prohibits engagement in manufacturing, importing or dealing in "firearms" without paying taxes on the weapons and registering as a firearms dealer. ("Firearms" controlled by the NFA include only machine guns and few other types of weapons.) The NFA also provides that applications to register will be denied if the transfer, possession or making of those NFA-defined "firearms" would be illegal.<sup>50</sup>

The Firearm Owner's Protection Act makes transfer or possession of a machinegun manufactured after May 19, 1986 illegal, thereby making it legally impossible for dealers of new machineguns to register under the NFA.<sup>51</sup> (Confusingly, the FOPA provision is part of the Gun Control Act, rather than part of the NFA, even





though the NFA is the main federal statute for machine guns.) The defendant in *Grier* challenged the constitutionality of the NFA, arguing that the FOPA implicitly repealed the NFA provisions under which he was convicted.

The Third Circuit, citing the analysis of other circuit courts on the issue, stated that unless the two statutes are irreconcilable, there is no implication of Congressional intent to repeal. The court held that the two statutes were easily reconcilable, because a person can comply with both the NFA and FOPA by simply refusing to be a dealer of post-1986 machine guns.<sup>52</sup> The defendant's challenges to the NFA were rejected and his conviction and sentence were affirmed.

In *U.S. v. Sivik*, the defendant, a licensed federal firearms dealer appealed the sentence he received upon pleading guilty to unlawful transfer of two machineguns in violation of 26 U.S.C. §§ 5861(e) and 5845(a) and (b).<sup>53</sup> His position was that the conviction violated his rights under the Second Amendment and denied him due process of law under the Fifth Amendment. The defendant argued that his rights under the Second Amendment included a right to transfer and possess unregistered machineguns and that the registration requirements were a violation of his right not to incriminate himself under the Fifth Amendment. The court found both his claims without merit.

#### FOURTH CIRCUIT

The Fourth Circuit held that a frame or receiver of a machinegun is a machinegun itself in *U.S. v. Williams*.<sup>54</sup> The defendant was convicted of conspiring to transfer a machinegun and of possessing and transferring a machinegun. He challenged the conviction by asserting that possession of the frame or receiver does not constitute possession of a machinegun. The court rejected the argument, maintaining that the statute clearly defines a frame or receiver as a machinegun.<sup>55</sup>

In *U.S. v. Hayes*, the defendants were convicted of knowingly selling firearms without a license.<sup>56</sup> Their sentence was enhanced because the firearms they were selling were "semiautomatic assault weapons." The defendants challenged the sentence enhancement,



arguing that the government could not prove that the weapons were not manufactured before the enactment of the Violent Crime Control Act of 1994<sup>57</sup> which banned the manufacture, transfer or possession of “semiautomatic assault weapons.” The defendants argued that if the weapons were manufactured before the enactment, there was a statutory exemption from prosecution for possession of those weapons. The court found that while there may be a statutory exemption for possession of pre-ban semiautomatic weapons, the defendants in *Hayes* were not charged with possession of “assault weapons”; they were charged with selling firearms without a license.<sup>58</sup> Therefore, the exemption from prosecution did not apply.

In *Blaustein & Reich, Inc. v. Buckles*, the plaintiff, a Federal Firearms Licensee (FFL) sued BATFE, alleging that BATFE’s demand for information related to the FFL’s acquisition of secondhand firearms was outside BATFE’s authority.<sup>59</sup> The FFL additionally alleged that the criteria used by BATFE to target FFLs were arbitrary and capricious.

BATFE requires all FFLs to maintain records about the firearms they manufacture, sell, import, and receive.<sup>60</sup> BATFE had determined that a very small percentage of FFL dealers had sold more than half of all guns involved in crime traces and that approximately 450 dealers had ten or more crime guns traced to them for which less than three years had elapsed between the time the gun was sold and the time it was found at a crime scene.<sup>61</sup> Demand letters were sent to the 450 dealers, among them the plaintiff. BATFE maintains that a high volume of gun traces with short periods between purchase and criminal association often indicates illegal firearms trafficking, which is why BATFE demanded the information about the secondhand firearms. The Federal Gun Control Act of 1986 gives BATFE some authority to demand, by letter, all recorded information that FFLs are required to maintain.<sup>62</sup>

The Fourth Circuit held the letters 1) did not exceed BATFE’s authority to seek information; 2) did not violate the ban on creating a national registry of firearms; 3) did not violate a statutory ban on new regulations which require the transfer of firearms records to facilities owned by the U.S.; and 4) the criteria used to target FFLs were not arbitrary and capricious. The court held BATFE is not restricted to issuing demand letters only in connection with a criminal



investigation or to non-compliant FFLs.

In both *U.S. v. Mowatt*<sup>63</sup> and *U.S. v. Jennings*,<sup>64</sup> the court dealt with defendants, previously convicted of misdemeanors, who had been charged with possession of a firearm after conviction of a crime punishable by imprisonment exceeding one year. Pursuant to 18 U.S.C. § 922(g)(9), a person who has been convicted of a crime in any court, punishable with imprisonment exceeding one year is prohibited from possessing a firearm.

Both defendants argued that because their convictions for misdemeanors did not result in their civil rights being taken away, they were not prohibited persons within the meaning of 18 U.S.C. § 922(g)(9). They pointed out that § 921(a)(20) states that “any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” Both the defendants contended that because their civil rights had never been taken away, they should be treated as though their civil rights had been restored, which would mean that they were not prohibited from possessing a firearm.

However, Maryland law still prohibited the defendants from possessing firearms.<sup>65</sup> Under Maryland law, any person convicted of a misdemeanor that carries a statutory penalty of more than two years is prohibited from possessing a firearm. Therefore, the defendants were required to forfeit their weapons to the government.

In *U.S. v. Bundy*, the defendant plead guilty to one count of possession of an unregistered firearm, on the condition that he could appeal the denial of his pretrial motions for production of documents.<sup>66</sup> Conditional guilty pleas are strictly regulated. One of the rules which applies in certain appellate courts is that any conditional guilty plea must be limited to case-dispositive issues.<sup>67</sup> The Fourth Circuit found in this case that the appeal of the defendant’s pretrial motion for production of documents was not a case dispositive issue. The court therefore set aside the plea and remanded the case to the lower court.





## FIFTH CIRCUIT

In *U.S. v. Camp*,<sup>68</sup> the court dealt with the definition of a machinegun. The defendant had modified a semiautomatic rifle by attaching an automatic firing device. The device started an electric motor, causing a fishing reel placed inside the weapon's trigger guard to rotate, whereupon the weapon would fire until the shooter released the switch controlling the device. BATFE alleged the weapon was capable of "firing more than one shot without manual reloading by a single function of the trigger"<sup>69</sup> which fits the statutory definition of a machinegun.<sup>70</sup> The district court had decided that the device was not a trigger as found in § 5845(b) and granted the defendant's motion to dismiss.

However, the Fifth Circuit found that the word "trigger" has no statutory definition, but that it is defined in previous cases as "any mechanism...used to initiate the firing sequence."<sup>71</sup> It held that the defendant's device was indeed used to initiate the firing sequence, and therefore vacated the dismissal and remanded the case back to the district court.

In *U.S. v. Darrington*<sup>72</sup> the defendant pled guilty to being a felon-in-possession of a firearm or ammunition.<sup>73</sup> He appealed based on Second Amendment, interstate commerce, Tenth Amendment and equal protection grounds.

In rejecting the defendant's Second Amendment claim, the court stated that although it recognized the protection of an individual right to bear arms,<sup>74</sup> that it had also specified that narrow exceptions or restrictions for particular cases are reasonable and consistent with the Second Amendment. The defendant's interstate commerce arguments were rejected on well-settled case law which stated that, "the constitutionality of § 922(g) is not open to question."<sup>75</sup> The defendant's Tenth Amendment challenge was similarly rejected. The court stated that the statute is a valid exercise of congressional authority and that the Tenth Amendment, "[I]n no way inhibits the activities of the federal government in situations in which a power has been so conferred."<sup>76</sup>

Finally, the defendant's equal protection argument, that the section depends on varying state law definitions of criminal conduct, was rejected by the court based on Supreme Court precedent hold-



ing that, "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm."<sup>77</sup>

In *U.S. v. Gonzales*, the trial court sentenced the defendant to 30-years in prison based on his use of a machinegun in conjunction with drug trafficking offenses.<sup>78</sup> The statute under which the defendant was sentenced provided a five-year sentence for an ordinary firearm but a 30-year sentence for use of a machinegun.<sup>79</sup> The jury was not informed that he used a machinegun, nor was the jury charged with determining what type of gun he used.

After Gonzalez had been convicted and sentenced, the U.S. Supreme Court, in *Castillo v. U.S.*, held that the jury, not the judge should determine whether a machine gun was used.<sup>80</sup> Later still, in *Apprendi v. New Jersey*, the U.S. Supreme Court ruled broadly that many factors used in sentencing enhancements must be found by the jury.<sup>81</sup> Gonzales appealed his sentence, and argued that the *Castillo* and *Apprendi* rules should be applied retroactively to his own case.

The Fifth Circuit held that the issue of whether the court or the jury should determine what type of gun was used was a procedural issue. According to the Supreme Court case of *Teague v. Lane*, only two types of changes in procedural rules should be applied retroactively: 1) those that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or 2) those that require the observance of those procedures that are implicit in the concept of ordered liberty.<sup>82</sup>

The Fifth Circuit reasoned that *Castillo* "does not determine what conduct the law criminalizes, but rather tends to ensure an accurate conviction of and sentence for conduct that the law criminalizes... *Castillo* now tends to ensure that these sentences will be imposed in a more accurate fashion."<sup>83</sup>

The Fifth Circuit explained that "*Apprendi v. New Jersey*, ...requires courts to determine the statute's basic offense and its maximum penalty, and then to determine what other facts in the statute affect the possible penalty."<sup>84</sup>

Accordingly, the Fifth Circuit held that *Castillo* and *Apprendi* are non-retroactive, under the *Teague* framework.<sup>85</sup> Because the procedural issue in *Gonzales* did not fit into either of the *Teague* classifica-



tions, the 30-year sentence stood.

In *U.S. v. Everist*,<sup>86</sup> the defendant was convicted of being a felon-in-possession of a firearm.<sup>87</sup> The defendant argued that the felon-in-possession statute violated his right to bear arms, protected by the Second Amendment. The court rejected this argument, referencing *U.S. v. Emerson* in which the Fifth Circuit stated, “it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms.”<sup>88</sup>

The Fifth Circuit reversed a conviction in *U.S. v. Johnson*.<sup>89</sup> The defendant had been convicted of possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B). The gun that the defendant was convicted of possessing belonged to another person. There was no evidence in the record that he was in any way aware that the serial number on the gun had been obliterated before the gun was found in his car. The court interpreted the statute prohibiting possession of a gun with an obliterated serial number to require 1) knowing possession of a firearm and 2) knowing that the serial number of the possessed firearm had been removed, obliterated, or altered.<sup>90</sup> The court found that there was insufficient evidence to support the knowledge requirement of the statutes, and reversed the defendant’s conviction, remanding the case to the district court for a judgment of acquittal.

*U.S. v. Orellana* involved an defendant convicted of being an illegal alien in possession of a firearm in violation of 18 U.S.C § 922(g)(5)(A).<sup>91</sup> The defendant challenged his conviction based upon his temporary lawfully protected status, which was granted to El Salvador nationals by the U.S. Attorney General in March 2001.<sup>92</sup> In analyzing the meaning of the statute and that of temporary protected status, the court stated, “[T]he plain language of § 922(g)(5)(A) provides support for the proposition that [the defendant’s] presence in the United States was lawful at the time of the alleged indictment.”<sup>93</sup> The government contended that a BATFE regulatory definition of § 922(g)(5)(A) provided that because the defendant originally entered the U.S. illegally, he maintains a status of being unlawfully present, for purposes of the GCA.<sup>94</sup>

However, the court held that the statute itself was ambiguous, that the weight and interpretation of BATFE regulation was questionable and that there was an absence of relevant case law.<sup>95</sup> The





court therefore applied the rule of lenity, which provides that ambiguity in a statute should be resolved in favor of a defendant. The court reversed the conviction.<sup>96</sup>

In *U.S. v. Shelton*,<sup>97</sup> the defendant challenged his conviction for possession of a firearm after being convicted of a misdemeanor domestic violence offense and of making false written statements in purchasing a firearm.<sup>98</sup> The defendant appealed the possession of a firearm conviction. He argued that the Texas assault statute under which he was convicted did not fit the federal definition of domestic violence because the Texas statute did not require the use of force, and because the victim, his live-in girlfriend, was not a person specified in the misdemeanor assault statute.<sup>99</sup>

The court dealt quickly with the specified person issue. The federal statute requires that the offense involved “the use or attempted use of physical force” by a person “who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”<sup>100</sup> The defendant had stated himself that he had been living with his girlfriend for two months at the time of the offense. The court found that they had been cohabiting and that she was a person similarly situated to a spouse.

The use of force issue required more analysis. The Texas statute did require that the defendant, “intentionally, knowingly, or recklessly cause bodily injury to another, including the person’s spouse.”<sup>101</sup> Looking at prior case law, the court decided that a conviction for causing bodily injury would necessarily imply that force was used to cause the bodily injury.<sup>102</sup>

The defendant also argued that his indictment was defective because it did not set forth that he knew it was unlawful for him to possess a firearm after his prior conviction. The court stated that it had ruled on this issue in previous cases; conviction for illegal gun possession “does not require knowledge that one is violating the law, but only of the legally relevant facts.”<sup>103</sup>

The defendant’s last argument was that the federal statute, which was enacted under Congressional power to regulate interstate commerce, could not constitutionally include intrastate possession of a firearm, when the firearm was merely transported across state lines long ago in commerce. The court easily rejected the argument, stat-







ing that it has “made clear that stipulated evidence showing that a weapon was manufactured outside of the state in which it was possessed was sufficient to support a conviction.”<sup>104</sup> The defendant’s conviction was affirmed.

In *U.S. v. Phipps*,<sup>105</sup> the court found that 18 U.S.C. § 924(c)(1) does not unambiguously authorize multiple convictions for the single use of a single firearm.<sup>106</sup> The defendants had been convicted of conspiracy to commit kidnapping and carjacking, and of using a firearm during and in relation to a kidnapping. They appealed the firearms convictions, which both fell under 18 U.S.C. § 924(c)(1). The statute states: “any person who, during and in relation to any crime of violence...uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence,” be sentenced to additional terms of imprisonment based on the type of firearm used and the nature of its use.<sup>107</sup>

The statute requires that the offender commit predicate offenses, in this case kidnapping and carjacking. Here, the defendants were convicted not only for using a firearm during a kidnapping, but then again for using the same firearm during the simultaneous carjacking. The court found that the statute was ambiguous as to whether it could include multiple offenses committed at the same time. It applied the rule of lenity to reverse the convictions.

In *U.S. v. Roach*, the defendant pled guilty to being an addict or unlawful user of a controlled substance in possession of a firearm and appealed his sentence.<sup>108</sup> Roach was sentenced to 60-months in prison and three years of supervised release in a 14-month upward deviation by the court from the United States Sentencing Guidelines. At the time of his arrest, Roach was a district attorney. The upward deviation in his sentence was based upon his possession of 35 firearms and a betrayal of the public trust.

Roach appealed his sentence on the grounds that the sentencing guidelines should have been treated as mandatory and not merely advisory, and that the law to which he pled guilty violates due process and equal protection under the Constitution. The court found that under the Supreme Court’s *Booker* precedent,<sup>109</sup> the sentencing guidelines are not mandatory; the sentence must simply be reasonable. The court decided that the district court which sentenced the





defendant did not abuse its discretion in deviating from the sentencing guidelines.

In arguing due process and equal protection, Roach maintained that the right to keep and bear arms is fundamental, and that the court should therefore apply a strict scrutiny analysis to determine whether infringement of this right implicates due process or equal protection. The court countered that a drug user does not have the fundamental right to keep and bear arms, so the strict scrutiny analysis does not apply.<sup>110</sup> The court found that the equal protection and due process clauses were not implicated.

#### SIXTH CIRCUIT

In *U.S. v. Wynn*,<sup>111</sup> a case very similar to that of *U.S. v. Lee*,<sup>112</sup> the defendant was convicted of possession of an unregistered sawed-off shotgun and being a felon-in-possession of a firearm. He appealed his sentence, which had been enhanced based upon the status of the sawed-off shotgun as a “destructive device” under the National Firearms Act. Like the court in *Lee*, the Sixth Circuit found that double counting did not result when a sawed-off shotgun was used both to determine defendant’s base offense level and to apply enhancements to his sentence for destructive devices.<sup>113</sup> The defendant in *Wynn* challenged his sentence by questioning the status of the sawed-off shotgun as a destructive device. After consulting the statute and its legislative history, the court concluded that a sawed-off shotgun was indeed a destructive device.<sup>114</sup>

In *U.S. v. O’Malley*,<sup>115</sup> the defendant pled guilty in two district courts of conspiracy to steal firearms,<sup>116</sup> theft of firearms from a federally licensed dealer,<sup>117</sup> and of receipt of stolen firearms which had been shipped interstate.<sup>118</sup> The defendant appealed her sentences, which had been enhanced because one of the firearms taken had been a “semiautomatic assault weapon.” The Sixth Circuit found that the lower court’s conclusions that the weapon was illegal were erroneous and that the enhancement should not have been applied. The defendant’s sentence was vacated and remanded to the district courts for re-sentencing.

In *U.S. v. Oliver*,<sup>119</sup> the court questioned whether the semiautomatic firearm that the defendant pled guilty to possessing fit the





statutory definition<sup>120</sup> of a “semiautomatic assault weapon,” which would require an enhanced sentence. The court analyzed the definition of a semi-automatic assault weapon: “a semi-automatic assault rifle that has an ability to accept a detachable magazine and has at least 2 of- (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and (v) a grenade launcher.”<sup>121</sup> The Sixth Circuit agreed with the district court that the firearm in question had a detachable magazine and a protruding pistol grip and therefore fit the statutory definition of a semi-automatic assault weapon.

This ruling seems to be an error based upon 18 U.S.C. § 922(v)(3), which states that the prohibition on possessing a semi-automatic assault rifle found in 18 U.S.C. § 922(v)(1) shall not apply to weapons listed in Appendix A to 18 U.S.C. § 922. The weapon used by the defendant was a Ruger Mini 14 Ranch Rifle.<sup>122</sup> This firearm is listed in the Appendix under “Centerfire Rifles – Autoloaders” as a “Ruger Mini-14 Autoloading Rifle (w/o folding stock).”<sup>123</sup> The opinion nowhere states that the firearm had a folding stock. Nonetheless, the defendant’s sentence was affirmed.

The Supreme Court granted a petition for certiorari and vacated and remanded the judgment, though not on the grounds of the above error. The decision was based on *Booker*,<sup>124</sup> which mainly concerned the Sixth Amendment protection of the right to a jury trial. On remand, the Sixth Circuit reaffirmed its opinion that the firearm possessed by the defendant met the statutory definition of a semi-automatic assault rifle. It then vacated the judgment and sentence of the district court and remanded the case for re-sentencing.

In *Appalachian Resources Development Corp. v. McCabe*,<sup>125</sup> the court affirmed a grant of summary judgment in favor of BATFE, which had revoked the Corporation’s license<sup>126</sup> to sell firearms and ammunition. The license was revoked for violating the Gun Control Act of 1968 by selling handgun ammunition to an individual whom the licensee knows or has reasonable cause to believe is less than 21-years old.<sup>127</sup>

An 18-year old male bought .25 caliber ammunition from the Corporation. This was evidenced by sales receipts found in the de-





fendant's car. The Corporation maintained it was unaware that the male was under the age of 21. However, the statute only requires that the seller have reasonable cause to believe the purchaser is not of the legal age. Pictures as well as testimony demonstrated that the man looked to be underage and that the clerk of the corporation did not check the man's identification, so the court affirmed the district court's grant of summary judgment.

In *U.S. v. Ninety-three (93) Firearms* the court affirmed a government forfeiture action.<sup>128</sup> The case was very similar to *U.S. v. Miscellaneous Firearms, Explosives, Destructive Devices and Ammunition*,<sup>129</sup> which is discussed in the Seventh Circuit section. In both cases the courts found that although the law requires that *any* action for forfeiture of firearms must be brought within 120 days of the related seizure, *all* action is not required to commence within that time period, and that commencement of administrative proceedings (but not judicial proceedings) during the 120 days was sufficient.

*Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco, and Firearms*<sup>130</sup> resembled the Supreme Court case of *Grob v. Ramirez*. Baranski owned a firearm importing business, which was implicated in illegal gun sales. BATFE obtained a warrant to search and seized over 300 firearms. The firearms were used as evidence in a case against Baranski. He filed a challenge to the seizure, on the grounds that the search violated the Fourth Amendment protection, which requires that any search be based on a warrant issued "... upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."<sup>131</sup>

Although the affidavit submitted to the magistrate contained a particular description of the place to be searched, and a description of the items to be seized, the warrant itself did not. The warrant only provided directions to refer to the affidavit for a description of the items to be seized, and a brief description of the place to be searched. This affidavit was supposed to be attached to the warrant. However, the magistrate had sealed the affidavit, so when the search was performed, it was not attached to the warrant.

The court found that the warrant was sufficiently particular in its description of the place to be searched because the place was described well enough to identify it with reasonable effort. However,





in referring to the items to be seized the court stated, “As in *Groh*, the warrant was deficient as to the Fourth Amendment’s particularity requirement because it provided no description of the type of evidence sought.”<sup>132</sup> The warrant was therefore declared invalid, and the agents, based on *Groh*, were not found to be entitled to qualified immunity.

#### SEVENTH CIRCUIT

In *U.S. v. Price*,<sup>133</sup> the Seventh Circuit reaffirmed the constitutionality of the felon-in-possession statute. The defendant made an argument that the Fifth Circuit’s ruling in *Emerson*,<sup>134</sup> recognizing the Second Amendment as an individual right, and the concurrence by Attorney General John Ashcroft in a letter to the National Rifle Association, as well as an official statement by Solicitor General Ted Olson, would give the Seventh Circuit a basis on which to re-examine its stance on the felon-in-possession law. The Seventh Circuit disagreed, stating that even if it were inclined to re-examine its stance on the individual versus collective right, the ruling in *Emerson* was consistent with the Seventh Circuit’s conclusion in prior cases that rights under the Second Amendment could be restricted.

The issue was addressed again by the Seventh Circuit in *U.S. v. Jackubowski*.<sup>135</sup> The court was unconvinced by the defendant’s argument that the felon-in-possession statute contravenes the Second Amendment. The defendant argued that the Second Amendment reserved the right to regulate firearms to the states, not the federal government. The court struck down the argument with little fuss, citing the Supreme Court opinion in *U.S. v. Miller*, which, “unambiguously held that the federal government can play some role in the regulation of firearms.”<sup>136</sup>

The defendant also asserted that the Supreme Court’s ruling in *Lopez v. U.S.*,<sup>137</sup> which found that the Gun Free School Zones Act of 1990 was an infringement on states’ rights, should be read to imply that Congress does not have the power to authorize regulations on firearms. His arguments were dismissed based on well-settled case law.

Yet another felon-in-possession conviction was challenged in *U.S. v. Allen*.<sup>138</sup> In this case, the defendant’s conviction was reversed.



The only evidence that the government had that the defendant was indeed a felon was a record of a felony conviction for a person having the same name as the defendant. The court found that because of the prevalence of common or identical names, that this record alone was insufficient to establish the defendant's status as a felon if the defendant challenged the evidence. This decision comports with similar holdings by the Second, Third and Tenth Circuits.

A case involving forfeiture of firearms, *U.S. v. Miscellaneous Firearms, Explosives, Destructive Devices and Ammunition*, found that although the law requires that any action for forfeiture of firearms must be brought within 120 days of the related seizure, all action is not required to commence within that time period.<sup>139</sup> Here, the defendant was convicted of being a felon-in-possession of firearms. The firearms were legally seized by BATFE, which commenced administrative forfeiture proceedings forty-four days after the seizure. Judicial forfeiture proceedings by the United States Attorney's Office did not commence until approximately 18 months following the seizure.

The defendant's wife asserted that the judicial proceeding could not be maintained as it did not commence in a timely manner as required by statute. The statute requires: "Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure."<sup>140</sup> The court's opinion analyzed the meaning of the use of the word "any" in the statute. The court held that since an administrative forfeiture proceeding had commenced within the required time period, the fact that the judicial proceeding was not commenced within the 120 days was irrelevant and therefore the provisions of the statute were met.

In *U.S. v. Queen*, the defendant was convicted of providing false information to a firearms dealer under 18 U.S.C. § 922(a)(6).<sup>141</sup> The statute requires a gun buyer to provide truthful information to gun dealers when that information is material to the lawfulness of the sale of the firearm. In this case, the defendant filled out BATFE form 4473, and in doing so, provided a false street address.

The defendant contended that only his state of residence, and not his exact street address was material to the lawfulness of the firearms sale. The court rejected the argument, stating that 18 U.S.C. § 922(b)(5) requires firearms dealers to maintain records of buyer



information, including the buyer's correct street address. The court found that when read together, the two sections clarified each other and demonstrated that the buyer's street address is a fact material to the lawfulness of a firearms sale. The decision was also supported by case law from other circuits. The Fifth Circuit, in *U.S. v. Grudger*,<sup>142</sup> clearly held that providing a false street address when buying a firearm was a material misrepresentation; and the Fourth Circuit in *U.S. v. Beberra*<sup>143</sup> and Ninth Circuit in *U.S. v. Buck*<sup>144</sup> both essentially held that providing a false address was a violation of § 922(a)(6).

In *City of Chicago v. U.S. Department of Treasury*, the court found that appropriations legislation by Congress precluded the City's request under the Freedom of Information Act (FOIA) for disclosure of information regarding sale and tracing of firearms.<sup>145</sup> The suit grew out of the City of Chicago's suits against the gun industry. In suing, the City attempted to obtain access to BATFE's gun tracing and multiple sales databases. Originally, BATFE complied in part.

The FOIA, which makes most government documents available to the public, has exemptions for privacy and law enforcement purposes. BATFE contended that the FOIA exemptions barred the release of some records. The district court ordered BATFE to release the information, and the Seventh Circuit affirmed.

BATFE filed a petition for a writ of certiorari from the Supreme Court, which granted the petition.<sup>146</sup> Congress then passed the Consolidated Appropriations Resolution of 2003 (CAR). Because the Supreme Court thought CAR might have bearing on the case, the Supreme Court decided not to hear it, vacated the Seventh Circuit's judgment, and remanded the case back to the Seventh Circuit for consideration in light of CAR.

Congress then passed another appropriations rider which prohibited the use of appropriated funds to disclose to the public firearms trace or multiple sales data. On remand, the Seventh Circuit again found in favor of the City. The Court decided that although the use of funding was prohibited by the rider, the City's right to access the information under the FOIA was unaffected.<sup>147</sup> The City suggested that the Court appoint someone to retrieve the data from BATFE at the City's cost, which the Court did.

BATFE filed for a re-hearing, and while the petition was pending, Congress passed the Consolidated Appropriations Act of 2005





(CAA), which contained another rider pertinent to the sales and trace databases. The language of the Act stated, “[A]ll such data shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal Court or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives....”<sup>148</sup>

The Seventh Circuit recognized that the language indicated Congress’ intent to prevent access to the databases except for law enforcement purposes. Additionally, the Seventh Circuit found that CAA changed FOIA by exempting data previously available to the public. FOIA’s exemption number three provides that the duty to disclose does not apply to information specifically exempted by statute, as long as the relevant statute does not leave discretion on the issue.<sup>149</sup> Because there is no ambiguity in the CAA as applicable to the information requested by the City, the Court finally held that the new appropriations legislation precluded the City’s request for information.

## EIGHTH CIRCUIT

In *U.S. v. Walker*, the Eighth Circuit found that a charge for felon-in-possession of a firearm and felon-in-possession of ammunition should not have been charged as one single offense.<sup>150</sup> The defendant, a felon, simultaneously possessed a firearm and ammunition. Without evidence that the firearm and ammunition were acquired or possessed at different times, the Eighth Circuit recognized itself as the only circuit which would find the defendant committed two crimes rather than one single offense. The Eighth Circuit stated that most courts follow the interpretation in *U.S. v. Verrecchia*,<sup>151</sup> that when Congress intended for multiple charges to be associated with a single occurrence, Congress made its intent clear. *Verrecchia* also stood for the proposition that ambiguity in the criminal code should be resolved in favor of the lesser punishment.<sup>152</sup> However, the Eighth Circuit found that *U.S. v. Peterson*,<sup>153</sup> where simultaneous possession of a firearm and ammunition was found to comprise two separate offenses under 18 U.S.C. § 922(g)(1), controlled the case.

In a similar case, *U.S. v. Lee*, the court found that double counting did not result when use of a sawed-off shotgun was used both







to determine the defendant's base offense level and to apply a destructive device enhancement to his sentence.<sup>154</sup> He was convicted of possession of an unregistered sawed-off shotgun and appealed the recommended two-level destructive device enhancement to his sentence.

The U.S. Sentencing Commission provides 43 different offense levels for sentences based on the severity of the defendant's offense.<sup>155</sup> Then, based upon other factors, the courts may choose to enhance the offense level. The defendant's base offense level in *Lee* was founded upon possession of an unregistered sawed-off shotgun. His offense level was then enhanced based upon U.S. Sentencing Guidelines § 2K2.1(b)(3), which allows a two-level increase for a destructive device. The court ruled that the Sentencing Commission intended that both the base level offense and the destructive device enhancements should be applied.<sup>156</sup>

In *U.S. v. Lippman*, the defendant challenged his conviction for possession of a firearm by an individual subject to a domestic violence restraining order.<sup>157</sup> He claimed that the conviction violated his Second Amendment rights. The defendant's argument was that the Eighth Circuit had recognized the Second Amendment as protecting an individual as opposed to a collective right in *U.S. v. Hutzell*.<sup>158</sup> He then asserted that because the right was individual, the government would need an especially compelling reason to deprive him of the right.

The court rejected the argument, stating that it had not, in fact, recognized the Second Amendment as protecting an individual right. Further, the court maintained that even if it had they done so, the government's interest in preventing domestic violence is compelling enough to justify the conviction.

Interestingly, the concurring opinion on this case disagreed with the rest of the court on the individual versus collective rights. The concurrence stated, "I would resolve Lippman's claim by assuming the Second Amendment protects an individual's right to possess a firearm..."<sup>159</sup> The concurring opinion, though recognizing the individual right, stated that federal firearms restrictions should still be permitted, and that the particular regulation at issue was constitutional.





## NINTH CIRCUIT

In *U.S. v. Weatherspoon*,<sup>160</sup> the defendant was convicted of being in a felon-in-possession of a firearm. He had been in a car with two other individuals. The car was pulled over and searched by the police, who found a firearm under the defendant's seat. The two individuals made statements that the gun was in the defendant's possession earlier in the day. One individual recanted the statement, and the other admitted that the statement was only provided in return for not being prosecuted for other crimes.

The defendant challenged the conviction on grounds that the verdict was tainted by improper statements made by the prosecutor during closing arguments. The court found that the prosecutor's statements vouching for the candor of the witnesses and then urging the jury to convict to alleviate social problems, were inflammatory and prejudicial. The court reversed the sentence and remanded the case to the district court for a new trial.

The court in *U.S. v. Stewart* confirmed that 18 U.S.C. § 922(o) has an interstate commerce requirement.<sup>161</sup> The statute prohibits transfer or possession of a machinegun manufactured after May 19, 1986. The defendant argued that Congress did not have the authority under the interstate commerce power to regulate his specific machineguns, because he had fabricated them at home; therefore they did not involve interstate commerce.

The government argued that the statute could apply since some of the parts of the machineguns had traveled in interstate commerce. The Ninth Circuit found that the components that had traveled in interstate commerce did not make up an entire machinegun, and that the firearms were genuinely homemade, from the defendant's original design.<sup>162</sup> The court stated, "We cannot agree that simple possession of machineguns—particularly possession of homemade machineguns—has a substantial effect on interstate commerce."<sup>163</sup>

The defendant also argued that the Second Amendment guarantees his right to possess machineguns despite his previous felony convictions. However, the court reiterated its holding in *Silveira v. Lockyer*<sup>164</sup> that the Second amendment did not afford a right of gun ownership to individuals.<sup>165</sup> The defendant's conviction for possession of a machinegun was reversed, but his conviction for posses-



sion of firearms by a felon was affirmed.

The Ninth Circuit denied a petition for rehearing en banc for *Silveira v. Lockyer*.<sup>166</sup> Five judges provided extensive dissents from the denial, but the petition failed to receive the necessary majority.

In *U.S. v. Padilla*,<sup>167</sup> the defendant was convicted of being a felon-in-possession of a firearm.<sup>168</sup> His predicate felony offense had been an adult conviction, even though he was a minor at the time. Later, his predicate adult conviction was vacated. The Ninth Circuit found that because the predicate conviction was not vacated prior to the defendant's possession of the firearm, he was a felon when he convicted of being a felon-in-possession. The district court's denial of a motion for a new trial was therefore upheld.

In *U.S. v. Nobriga*,<sup>169</sup> the defendant pled guilty, while reserving the right to appeal, to illegally possessing a firearm after having been convicted of misdemeanor domestic violence.<sup>170</sup> The defendant had previously been convicted under Hawaii's Abuse of Family or Household Member statute (AFHM).<sup>171</sup> The defendant argued that the AFHM conviction was not for misdemeanor domestic violence.

Federal gun law defines a domestic violence misdemeanor as one that, "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."<sup>172</sup>

The Ninth Circuit found that the phrase "physical force" as used in the federal statute means violent use of force against the body of another individual.<sup>173</sup> The court then found that an AFHM conviction does not necessarily require the offender to have used violent force. The defendant had stipulated that he had been guilty of the violent use of force, so the court found that his actions fit within the physical force required by the statute.

However, the Circuit court found that victim of the AFHM conviction did not fit into the categories of persons specified by the federal misdemeanor of domestic violence statute. Although the defendant had admitted that the victim was his former girlfriend, the court could not consider the evidence and found that even if

it were able to, the evidence did not prove the victim fit the federal definition.<sup>174</sup>

The denial of the motion to dismiss was reversed and the case was remanded to the district court to allow the defendant to withdraw his guilty plea.

Another misdemeanor domestic violence case, *U.S. v. Brailey*, found that the defendant who had never lost his civil rights could not argue that his civil rights had been restored; thus, he could not possess a firearm.<sup>175</sup> The defendant had conditionally pled guilty of being a prohibited person in possession of a firearm under federal law.<sup>176</sup> This prohibition was based on a conviction under Utah state law which fit the federal definition for a crime of misdemeanor domestic violence.<sup>177</sup>

Federal statute 18 U.S.C. § 922(g)(9) provides that a person shall not be considered to have been convicted of misdemeanor domestic violence if, “the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored.” The defendant appealed his plea; he argued that his civil rights had been restored because an amendment to the Utah domestic statute provided that persons convicted of misdemeanors may possess firearms under Utah state law. The defendant had been convicted of the Utah domestic violence misdemeanor before the Utah gun possession law was amended.<sup>178</sup> The Ninth Circuit ruled that because the state law under which the defendant pled guilty did not include loss of civil rights, the defendant’s rights had never been lost; therefore his rights could not have been “restored” within the meaning of the federal law. His guilty plea to possessing a firearm while being a prohibited person was affirmed.

In *U.S. v. Batterjee* the court ruled that the defendant had been entrapped into committing the crime of being a non-immigrant alien in possession of a firearm and ammunition.<sup>179</sup> The defendant was an alien from Saudi Arabia, legally in the United States on a student visa. He purchased a firearm from a federal firearms licensee. In doing so, he was asked to fill out BATFE Form 4473, which includes a list of questions about whether the purchaser is prohibited from possessing a firearm. The only question pertaining to immigrant status was question 9h, which asked whether the purchaser was legally in the United States. The defendant, truthfully, answered in the affirmative.

He was convicted under 18 U.S.C. §§ 922(g)(5)(B) and 924(a)(2).

Congress had amended § 922(g)(5) to prohibit persons lawfully present in the U.S. on a non-immigrant visa from possessing firearms or ammunition. (Non-immigrant legal aliens are still allowed to possess guns for sporting purposes, under certain conditions not relevant here.) The amendment was enacted in 1998, approximately three years before the defendant purchased a firearm and ammunition. However, BATFE did not update Form 4473 to reflect the amendment until almost four years following the change in the law, and nearly a year after the defendant purchased the firearm and ammunition.<sup>180</sup>

The court ruled that the situation fit the requirements of the affirmative defense of entrapment by estoppel, where “a defendant must show that (1) ‘an authorized government official,’ ‘empowered to render the claimed erroneous advice,’<sup>181</sup> (2) ‘who has been made aware of all the relevant historical facts,’<sup>182</sup> (3) ‘affirmatively told him the proscribed conduct was permissible,’<sup>183</sup> (4) that he relied on the false information,<sup>184</sup> and (5) ‘that his reliance was reasonable.’”<sup>185</sup> The court found the defendant had reasonably relied on the representations of the FFL and the outdated version of Form 4473, neither of which informed him that his conduct was prohibited. The court therefore reversed the defendant’s conviction.

In *Nordyke v. King*<sup>186</sup> two gun show promoters challenged a county ordinance which made possession of firearms on county property a misdemeanor.<sup>187</sup> Since 1991, there had been guns shows on the Alameda County fairgrounds, an area of unincorporated county land.<sup>188</sup> The ordinance effectively barred future gun shows from being held on the fairgrounds.

In 2000, the promoters brought suit in an attempt to get a temporary restraining order which would prevent the ordinance from being enforced. The suit was treated by the district court as an application for preliminary injunction, and because the promoters could not show a fair chance of success on the merits, the application was denied.<sup>189</sup>

The Ninth Circuit asked the California Supreme Court to rule on whether the county anti-gun show ordinance was affected by the California state preemption law. The preemption law forbids local ordinances which ban gun possession. The California Supreme



Court held that “whether or not the Ordinance is partially preempted, Alameda County has the authority to prohibit operation of gun shows on its property, and, at least to that extent, may ban possession of guns on its property.”<sup>190</sup>

The Ninth Circuit then applied California law, as conclusively determined by the California Supreme Court, and held that the district court properly determined that the promoter’s claim about the California preemption law was without merit.

The Ninth Circuit also considered the promoters’ other claims, which were that the ordinance impedes the right to free speech protected by the First Amendment and that it infringes the right of individuals to possess and bear firearms protected by the Second Amendment. In the First Amendment claim, the promoters argued that gun possession (in the context of gun shows) involves expressive conduct. The Ninth Circuit stated that if in fact gun shows involve expressive conduct, then the question is whether the ordinance is aimed at suppressing free speech.<sup>191</sup> The court found that the ordinance is not directed at suppressing expressive conduct.

The Ninth Circuit also stated that possession of a gun was not expression, nor was it commercial speech; the gun show ordinance did interfere with sales of guns, but such sales are not commercial speech. In analyzing the promoters’ Second Amendment claim, the court reiterated its holding in *Hickman v. Block*,<sup>193</sup> which was that the Second Amendment guarantees a collective right for the states to maintain an armed militia and offers no protection for an individual right to bear arms. The holding also asserted that individuals have no standing to raise a Second Amendment challenge to a law regulating firearms.<sup>194</sup>

Additionally, the court found that it lacked jurisdiction under Article III of the U.S. Constitution to adjudicate the promoters’ Second Amendment challenge. The court therefore upheld that denial of the application for preliminary injunction. In 2004, the promoters filed a petition for a rehearing, which was denied by the court. A petition for a writ of certiorari was filed with the Supreme Court in 2004, as well. It too, was denied.





## TENTH CIRCUIT

The Tenth Circuit reaffirmed its holding that the Second Amendment does not protect an individual right to bear arms in *U.S. v. Parker*, wherein the defendant was convicted of carrying a loaded firearm in a vehicle on a military base.<sup>195</sup>

The crime was a violation of a Utah state statute adopted by the Assimilative Crimes Act (ACA). The ACA is used as a gap-filler to provide state law to apply on federal jurisdictions, such as a federal military base, as provided by 18 U.S.C. § 7(3). The ACA works to provide state law to guide criminal prosecution for a crime committed within a federal jurisdiction if that crime is not covered by an applicable federal law.<sup>196</sup>

The defendant challenged his conviction on Second Amendment and Tenth Amendment grounds. The Tenth Circuit dismissed the Tenth Amendment challenge immediately. The court then engaged in a thorough analysis of the Supreme Court decision in *U.S. v. Miller*,<sup>197</sup> in which (as characterized by the Tenth Circuit) the Supreme Court had concluded that unless the possession of a firearm is related to use in a well-organized militia, the Second Amendment does not protect the right to keep and bear that firearm.

Although the defendant relied upon the Fifth Circuit's ruling that the Second Amendment *does* protect an individual right,<sup>198</sup> the Tenth Circuit rejected this argument based upon its own precedent. The Tenth Circuit maintained that it has adopted a "sophisticated collective rights model...under which an individual has a right to bear arms, but only in direct affiliation with a well-organized state-supported militia."<sup>199</sup> It therefore concluded that the prosecution of the defendant under the ACA did not violate the Second Amendment.

In *U.S. v. Wonschik*, the Tenth Circuit found that possession of parts that could be assembled into an automatic weapon could constitute illegal possession of an automatic weapon.<sup>200</sup> The defendant was in possession of a semi-automatic weapon as well as parts, including two drop-in auto sears, which, when attached, would convert that weapon into a fully automatic M-16.

The government expert testified that he was unable to make the weapon function with either of the auto-sears installed, and was only





able to make the weapon function as an automatic without the auto-sear. The defense expert testified that, as assembled by the government expert, the defendant's weapon did not qualify as an automatic weapon because it did not contain an auto-sear.<sup>201</sup> The defense expert maintained that the functioning of the weapon as an automatic was a malfunction.

Congress defines a machinegun as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically."<sup>202</sup> Although the defendant maintained that he was unaware that he was in possession of such pieces, and that his weapon was not, in fact, capable of being used as an automatic weapon unless put together improperly and made to malfunction, the court affirmed his conviction, based upon the statutory language that the gun could be "readily restored" to fire automatically.

In *U.S. v. Wynne*, the defendant was convicted of possession of a firearm while under a restraining order, in violation of 18 U.S.C. § 922(g)(8).<sup>203</sup> He was also convicted of making false statements in connection with a firearms purchase, violating § 922(a)(6). The defendant had been under a temporary restraining order, and when purchasing a weapon, was asked to fill out a form which inquired about the existence of any restraining orders. The defendant answered that he was not subject to a restraining order.

The defendant argued that the statutes which he was convicted of violating are unconstitutional as applied under the Second Amendment. The court's previous cases had established its view that in order to prove a violation of the Second Amendment, one must establish that the guns in the defendant's use were reasonably connected to his service in a militia. The Tenth Circuit stated that, "Because [the defendant] has failed to offer any credible evidence or argument responsive to the elements set forth in our previous cases, his Second Amendment challenge is without merit."<sup>204</sup> The conviction was affirmed.

In *U.S. v. Hardridge*<sup>205</sup> the defendant was convicted of being a felon-in-possession of a firearm<sup>206</sup> and of knowingly making a false statement in connection with the purchase of a firearm.<sup>207</sup> The prior cases on which the felon-in-possession convictions were based were two state convictions for aggravated battery when the defendant was 17. The defendant was prosecuted as an adult, but testified that he







believed his crimes had been juvenile offenses, and that he had been misled by statements of a firearms dealer, a state judge, and local law enforcement officers.<sup>208</sup>

When the defendant had been sentenced in state court, the state judge had stated that the defendant would be prohibited from carrying a firearm upon his release.<sup>209</sup> The defendant mistakenly took the judge's statement to mean that during his two-year post-release supervision, he was prohibited from possessing a firearm.

Additionally, his prior convictions somehow were not entered into the National Crime Information Center database. The defendant was provided with a report by the Kansas City Police Department stating that no records found were attributed to him. Subsequently, when the defendant purchased a firearm, he was told by the dealer that a juvenile conviction did not need to be declared.

Upon his federal conviction for being a felon-in-possession, the defendant argued that he was entrapped by the statements of various government officials into thinking that he could legally possess a firearm. However, the court stated that entrapment only occurs, "where an agent of the government affirmatively misleads a party as to the state of the law and that party proceeds to act on the misrepresentation..."<sup>210</sup>

The court found that the firearms dealer who told the defendant he did not need to report a juvenile conviction was not an agent of the government. It also found that the statement by the judge at sentencing for the prior offenses could not have been interpreted by the defendant to imply anything about the application of federal firearms law after his post-release supervision.<sup>211</sup> Additionally, the court found the information from the Kansas City Police Department could not be construed as entrapment because it was not a "government official or agency responsible for interpreting, administering, or enforcing the law defining the offense as entrapment by estoppel requires."<sup>212</sup>

The defendant's final argument was that he could not have committed the crime of "knowingly making false or fictitious oral or written statements"<sup>213</sup> in purchasing a firearm because he believed, based upon the information he received from the local police and the firearms dealer, that his conviction had been of a juvenile crime. The court rejected this argument, stating that there was no way the





defendant could have been unaware of his prosecution and conviction as an adult.<sup>214</sup>

In *U.S. v. Atandi*, the defendant was an alien unlawfully in the United States who had not yet been ordered removed from the country; his wife had filed a petition on his behalf for him to remain in the U.S. as an Alien Relative.<sup>215</sup> He was convicted of being an alien unlawfully in the United States in possession of a firearm pursuant to 18 U.S.C. § 922(g)(5)(A). The defendant had originally come to the U.S. on a student visa.

He challenged the conviction because he had not yet been ordered to leave the U.S. and because the Alien Relative petition had been filed; he therefore asserted that he was therefore not unlawfully in the country. (And, accordingly, was not covered by the federal law against gun possession by illegal aliens.)

The defendant's student visa was based on the defendant pursuing a full course of study; he stopped his studies two months after entering the U.S. He thereby violated his visa. Accordingly, he was an illegal alien, and was prohibited from possessing firearms.

#### ELEVENTH CIRCUIT

*U.S. v. Vega*, dealt with the enhancement of a sentence for crimes involving legally possessed semiautomatic firearms.<sup>216</sup> These firearms were legally possessed under the grandfather provision of the 1994 assault weapons ban, which exempted from the ban the possession or sale of "assault weapons" lawfully possessed under federal law on the date of the ban's enactment.<sup>217</sup>

The defendant had pled guilty to three counts of making false statements to a dealer when purchasing firearms in violation of 18 U.S.C. § 924(a)(1)(A). The government sought to enhance the sentence because the offense involved an Action Arms UZI,<sup>218</sup> and used U.S. Sentencing Guidelines § 2K2.1(a)(5), which allows for a higher offense level for a firearms violation if the firearm in question is one specified by the "assault weapon" statute.<sup>219</sup> However, because the weapons were not illegal, based on the "grandfather" provision of the assault weapons ban, the court found the two statutes cannot be applied simultaneously, and the Sentencing Commission's guidelines must give way to the Congressional directive. The sentencing enhancement was not allowed.





## CONCLUSION

This Article is a comprehensive review of the federal appellate firearms cases rendered between 2003 and 2006. But it only touches the surface of the issues and controversy surrounding the Second Amendment. Since the writing of this Article, many decisions have been rendered involving the Second Amendment. Most notable among them is the *Parker* decision by the D.C. Circuit holding that the D.C. handgun ban violates the individual Second Amendment right. I hope this Article will pique readers' interest in the Second Amendment, and also serve as a tool for quick reference of Second Amendment case law.

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# THE DISTRICT OF COLUMBIA GUN BAN: WHERE THE SEDUCTIVE PROMISE OF GUN CONTROL MEETS REALITY

By Robert J. Endorf Jr.

*The District of Columbia's handgun prohibition is the most-studied gun control measure in this country. After over thirty years there is still no reliable evidence to support the ban's efficacy. There is no evidence that the gun ban has lowered violent crime, reduced the illegal gun supply, prevented any firearm accidents or suicides, or had any advantageous effect whatsoever. There is, however, good reason to believe that the gun ban has harmed the District by making law-abiding citizens helpless in one of the most crime-ridden cities in America. Supporters of the District's gun ban say that it has helped counteract the plague of violence that has long afflicted the city; thirty years of research has proven such sentiments to be based on wishful thinking and political myths. Robert Endorf is a graduate of NYU Law School and is a lawyer in Kentucky.*

Keywords: handgun, firearm, ban, prohibition, self-defense, District of Columbia

The District of Columbia's strong gun control laws are a lightning rod for combatants in the gun control debate. These laws are the most restrictive in the country. They have prohibited almost all ownership of handguns since 1976<sup>1</sup> and have mandated firearm storage regulations that render defensive firearm usage almost impossible.<sup>2</sup> These strict firearm laws are, according to their supporters, a crucial policy for reducing violent crime in D.C.<sup>3</sup> The paradox for the ban's supporters is that the District of Columbia remains one of the most crime-ridden cities in America, routinely winning the notorious distinction of being the nation's murder capital.<sup>4</sup> Whether the D.C. gun ban has helped an already dangerous city, or made a bad situation worse, is a subject of great contention.

In 2004 and 2005 Congress considered the *District of Columbia Personal Protection Act*,<sup>5</sup> which would have repealed the D.C. gun laws





and legalized handgun possession in the home. This bill failed passage in both years.<sup>6</sup> The D.C. gun ban was controversial in part because the high crime rate in D.C. had not abated since the gun ban went into effect.<sup>7</sup> Former Secretary of Defense Donald Rumsfeld started a row when he stated that Baghdad had a lower homicide rate than D.C.<sup>8</sup> U.S. Representatives in favor of repealing the ban argued that D.C.'s gun laws have failed to lower crime and have made it impossible for honest citizens to defend themselves from criminals.<sup>9</sup> Those working to retain the ban contended that legalizing firearm possession would flood the District's streets with handguns and consequently increase violent crime.<sup>10</sup>

The ostensible goal of the District's gun ban is to reduce violence.<sup>11</sup> Research on the effectiveness of the D.C. gun ban has come to divergent conclusions. Those who debate gun control differ on whether the D.C. ban has lowered violent crime,<sup>12</sup> whether any gun ban can significantly lower violent crime,<sup>13</sup> or whether the D.C. ban has failed to reduce violent crime because not enough jurisdictions have embraced strict gun control.<sup>14</sup> There is also disagreement over whether legal firearm ownership produces any benefits that the D.C. gun ban has removed.<sup>15</sup> This Article analyzes the effects of the D.C. gun ban, both good and bad, to determine whether those effects as a whole, have helped or hurt the citizens of D.C.

#### I. THE CONTENT OF D.C.'S HANDGUN PROHIBITION

The District of Columbia firearm laws' most significant feature is their prohibition against almost all handgun ownership.<sup>16</sup> The law mandates that a "registration certificate shall not be issued for a: ... (4) Pistol not validly registered to the current registrant prior to September 24, 1976".<sup>17</sup> Only residents who had a properly registered handgun thirty years ago may legally possess a handgun now; the law does not permit any legal ownership of handguns acquired after that date. The only exceptions are for the military, law enforcement officers, and retired law enforcement officers, for whom the police chief has used his discretion to permit registration.<sup>18</sup> Beyond the narrow exceptions, the only legally owned handguns are those owners registered thirty years ago.

The D.C. gun laws also prevent persons who legally own a handgun or a properly registered rifle or shotgun from using them for self-defense. The D.C. code requires firearm owners, except for law



enforcement personnel, to store the “firearm in his possession unloaded and disassembled or bound by a trigger lock”.<sup>19</sup> Such storage renders a firearm unusable in many cases for self-defense in an emergency.<sup>20</sup>

Additionally, the District of Columbia’s restrictions upon carrying weapons are quite strict. The carry regulations are different from the registration requirements, so one could have a legally registered firearm and still violate the carry laws.<sup>21</sup> The carry laws are so strict that a resident owning a legally registered firearm cannot carry that firearm within his own home, such as when transporting it from one room of his house to another.<sup>22</sup> He also cannot carry the firearm into an automobile in order to take it to practice at a shooting range.<sup>23</sup> The D.C. carry law is almost absolute because it provides almost no statutory exemptions for legally carrying a firearm; general exceptions are only for those issued a carry license or proper law enforcement officers: “No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license.”<sup>24</sup> The District of Columbia virtually never grants a carry license.<sup>25</sup> The District repealed the statutory exemption for carrying a firearm within one’s own home in 1994, thus removing any statutory allowance for civilians carrying a firearm without a license.<sup>26</sup>

Even moving a disassembled firearm violates the carry laws; thus, one who owns a legally registered firearm, stored legally (e.g., disassembled) would violate the statute by innocently carrying the firearm from one room in his home to another.<sup>27</sup>

The judicial allowances for carrying without a license are so narrow that they are almost nonexistent. The D.C. courts have created an exception for the innocent person carrying a firearm; specifically, one who finds a gun lying on the ground and takes possession of it for the sole purpose of immediately turning it over to the police.<sup>28</sup> This exception is so rare that it is almost never applicable.<sup>29</sup> There also is an exception when carrying a gun when using it for self-defense; however, the courts interpret this exception quite narrowly.<sup>30</sup> The self-defense exception to carrying without a license only applies to the act of self-defense itself, not before or after the act.<sup>31</sup> Therefore, even use of a firearm for self-defense can violate D.C.’s gun laws if the person employing self-defense carries the firearm before



and after its use.

The District of Columbia firearm laws the strictest in the nation because they outlaw almost all handgun ownership and place significant prohibitions on persons who own long guns. The requirement to store guns disassembled or locked renders them almost useless for self-defense because the time required to reassemble or unlock them makes them unavailable for use during a home invasion, an event that usually unfolds very rapidly. Additionally, the draconian carry laws render moving a properly registered and disassembled firearm, even within one's home, illegal. The only significant exception to the carry and storage laws is the judicial exception applicable when one uses a gun in self-defense. Even if one manages to unlock or reassemble his gun in time to use it for self-defense, the self-defense exception is quite narrow and the limits of its protections are easily exceeded by persons not knowledgeable about the precise contours of the strict boundaries. The D.C. firearm laws make handgun ownership impossible for almost everyone, long gun ownership difficult, and the use of firearms for self-defense close to impossible.

## II. A FRAMEWORK FOR ANALYZING DC'S HANDGUN PROHIBITION

A framework for analyzing the consequences of the District of Columbia gun ban is necessary to properly evaluate the consequences' relative importance. One common method is to compare the costs to the benefits and determine whether the policy provides a net benefit or detriment for society. However, such an approach is inappropriate for this case. The D.C. gun ban almost completely prohibits an entire class of products (handguns), and places severe restrictions upon long arms. The D.C. laws also establish de facto prohibition on formerly legal activities involving firearm usage, such as firearm sports. A free society ought to take great care before prohibiting the possession or use of a product. Those who wish to restrict the liberty of others in a free society must show a clear benefit from that loss of liberty.

The United States possesses a deep-rooted faith in individual freedom and liberty. Despite this country's failures to always live up to its ideals, the philosophical convictions inform how this country deals with policy issues and its citizens. Citizens who live in a society premised upon personal freedom should retain their autonomy to decide from which products and activities they will seek enjoyment





and fulfillment. The state should only interfere with its citizens' liberty when there exists a compelling justification for such interference. The government should prove a clear net benefit to society before prohibiting its citizens' possession of a product. All things being equal, the presumption in a free society ought to be in favor of legal access to whatever products and activities an individual may choose. Those in favor of banning handguns need to prove not simply that the ban has possibly produced a net benefit, but that banning guns demonstrably has and will provide more benefits than costs. Otherwise, a ban would allow those opposed to a product and its use to force their opinions, absent any persuasive justification of its necessity or benefit, on all of society. Thus, those in favor of the D.C. gun ban must conclusively prove that the ban's benefits clearly outweigh its costs.<sup>32</sup>

III. EMPIRICAL EVIDENCE DIRECTLY APPLICABLE TO D.C.'S  
HANDGUN PROHIBITION

Many proponents of the D.C. gun ban make the unstudied argument that more guns necessarily cause more violence; thus, any reduction in the supply of firearms is beneficial. Josh Sugarmann, the Executive Director of the Violence Policy Center, a group fighting for a national handgun ban, writes: "We know in the District of Columbia—where we've banned handguns—that if you minimize the number of handguns you are going to have less shootings, a pretty simple, straightforward concept."<sup>33</sup> The District of Columbia Mayor, Anthony Williams, stated before Congress that "[i]n my view ... any increase in the number of guns in the District will increase the likelihood that crimes will be committed with those guns."<sup>34</sup>

The assumption that any reduction in firearms necessarily reduces violence is appealing in its sheer simplicity; but it is also false. There are many studies concerning firearm ownership density and its relation to crime rates and violence.<sup>35</sup> Gary Kleck's exhaustive analysis and review of this research concluded:

[T]here is no consistent positive association between gun ownership levels and violence rates across (1) time, within the United States, (2) U.S. cities, (3) counties within Illinois, (4) county-sized areas in England, (5) U.S. states, (6) regions of the United States, (7) nations, or (8)



populations subgroups.<sup>36</sup>

The research proves that there is no simple cause and effect relationship of more guns causing more crimes or fewer guns causing fewer crimes. As with most social issues, the causes of violent crime are complex. The assumption that more guns cause more violence, and its converse, that fewer guns will reduce violence, is not only an oversimplification of complex phenomena, but also demonstrably false. If the D.C. gun ban did reduce crime, the reduction would not be because of a simple causal relationship between guns and violence.<sup>37</sup>

Supporters of the D.C. gun ban need more than assumptions and simplistic theories to prove that the ban is beneficial; the National Research Council agrees that “[t]heory alone cannot determine whether this [D.C.] handgun ban will reduce crime and violence overall.”<sup>38</sup> Real proof is necessary. Valid justification of the D.C. gun ban requires not false assumptions and guesses, but credible explanation and corroboration that the ban has created a net benefit for the District.

Although the D.C. gun ban has now operated for over thirty years, the District remains one of the most crime-infested cities in the nation.<sup>39</sup> The effects of the ban, even after three decades, are not so obvious that common sense and bare crime statistics show it to have clearly lowered crime; a cursory glance at the crime rates for the last half-century in the District would actually suggest that the ban has had either no effect or has increased violent crime.<sup>40</sup> Many opponents of the ban argue that those bare crime statistics prove the ban’s ineffectiveness;<sup>41</sup> however, those statistics do not prove, absent any other analysis, anything about the ban’s effects.<sup>42</sup> Observed trends in the D.C. crime statistics cannot prove, by themselves, what caused those trends; therefore, absent additional analysis, simple crime statistics cannot prove either the ban’s effectiveness or lack thereof.

The most prominent research on the D.C. gun ban is Colin Loftin’s time series study.<sup>43</sup> This study concluded that “[b]ecause people either voluntarily disposed of guns or altered their patterns of storage and use, or because it was more difficult to obtain a new gun, the District of Columbia had about 47 fewer gun deaths each year after the restrictive licensing law was implemented.”<sup>44</sup> Loftin compared the homicide and suicide rates for the period from 1968 until the





enactment of the ban (October 1976), to the period after the enactment until 1988. Ideally, the crime rates for the post-ban period would significantly differ from the pre-ban rates, thus proving that the ban caused those differences.

Loftin used two controls to filter out changes in homicide rates caused by factors other than the gun ban.<sup>45</sup> As an internal control, Loftin assumed that if rates of overall firearm deaths lowered after the ban, but the non-firearm homicides and suicides remained relatively constant, then the only explanation is that the gun ban was reducing the rates of firearm deaths. If a non-gun-control factor was affecting homicides and suicides, then it should affect both firearm and non-firearm rates equally; thus, because the firearm rates declined and the non-firearm rates did not, Loftin concluded that the causal factor must be the gun ban. The second control compared the D.C. homicide rates to those of the District's suburbs, where the ban did not extend. The study concluded that the ban must have reduced firearm violence in the District because the suburbs did not experience the same decrease in firearm homicide rates as D.C.:

The strongest argument for attributing the reduction in homicides and suicide by firearms in the District of Columbia to the restrictive licensing law is the relative implausibility of alternative explanations ... The pattern of change in mortality rates that would be predicted from the affects of the gun law is specific and unlikely to be simulated by coincidental changes in demographic, economic, cultural, or social factors. For example, economic factors might alter the homicide rate or the suicide rate, but it is unlikely that they would affect only deaths involving guns and that the changes would be limited to the District of Columbia.<sup>46</sup>

The Loftin study is the most persuasive research to conclude that the D.C. gun ban has created significant benefits; however, upon closer scrutiny its methodology and conclusions are flawed.

Chester Britt and Gary Kleck scrutinized the Loftin study.<sup>47</sup> Britt and Kleck identified four major faults with Loftin's study. First, Loftin's selection of the D.C. suburbs as an external control for D.C. was inappropriate because the two regions are so dissimilar: "D.C.





is a high violence city, with a very poor, predominantly black, and exclusively urban population, while its suburbs constitute one of the nation's wealthiest areas, with low violence rates and an overwhelmingly white, largely suburban or rural population.<sup>48</sup> The D.C. suburbs are an especially inappropriate choice because much better control cities exist for D.C.; Baltimore is considerably more similar to D.C. than the District's suburbs.<sup>49</sup>

Another major flaw in Loftin's study is his assumption that firearm violence and non-firearm violence rates will respond in similar frequency and pattern to factors affecting violence generally.<sup>50</sup> Loftin assumes factors affecting primarily firearm violence, such as a gun ban, will cause a reduction in firearm violence, but will not affect general violence rates. Loftin offers no explanation or evidence as to why firearm and non-firearm violence rates are so identical in their reactions, despite using the assumption as his only internal control. Britt's research demonstrates that firearm violence rates are much more volatile than non-firearm violence rates.<sup>51</sup> It is empirically untrue that firearm violence rates and non-firearm violence rates will show comparable change from factors affecting violence rates generally; therefore, a reduction in firearm violence rates unaccompanied by a reduction in general violence rates does not prove or indicate that gun control measures caused that reduction. One cannot draw a meaningful conclusion from a difference in the change between firearm and non-firearm crime statistics.

Absent any appropriate internal or external controls, Loftin's study cannot prove the D.C. gun ban to be the cause of any observed effects. Numerous other factors could have caused any observed change in crime rates. Edward Jones, in research for the Department of Justice, found two contemporaneous events that could have caused the lowered gun homicides in D.C., specifically three large law enforcement efforts effective at the same time as the handgun ban.<sup>52</sup> Absent viable controls, there is no reason to ascribe crime reductions to any one possible cause over another.

Loftin found that "the [D.C. gun] law reduced gun-related suicides and homicides substantially and abruptly."<sup>53</sup> However, abrupt changes in the crime rates just after the ban's enactment do not correspond with the ban's design, which would only gradually take effect.<sup>54</sup> The D.C. gun ban contained a grandfather clause permitting





the legal possession of handguns registered before the ban's passage; the law only prohibited the issuance of any new handgun permits.<sup>55</sup> The ban therefore would only take effect gradually as persons who legally possessed a handgun either left D.C. or died.<sup>56</sup> An abrupt reduction in firearm homicides and suicide does not accurately represent the possible effects of a law capable primarily of gradual results. The incongruity between Loftin's findings and the realities of the ban merits, at the very least, caution regarding Loftin's conclusions.<sup>57</sup>

Finally, Britt demonstrated that Loftin's results are very fragile.<sup>58</sup> Changes in the study's parameters create divergent findings of the ban's effects. Changing the external control from D.C.'s suburbs to Baltimore produces results showing that D.C.'s gun ban failed to reduce homicide rates.<sup>59</sup> Extending the study to include more recent homicide data, even by one year, *i.e.*, extending the study through 1989, produces results "nearly eliminating the apparent reduction in gun homicides."<sup>60</sup> Since the expected consequences of the ban were to take effect gradually, extending the period after the ban's introduction should increase the ban's effects, not eliminate them. The National Research Council noted: "one would expect that the share of crimes in which guns are used should decrease over time if the handgun ban is effective."<sup>61</sup> If the handgun ban has been effective, it should have increasingly reduced homicides over time; instead, extending the time examined eliminated any evidence of the ban's effectiveness.

The study's results also change significantly when one alters the time when the ban started to take effect, its intervention point.<sup>62</sup> There are many possible times at which to place the intervention point; Loftin placed it just after ban's passage,<sup>63</sup> while Britt used the date when the ban survived all legal challenges and became enforceable, five months after Loftin's choice.<sup>64</sup> Loftin found that the D.C. gun ban had reduced homicides, but Britt found, when changing only the intervention point, that the ban had been ineffective.<sup>65</sup> Britt's intervention point is superior because it is unlikely that the ban would affect violent crime before it actually banned handguns; however, numerous reasonable times for the intervention point exist.<sup>66</sup> Making modest changes to improve the study, such as including a minor extension to the data examined or choosing a slightly dif-





ferent, but more appropriate, placement of the intervention point, produces contradictory results; thus, Loftin's conclusions are questionable because they depend on specific choices of parameters that when improved produce contradictory results.

The probable reason for the fragility is that D.C.'s homicide rates started to decline in 1974, two years before the ban, and continued to decline through the enactment of the handgun ban and into the middle of the 1980s.<sup>67</sup> Daniel Polsby noted that "it might have seemed more natural to associate the decline in the murder rate with some event more nearly coincident with its beginning...rather than with a variable like the [D.C.] gun control law, that commenced some two years after the decline in the murder rate had begun."<sup>68</sup>

Loftin's research has problems typical of time series studies.<sup>69</sup> Kleck's comprehensive critique of such studies concluded:

Univariate time series studies of gun laws are virtually worthless for evaluating their impact, because (1) they cannot rule out any alternative explanations of changes in violence rates, (2) they have not established a close correspondence between the time when changes in violence levels occur and when the laws were implemented, and (3) their users have failed to test the sensitivity of their results to changes in the time period studied, the time point when a law's effects were supposed to begin, or assumptions about the way in which the effects were supposed to manifest themselves.<sup>70</sup>

Kleck uses Loftin's article as an example of the flaws of time series studies:

[The time series] approach is so deficient for purposes of policy impact assessment and hypothesis testing that it would not be an overstatement to describe it as "subscientific." If one cannot rule out any rival explanations of trends in the target variable, then attributing them to an intervention amounts to little more than an idle guess, based on a very rough temporal coincidence. The Washington, D.C., study by Loftin et al. illustrates that [time series'] findings are often so





fragile that even the slightest changes in study design can completely overturn the conclusions.<sup>71</sup>

Loftin's research does not prove that the D.C. gun ban reduced, or failed to reduce, violent crime in the District.

The U.S. Conference of Mayors [U.S.C.M.] conducted the first study on the effects of the D.C. gun ban.<sup>72</sup> The U.S.C.M. used a time series methodology for its research. The study compared crime rates for the three years before the ban to the rates for the three years after the ban.<sup>73</sup> The study then compared those rates from the District to the rates from the United States generally, the South, and five cities.<sup>74</sup> Those comparisons were the only controls used in the study. The U.S.C.M. then concluded that “[t]he Firearms Control Act, and not chance alone or other extraneous factors, has been responsible for the significant reduction in both firearm and handgun crime” in D.C.<sup>75</sup>

The District of Columbia Police immediately criticized the U.S.C.M. study.<sup>76</sup> Additionally, a study by the Congressional Research Service and a review conducted by Edward Jones, on behalf of the Department of Justice, both strongly criticized the U.S.C.M. study.<sup>77</sup> The Congressional Research Service examined the U.S.C.M. study and found “substantial evidence that the study is flawed by an inappropriate model...the questions raised by the methods used in the study present a serious challenge to the integrity of the conclusions drawn.”<sup>78</sup> Because of numerous technical errors in the Mayors' study, the Congressional Research Service concluded that “[a]lthough the Firearms Control Act may have affected the crime rate in the District of Columbia, it is our judgment...that the study fails to establish such a relationship.”<sup>79</sup>

Jones also doubted the validity of the methodology used in the U.S.C.M. study.<sup>80</sup> The U.S.C.M. study assumed that the factors affecting the crime rates in D.C. would be substantially similar to those affecting the crime rates in the control cities.<sup>81</sup> The assumption sidesteps the problems time series studies experience in establishing causation; gun control must necessarily cause any observed differences when, through assumption, all other causes are equal and thus cannot account for those differences. The U.S.C.M. compounds the error by offering no justification for the control cities used.<sup>82</sup> The study's conclusions rest upon the unsupported and highly improb-





able assumption that D.C. and the five control cities, chosen for no expressed reason, all experienced identical factors affecting their crime rates, except for the D.C. gun ban's effects upon D.C.

The U.S.C.M. study is far from compelling. Besides the errors specific to it, the study also suffers all the deficiencies inherent in any time series study.<sup>83</sup> Like the Loftin study, the U.S.C.M. study fails to establish causation, fails to specify why its intervention point is correctly placed, fails to explain why the effects of a slow-acting policy are observed to be abrupt, and fails to offer any proof for the robustness of its data. The U.S.C.M. study's conclusions are of no use in determining the effects of the D.C. gun ban.

The only other study to specifically examine the D.C. gun ban is a crude time series performed by Jones.<sup>84</sup> Jones simply compared D.C.'s homicide data for 1974 and 1978 to those in Baltimore for the same years.<sup>85</sup> Jones only considered two different, non-consecutive years, one before, the other after the ban. Despite this tiny data set, Jones concluded that the ban did not affect the criminal use of firearms for homicides, but did reduce the rate of murders by firearm among acquaintances and family members.<sup>86</sup> Jones also found a reduction in justified homicides after the ban.<sup>87</sup> The study fails to consider whether the reduction in justified homicides offsets any benefits from a reduction in criminal homicides. Additionally, Jones' study suffers from considering only a minuscule amount of the available data, and from all the problems inherent in any time series study of gun control.<sup>88</sup> Jones' study does not prove anything about the D.C. gun ban.

Various federal agencies have considered the effectiveness of the D.C. gun ban. The Center for Disease Control [CDC] commissioned a panel of health experts to examine the effects of gun control on violence.<sup>89</sup> After surveying the existing research in the field, the panel found that "studies of the Washington, D.C., handgun ban yielded inconsistent results",<sup>90</sup> and that there is "insufficient evidence to determine [the] effectiveness" of gun bans on violence.<sup>91</sup> The panel's analysis of fifty-one studies, examining the effects of eight types of gun control and three combinations of those types, concluded that there existed "insufficient evidence to determine effectiveness" in every case.<sup>92</sup> Despite widespread accusations that the CDC strongly favors gun control,<sup>93</sup> its panel still concluded, based





upon all available evidence, that there is no proof that the D.C. gun ban, or any gun control law, has reduced violence.

The National Academy of Sciences (NAS) has also recently published a survey of gun control research.<sup>94</sup> This survey had a panel of experts scrutinize the existing research on the effectiveness of various types of gun control. Some have accused this NAS panel of being composed mostly of those biased in favor of gun control;<sup>95</sup> however, the NAS survey found that “the District of Columbia handgun ban yields no conclusive evidence with respect to the impact of such bans on crime and violence.”<sup>96</sup>

Despite three decades of research into whether the D.C. gun ban has reduced violence or crime, there exists no compelling evidence that the ban has been in any way effective. Numerous scholars and government agencies have attempted to determine the effectiveness of the D.C. gun ban; the NAS recognized that the “District of Columbia’s Firearms Regulations Act of 1975 is the most carefully analyzed example of a handgun ban.”<sup>97</sup> The studies analyzing the effects of the D.C. gun laws are all time series studies that inherently contain serious flaws. These studies’ conclusions do not provide reliable evidence. Two recent panels of experts have each concluded that the available research does not contain any valid evidence that the ban has benefited D.C. There is no credible research proving the D.C. gun ban to have reduced crime or violence in the District.

#### IV. EVIDENCE INDIRECTLY APPLICABLE TO D.C.’S HANDGUN BAN

A prohibition requires justification. Persons who support the D.C. gun ban because of its role in reducing violence have no direct evidence to prove the assertion. Quantifiable and direct proof of the ban’s effect on violence, whether negative, positive, or null, does not exist. However, indirect, but convincing, evidence of the ban’s effectiveness may exist.

The D.C. gun ban’s almost total prohibition of the legal handgun supply, and harsh restrictions on the long gun supply, may have caused a reduction in the illegal gun supply. A reduction in the illegal firearm supply should have reduced firearm availability for criminals. If criminals find obtaining a firearm more difficult, fewer criminals may use guns. A reduction in the criminal use of firearms is obviously beneficial.

Evidence measuring firearm availability for criminals in the Dis-





trict of Columbia is indirect and sparse. What information there is tends to show that criminals find many ready sources for acquiring firearms. During 1994-1999, the Washington Metropolitan Police Department recovered an average of 2,105 crime guns a year.<sup>98</sup> The last gun “buyback” program in D.C. yielded 2,912 guns, despite taking place twenty-three years after the ban, in 1999.<sup>99</sup>

Even the District of Columbia’s attorney, while defending the ban before the D.C. Court of Appeals, admitted in oral argument that the ban has not stopped criminals from obtaining guns.<sup>100</sup> The Bureau of Alcohol, Tobacco and Firearms’ summary of a major law enforcement initiative to reduce gun violence in D.C. gave a damning assessment of the gun ban’s ability to reduce criminal access to firearms: “[t]he District of Columbia has the strictest set of local firearms laws in the country ... [a]nd yet, by even the most conservative estimate, thousands of illegal firearms continue to be present in the District every day.”<sup>101</sup> There is no indication the D.C. gun ban has reduced firearm availability for criminals; there is no evidence demonstrating a reduction in the illegal supply of firearms in the District.

It is unsurprising that the D.C. gun ban has failed to reduce the illegal supply of firearms. As with drugs, the criminal use of firearms is not a supply-based problem but a demand-based one.<sup>102</sup> Criminals do not want firearms simply because they are available, but instead because they believe them to be necessary or useful tools. Jones noted that the local D.C. ban did not affect illegal sources for firearms, such as trafficking, and that the ban cannot counter a criminal’s “single minded intention” to commit crimes and use firearms.<sup>103</sup> Criminals by definition engage in illegal activity; therefore, criminals’ use of illegal means to acquire firearms is to be expected. Daniel Polsby explained the crux of this problem as: “how does one successfully regulate a market for a commodity for which there exist no satisfactory substitutes and which is demanded by people whose disposition to comply with the law is less than that of average citizens, and whose willingness to take risks is greater?”<sup>104</sup>

People in favor of the D.C. gun ban usually blame the District’s easy firearm availability for criminals on gun trafficking. The Violence Policy Center notes that ninety-seven percent of illegal firearms in the District come from other jurisdictions, and thus blames







those jurisdictions for D.C.'s gun crime.<sup>105</sup> The *Washington Post* opined that the "problem is lax gun laws in other jurisdictions that allow weapons to flood into the city."<sup>106</sup> Charles Ramsey, Chief of the Metropolitan Police Department, testified before Congress that seventy-nine percent of homicides in D.C. are committed with firearms, but only one percent of those firearms are registered in D.C.<sup>107</sup> Ramsey also stated that "the vast, vast majority of the weapons we recover [from crimes] originate from jurisdictions outside the District."<sup>108</sup>

Advocates who argue that the ban is effective and admit that trafficking is the overwhelming source of current crime guns have an inherent conflict in their position.<sup>109</sup> If the ban has been effective, then it should have reduced the illegal supply of firearms; if trafficking floods D.C. with illegal firearms, then any reduction in the illegal supply is unlikely. The ban must reduce the illegal supply of firearms to have an appreciable effect, but massive firearm trafficking precludes the ban's ability to restrict the illegal firearm supply. Displacing the origin of the illegal firearm supply accomplishes nothing if it fails to reduce that supply. The trafficking of firearms into D.C. simply demonstrates why prohibitions are incapable of stopping criminals from getting guns.

The simple solution for gun trafficking is extending the prohibition to include a larger geographical area.<sup>110</sup> Current political realities in the United States make national, or even regional, firearm prohibition a near impossibility,<sup>111</sup> even if Congress passes a national ban, it would presumably apply to D.C. as well, so the local ban would be unnecessary. The laws within the District cannot meaningfully restrict the ownership or carrying of firearms any further, and D.C. cannot extend the ban beyond its own borders; thus, D.C. has no available remedies for the ban's failure to disarm criminals.

Prohibition of alcohol did not end the speakeasy's supply of gin, and the drug war failed to prevent the crack epidemic.<sup>112</sup> Likewise, the D.C. gun ban has not prevented criminal possession of firearms. Demand will always create supply:

There is no good reason to suppose that people intent on arming themselves for criminal purposes would not be able to do so even if the general availability of firearms to the larger population were seriously restricted. Here it may be appropriate to recall the First Law of Economics,



a law whose operation has been sharply in evidence in the case of Prohibition, marijuana and other drugs, prostitution, pornography, and a host of other banned articles and substances, namely, that demand creates its own supply. There is no evidence anywhere to show that reducing the availability of firearms *in general* likewise reduces their availability to persons with criminal intent or that persons with criminal intent would not be able to arm themselves under any set of general restrictions on firearms.<sup>113</sup>

Prohibiting almost all firearm ownership requires justification that the ban will produce benefits that outweigh the costs prohibitions impose upon a free society. Thirty years after passage, there is no proof that the D.C. gun ban has reduced violent crime, and no evidence that it has reduced criminals' access to firearms. If the D.C. gun ban has benefited D.C., it is unclear how.

The one obvious effect of the D.C. gun ban is a dramatic reduction in legal firearm ownership. The disarmament of the general, law-abiding population is an intentional result of the D.C. gun ban, not just a means to somehow reducing the illegal firearm supply, but a result sought for its own sake. Therefore, even though the ban has failed to reduce the illegal supply of firearms, it has still succeeded in disarming the law-abiding citizens of D.C. Usually those in favor of a gun ban couch their arguments in terms of crime control or violence prevention; however, often the method intended to achieve these goals is the elimination of legal ownership as a primary result, rather than as a necessary consequence of attempting to reduce illegal supply.<sup>114</sup>

Statements by supporters of the D.C. gun ban clearly advocate the elimination of legal ownership of firearms as a benefit in itself.<sup>115</sup> Representative Eleanor Norton (D, D.C.) argued that: "guns protect a tiny few at home but annually leave thousands of Americans killed in family and acquaintance quarrels, domestic violence and suicides."<sup>116</sup> The Mayor of the District of Columbia, Anthony Williams, testified that "any increase in the number of guns in the District will increase the likelihood that crimes will be committed with those guns."<sup>117</sup> The officials who originally passed the D.C. gun ban held the same position as D.C.'s current leadership:



Council members in the legislative debate were mindful of the fact that the proposed possession requirements generally would have more of an impact on law-abiding firearm owners than criminal users because criminal users likely would not attempt to re-register. Nevertheless, they considered the possession requirements desirable because of their potential for reducing the number of easily assessable handguns that could be used in argumentative situations spontaneously by law-abiding citizens and with relatively greater lethal effect than other potential weapons. The requirement that residents maintain firearms in an immediately inoperable condition, which was the subject of lengthy legislative debate, reinforces this consideration and the council's notion that a handgun or other firearm was not a desirable instrument for home protection.<sup>118</sup>

The leadership of D.C., past and present, believes that legal firearm ownership by honest citizens is dangerous.

The perceived benefit from disarming the law-abiding rests on the belief that firearm possession is dangerous and offers almost no legitimate utility.<sup>119</sup> The average gun owner may use that gun to violently end a family or neighborly disagreement, or the gun owner may die from a firearm accident or commit suicide with that gun. The same firearm hardly ever offers help for surviving a self-defense situation, despite its great utility for criminal uses. If it is true that the general population frequently uses guns in the heat of passion to end disagreements, then firearm ownership, for even the law-abiding, may cause D.C.'s residents serious injury. The cost is even greater if guns almost never offer counterbalancing benefits, such as saving people forced to act in defense of their lives. If firearms are inherently dangerous or if society cannot trust its own citizens to legally own and use firearms, then the obvious response is to ban guns.

Supporters of the D.C. gun ban who believe that any gun ownership is dangerous, regardless of the owner, need to prove their case. The simple argument that more guns cause more gun crime, *i.e.*, that increased gun density increases crime rates, is demonstrably false.<sup>120</sup> However, gun control advocates continually recycle the false platitude that more guns equals more crime.



Arthur Kellerman argues that owning a gun increases the risk of homicide.<sup>121</sup> The contention that owning a gun is a risk factor for homicide and therefore guns pose an inherent danger to their owners and society is essentially a redesign of the basic gun density argument; if gun ownership increases the probability of homicide, then more guns should statistically lead to more homicides, *i.e.*, more guns cause more crime. Kellerman's bases his conclusion that guns are a risk factor for homicide on research he conducted.<sup>122</sup> Kellerman compared a set of households where a homicide took place to a set of households where no homicide took place. He found that the households where a homicide took place were more likely to have contained a firearm, and thus concluded that homicides are more likely in households possessing a firearm. Specifically, Kellerman concluded that households with a gun are almost three times more likely to be victimized by homicide than those without guns.<sup>123</sup> The obvious implication is that mere firearm possession will increase the risk of homicide.

If firearms increase the risk of homicide for households possessing them, then one would expect increased rates of firearm ownership, an independent risk factor, to cause increased rates of homicides. However, evidence clearly shows no cause and effect relationship between gun density and crime rates.<sup>124</sup>

Kellerman's study has come under intense criticism.<sup>125</sup> Less than two percent of the homicides examined in Kellerman's study were committed with the firearm kept in the house.<sup>126</sup> It is disingenuous to conclude that firearms kept in the home triple the risk of homicide based upon samples where ninety-eight percent of the homicides involved firearms not kept in the home. Additionally, the Kellerman study has received condemnation for lacking necessary controls, using an inappropriate control group, and for containing a host of other serious technical errors.<sup>127</sup> Don Kates concluded that "[the Kellerman study] and the prior studies would be more appropriately cited in a statistics textbook as a cautionary example of multiple statistical errors."<sup>128</sup>

Another approach to establishing that guns cause violence is to compare international gun density and homicide rates.<sup>129</sup> Other developed nations generally have significantly lower rates of murder, even when their non-homicide crime rates similar to America's



rates.<sup>130</sup> Franklin Zimring argues that the reason for high murder rates in the U.S. is a violent culture that pushes its citizens to own firearms for self-defense.<sup>131</sup> Increased firearm availability will cause violent encounters to conclude fatally more often; additionally, if more people are armed, more criminals may feel the need to arm themselves to complete their crimes.<sup>132</sup> Therefore, more guns will cause an escalation in the use of firearms and support the existing culture of violence, resulting in more violent encounters that are more often fatal; in other words, violence only begets violence. The argument relies upon comparisons between U.S. and foreign nations alleging that firearm availability accounts for America's high murder rates; however, many other factors besides gun availability may account for higher U.S. murder rates.<sup>133</sup> A mere correlation of America's relatively high murder rates and relatively easy gun availability does not prove that easy gun availability in the United States caused more murders.<sup>134</sup> Therefore, the argument that more firearms will cause more people, even law-abiding gun owners, to commit murder is unfounded.

Even if firearms do not increase crime or homicides, firearm ownership may increase firearm accidents or suicide.<sup>135</sup> A firearm accident is obviously impossible without a firearm; therefore, disarming the general population might reduce the risk of firearm accidents. However, even in areas without a gun ban, firearm accidents are extraordinarily rare, and usually the result of extremely reckless behavior.<sup>136</sup> A small child has over one hundred times greater risk of dying from a swimming pool accident than from a firearm accident.<sup>137</sup> Additionally, there is no credible evidence that gun control laws reduce the frequency of firearm accidents;<sup>138</sup> additionally, despite the gun ban, D.C. still contains a large stock of illegal firearms. Kleck's thorough analysis of firearm accident research concluded that "the risk of an accident is quite low overall, and is virtually non-existent for most gun owners."<sup>139</sup>

Research shows gun controls to have little or no ability to reduce the prevalence of suicide.<sup>140</sup> Theoretically, reducing the availability of firearms may either force a substitution to a less lethal means of suicide or even dissuade someone from committing suicide altogether. Despite the high probability of death from a self-inflicted gunshot wound, there are numerous other methods of suicide with





equal probability of producing a fatal outcome.<sup>141</sup> Hanging, drowning, exposure to car exhaust (carbon monoxide), jumping from a large height, an overdose of medication, and many other methods generally have the same probability as a self-inflicted gunshot wound of resulting in death.<sup>142</sup> Obvious and equally effective substitutes for firearms are available for suicide. Additionally, the available research provides no conclusive evidence that strict gun controls will reduce suicides; Kleck concluded:

On the whole, previous studies failed to make a solid case for the ability of gun controls to reduce the total suicide rate ... the studies have been about equally divided between those finding an apparent negative impact on total suicide rates and those failing to do so. However, the studies supportive of gun control efficacy have almost all been among the most technically primitive.<sup>143</sup>

Suicide is mainly a medical and psychological problem; any effect gun control has on suicide rates is of ancillary importance for the general issue of suicide. Numerous equally lethal substitutes for firearms exist, so it is unlikely that banning one among many methods for suicide will have a significant impact on suicide rates.

Reducing firearm accidents and suicide are weak justifications for disarming law-abiding citizens. The rates of firearm accidents are extremely low, especially for persons not prone to reckless behaviors.<sup>144</sup> Firearm accidents are so rare that the D.C. gun ban's elimination of the legal supply of firearms is unlikely to have had a statistically significant impact on firearm accident rates in the District.<sup>145</sup> Residential swimming pools pose a much greater risk for accidents than firearms; therefore, the logic behind banning firearms to reduce firearm accidents would also justify banning residential swimming pools. Almost anything poses some risk; therefore, the elimination of a small risk factor cannot justify the handgun ban because it would also justify the prohibition of almost everything. As some fear is already happening, such policies would really create a 'nanny state,' where safety routinely trumps liberty. More is necessary than the reduction of an extremely low risk of firearm accidents to justify a gun ban.

The D.C. gun ban's ability to significantly affect suicide rates is





also unlikely. There is no conclusive or even persuasive evidence that gun control can reduce suicide rates. If the benefit from disarming the law-abiding is an uncertain, and at most slight, reduction in suicide, then the ban is hardly worthwhile. The District would be better off implementing a policy specifically addressing suicide.

The unfounded belief that firearms are inherently dangerous and that mere possession, even by the law-abiding, causes crime or poses a dangerous risk is simply false. Guns are not inherently dangerous, and eliminating legal gun ownership has not removed risk or causal factors for crime, homicide, accidents, or suicide. If legally owned firearms do not inherently pose a threat to D.C., then the only other possible danger from legal firearm ownership is from the owners themselves. Legal guns may not cause crime or pose inherent risks, but their owners may pose a danger to D.C.

The District of Columbia's leadership believes that disarming the average citizen would bring benefits because the state cannot trust the common resident to refrain from using firearms to end an argument or feud with his family or neighbors. Chief Ramsey testified that:

Repealing our gun laws would mean more guns being more readily available to more people. And with handguns more readily available, I am convinced that more people would be inclined to use those handguns to settle arguments or domestic disputes, or to retaliate against someone else. I am convinced that these types of incidents ... would far outnumber any instances in which a handgun in the house might be used as protection.<sup>146</sup>

Thus, the logic goes that even if firearms do not pose an inherent risk factor, the average Joe still should not own one because at any moment he may use it to commit a heinous crime. Gun owners may pose a serious danger because they cannot be trusted to stay rational during disagreements and avoid using a gun to end an argument. The constant potential of one's neighbor or relative resorting to unjustified lethal force at any moment or over any disagreement surely justifies prohibition of the tools enabling the commission of such unthinkable acts.

However, this paranoid view of the average citizen has no basis





in fact.<sup>147</sup> The average murderer is not someone who has had no or virtually no previous criminal history. The vast majority of people do not just ‘snap’ and kill over a disagreement.<sup>148</sup> Most murderers are not like the rest of society:

Local and national studies dating back to the 1890s show that in almost every case murderers are aberrants exhibiting life histories of violence and crime, psychopathology, substance abuse, and other dangerous behaviors. Looking only to prior crime records, roughly 90 percent of adult murderers had adult records, with an average adult criminal career of six or more years, including four major adult felony arrests.<sup>149</sup>

Murderers mostly come from the ranks of hardened, career criminals, not the vast majority of law-abiding citizens;<sup>150</sup> a “relatively small number of very scary aberrants” commit most murders.<sup>151</sup> Federal law already prohibits most with serious criminal histories from firearm ownership, because of a felony conviction, mental illness, drug abuse, a domestic violence conviction, being subject to a restraining order, etc.<sup>152</sup> Those that are the most likely to commit murder come from the same group of career criminals who already have access to illegal firearms, even under the D.C. gun ban. Therefore, while the D.C. ban disarms the general, law-abiding population, most potential murderers were already unable to legally possess a firearm under federal law, but still able to illegally obtain a gun under the D.C. gun ban. If the law-abiding citizens are not the people committing murders, then the D.C. gun ban cannot prevent murders, because law-abiding citizens are the only people the ban disarmed. Banning firearms will not prevent homicides, or as Kates stated:

It simply isn’t true that previously law-abiding citizens commit most murders or many murders, or virtually any murders; and so disarming them could not eliminate most murders or many murders or virtually any murders. Homicide studies show that murderers are not ordinary citizens, but extreme aberrants of whom it is unrealistic to assume that they will have any more compunction about flouting gun laws than about murder.<sup>153</sup>







Ancillary to the average citizen as murderer myth is the proposition that most murderers kill their innocent family and friends.<sup>154</sup> The scenario Chief Ramsey suggests as being the typical murder is the average Joe reaching for his gun in a moment of passionate disagreement with his family or friends and shooting one of these innocent victims.<sup>155</sup> However, since the overwhelming majority of murderers are career criminals, that image is almost never the case. Most homicides are the result of criminal behavior or high-risk activities, especially drug activities;<sup>156</sup> eighty percent of homicides in the District of Columbia are drug related.<sup>157</sup> Homicides are almost never the result of a law-abiding citizen, engaged in lawful activities, getting into an argument with a friend or family member and, in the heat of the moment, fatally shooting that innocent person.

Interestingly, Chief Ramsey testified this year that:

Our figures show that homicides in D.C. are frequently motivated by arguments and retaliation. Together with domestic violence, these motives account for half of all homicides in the District. These types of homicides are seldom pre-motivated offenses, but rather spur-of-the-moment, ‘crimes of passion.’<sup>158</sup>

Chief Ramsey also stated that seventy-nine percent of homicides in the District involved firearms, but only one percent of firearms recovered from crimes were registered in the District.<sup>159</sup> Obviously, the D.C. ban did not stop crimes of passion, or even the ones using firearms. Only one percent of the recovered crime firearms were registered in D.C., so most murderers possessed illegal firearms, and were, by definition, already criminals. Even of the one percent of registered firearms recovered, it is not clear whether the registrant, the legal owner of the gun, used the gun or whether someone else stole the gun and subsequently used it to commit murder. The overwhelming majority, more than ninety-nine percent, of perpetrators of “crimes of passion” firearm homicides were already criminals because of their illegal possession and carrying of a firearm. The District’s almost total elimination of legal handgun ownership and its harsh restrictions on long guns makes firearm homicides committed by otherwise law-abiding citizens almost impossible, simply because the law-abiding usually cannot own guns.





If Chief Ramsey were correct and the otherwise law-abiding commit the majority of firearm homicides, then the ban's near elimination of firearm ownership among the law-abiding, and thus near elimination of their ability to commit firearm homicides, should have led to a correspondingly great reduction in homicides in the District. Presumably, the disarmed people who fly into sudden murderous rages would either not go through with their irrational but temporary murderous desire because other weapons are somehow unsatisfactory, or they would substitute less lethal weapons, such as knives and clubs. Thus, either firearm homicides should drop and non-firearm homicides rise as the District's law-abiding and disarmed populace substitute non-firearm weapons for their homicidal rages, or overall homicides should fall if residents just stop killing over disagreements now that they cannot own a gun. Neither has happened; there is no evidence of a significant reduction in homicides, firearm or otherwise, because of the ban.<sup>160</sup>

The high rates of firearm homicides, and specifically crime of passion firearm homicides, after the ban's enactment suggest that criminals, not the average citizen, committed most homicides before the ban, as they are necessarily committing almost all firearm homicides after the ban. Thus, the ban did not reduce crimes of passion because the ban only disarmed the law-abiding, who almost never commit those crimes. Career criminals commit most murders and the D.C. gun ban failed to disarm them.

As research on the demographic makeup of murderers proves, they usually are heavily involved in criminal activity before their murderous acts.<sup>161</sup> This group of serious criminals is the most likely to ignore the prohibition on handguns. Therefore, it is not surprising that D.C. still experiences many homicides, most involving firearms. Proving that the D.C. gun ban reduces homicides of passion, through disarming the law-abiding, requires evidence that either the law-abiding are prone to such crimes or that the ban has in fact reduced those crimes. The research proves the former false, it is extremely rare for the law-abiding to commit murder, and there is no credible evidence of the latter. Disarming the law-abiding residents does not make D.C. safer:

We have in some inner-city communities—Washington D.C., New York City, perhaps the housing projects of





Chicago, and a handful of other venues—the virtual disarmament of the noncriminal element ... Hard experience tells us that the residents of those venues are no safer. Indeed, there is evidence that the helplessness of those populations has even emboldened the microculture of violent criminals that menace inner-city life.<sup>162</sup>

Legal possession of firearms by law-abiding citizens is not a social ill. The vast majority of citizens are law-abiding and extraordinarily unlikely to commit murder, even if they own firearms. Despite much rhetoric accusing the average citizen of succumbing to some sudden compulsion to commit heinous acts with a firearm, and thus being responsible for most murders, the overwhelming evidence proves those beliefs are pure fantasy. Those who commit almost all murders are hardened, career criminals who possess firearms despite the D.C. gun ban. Additionally, firearms pose no inherent risk for those who own them. The banning of firearm possession for law-abiding citizens does not prevent homicide and does not protect families from any inherent risk factor. There simply is no evidence or compelling reason to conclude that banning the possession of firearms from the law-abiding citizenry has brought about any benefits for D.C.

Prohibitions in a free society require legitimacy. The District of Columbia gun ban at minimum requires justification that it provides more benefit than cost for society. Thirty years after the enactment of the District of Columbia gun ban, there exists almost no evidence that it has been in any way beneficial. Supporters of the ban hail it as an important step in preventing gun violence, but no credible evidence shows the ban to have had any effect on violent crime in the District. Some claim reducing the supply of legal firearms will subsequently restrict the black market supply; however, there is no evidence that criminals are experiencing more difficulty obtaining firearms now, thirty years after the ban, than they were before the ban. The trafficking of firearms into the District and the overwhelming number of crime recovery firearms from other jurisdictions suggest that the illegal supply of firearms is as prolific as ever. Additionally, there exists no evidence or reason to suspect that the disarming of the law-abiding citizenry has provided any decrease in violence. The belief that guns pose some inherent danger or risk





factor is discredited propaganda. The ban's ability to reduce firearm accidents and suicide is unlikely; gun control's affect on suicide is so uncertain and firearm accidents are so rare that a gun prohibition merely to reduce firearm accidents or suicide is at best hardly effective and at worst absurd. Most homicides are the actions of tiny minority of hardened, career criminals who constitute the group least likely to obey the D.C. gun ban. The paranoia of those who fear that any gun owner is a potential killer and threat to all is pure fiction. Firearm ownership by the law-abiding D.C. citizens does not pose inherent risks, arm potential murderers, or supply the black market with firearms.

During the 2005 Congressional hearing on the D.C. Personal Protection Act, not a single supporter of the D.C. gun ban offered any evidence that the ban reduced gun violence, violent crime in general, or provided any benefit at all.<sup>163</sup> They simply stated that D.C. has a violent crime problem, which may be improving, and that legalizing the possession of firearms in the District will put at risk any efforts to control the city's rampant crime problems.<sup>164</sup> However, without any evidence that the thirty-year-old ban has produced any benefits or will produce any benefits, belief in the District of Columbia gun ban's ability to reduce violence is based on faith rather than reason.

#### V. COSTS IMPOSED UPON THE CITIZENS OF D.C. BECAUSE OF ITS HANDGUN PROHIBITION

Any discussion of costs versus benefits is incomplete without an analysis of the cost side of the ledger. The debate over the D.C. gun ban usually focuses on whether the ban has reduced gun crime, but there are other consequences of the ban. The ban eliminates the legal possession of handguns for almost all D.C. residents and requires residents owning rifles or shotguns to store them in such a manner that they are unavailable for self-defense use. The D.C. gun laws have effectively deprived law-abiding citizens of the possibility of defending themselves with firearms.<sup>165</sup> Supporters of the gun ban dismiss the defensive value of firearms as helping only the "tiny few";<sup>166</sup> the officials who passed the ban held the "notion that a handgun or other firearm was not a desirable instrument for home protection."<sup>167</sup> However, those officials also believed that guns had such a great utility for criminal use that their prohibition was nec-





essary. Thus, guns paradoxically offer criminals enhanced effectiveness, but provide the law-abiding citizen no enhanced ability to defend himself; firearms provide great offensive utility, but almost no defensive utility, at least according to supporters of the ban.

Those in favor of the prohibition almost never suggest that police should likewise go without a firearm;<sup>168</sup> to do so would leave Metropolitan Police Officers vulnerable in a very dangerous city. Guns must thus be effective defensive tools for police officers. It is doubtful why guns would help the police defend themselves, but be useless for ordinary citizens. Police officers face more dangerous situations more often than average citizens do, even citizens of D.C.; however, a higher probability of being attacked or victimized does not make guns either more or less effective tools for self-defense, it only increases the chance of self-defense becoming necessary. If the reason is that the police have more firearms training than the average citizen does, then the solution is to require training as a requisite for firearm ownership. There is no reason to believe that firearms are not useful self-defense tools for civilians and police; otherwise, the ban should disarm the police as well.

The research on the use of firearms for self-defense proves that they are effective in both disrupting crimes in progress and in deterring criminals from committing a crime.<sup>169</sup> The victim in many self-defense scenarios is statistically better off using a firearm for self-defense than with other strategies, such as using another type of weapon or complying with the criminal.<sup>170</sup> Despite Chief Ramsey's opinion that firearms rarely protect victims,<sup>171</sup> the rank and file Metropolitan police advise residents to ignore the D.C. storage laws and keep shotguns assembled and loaded so that they can defend their homes.<sup>172</sup> The great majority of victims do not even need to fire a gun; displaying the gun will cause an attacker to retreat.<sup>173</sup> Not only are firearms advantageous for those defending themselves, but also their defensive use is very common.<sup>174</sup> The best research on the frequency of defensive gun uses finds that there are about two and a half million defensive gun uses a year in the United States (a defensive gun use includes the display of a firearm, in addition to cases where the gun was fired).<sup>175</sup> Defensive gun use in this country is around three times more common an experience than criminal use of a firearm.<sup>176</sup> Although the vast majority,<sup>177</sup> of defensive gun





uses do not involve firing the gun, justified civilian self-defense killings of violent criminals surpasses police killings of criminals by five times.<sup>178</sup> Therefore, use of a firearm for self-defense is both effective and common.

When confronted with a violent criminal act, many have no choice but to respond in self-defense or acquiesce to the criminal's will. Eighty-three percent of Americans will be the victims of violent crime sometime in their lives.<sup>179</sup> Most of those victims will not be able to rely on police protection during the commission of the crime, but instead must rely upon themselves. Police forces react to crime by finding the perpetrator and by acting as a general deterrent to crime; however, they are not personal bodyguards and usually cannot disrupt a crime in progress.<sup>180</sup> Even when only responding, the Metropolitan Police are abysmal, taking an average of eight and a half minutes to respond to their highest priority 911 calls.<sup>181</sup> The police are not responsible for the protection of individual citizens;<sup>182</sup> the highest court for the District of Columbia has ruled that it is a "fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen."<sup>183</sup> The reality is that most people will be the victim of a violent crime at some point in their lives, and for many of them self-defense with a firearm is statistically their best option. The law-abiding citizens of the District of Columbia do not have that option for survival, despite living in one of the most crime-ridden areas in the nation.

Not only do firearms provide citizens an effective means of self-defense when directly confronted with violent crime, firearm ownership also acts as a deterrent to many types of violent crime.<sup>184</sup> A survey of incarcerated felons found that forty-three percent had decided not to commit a specific crime because they believed that the victim might be armed.<sup>185</sup> Knowledge that an intended victim might possess a gun plays a role in many criminals' decision to either commit the crime through direct confrontation with the victim, through a more indirect method, or whether to commit the crime at all. Such is the likely reason the United States has a lower rate of burglars victimizing occupied homes than countries with strict gun control.<sup>186</sup> Nations with strict gun control, like Great Britain, the Netherlands, and Canada, have rates of burglaries into an occupied





home at around fifty percent of all residential burglaries; the rate in the United States is usually around ten percent.<sup>187</sup> When a criminal enters an occupied home, there is a serious risk that the criminal will assault the legal occupant. Increasing the rate at which burglars victimize occupied homes is thus likely to increase rates of violence as more burglars assault occupants.<sup>188</sup> Therefore, firearm ownership reduces violent crime because it deters criminals from directly confronting their victims, especially through burglars' avoidance of occupied homes.

If the state prohibits the legal ownership of firearms, then it eliminates any deterrent effect from that ownership. Firearm prohibition means that criminals no longer need fear, as surveys show they do,<sup>189</sup> that their victims will defend themselves with firearms. Since criminals can never have certain knowledge about who exactly owns a firearm, the deterrent effect protects not only gun owners, but all citizens.<sup>190</sup> Lawrence Southwick's analysis of the defensive gun use research found a remarkable correspondence between the numerous surveys and concluded that civilian firearm ownership deterred between eight hundred-thousand to two million crimes and disrupted between one and a half to two and a half million crimes in the United States annually.<sup>191</sup> The District of Columbia's near total ban on handguns and its extremely restrictive registration, handling, and storage laws prevent any firearm ownership deterrence from protecting not only gun owners, but all D.C. citizens.

Research on the defensive use of firearms proves that people frequently and effectively use firearms for self-defense. Firearm ownership also affects the behavior of criminals so that they are less likely to directly confront victims. This deterrence protects not only gun-owners, but all of D.C. from home invasions and other violent crimes. The District of Columbia's gun laws prevent firearm ownership's deterrent against criminal violence and citizens' ability to use the most effective means to defend themselves from violent crime. Therefore, D.C.'s gun ban does impose significant costs upon those living under it; Kleck summarized the risks from firearm prohibition succinctly:

Gun ownership among prospective victims may well have as large a crime-reducing effect as the crime-increasing effects of gun possession among prospective





criminals ... [O]ne has to take seriously the possibility that “across-the-board” gun control measures could decrease the crime control effects of noncriminal gun ownership more than they would decrease the crime-causing effects of criminal gun ownership ... To disarm noncriminals in the hope that this might somehow indirectly help reduce access to guns among criminals, e.g., by reducing gun theft, is not a risk-free policy.<sup>192</sup>

Therefore, gun bans may not reduce violent crime even if they disarm both criminals and the law-abiding, and almost certainly will not if they only disarm the law-abiding.

The often unmentioned effects from a gun ban are the costs imposed upon those who want to legally use and enjoy firearms recreationally, but cannot because of the ban.<sup>193</sup> The loss of the sporting uses for firearms is significant. A free society generally permits its citizens the autonomy to determine their own paths in life and pursue their own interests. Absent a compelling reason for prohibition, decisions concerning what to own, what activities to participate in, and what sports to compete in ought to be left to the individual. A compelling reason is evidence that the individual's choice would cause significant harm to others or society. If the state required no justification for prohibiting individual actions or possessions, then society would not truly be free, as the government would then have the power to trump personal autonomy and liberty capriciously and without regard to the values of a free society or the legitimacy of government. Innumerable activities and products could have some theoretical or fictional harm for society, but without convincing evidence that those things actually cause harm and that their prohibition would bring about a real reduction in that harm, then the government ought not to prohibit them. Otherwise, this government would be, at best, a ‘nanny’ state, where possible safety concerns routinely triumph over liberty, or, at worse, a tyranny. Prohibitions always contain the inherent cost of depriving those who formerly used and enjoyed the banned object their continued use or enjoyment of it. This cost is significant in a free society; for a government to inflict that cost upon its citizens, justification that the benefits of the prohibition clearly outweigh the costs is necessary.







## VI. CONCLUSIONS

The D.C. firearm laws have cost the District much, and bought slight, if any, benefit. The ultimate hope for the ban is a reduction in violent crime. The reality, thirty years later, is that the “most carefully analyzed ... handgun ban”<sup>194</sup> has provided no evidence that it has had any effect on violent crime. Numerous researchers have studied the D.C. crime data, yet none of these studies provide credible evidence that the ban has had any positive effect. The ban has not produced effects so conspicuous that an examination of D.C.’s crime data shows the ban’s success, other data show that the ban could not have reduced violent crime in the District.

The ideal situation, according supporters of the ban, is disarmament of both criminals and the law-abiding. If no one in D.C. owned a firearm, except for those exempted under the ban’s narrow exceptions, the District might experience a reduction in gun violence. However, that situation is not ideal because legal gun ownership is beneficial. Firearm possession enables citizens to use effective methods for defending themselves, especially for the elderly and handicapped forced to defend themselves from young and strong attackers.<sup>195</sup> Knowledge of possible firearm possession by victims also deters criminals. The D.C. gun ban eliminates these benefits. A ban that was completely effective at disarming D.C. would not bring a net benefit for D.C. if the costs from disarming the law-abiding outweighed the benefits from disarming criminals. The balancing is, however, moot; the D.C. gun ban has failed to disarm criminals.

The District’s gun laws did disarm the law-abiding, but not the criminals. Disarming the law-abiding is not beneficial. Despite myths to the contrary, a very small minority of the population, consisting of hardened criminals, commit the majority of gun crimes. Disarming the law-abiding does not reduce violent crime. The only possible benefit from a firearm prohibition that fails to disarm criminals is a possible reduction in the risk of firearm accidents and a slight chance that suicide rates will experience meager improvement. Neither of these benefits is certain and their overall consequences are insignificant. Reducing an already miniscule risk factor is hardly enough justification for a prohibition, especially when the costs of the prohibition are high. The evidence that a ban may reduce suicide rates is weak and even if true, a policy directly targeting suicide is a





far more effective and honest plan than a gun ban. The disarming of law-abiding citizens imposed a cost on the District, not a benefit.

The D.C. gun laws are a failure. The ban is incapable of disarming the criminals who are responsible for almost all gun crime, and, at the same time, the ban imposed a significant cost through disarming law-abiding citizens. The law has not kept criminals from acquiring guns, but has eliminated almost any chance a grandmother has in defending herself against a home invasion. The District of Columbia is a city where armed criminals know the easy vulnerability of their victims. John Lott's testimony to Congress is an accurate description of the ban's results:

Even though guns will leak into the District and Chicago from neighboring areas, at least some minor benefit should have been observed if gun bans did indeed reduce crime. Instead, the opposite was the case. The bans appear to have disarmed mainly law-abiding citizens while leaving criminals free to prey on the populace.<sup>196</sup>

There is no evidence that the D.C. gun laws have or can produce any beneficial effect for the citizens of the District. The ban has instead harmed the citizens living under it.

Like any prohibition, the D.C. gun ban must prove its net benefit to justify the inherent costs prohibitions impose on a free society. Even though the ban has operated for thirty years, it still lacks the basic justification that it has benefited those living under it. Beyond naive theories, myths, and political polemics, the District of Columbia gun ban has no justifiable reason for continued existence. The ban not only lacks justification, evidence shows that the ban has harmed the citizens of D.C. Supporters of the D.C. gun ban have failed to provide convincing evidence of the ban's effectiveness and have ignored, rather than disputed, evidence demonstrating the high costs the ban has imposed upon the District's residents.

Violence is a complex problem that has always plagued societies. Gun control is alluring in its simplicity, but deeply flawed upon closer inspection. Like Prohibition before it, gun control blames a material object for a complex human and societal problem. Once alcohol and its use was the supposed root of societal ill, now firearms are claimed to be the cause of society's violent crime problems.





As with the prohibition of alcohol, the prohibition of firearms has affected only those who already obey the law and has failed to deliver the great benefits it promised. The D.C. gun ban has caused even worse results than alcohol prohibition because alcohol does not provide the benefits that firearm ownership does. The D.C. gun ban has not only failed to realize its promises, but has made society worse. Like the panacea of Prohibition, the D.C. gun ban is a failure in theory and action. The seductively simple policy of gun prohibition restricts liberty while failing to address the complex problems it promises to, yet cannot, fix. Gun control is an absurdly naïve and ineffective solution to real problems:

After research disclosed that mosquitoes were the vector for transmission of yellow fever, the disease was not controlled by sending men in white coats to the swamps to remove the mouth parts from all the insects they could find. The only sensible, efficient way to stop the biting was to attack the environment where the mosquito bred.

Guns are the mouth parts of the violence epidemic. The contemporary urban environment breeds violence no less than swamps breed mosquitoes. Attempting to control this problem of violence by trying to disarm the perpetrators is as hopeless as trying to contain yellow fever through mandible control.<sup>197</sup>

#### ENDNOTES

1. D.C. CODE ANN. § 7-2502.02.
2. D.C. CODE ANN. § 7-2507.02; *see also* discussion *infra* text at notes 19-31 (discussing why §7-2507.02 makes the use of firearms for self-defense almost impossible).
3. *See* discussion *infra*, text at notes 33-34 (identifying the ban supporters' belief that the ban has reduced violent crime and is thus necessary).
4. *See Under Fire: Does the District of Columbia's Gun Ban Help or Hurt the Fight Against Crime?: Hearings on H.R. 1288 Before the Committee on Government Reform*, 109<sup>th</sup> Cong. (2005) (testimony of John R. Lott, Jr., Ph.D., Resident Scholar, American Enterprise Institute). D.C. was the murder capital three times between 2000 and 2005; the two years D.C. did not have the high-



est murder rate for cities of over 500,000 residents, it finished second and third. *See id.*, *see also* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEORGE MASON UNIVERSITY CIVIL RIGHTS LAW JOURNAL 105, 105 n.1 (1995) (providing information on the murder capital title and D.C.'s annual descent towards that title).

5. H.R. 3193, 108<sup>th</sup> Congress (2004); H.R. 1288, 109<sup>th</sup> Congress (2005); S. 1082, 109<sup>th</sup> Congress (2005).

6. *See* Spencer S. Hsu, *Gun Ban Opposition Called 'Slap in the Face': Williams, Ramsey Assail Lawmakers*, WASHINGTON POST, June 29, 2005, at B01 (explaining that the Personal Protection Act was shelved in 2004 after the Senate failed to vote on it). Despite expectations that the 2005 bill would pass, it never received serious consideration in Congress. *See* Mike Rupert, *Gun Ban Repeal Looks Like Sure Shot*, WASHINGTON EXAMINER, June 30, 2005.

7. *See Under Fire*, *supra* note 4 (testimony of John Lott) ("D.C.'s gun control regime has aroused surprisingly little controversy until recently. Had the law worked, the relative lack of controversy wouldn't surprise anyone. But, if one looks at the data, it is clear that the law hasn't done anything to reduce violence.").

8. *See* Sylvia Moreno, *Rumsfeld Comments Inspire District's Ire*, WASHINGTON POST, June 20, 2003, at B01.

9. *See, e.g.*, 150 CONGRESSIONAL RECORD H7758, H7761 (daily ed. Sept. 29, 2004) (statement of Rep. Wamp) [hereinafter 150 CONG. REC.] ("Gun control does not work. There is no evidence to show that it works. As a matter of fact, what the truth is that when we control guns, the bad guys have plenty...and the good guys cannot defend themselves.").

10. *See, e.g., id.* at H7759-61 (statement of Rep. Norton) ("Encouraging guns, including fully loaded handguns and military-style assault weapons that will soon make their way to the Nation's Capital ... would disgrace the Nation here and around the world. Creating a new and expanded gun culture here ... is an act of reckless irresponsibility.").

11. *See* text at notes 33-34.

12. *Compare, e.g.*, 150 CONG. REC., *supra* note 9, at H7760 (statement of Rep. Norton) ("Repeal shows a special contempt for the people who live here because the city has sharply reduced its homicide rate, now at a 20-year low"), *with, e.g.*, John Lott, *District of Inequality*, NATIONAL REVIEW ONLINE (Sept. 29, 2004) ("[W]ith a murder rate of 46 per 100,000 people in 2002, the District easily holds the title of the U.S. murder capital among cities with over 500,000 people. This was not even close to being the case prior to the ban."), <http://www.nationalreview.com/comment/lott200409290839.asp>.



13. Compare Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 243 (1993) (“My argument for banning handguns is utilitarian: the likely good consequences of my proposal, I argue, far outweigh the possible bad consequences.”), with David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 285 (1993) (“The more deeply one looks into the issue, the more difficult it becomes to conclude that handgun prohibition will save lives. Prohibition might instead result in a significant increase in the deaths of innocents.”); see also Nicholas Dixon, *Perilous Protection: A Reply to Kopel*, 12 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 361 (1993).

14. See, e.g., *Handgun-Free America Denounces Reversal of DC Handgun Ban Legislation Introduced by Utah Senator*, PRESS RELEASE (Handgun-Free America, Inc.), July 18, 2003 (“Although the District has some of the most strict gun-control laws in the country, it is also known as the murder capital of America. This distinction comes largely as a result of gun trafficking from neighboring states such as Virginia and Maryland.”), available at <http://www.handgunfreedc.org/hfarelease1.htm>.

15. See GARY KLECK, DON B. KATES, *ARMED: NEW PERSPECTIVES ON GUN CONTROL*, 330-34 (2001) (“Undesirable though such a state of affairs may be, much of social order in America may depend on the fact that millions of people are armed and dangerous to criminals.” ID. at 332) [hereinafter KLECK & KATES].

16. For a history of the District’s gun laws before 1976, see Halbrook, *supra* note 4, at 109-17.

17. D.C. CODE ANN. § 7-2502.02.

18. D.C. CODE ANN. § 7-2502.01.

19. D.C. CODE ANN. § 7-2507.02.

20. See JOHN R. LOTT, JR., *THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU’VE HEARD ABOUT GUN CONTROL IS WRONG* 137-41 (2003) [hereinafter BIAS]; see also *infra* note 172 and accompanying text (describing the advice of some D.C. police officers who told residents to keep their shotguns assembled and loaded so that they can use them for self-defense); see generally BIAS, *supra*, at 137-89; John Lott, John Whitley, *Safe Storage Gun Laws: Accidental Deaths, Suicides, and Crime*, 2 JOURNAL OF LAW AND ECONOMICS 659 (2001) (“we find no support that safe storage laws reduce either juvenile accidental gun deaths or suicides. Instead, these storage requirements appear to impair people’s ability to use guns defensively.”). Lott recounts:

One almost humorous example of the problems gun locks pose



was provided by former Maryland governor Parris Glendening, who set up a press conference to generate support for his gun lock proposals. As the centerpiece of the press conference, the governor planned to demonstrate how easy it was to work a gun lock. Yet, the demonstration did not work as planned. One newspaper described the governor ‘struggling numerous times to remove it. He eventually got it after returning to the podium to try a few more times.’ Indeed, he received the help of several police officers in removing the lock.

BIAS, *supra* at 139 (citations omitted) (quoting Gerald Mizejewski, *Glendening Shows off Trigger Lock*, WASHINGTON TIMES, March 23, 2000, at C1).

21. *See* Tyree v. United States, 629 A.2d 20 (D.C. 1993) (holding that violations for possession of an unregistered firearm and for carrying a firearm without a license are separate and distinct crimes).

22. *See* D.C. CODE ANN. § 22-4504; D.C. CODE ANN. § 22-4505. The former is the general carry statute and the latter specifies the exceptions to the former. Except for specified agents of the government and gunsmiths while at work, a person can legally carry a firearm only to his home or business after purchase, to a gunsmith for repair and then back to his home or business, and from one home or business to another. Any civilian carrying a firearm must keep the firearm unloaded and in a “secure wrapper.” The specificity of the exceptions implies that carrying for any other purpose or in any other place is in violation of § 22-4504. Carrying within one’s home was once an exception to the carry law, but D.C. abolished that exception in 1994, *see infra* note 26.

23. *See id.*

24. D.C. CODE ANN. §22-4504; *see supra* note 22.

25. *See* Bsharah v. United States, 646 A.2d 993, 996 n.12 (D.C. 1994).

26. *See* United States v. Woodfolk, 656 A.2d 1145, 1149 n.11 (D.C. 1995).

27. *See* Cooke v. United States, 275 F.2d 887, 889 n.3 (D.C. 1960) (holding that a violation of §22-4504 does not require the defendant to have intended to use the carried firearm for an unlawful purpose); Carey v. United States, 377 A.2d 40, 43 (D.C. 1977) (affirming *Cooke*); Rouse v. United States, 391 A.2d 790 (D.C. 1978) (carrying a disassembled firearm is a violation of § 22-4504); Curtice v. United States, 488 A.2d 917 (D.C. 1985) (carrying a firearm that is disassembled or broken, but that one could assemble or repair without expert knowledge violates § 22-4504); *supra* note 22. No exception exists for civilians to transport or carry a firearm within their homes, even if that firearm is disassembled and its owner lacks criminal intent.

28. *See* Hines v. United States, 326 A.2d 247, 248 (D.C. 1974) (“accused must show not only an absence of criminal purpose but also that his possession was excused and justified as stemming from an affirmative effort to aid and enhance social policy underlying law enforcement”).
29. *See* Bieder v. United States, 707 A.2d 781, 783-84 (D.C. 1998) (“the narrowness of the innocent person exception is demonstrated by the fact that no reported decision in this jurisdiction can be found in which that defense was recognized as applicable to the facts”).
30. *See* Mitchell v. United States, 441 A.2d 644 (D.C. 1993).
31. *See* Logan v. United States, 402 A.2d 822, 826 (D.C. 1979).
32. For a very good analysis for why there is a *prima facie* right to own guns for recreation and self-defense, see Michael Huemer, *Is There a Right to Own a Gun?*, 29 SOCIAL THEORY AND PRACTICE 297 (2003).
33. JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS 85 (2001).
34. *Under Fire*, *supra* note 4 (testimony of Anthony Williams, Mayor of the District of Columbia).
35. *See* GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 18-30; 248-59 (1997) (providing an excellent analysis of the research concerning the relationship between gun ownership density and violence).
36. *Id.* at 22-23. This Article has corrected a typographical error in the numbers in the quoted text.
37. *See id.* at 248-51.
38. COMMITTEE ON LAW AND JUSTICE, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 97-98 (2004) [hereinafter NATIONAL RESEARCH COUNCIL].
39. *See supra* note 4 and accompanying text.
40. *See, e.g., id.*
41. *See, e.g.,* National Rifle Association, Institute for Legislative Action, *The Case for Repealing D.C.’s Gun Laws*, <http://www.nraila.org/Issues/Fact-Sheets/Read.aspx?ID=72> (giving as its first justification for repealing the D.C. gun ban: “D.C.’s homicide rate has soared since the city banned handguns in 1976.” (emphasis omitted)).
42. *See* KLECK, *supra* note 35, at 10-11 (arguing that numerous violations of a law do not necessarily mean that law is ineffective); Don B. Kates Jr., *The Value of Civilian Handgun Possession as a Deterrent Against Crime*, 18 AMERICAN JOURNAL OF CRIMINAL LAW 113, 130-34 (1991) (criticizing various arguments

that are based upon simple comparisons of bare crime statistics).

43. Colin Loftin et al., *Effects of Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 THE NEW ENGLAND JOURNAL OF MEDICINE 1615 (1991).

44. *Id.* at 1620.

45. *See id.* at 1615.

46. *Id.* at 1618.

47. Gary Kleck et al., *The Emperor Has No Clothes: Using Interrupted Time Series Designs to Evaluate Social Policy Impact*, 12 JOURNAL ON FIREARMS AND PUBLIC POLICY 197 (2000) [hereinafter Kleck]; Chester L. Britt et al., *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 LAW & SOCIETY REVIEW 361 (1996) [hereinafter Britt] (demonstrating “[t]hree common problems in the use of these [time series] designs” and “illustrat[ing] these problems with a critical reassessment of Loftin et al.’s (1991) evaluation of the 1976 District of Columbia Gun Law.”); *see also* David McDowall et al., *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.’s Reassessment of the D.C. Gun Law*, 30 LAW & SOCIETY REVIEW 381 (1996) (presenting Loftin et al.’s response to Kleck and Britt’s criticisms); Chester L. Britt et al., *Avoidance and Misunderstanding: A Rejoinder to McDowall et al.*, 30 LAW & SOCIETY REVIEW 393 (1996).

48. Britt, *id.*

49. *See id.*

50. *See* Loftin, *supra* note 43, at 1617-18; Britt, *supra* note 47.

51. *See* Britt, *supra* note 47 (“the use of a nongun homicide series does not allow the researcher to rule out competing explanations of observed trends, since gun and nongun homicides appear to have different covariates and routinely diverge in the absence of new gun laws.”).

52. Edward D. Jones III, *District of Columbia’s Firearms Control Regulation Act of 1975’: The Toughest Handgun Control Law in the United States – Or Is It?*, 455 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 138, 144-45 (1981) (“[W]ith respect to law enforcement that would have the potential of affecting firearm crime rates, three significant changes occurred in Washington, D.C., during the two years immediately preceding the February 1977 effective date of the [D.C. gun ban].). Jones’ conclusions do not necessarily reflect those of Department of Justice, *id.* at 138.

53. Loftin et al., *supra* note 43, at 1620.

54. *See* Britt, *supra* note 47; Britt’s criticism:





[Loftin] concluded that the law had an “abrupt” impact on gun homicides, based solely on results showing that the model with an abrupt and permanent impact specification fit the data better than one specifying a gradual impact. On a priori theoretical grounds, however, it would be hard to imagine an intervention whose impact (if any) was more likely to be gradual. By effectively banning future legal handgun acquisitions but allowing existing legal handguns to remain legal, the D.C. law was virtually designed to have only a gradual effect.

*Id.*

55. D.C. CODE ANN. § 7-2502.02.

56. *See* Jones, *supra* note 52, at 143; *see also* NATIONAL RESEARCH COUNCIL, *supra* note 38, at 97-8 (explaining how the D.C. gun ban should have had a gradual effect because the law contained a grandfather clause for handguns registered before the ban’s enactment).

57. *See* Britt, *supra* note 47. Britt found that:

Few interventions will allow such a clear-cut, theoretically based choice of intervention impact patterns, yet Loftin et al. (1991) made a purely ex post facto choice of a theoretically less appropriate model solely because it fit the data better. If the gradual impact model did not fit the data very well, then in light of the nature of the D.C. gun law, it may have been more appropriate to conclude that the law did not have an effect on homicides, since the impact of the law had to be gradual. Put another way, the pattern of change in homicide trends suggested that something other than the handgun ban was responsible for the observed decline in gun homicides.

*Id.*

58. *Id.* (“The pronounced impact of even small changes in the specification of the time series can be illustrated simply with analyses of the District of Columbia handgun ban. Loftin et al.”).

59. *See id.* (“it again appears that the D.C. gun law had little, if any, impact on homicides in D.C., since a nearly identical pattern was observed in a city [Baltimore] that implemented no new gun laws at this time”).

60. *Id.*

61. NATIONAL RESEARCH COUNCIL, *supra* note 38, at 98.

62. *See* Britt, *supra* note 47.

63. Loftin, *supra* note 43, at 1616.





64. Britt, *supra* note 47; *see also* Halbrook, *supra* note 4, at 109-116 (providing an account of the D.C. gun ban's legal challenges).
65. *See* Britt, *supra* note 47.
66. *Id.* Not until five months after the ban's passage did registration of new handguns stop; many dates could plausibly be the point at which the ban's impact started, such as anywhere along the legislative and judicial process towards its full enactment and enforcement, or at moments where the ban received great publicity, etc., *Id.*
67. *See* Daniel D. Polsby, *Firearms Costs, Firearms Benefits, and the Limits of Knowledge*, 86 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 207, 212-13 (1995); *see also* *Under Fire*, *supra* note 4 (testimony of John R. Lott).
68. Polsby, *supra* note 67, at 213.
69. *See* KLECK, *supra* note 35, at 352-57.
70. *Id.* at 355.
71. Kleck, *supra* note 47.
72. ROBERT NICHOLSON, U.S. CONFERENCE OF MAYORS, THE ANALYSIS OF THE FIREARMS CONTROL ACT OF 1975 (1980) [hereinafter U.S. CONFERENCE OF MAYORS].
73. *See* Jones, *supra* note 52, at 143.
74. *See id.* The cities were Atlanta, Baltimore, Cleveland, San Antonio and San Diego.
75. U.S. CONFERENCE OF MAYORS, *supra* note 72, at 17.
76. *See* 126 CONGRESSIONAL RECORD, PART 22, 28935 (1980) (Extension of Remarks of Rep. Ashbrook).
77. *Id.* at 28936 (reprinting the Congressional Research Service report); Jones, *supra* note 52. Jones' conclusions do not necessarily reflect those of Department of Justice, *id.* at 138.
78. CONGRESSIONAL RECORD, *supra* note 77, at 28936 (reprinting the Congressional Research Service report).
79. *Id.*
80. Jones, *supra* note 52, at 144-47.
81. *See id.* at 144 ("[T]he U.S. Conference of Mayors' study assumes 'that violence in Washington, D.C., is subject to the same exogenous forces as is crime in other communities and regions of the country.'" *Id.* (quoting U.S. CONFERENCE OF MAYORS, *supra* note 72, at 10)).
82. *See* Jones, *supra* note 52, at 145 ("With regard to research method, the





U.S. Conference of Mayors' study is deficient in its choice and use of control jurisdictions...offer[ing] no choice criterion for the cities studied.”).

83. See KLECK, *supra* note 35, at 352-78; *see also* text at notes 69-71.

84. Jones, *supra* note 52, at 147-49.

85. *Id.* at 147-49.

86. *Id.*

87. *Id.*

88. See KLECK, *supra* note 35, at 352-78; *See also* text at notes 69-71.

89. Task Force on Community Preventive Services, Centers for Disease Control and Prevention, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 MORBIDITY AND MORTALITY WEEKLY REPORT RR-14, 11 (2003).

90. *Id.* at 14.

91. *Id.* at 16.

92. *See id.* at 14-16.

93. See KLECK & KATES, *supra* note 15 at 32, 59, 69-70, 84 (showing the leadership of the CDC to have made numerous partisan statements in favor of gun control and the CDC's reports to contain numerous omissions, deceptions, and outright lies, all supporting gun control).

94. NATIONAL RESEARCH COUNCIL, *supra* note 38.

95. See LOTT, *supra* note 20, at 31-32, 53-55 (showing that this study was conducted by a panel overwhelmingly biased in favor of gun control).

96. NATIONAL RESEARCH COUNCIL, *supra* note 38, at 98.

97. *Id.* at 97.

98. See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, WASHINGTON METROPOLITAN POLICE DEPARTMENT'S GUN BUY-BACK PROGRAM: SUMMARY REPORT, 2 (1999), available at [http://www.atf.gov/pub/fire-explo\\_pub/buyback/buy\\_back.htm](http://www.atf.gov/pub/fire-explo_pub/buyback/buy_back.htm).

99. *See id.* at 77.

100. See Gene Healy, *Less Guns, More Crime*, AMERICAN SPECTATOR, Jan. 20, 2004 (quoting and commenting on the exchange in which D.C. Corporation Counsel Daniel Reznick agreed that the D.C. gun ban did not keep guns from criminals, in oral argument before Judge Reggie Walton in *See-gars v. Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004)).

101. Bureau of Alcohol, Tobacco and Firearms, *Operation Ceasefire* (visited August 2005) [http://www.atf.gov/pub/fire-explo\\_pub/ceasefire/index](http://www.atf.gov/pub/fire-explo_pub/ceasefire/index).





htm. The website is the BATF's homepage for Operation Ceasefire.

102. See Polsby, *supra* note 67, at 219 (explaining why the criminal use of firearms is a demand rather than a supply issue).

103. Jones, *supra* note 52, at 149.

104. Polsby, *supra* note 67, at 219.

105. *Congress Should Reject Dangerous Legislation (H.R. 1288) Repealing the District of Columbia's Longstanding Laws Banning Assault Weapons and Handguns*, PRESS RELEASE (Violence Policy Center), June 28, 2005 ("dealers in the District accounted for a meager three percent of recovered crime guns ... America would be a much safer place if the rest of the country replicated Washington, D.C.'s strict gun laws."), available at <http://www.vpc.org/press/0506dc2.htm>.

106. *Unloading on D.C.*, WASHINGTON POST, Sept. 18, 2004, at A24.

107. *Under Fire*, *supra* note 4 (testimony of Charles Ramsey, Chief of the Metropolitan Police Department).

108. *Id.*

109. See, e.g., HANDGUN FREE D.C., DISTRICT OF COLUMBIA HELD HOSTAGE BY GUNS FROM OTHER JURISDICTIONS, (2004) ("Despite this strong evidence that the District's gun laws work and that gun laws in other jurisdictions need to be strengthened, many members of Congress (most from states with extremely weak gun laws) are pushing legislation (S. 1082 and H.R. 1288) to repeal the District's landmark gun laws."), available at <http://www.handgunfreedc.org/traffickingfacts.pdf>.

110. See, e.g., *supra* note 105.

111. See Don B. Kates, Jr., *Bigotry, Symbolism and Ideology in the Battle over Gun Control*, PUBLIC INTEREST LAW REVIEW 31 (1992) [hereinafter *Bigotry*] (showing that gun prohibition is considered extreme by mainstream voters).

112. See, e.g., Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, CATO POLICY ANALYSIS No. 180 (1992) ("the war on drugs has failed completely to halt the influx of cocaine and heroin, both of which are cheaper, purer, and more abundant than ever.").

113. JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN THE UNITED STATES 137-38 (1985).

114. See KLECK & KATES, *supra* note 15, at 107-65 (demonstrating the pro-control movement's radical belief in and desire for total firearm prohibition).

115. Many ideological and cultural beliefs concern the issue of whether the



general population should possess arms. See *Bigotry*, *supra* note 111; Robert J. Cottrol, *Submission is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 UNIVERSITY OF COLORADO LAW REVIEW 1029, 1066 n.131 (1998) (providing an overview of the various political and ethical views that support the disarmament of the general population); see also Cottrol, *id.* at 1079-80 (“history shows us that helpless people are rarely left unmolested ... [w]ith that history in mind [the atrocities committed by the Nazi and Imperial Japanese governments], we should look long and hard before we accept a solution [to violence] that calls for a more submissive population less capable of self-defense.” *Id.*); Daniel D. Polsby, Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASHINGTON UNIVERSITY LAW QUARTERLY 1237 (1997) (arguing that an armed populace can better defend itself against oppression and genocide); John Salter & Don B. Kates, Jr., *The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 185 (Don B. Kates, Jr. ed., 1979).

The goal of this Article is to examine the policy implications of D.C.’s handgun ban, rather than its ideological and political implications. That distinction is sometimes difficult; for current purposes, arguments based upon morality or political theory will be passed over in favor of arguments concerning the practical effects of the D.C. handgun ban on D.C.’s residents.

116. Representative Eleanor Norton, *Notes From Congress, August 2003*, <http://www.norton.house.gov>.

117. *Under Fire*, *supra* note 4 (testimony of Anthony Williams, Mayor of the District of Columbia).

118. Jones, *supra* note 52, at 142-43.

119. See *supra* notes 114-118.

120. See text at notes 33-37.

121. See Arthur Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENGLAND JOURNAL OF MEDICINE 1084 (1993).

122. *Id.*

123. *Id.* at 1091.

124. See text at notes 33-37.

125. See KLECK & KATES, *supra* note 15, at 73-83, 305 (“The credibility of Kellerman’s interpretations collapsed ... People may well be endangered by guns possessed by dangerous people outside their own homes, but their risk of being victimized is not significantly increased by guns kept in their own homes.” at 305); Gary Kleck, Michael Hogan, *National Case-Control Study of*

*Homicide Offending and Gun Ownership*, 46 SOCIAL PROBLEMS 275 (1999) (“the positive association between household gun ownership and homicide victimization obtained in the Kellerman (1993) study ... is most likely to be largely or entirely spurious, reflecting the common effects of risk factors such as drug dealing and gang membership on homicide victimization and on the acquisition of guns for self-protection.”); KLECK, *supra* note 35, at 243-47 (“There was an enormous gap between the authors’ [Kellerman et al.] strong conclusions and their very weak evidence, using ordinary norms of conventional science.” at 246); Polsby, *supra* note 67, at 210-14 (“It is unpersuasive to maintain that homicide victimization follows handgun ownership in a causal sequence, as though possession of a weapon could somehow magnetize murderers to ones’ doorstep.” at 211).

126. See KLECK & KATES, *supra* note 15, at 75, 305.

127. See Don Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 61 TENNESSEE LAW REVIEW 513, 584-95 (1994). After meticulously criticizing the Kellerman study, Kates concludes that it exemplifies the problems shown in the medical research on gun control:

While the anti-gun editorials and articles discussed had the superficial form of academic discourse, the basic tenets of science and scholarship have too often been lacking. We call them ‘anti-gun health advocacy literature’ because they are so biased and contain so many errors of fact, logic, and procedure that we can not regard them as having a legitimate claim to be treated as scholarly or scientific literature.

*Id.* at 595.

128. KLECK & KATES, *supra* note 15, at 73.

129. See, e.g., Dixon, *supra* note 13.

130. See KLECK, *supra* note 35, at 359-60.

131. FRANKLIN E. ZIMRING, GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

132. See *id.* at 1-10, 47-50.

133. See Daniel D. Polsby, Don B. Kates, Jr., *American Homicide Exceptionalism*, 69 UNIVERSITY OF COLORADO LAW REVIEW 969 (1998) [hereinafter Polsby & Kates] (“There are large differences between Americans and the populations of foreign countries, even English-speaking countries with many superficial similarities.”); Cottrol, *supra* note 115, (“Let me suggest that the story of black homicide in the inner city and the history of Americans of African descent that helped produce it should suggest due caution concern-

ing the business of making comparisons between crime and violence in the United States and other industrialized nations.”); *see generally* DAVID KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY* (1992) (providing an excellent discussion of culture, crime, and gun control).

134. *See* sources cited *supra* note 133; KLECK, *supra* note 35, at 359-60 (“Many ... problems afflict the use of cross-national violence rates to assess gun law impact ... Pairs of nations are compared, but are arbitrarily selected so as to prove whatever point the analyst wishes, or many nations are compared and any observed differences in violence are arbitrarily attributed to differences in gun control strictness.”).

135. *See, e.g.*, THE VIOLENCE POLICY CENTER, *SAFE AT HOME: HOW D.C.’S GUN LAWS SAVE CHILDREN’S LIVES* (2005), available at <<http://www.vpc.org/studies/dcsuicide.pdf>> (“Guns kept at home escalate the risk of suicide”); Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 47 (1999); *see generally* LOTT, *supra* note 20, at 137-89 (providing an evaluation of firearm ownership’s possible risk for accidents and suicide).

136. *See* KLECK, *supra* note 35, at 306-08, 312-13, 321-22 (“The accidental death rate for motor vehicles is fourteen times as high as for guns when based on the number of owning households, and thirty-three times as high when based on numbers of devices in existence...” *Id.* at 296). Kleck describes those likely to experience a gun accident:

[T]he data on victims indicate that shooters in gun accidents are disproportionately drawn from the same demographic groups that are overrepresented in intentionally violent behavior ... these facts hint at the possibility that accidental and intentional killers may share some underlying personality traits, such as poor aggression control, impulsiveness, alcoholism, willingness to take risks, and sensation seeking.

*Id.* at 307.

137. *See id.* at 296.

138. *See id.* at 313-21.

139. *Id.* at 322.

140. *See id.* at 287-88 (“previous studies failed to make a solid case for the ability of gun controls to reduce the total suicide rate.”); *see generally id.* at 265-92 (providing a comprehensive overview of the research on gun control’s relation to suicide rates).

141. *See id.* at 265-67.

142. *See id.*
143. *Id.* at 287-88.
144. *See id.* at 322.
145. *See* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 113-14 (2<sup>nd</sup> ed. 1998) (finding little impact from firearm ownership rates on firearm accident rates).
146. *Under Fire*, *supra* note 4 (testimony of Charles Ramsey, Chief of the Metropolitan Police Department).
147. *See* KLECK & KATES, *supra* note 15, at 20-22, 72-73, 304-05; Polsby & Kates, *supra* note 133 (“Murderers are not plain folks. Neither, for the most part, are their victims. To the extent that killings are the product of arguments, it should be borne in mind that only arguments between a certain sort of antagonist are likely to have a mortal outcome.”); Cottrol, *supra* note 115 (describing the population subgroups prone to murder). Kates argues that:

The point of these falsehoods is to evade the problem of gun bans being unenforceable. The embarrassing fact that criminals are not going to obey gun bans can be evaded by misrepresenting murder as something committed by ‘law-abiding citizens.’ But ‘the use of life-threatening violence in this country is, in fact, largely restricted to a criminal class and embedded in a general pattern of criminal behavior.’ This is documented by homicide studies so numerous and consistent that their findings ‘have become criminological axioms’ about the ‘basic characteristics of homicide...’

KLECK & KATES, *supra* at 15 (alterations in original) (citations omitted) (quoting, first, Delbert S. Elliott, *Life Threatening Violence Is Primarily a Crime Problem: A Focus on Prevention*, 69 COLORADO LAW REVIEW 1085 (1998), and second, David M. Kennedy, Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUDIES 267 (1998)).

148. *See* KLECK & KATES, *supra* note 15, at 20-21.
149. *Id.* at 20 (citations and italics omitted).
150. *Id.* at 20-22.
151. *Id.* at 21-22 (quotations omitted).
152. 18 U.S.C. §922(d).
153. KLECK & KATES, *supra* note 15, at 71.
154. *See, e.g., Under Fire*, *supra* note 4 (testimony of Charles Ramsey, Chief





of the Metropolitan Police Department); Jones, *supra* note 52, at 142-43.

155. *Under Fire*, *supra* note 4 (testimony of Charles Ramsey, Chief of the Metropolitan Police Department).

156. See KLECK & KATES, *supra* note 15, at 21; see also Polsby & Kates, *supra* note 133. Polsby and Kates provide an accurate picture of murders and murderers:

The crucial thing is not that many murders arise out of arguments, but who is doing the arguing. Everyone experiences interpersonal conflict in one way or another and at one time or another, but it is exceptionally rare for such antagonisms to lead to mortal consequences unless at least one of the disputants has a life history of crime (often irrationally violent), mental disorder, or substance abuse. The mystery of why, contrary to all common experience, arguments lead to murder disappears when we realize who the participants in these particular arguments are: drug dealers versus customers or competitors; co-members of criminal gangs or rival gangs; and abusive men versus the women and children they have brutalized on countless prior occasions.

*Id.* at 133.

157. See KLECK & KATES, *supra* note 15, at 21.

158. *Under Fire*, *supra* note 4 (testimony of Charles Ramsey, Chief of the Metropolitan Police Department).

159. *Id.*

160. *Id.* (testimony of John R. Lott). The grandfather clause for handguns legally owned before the ban would have made any reduction in violence from the D.C. gun ban gradual in effect. No evidence shows a gradual reduction in violence, much less one that corresponds with drops in legal firearm possession and crimes of passion over time. See at notes 53-57.

161. See *supra* note 147.

162. Cottrol, *supra* note 115, at 1078-79 (citations omitted).

163. *Under Fire*, *supra* note 4.

164. *Id.*

165. See text at notes 19-31.

166. Norton, *supra* note 116.

167. Jones, *supra* note 52, at 143.



168. See KLECK, *supra* note 35, at 167-70; James B. Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow up the Rule?*, 49 LAW AND CONTEMPORARY PROBLEMS 223 (1986) (discussing why the police exception to a handgun ban is not as obviously justified as is commonly accepted).

169. See KLECK, *supra* note 35, at 147-90 (providing an excellent analysis of the existing research and the results of his own research); Kopel, *supra* note 13, at 332-50; Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOCIAL PROBLEMS 15 (1988).

170. See KLECK, *supra* note 35, at 167-75; Kates, *supra* note 42, at 148-52. Kates explains the national victim survey results:

The more recent national victim surveys ... show[ ] that victims who resisted with guns were much less likely to lose their possessions to robbers than those who resisted with any other kind of weapon ... [T]his recent data finds gun armed resisters approximately fifty percent less likely to be injured than victims who submitted to the criminal. In contrast, knife-armed resisters were more likely to suffer injury than non-resisters and much more likely to be injured than gun armed resisters. Comparisons to other forms of resistance are also favorable to the effectiveness of gun armed self-defense.

*Id.* at 148-49 (citations omitted).

171. *Under Fire*, *supra* note 4 (testimony of Charles Ramsey, Chief of the Metropolitan Police Department).

172. See Cottrol, *supra* note 115, at 1068 n.133:

[B]y 1996, some D.C. police officers were openly telling residents to disregard the provision requiring long guns to be unloaded and disassembled, urging residents to use shotguns to defend their dwellings. At a meeting of Capitol Hill residents concerned with crime and victimization, one police officer said “[shotguns are] not supposed to be loaded ... but you know how that goes.”

*Id.* (last two alterations in original) (citations omitted) (quoting Robert E. Pierre, *Shocked Into Self-Defense: Crime on Capitol Hill Spurs a Call to Arms*, WASHINGTON POST, Mar. 22, 1996, at A1).

173. See KLECK, *supra* note 35, at 162.

174. See *id.* at 149-62.

175. See Gary Kleck, Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-defense With a Gun*, 86 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 150 (1995); See generally KLECK *supra* note 35, 149-62 (giving an anal-

ysis of all the research on this issue). Although many pro-control authors cite the National Crime Victimization Survey estimates on the frequency of defensive gun uses, that survey has numerous issues that should give one great caution in its estimates, especially when fifteen other independent surveys all give numbers an order of magnitude higher. *Id.* at 152-59.

176. See KLECK, *supra* note 35, at 159-60.

177. See *id.* at 164.

178. See Kates, *supra* note 42, at 139 (“It is estimated that if all lawful civilian self defense killings were counted, the actual number of violent criminals killed by citizens might exceed the number killed by police each year by as much as five times.”); see also KLECK, *supra* note 35, at 163 (“citizens legally kill far more felons than police officers do”).

179. See KLECK, *supra* note 35, at 167.

180. See Kates, *supra* note 42, at 123-25 (“Given what New York courts have called ‘the crushing nature of the burden,’ the police cannot be made responsible for protecting the individual citizen. Providing such protection is up to the threatened individual, not the police.”) at 125 (citations omitted).

181. See Matthew Cella, *Police Response Times ‘Scary,’* WASHINGTON TIMES, May 13, 2004.

182. See Kates, *supra* note 42, at 123-25 (“The proposition that individuals must be responsible for their own immediate safety, with police providing only a general deterrent, is inherent in any society.”)

183. *Warren v. District of Columbia*, 444 A.2d 1, 4 (D.C. 1981) (concerning a suit against D.C. resulting from a tragedy when D.C. police failed without reason to respond to a 911 call, resulting in three women, in their own home, enduring the following: “[f]or the next fourteen hours the women were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands of their attackers.”; see also *Bowers v. DeVito*, 686 F.2d 616 (7<sup>th</sup> Cir. 1982) (holding that the U.S. Constitution does not require state or local governments to provide adequate police protection).

184. See KLECK, *supra* note 35, at 179-84.

185. See JAMES D. WRIGHT, PETER H. ROSSI, *THE ARMED CRIMINAL IN AMERICA: A SURVEY OF INCARCERATED FELONS* (1985).

186. See KLECK, *supra* note 35, at 182-84; see also LOTT, *supra* note 20, at 140 (showing that burglars are significantly less likely to victimize occupied homes in the U.S. than in Britain).

187. See KLECK, *supra* note 35, at 183.



188. *See id.* at 183-84.

189. *See* WRIGHT, *supra* note 185.

190. *See* KLECK, *supra* note 35, at 182; KLECK & KATES, *supra* note 15, at 346-48.

191. Lawrence Southwick, Jr., *Guns and Justifiable Homicide: Deterrence and Defense*, 18 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 217, 244 (1999) (“Without the civilian guns being used to deter and stop crimes, the numbers of completed crimes could well double.”).

192. KLECK & KATES, *supra* note 15, at 332-33.

193. *See* Huemer, *supra* note 32, at 304-05. Huemer discusses the often ignored importance of the recreational value of firearms to individual rights:

The recreational uses of guns include target shooting, various sorts of shooting competitions, and hunting. In debates over gun control, participants almost never attach any weight to this recreational value—perhaps because that value initially appears minor compared with the deaths caused or prevented by guns. The insistence that individuals have a right to engage in their chosen forms of recreation may seem frivolous in this context. But it is not ... gun enthusiasts’ prima facie right to own guns is significant in virtue of the central place that such ownership plays in their chosen lifestyle. A prohibition on firearms ownership would constitute a major interference in their plans for their own lives ... this suffices to show that such a prohibition would be a serious rights-violation.

*Id.* at 304-06 (citations omitted).

194. NATIONAL RESEARCH COUNCIL, *supra* note 38, at 97.

195. Thus the famous old west saying: ‘God created man, but Col. Colt made them equal.’

196. *Under Fire*, *supra* note 4 (testimony of John R. Lott, Jr.).

197. KLECK & KATES, *supra* note 15, at 84-85 (quoting James Wright, *Bad Guys*, *Bad Guns*, NATIONAL REVIEW, March 6, 1995, at 51).





# WOULD BANNING FIREARMS REDUCE MURDER AND SUICIDE? A REVIEW OF INTERNATIONAL AND SOME DOMESTIC EVIDENCE

By Don B. Kates and Gary Mauser

*This article examines international criminal justice data, to evaluate the relationship between repressive gun laws and homicide rates. The article finds that repressive gun laws do not appear to lead to lower homicide. For example, the Soviet Union and Russia, with highly restrictive gun laws, have experienced homicide rates much higher than the United States. Similarly, Luxembourg, an extremely restrictive jurisdiction, has a much higher homicide rate than its neighbors. The generally low homicide rates in Western Europe long preceded the introduction of highly restrictive gun laws. On the whole, the comparative international evidence strongly suggests that harsh gun control is not effective at reducing homicide.*

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## INTRODUCTION

International evidence and comparisons have long been offered as proof of the mantra that more guns mean more deaths and that fewer guns, therefore, mean fewer deaths.<sup>1</sup> Unfortunately, such discussions are all too often afflicted by misconceptions and factual error and focus on comparisons that are unrepresentative. It may be useful to begin with a few examples. There is a compound assertion that (a) guns are uniquely available in the United States compared with other modern



developed nations, which is why (b) the United States has by far the highest murder rate. Though this has been endlessly repeated, (b) is, in fact, false and (a) substantially so.

Since at least 1965, the false assertion that the United States has the industrialized world's highest murder rate has been an artifact of politically motivated Soviet minimization designed to hide the true homicide rates.<sup>2</sup> Since well before that date, the Soviet Union possessed extremely stringent gun controls<sup>3</sup> that were effectuated by a police state apparatus providing stringent enforcement.<sup>4</sup> So successful was that regime that few Russian civilians now have firearms and very few murders involve them.<sup>5</sup> Yet, manifest success in keeping its people disarmed did not prevent the Soviet Union from having far and away the highest murder rate in the developed world.<sup>6</sup> In the 1960s and early 1970s, the gun-less Soviet Union's murder rates paralleled or generally exceeded those of gun-ridden America. While American rates stabilized and then steeply declined, however, Russian murder increased so drastically that by the early 1990s the Russian rate was three times higher than that of the United States. Between 1998-2004 (the latest figure available for Russia), Russian murder rates were nearly four times higher than American rates. Similar murder rates also characterize the Ukraine, Estonia, Latvia, Lithuania, and various other now-independent European nations of the former U.S.S.R.<sup>7</sup> Thus, in the United States and the former Soviet Union transitioning into current-day Russia, "homicide results suggest that where guns are scarce other weapons are substituted in killings."<sup>8</sup> While American gun ownership is quite high, Table 1, *infra*, shows many other developed nations (e.g., Norway, Finland, Germany, France, Denmark) with high rates of gun ownership. These countries, however, have murder rates as low or lower than many developed nations in which gun ownership is much rarer. For example, Luxembourg, where handguns are totally banned and ownership of any kind of gun is minimal, had a murder rate nine times higher than Germany in 2002.<sup>9</sup>

*Table 1: Europe Gun Ownership and Murder Rates*  
(rates given are per 100,000 people and in descending order)

Nation	Murder Rate	Rate of Gun Ownership
Russia	20.54 [2002]	4,000
Luxembourg	9.01 [2002]	c. 0
Hungary	2.22 [2003]	2,000
Finland	1.98 [2004]	39,000

Sweden	1.87 [2001]	24,000
Poland	1.79 [2003]	1,500
France	1.65 [2003]	30,000
Denmark	1.21 [2003]	19,000
Greece	1.12 [2003]	11,000
Switzerland	0.99 [2003]	16,000
Germany	0.93 [2003]	30,000
Norway	0.81 [2001]	36,000
Austria	0.80 [2002]	17,000

Notes: This table covers all the Continental European nations for which the two data sets given are both available. In every case, we have given the homicide data for 2003 or the closest year thereto because that is the year of the publication from which the gun ownership data are taken. Gun ownership data comes from GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY 64 tbl.2.2, 65 tbl.2.3 (2003).

The homicide rate data comes from an annually published report, Canadian Centre for Justice Statistics, *Homicide in Canada*, JURISTAT, for the years 2001–2004. Each year's report gives homicide statistics for a dozen or so foreign nations in a section labeled "Homicide Rates for Selected Countries." This section of the reports gives no explanation of why it selects the various nations whose homicide statistics it covers. Moreover, also without explanation, the nations covered differ from year to year. Thus, for instance, murder statistics for Germany and Hungary are given in all four of the pamphlets (2001, 2002, 2003, 2004), for Russia are given in three years (2001, 2002, and 2004), for France in two years (2001 and 2003), and for Norway and Sweden in only one year (2001).

The same pattern appears when comparisons of violence to gun ownership are made within nations. Indeed, "data on firearms ownership by constabulary area in England" show "a *negative* correlation,"<sup>10</sup> i.e. "where firearms are most dense violent crime rates are lowest, and where guns are least dense violent crime rates are highest" (quoting a description of what American data have also consistently shown).<sup>11</sup> Many different data sets from various kinds of sources are summarized as follows by the leading text:

[T]here is no consistent significant positive association between gun ownership levels and violence rates: across (1) time within the United States, (2) U.S. cities, (3) counties within Illinois, (4) country-sized areas like England, U.S. states, (5) regions of the United States, (6) nations, or (7) population subgroups . . . .<sup>12</sup>



A second misconception about the relationship between firearms and violence attributes Europe's generally low homicide rates to stringent gun control. That attribution cannot be accurate since murder in Europe was at an all-time low *before* the gun controls were introduced.<sup>13</sup> For instance, virtually the only English gun control during the nineteenth and early twentieth centuries was the practice that police patrolled without guns. During this period gun control prevailed far less in England or Europe than in certain American states which nevertheless had—and continue to have—murder rates that were and are comparatively very high.<sup>14</sup>

In this connection, two recent studies are pertinent. In 2004, the U.S. National Academy of Sciences released its evaluation from a review of 253 journal articles, 99 books, 43 government publications, and some original empirical research. It failed to identify any gun control that had reduced violent crime, suicide, or gun accidents.<sup>15</sup> The same conclusion was reached in 2003 by the U.S. Centers for Disease Control's review of then-extant studies.<sup>16</sup>

Stringent gun controls were not adopted in England and Western Europe until after World War I. Consistent with the outcomes of the recent American studies just mentioned, these strict controls did not stem the general trend of ever-growing violent crime throughout the post-WWII industrialized world including the United States and Russia. Professor Malcolm's study of English gun law and violent crime summarizes that nation's nineteenth and twentieth century experience as follows:

The peacefulness England used to enjoy was not the result of strict gun laws. When it had no firearms restrictions [nineteenth and early twentieth century] England had little violent crime, while the present extraordinarily stringent gun controls have not stopped the increase in violence or even the increase in armed violence.<sup>17</sup>

Armed crime, never a problem in England, has now become one. Handguns are banned but the kingdom has millions of illegal firearms. Criminals have no trouble finding them and exhibit a new willingness to use them. In the decade after 1957, the use of guns in serious crime increased a hundredfold.<sup>18</sup>





In the late 1990s, England moved from stringent controls to a complete ban of all handguns and many types of long guns. Hundreds of thousands of guns were confiscated from those owners law-abiding enough to turn them in to authorities. Without suggesting this caused violence, the ban's ineffectiveness was such that by the year 2000 violent crime had so increased that England and Wales had Europe's highest violent crime rate, far surpassing even the United States<sup>19</sup> Today, English news media headline violence in terms redolent of the doleful, melodramatic language that for so long characterized American news reports.<sup>20</sup> One aspect of England's recent experience deserves note, given how often and favorably advocates have compared English gun policy to its American counterpart over the past 35 years.<sup>21</sup> A generally unstated issue in this notoriously emotional debate was the effect of the Warren Court and later restrictions on police powers on American gun policy. Critics of these decisions pointed to soaring American crime rates and argued simplistically that such decisions caused, or at least hampered, police in suppressing crime. But to some supporters of these judicial decisions, the example of England argued that the solution to crime was to restrict guns not civil liberties. To gun control advocates, England, the cradle of our liberties, was a nation made so peaceful by strict gun control that its police did not even need to carry guns. The United States, it was argued, could attain such a desirable situation by radically reducing gun ownership, preferably by banning and confiscating handguns.

The results discussed earlier contradict those expectations. On the one hand, despite constant and substantially increasing gun ownership, the United States saw progressive and dramatic reductions in criminal violence in the 1990s. On the other hand, the same time period in the United Kingdom saw a constant and dramatic increase in violent crime to which England's response was ever-more drastic gun control including, eventually, banning and confiscating all handguns and many types of long guns.<sup>22</sup> Nevertheless, criminal violence rampantly increased so that by 2000 England surpassed the United States to become one of the developed world's most violence-ridden nations.

To conserve the resources of the inundated criminal justice system, English police no longer investigate burglary and "minor



assaults.”<sup>23</sup> As of 2006, if the police catch a mugger, robber, or burglar, or other “minor” criminal in the act, the policy is to release them with a warning rather than to arrest and prosecute them.<sup>24</sup> It used to be that English police vehemently opposed the idea of armed policing. Today ever more police are being armed. Justifying the assignment of armed squads to block roads and carry out random car searches, a police commander asserts: “It is a massive deterrent to gunmen if they think that there are going to be armed police.”<sup>25</sup> How far is that from the rationale on which 40 American states have enacted laws giving qualified, trained citizens the right to carry concealed guns? Indeed, news media editorials have appeared in England arguing that civilians should be allowed guns for defense. There is currently a vigorous controversy over proposals (which the Blair government first endorsed but now opposes) to amend the law of self-defense to protect victims from prosecution for using deadly force against burglars.<sup>26</sup>

The divergence between the United States and the British Commonwealth became especially pronounced during the 1980s and 1990s. During these two decades, while Britain and the Commonwealth were making lawful firearm ownership increasingly difficult, more than 25 states in the United States passed laws allowing responsible citizens to carry concealed handguns. There are now 40 states where qualified citizens can obtain such a handgun permit.<sup>27</sup> As a result, the number of Americans allowed to carry concealed handguns in shopping malls, on the street, and in their cars has grown to 3.5 million men and women.<sup>28</sup> Economists John Lott and David Mustard have suggested that these new laws contributed to the drop in homicide and violent crime rates. Based on 25 years of correlated statistics from all of the more than 3,000 American counties Lott and Mustard conclude that adoption of these statutes has so deterred criminals from confrontation crime and caused murder and violent crime to fall faster in states that adopted this policy than in states that did not.<sup>29</sup>

As indicated in the preceding footnote, the notion that more guns reduce crime is highly controversial. What the controversy has obscured from view is the corrosive effect of the Lott and Mustard work on the faith that more guns equals more murder. As previously stated, adoption of state laws allowing millions of qualified citizens





to carry guns has not resulted in more murder or violent crime in these states. Rather, adoption of these statutes has been followed by very significant reductions in murder and violence in these states.

To determine whether this expansion of gun availability caused reductions in violent crime requires taking account of various other factors that might also have contributed to the decline. For instance, two of Lott's major critics, Donohue and Levitt, attribute much of the drop in violent crime that started in 1990s to the legalization of abortion in the 1970s, which they argue resulted in the non-birth of vast numbers of children who would have been disproportionately involved in violent crime had they existed in the 1990s.<sup>30</sup>

The Lott-Mustard studies did not address the Donohue-Levitt thesis. Lott and Mustard did account, however, for two peculiarly American phenomena which many people believed may have been responsible for the 1990s crime reduction: the dramatic increase of the United States prison population and the number of executions. The prison population in the United States tripled during this time period, jumping from approximately 100 prisoners per 100,000 in the late 1970s to more than 300 per 100,000 people in the general population in the early 1990s.<sup>31</sup> In addition, executions in the United States soared from approximately 5 per year in the early 1980s to more than 27 per year in the early 1990s.<sup>32</sup> Neither of these trends is reflected in Commonwealth countries.

Although the reason is thus obscured, the undeniable result is that violent crime, and homicide in particular, has plummeted in the United States over the past 15 years.<sup>33</sup> The fall in the American crime rate is even more impressive when compared with the rest of the world. In 18 of the 25 countries surveyed by the British Home Office, violent crime increased during the 1990s.<sup>34</sup> This contrast should induce thoughtful people to wonder what happened in those nations, and to question policies based on the notion that introducing increasingly more restrictive firearm ownership laws reduces violent crime. Perhaps the United States is doing something right in promoting firearms for law-abiding responsible adults. Or perhaps the United States' success in lowering its violent crime rate relates to increasing its prison population or its death sentences. (Several recent studies by economists calculate that each execution deters the commission of 19 murders.<sup>35</sup>). Further research is required to identify





more precisely which elements of the United States' approach are the most important, or whether all three elements acting in concert were necessary to reduce violent crimes.

#### I. VIOLENCE: THE DECISIVENESS OF SOCIAL FACTORS

One reason the extent of gun ownership in a society does not spur the murder rate is that murderers are not spread evenly throughout the population. Analysis of perpetrator studies shows that violent criminals—especially murderers—“*almost uniformly* have a long history of involvement in criminal behavior.”<sup>36</sup> So it would not appreciably raise violence if all law-abiding, responsible people had firearms because they are not the ones who rape, rob, or murder.<sup>37</sup> By the same token, violent crime would not fall if guns were totally banned to civilians. As the respective examples of Luxembourg and Russia suggest,<sup>38</sup> individuals who commit violent crimes will either find guns despite severe controls or will find other weapons to use.<sup>39</sup>

Startling as the foregoing may seem, it represents the cross-national norm, not some bizarre departure from it. If the mantra “more guns equals more death and fewer guns equals less death” were true, broad based cross-national comparisons should show that nations with higher gun ownership per capita consistently have more death. Nations with higher gun ownership rates, however, do not have higher murder or suicide rates than those with lower gun ownership. Indeed many high gun ownership nations have much lower murder rates. Consider, for example, the wide divergence in murder rates among Continental European nations with widely divergent gun ownership rates.

The non-correlation between gun ownership and murder is reinforced by examination of statistics from larger numbers of nations across the developed world. Comparison of “homicide and suicide mortality data for thirty-six nations (including the United States) for the period 1990–1995” to gun ownership levels showed “no significant (at the 5% level) association between gun ownership levels and the total homicide rate.”<sup>40</sup> Consistent with this is a later European study of data from 21 nations in which “no significant correlations [of gun ownership levels] with total suicide or homicide rates were found.”<sup>41</sup>





## II. ASKING THE WRONG QUESTION

However unintentionally, the irrelevance of focusing on weaponry is highlighted by the most common theme in the more guns equals more death argument. Epitomizing this theme is a World Health Organization (WHO) report asserting, “The easy availability of firearms has been associated with higher *firearm* mortality rates.”<sup>42</sup> The authors, in noting that the presence of a gun in a home corresponds to a higher risk of suicide, apparently assume that if denied firearms, potential suicides will decide to live rather than turning to the numerous other available suicide mechanisms. The evidence, however, indicates that denying one particular means to people who are motivated to commit suicide by social, economic, cultural, or other circumstances simply pushes them to some other means.<sup>43</sup> Thus, it is not just the murder rate in gun-less Russia that is four times higher than the American rate; the Russian suicide rate is also about four times higher than the American rate.<sup>44</sup>

There is no social benefit in decreasing the availability of guns if the result is only to increase the use of other means of suicide and murder, resulting in more or less the same amount of death. Elementary as this point is, proponents of the more guns equals more death mantra seem oblivious to it. One study asserts that Americans are more likely to be shot to death than people in the world’s other 35 wealthier nations.<sup>45</sup> While this is literally true, it is irrelevant—except, perhaps to people terrified not of death per se but just death by gunshot. A fact that should be of greater concern—but which the study fails to mention—is that per capita murder *overall* is only half as frequent in the United States as in several other nations where *gun* murder is rarer, but murder by strangling, stabbing, or beating is much more frequent.<sup>46</sup>

Of course, it may be speculated that murder rates around the world would be higher if guns were more available. But there is simply no evidence to support this. Like any speculation, it is not subject to conclusive disproof: but the European data in Table 1 and the studies across 36 and 21 nations already discussed show no correlation of high gun ownership nations and greater murder per capita or lower gun ownership nations and less murder per capita.<sup>47</sup>

To reiterate, the determinants of murder and suicide are basic



social, economic, and cultural factors, not the prevalence of some form of deadly mechanism. In this connection, recall that the American jurisdictions which have the highest violent crime rates are precisely those with the most stringent gun controls.<sup>48</sup> This correlation does not necessarily prove gun advocates' assertion that gun controls actually encourage crime by depriving victims of the means of self-defense. The explanation of this correlation may be political rather than criminological: jurisdictions afflicted with violent crime tend to severely restrict gun ownership. This, however, does not suppress the crime, for banning guns cannot alleviate the socio-cultural and economic factors that are the real determinants of violence and crime rates.<sup>49</sup>

*Table 2: Murder Rates of European Nations that Ban Handguns as Compared to Their Neighbors that Allow Handguns*

(rates are per 100,000 persons)

Nation	Handgun Policy	Murder Rate	Year
<b>A. Belarus</b>	banned	10.40	late 1990s
[Neighboring countries with gun law and murder rate data available]			
Poland	allowed	01.98	2003
Russia	banned	20.54	2002
<b>B. Luxembourg</b>	banned	09.01	2002
[Neighboring countries with gun law and murder rate data available]			
Belgium	allowed	01.70	late 1990s
France	allowed	01.65	2003
Germany	allowed	00.93	2003
<b>C. Russia</b>	banned	20.54	2002
[Neighboring countries with gun law and murder rate data available]			
Belarus	allowed	10.40	late 1990s
Finland	allowed	01.98	2004
Norway	allowed	00.81	2001

Once again, we are not arguing that the data in Table 2 shows that gun control *causes* nations to have much higher murder rates than neighboring nations that permit handgun ownership. Rather, we assert a political causation for the observed correlation that nations with stringent gun controls tend to have much higher murder rates than nations that allow guns. The political causation is that



nations which have violence problems tend to adopt severe gun controls, but these do not reduce violence, which is determined by basic socio-cultural and economic factors.

The point is exemplified by the conclusions of the premier study of English gun control. Done by a senior English police official as his thesis at the Cambridge University Institute of Criminology and later published as a book, it found (as of the early 1970s), “Half a century of strict controls . . . has ended, perversely, with a far greater use of [handguns] in crime than ever before.”<sup>50</sup> The study also states that:

No matter how one approaches the figures, one is forced to the rather startling conclusion that the use of firearms in crime was very much less [in England before 1920] when there were no controls of any sort and when anyone, convicted criminal or lunatic, could buy any type of firearm without restriction.<sup>51</sup>

Of course the point of this analysis is not that the law should allow lunatics and criminals to own guns. The point is that violence will be rare when the basic socio-cultural and economic determinants so dictate; and conversely, crime will rise in response to changes in those determinants—without much regard to the mere availability of some particular weaponry or the severity of laws against it.

### III. DO ORDINARY PEOPLE MURDER?

The “more guns equals more death” mantra seems plausible only when viewed through the rubric that murders mostly involving ordinary people who kill because they have access to a firearm when they get angry. If this were true, murder might well increase where people have ready access to firearms, but the available data provides no such correlation. Nations and areas with more guns per capita do not have higher murder rates than those with fewer guns per capita.<sup>52</sup>

Nevertheless, critics of gun ownership often argue that a “gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage . . . . *The problem is you and me—law-abiding folks*”<sup>53</sup>: that banning handgun possession only for those





with criminal records will “fail to protect us from the most likely source of handgun murder: ordinary citizens”<sup>54</sup>; that “most gun-related homicides . . . are the result of impulsive actions taken by individuals *who have little or no criminal background* or who are known to the victims”<sup>55</sup>; that “the majority of firearm homicide[s] occur] . . . not as the result of criminal activity, but because of arguments between people who know each other;”<sup>56</sup> that each year there are thousands of gun murders “by law-abiding citizens who might have *stayed* law-abiding if they had not possessed firearms.”<sup>57</sup>

These comments appear to rest on no evidence and actually contradict facts that have so uniformly been established by homicide studies dating back to the 1890s that they have become “criminological axioms.”<sup>58</sup> Insofar as studies focus on perpetrators, they show that neither a majority, nor many, nor virtually any murderers are ordinary “law-abiding citizens.”<sup>59</sup> Rather, almost all murderers are extremely aberrant individuals with life histories of violence, psychopathology, substance abuse, and other dangerous behaviors. “The vast majority of persons involved in life-threatening violence have a long criminal record with many prior contacts with the justice system.”<sup>60</sup> “Thus homicide—[whether] of a stranger or [of] someone known to the offender—is usually part of a pattern of violence, engaged in by people who are known . . . as violence prone.”<sup>61</sup> Though only 15% of Americans over the age of 15 have arrest records,<sup>62</sup> approximately 90 percent of “*adult* murderers have *adult* records, with an average adult criminal career [involving crimes committed as an adult rather than a child] of six or more years, including four major *adult* felony arrests.”<sup>63</sup> These national statistics dovetail with data from local nineteenth and twentieth century studies. For example: victims as well as offenders [in 1950s and 1960s Philadelphia murders] . . . tended to be people with prior police records, usually for violent crimes such as assault.”<sup>64</sup> “The great majority of both perpetrators and victims of [1970s Harlem] assaults and murders had previous [adult] arrests, probably over 80% or more.”<sup>65</sup> Boston police and probation officers in the 1990s agreed that of those juvenile-perpetrated murders where all the facts were known, virtually all were committed by gang members, though the killing was not necessarily gang-directed.<sup>66</sup> One example would be a gang member who stabs his girlfriend to death in a fit of anger.<sup>67</sup> Regardless of their arrests for other crimes, 80% of 1997 Atlanta murder arrestees had at least one earlier drug offense with 70% having 3 or more prior drug offenses.<sup>68</sup> A







*New York Times* study of the 1,662 murders committed in that city in the years 2003–2005 found that “More than 90 percent of the killers had criminal records.”<sup>69</sup> Baltimore police figures show that “92 percent of murder suspects had [prior] criminal records in 2006.”<sup>70</sup> Several of the more recent homicide studies just reviewed were done at the Kennedy School at Harvard and found almost all arrested murderers to have earlier arrests.<sup>71</sup>

That murderers are not ordinary, law-abiding responsible adults is further documented in other sources. Psychological studies of juvenile murderers variously find that at least 80%, if not all, are psychotic or have psychotic symptoms.<sup>72</sup> Of Massachusetts domestic murderers in the years 1991–1995, 73.7% had a “prior [adult] criminal history,” 16.5% had an active restraining order registered against them at the time of the homicide, and 46.3% of the violent perpetrators had had a restraining order taken out against them sometime before their crime.<sup>73</sup>

This last study is one of many exposing the false argument that a significant number of murders involve ordinary people killing spouses in a moment of rage. Although there are many domestic homicides, such murders do not occur in ordinary families, nor are the murderers ordinary, law-abiding adults. “The day-to-day reality is that most family murders are prefaced by a long history of assaults.”<sup>74</sup> One study of such murders found that “a history of domestic violence was present in 95.8%” of cases.<sup>75</sup> These findings are a routine feature of domestic homicide studies: “[domestic] partner homicide is most often the final outcome of chronic women battering”;<sup>76</sup> based on a study from Kansas City, 90% of all the family homicides were preceded by previous disturbances at the same address, with a median of 5 calls per address.<sup>77</sup>

The only kind of evidence cited to support the mythology that most murderers are ordinary people is that many murders arise from arguments or occur in homes and between acquaintances.<sup>78</sup> These bare facts are only relevant if one assumes that criminals do not have acquaintances or homes or arguments. Of the many studies belying this, the broadest analyzed a year’s national data on gun murders occurring in homes and between acquaintances. It found “the most common victim-offender relationship” was “where both parties . . . knew one another because of prior illegal transactions.”<sup>79</sup>





Thus the term “acquaintance homicide” does not refer solely to murders between ordinary acquaintances. Rather it encompasses, for example: drug dealers killed by competitors or customers; gang members killed by members of the same or rival gangs; and women killed by stalkers or abusers who have brutalized them on earlier occasions, all individuals for whom federal and state laws already prohibit gun possession.<sup>80</sup>

Obviously there are certain people who should not be allowed to own any deadly instrument. Reasonable as such prohibitions are, it is unrealistic to think those people will comply with such restrictions any more readily than they do with laws against violent crime.<sup>81</sup> In any event, studies analyzing acquaintance homicide suggest there is no reason for laws prohibiting gun possession by ordinary, law-abiding responsible adults because such people virtually never murder. If one accepts that such adults are far more likely to be victims of violent crime than to commit it, disarming them becomes not just unproductive but counter-productive.<sup>82</sup>

#### IV. MORE GUNS, *LESS* CRIME?

Anti-gun activists are not alone in their faith that widespread firearm ownership substantially affects violent crime rates. The same belief also characterizes many pro-gun activists. Of course, their faith leads them to the opposite conclusion: that widespread firearm ownership reduces violence by deterring criminals from confrontation crimes and making more attractive such nonconfrontation crimes as theft from unoccupied commercial or residential premises. Superficially, the evidence for this belief seems persuasive. Table 1, for instance, shows that Denmark has roughly half the gun ownership rate of Norway, but a 50% higher murder rate, while Russia has only one-ninth Norway's gun ownership rate but a murder rate 2400% higher. Looking at Tables 1–3 it is easy to find nations in which very high gun ownership rates correlate with very low murder rates, while other nations with very low gun ownership rates have much higher murder rates. Moreover, there is not insubstantial evidence that *in the United States* widespread gun availability has helped reduce murder and other violent crime rates. On closer analysis, however, this evidence appears uniquely applicable to the United States.





More than 100 million handguns are owned in the United States<sup>83</sup> primarily for self-defense,<sup>84</sup> and 3.5 million people have permits to carry concealed handguns for protection.<sup>85</sup> Recent analysis reveals “a great deal of self-defensive use of firearms” in the United States, “in fact, more defensive gun uses [by victims] than crimes committed with firearms.”<sup>86</sup> It is little wonder that the

National Institute of Justice surveys among prison inmates find that large percentages report that their fear that a victim might be armed deterred them from confrontation crimes. “[T]he felons most frightened “about confronting an armed victim” were those from states with the greatest relative number of privately owned firearms.’ Conversely, robbery is highest in states that most restrict gun ownership.<sup>87</sup>

Concomitantly, a series of studies by John Lott and his coauthor David Mustard conclude that the issuance of millions of permits to carry concealed handguns is associated with drastic declines in American homicide rates.<sup>88</sup>

Ironically, to detail the American evidence for widespread defensive gun ownership’s deterrent value is also to raise questions about how applicable that evidence would be even to the other nations that have widespread gun ownership but low violence. There are no data for foreign nations comparable to the American data just discussed. Without such data, we cannot know whether millions of Norwegians own handguns and carry them for protection, thereby deterring Norwegian criminals from committing violent crimes. Or whether guns are commonly kept for defense in German homes and stores, thus preventing German criminals from robbing them.

Moreover, if the deterrent effect of gun ownership accounts for low violence rates in high gun ownership nations other than the United States, one has to wonder why that deterrent effect is so much greater there. Even with the drop in United States murder rates that Lott and Mustard attribute to the massive increase in gun carry licensing, the United States murder rate is still eight times higher than Norway’s—even though the U.S. has an almost 300% higher rate of gun ownership. That is consistent with the points made above. Murder rates are determined by socio-economic and cultural factors. In the United States,





those factors include that the number of civilian-owned guns nearly equals the population—triple the ownership rate in even the highest European gun-ownership nations—and that vast numbers of guns are kept for personal defense. That is not a factor in other nations with comparatively high firearm ownership. High gun ownership may well be a factor in the recent drastic decline in American homicide. But even so, American homicide is driven by socio-economic and cultural factors that keep it far higher than in most European nations.

In sum, though many nations with widespread gun ownership have much lower murder rates than nations that severely restrict gun ownership, it would be simplistic to assume that at all times and in all places widespread gun ownership depresses violence by deterring many criminals into nonconfrontation crime. There is evidence that it does so in the United States, where defensive gun ownership is a substantial socio-cultural phenomenon. But the more plausible explanation for many nations having widespread gun ownership with low violence is that these nations never had high murder and violence rates and so never had occasion to enact severe anti-gun laws. On the other hand, in nations that have experienced high and rising violent crime rates, the legislative reaction has generally been to enact increasingly severe anti-gun laws. This is futile, for reducing gun ownership by the law-abiding citizenry—the only ones who obey gun laws—does not reduce violence or murder. The result is that high crime nations that ban guns to reduce crime end up having both high crime and stringent gun laws, while it appears that low crime nations that do not significantly restrict guns continue to have low violence rates.

Thus both sides of the gun prohibition debate are wrong in viewing the availability of guns as a major factor in the incidence of murder in any particular society. Though many people may still cling to that belief, the historical, geographic, and demographic evidence explored in this Article provides a clear admonishment. Whether gun availability is viewed as a cause or as a mere coincidence, the long term macrocosmic evidence is that gun ownership spread widely throughout societies consistently correlates with stable or declining murder rates. This pattern simply cannot be squared with the mantra that more guns equals more death and fewer guns equals less. Whether causative or not, the consistent international pattern is that more guns equals *less* murder and other violent crime. Even if one is inclined to think that gun availability is an important factor, the available international data cannot be squared with





the mantra that more guns equals more death and fewer guns equals less. Rather, if firearms availability does matter, the data consistently show that the way it matters is that more guns equals *less* violent crime.

#### V. GEOGRAPHIC, HISTORICAL AND DEMOGRAPHIC PATTERNS

If more guns equals more death and fewer guns equals less death, it should follow, all things being equal, (1) that geographic areas with higher gun ownership should have more murder than those with less gun ownership; (2) that demographic groups with higher gun ownership should be more prone to murder than those with less ownership; and (3) that historical eras in which gun ownership is widespread should have more murder than those in which guns were fewer or less widespread. As discussed earlier, these effects are not present. Historical eras, demographic groups, and geographic areas with more guns do not have more murders than those with fewer guns. Indeed, those with more guns often, or even generally, have fewer murders.

Of course, all other things may not be equal. Obviously, many factors other than guns may promote or reduce the number of murders in any given place or time or among particular groups. And it may be impossible even to identify these factors, much less to take account of them all. Thus any conclusions drawn from the kinds of evidence presented earlier in this paper must necessarily be tentative.

Acknowledging this does not, however, blunt the force of two crucial points. The first regards the burden of proof. Those who assert the mantra, and urge that public policy be based on it, bear the burden of proving that more guns do equals more death and fewer guns equals less death. But they cannot bear that burden because there simply is no large number of cases in which the widespread prevalence of guns among the general population has led to more murder. By the same token, but even more importantly, it cannot be shown that in many cases a reduction in the number of guns available to the general population has led to fewer deaths. Nor is the burden borne by *speculating* that the reason such cases do not appear is that other factors always intervene so it turns out that more guns do not mean more death and that fewer do not mean less.

The second issue, allied to the burden of proof, regards plausibility. On their face, the following facts from Tables 1 and 2 suggest that gun ownership is irrelevant, or has little relevance, to murder: France



and neighboring Germany have exactly the same, comparatively high rate of gun ownership, yet the French murder rate is nearly twice the German; France has infinitely more gun ownership than Luxembourg, which nevertheless has a murder rate five times greater, though handguns are illegal and other kinds of guns sparse; Germany has almost double the gun ownership rate of neighboring Austria yet a similarly very low murder rate; the Norwegian gun ownership rate is over twice the Austrian rate, yet the murder rates are almost identical.

And then there is Table 3, which shows Slovenia, with 66% more gun ownership than Slovakia, nevertheless has roughly one-third less murder per capita; Hungary has more than 6 times the gun ownership rate of neighboring Romania but a lower murder rate; the Czech Republic's gun ownership rate is more than 3 times that of neighboring Poland but its murder rate is lower; Poland and neighboring Slovenia have exactly the same murder rate, though Slovenia has over triple the gun ownership per capita.

*Table 3: Eastern Europe Gun Ownership and Murder Rates*  
(rates given are per 100,000 people and in descending order)

Nation	Murder Rate	Rate of Gun Ownership
Russia	20.54* [2002]	4,000
Moldova	08.13** [2000]	1,000
Slovakia	02.65** [2000]	3,000
Romania	02.50** [2000]	300
Macedonia	02.31** [2000]	16,000
Hungary	02.22† [2003]	2,000
Finland	01.98‡ [2004]	39,000
Poland	01.79† [2003]	1,500
Slovenia	01.81** [2000]	5,000
Cz. Republic	01.69** [2000]	5,000
Greece	01.12† [2003]	11,000

Notes: This table covers all the Eastern European nations for which we have data regarding both gun ownership and murder rates. Gun ownership data comes from GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY (2003).

\* Canadian Centre for Justice Statistics, *Homicide in Canada, 2002*, JURISTAT at 3.

\*\* United Nations Office on Drugs and Crime, *The Seventh United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems (1998–2000)*, Mar. 31, 2004, at 82, 260, 287, 370, 405, 398.

† Canadian Centre for Justice Statistics, *Homicide in Canada, 2003*, JURISTAT at 3.

‡ Canadian Centre for Justice Statistics, *Homicide in Canada, 2004*, JURISTAT at 3.

On their face, Tables 1, 2, and 3, and the comparisons gleaned from them suggest that gun ownership is irrelevant, or has little relevance, to murder. Historical and demographic comparisons offer further evidence. Again, all the data may be misleading. It is conceivable that more guns do equals more murder, but that this causation does not appear because some unidentifiable extraneous factor always intervenes. That is conceivable, but ultimately unlikely. As Hans Toch, a senior American criminologist who 35 years ago endorsed handgun prohibition and confiscation, but then recanted based on later research, argues “it is hard to explain that where firearms are most dense, violent crime rates are lowest and where guns are least dense, violent crime rates are highest.”<sup>89</sup>

#### A. Demographic Patterns

Contrary to what should be the case if more guns equals more death, there are no “consistent indications of a link between gun ownership and criminal or violent behavior by owners”; in fact, gun ownership is “higher among whites than among blacks, higher among middle-aged people than among young people, higher among married than among unmarried people, higher among richer people than poor”—all “patterns that are the reverse of the way in which criminal behavior is distributed.”<sup>90</sup>

These conclusions are reinforced by focusing on patterns of African-American homicide. Per capita, African-American murder rates are much higher than the murder rate for whites.<sup>91</sup> If more guns equals more death, and fewer guns equals less, one might assume gun ownership is higher among African-Americans than among whites, but in fact African-American gun ownership is markedly lower than white gun ownership.<sup>92</sup>

Particularly corrosive to the mantra are the facts as to rural African-Americans gun ownership. Per capita, rural African-Americans are much more likely to have firearms than are urban African-Americans.<sup>93</sup> Yet, despite their greater access to guns, the firearm murder rate of young rural black males is a small fraction of the firearm murder rate of young urban black males.<sup>94</sup>

These facts are only anomalous in relation to the mantra more guns equals more death, fewer guns equals less. In contrast, these facts accord with the earlier point regarding the aberrance of mur-



derers. Whatever their race, ordinary people simply do not murder. Thus preventing law-abiding, responsible African-Americans from owning guns does nothing at all to reduce murderers, because they are not the ones who are doing the killing. The murderers are a small minority of extreme antisocial aberrants *who manage to get guns whatever the level of gun ownership in the black community*.

Indeed, murderers generally fall into a group some criminologists have called “violent predators,” sharply differentiating them not only from the overall population but from other criminals as well.<sup>95</sup> Surveys of imprisoned felons indicate that while on the outside the ordinary felon averages perhaps 12 crimes per year.<sup>96</sup> In contrast, “violent predators” spend much or most of their time committing crimes, averaging at least 5 assaults, 63 robberies, and 172 burglaries annually.<sup>97</sup> A National Institute of Justice survey of 2,000 felons in 10 state prisons, which focused on gun crime, said of these types of respondents:

[T]he men we have labeled Predators were clearly omnibus felons . . . [committing] more or less any crime they had the opportunity to commit . . . . The Predators (handgun and shotgun combined) . . . amounted to about 22% of the sample and yet accounted for 51% of the total crime [admitted by the 2,000 felons] . . . . Thus, when we talk about “controlling crime” in the United States today, we are talking largely about controlling the behavior of these men.<sup>98</sup>

The point is not just that demographic patterns of homicide and gun ownership in the African-American community do not support the more guns equals more death mantra. More importantly those patterns refute the logic of fewer guns equals less death. The reason fewer guns among ordinary African-Americans does not lead to fewer murders is because it does not translate to fewer guns for the aberrant minority who do murder. The correlation of very high murder rates with low gun ownership in African-American communities simply does not bear out the notion that disarming the populace as a whole will disarm and prevent murder by potential murderers.







## B. Macro-historical Evidence: From the Middle Ages to the 20th Century

Notoriously, the Middle Ages were a time of brutal and endemic warfare. They also experienced rates of ordinary murder about double those of the U.S. at its worst.<sup>99</sup> But Middle Age homicide “cannot be explained in terms of the availability of firearms, which had not yet been invented.”<sup>100</sup> The invention provides some test of the mantra. If it is true that more guns equals more murder and fewer guns equals less death, murder should have risen with the invention of firearms, their increased efficiency, and the greater availability of them across the population.

Yet, using England as an example, murder rates seem to have fallen sharply as guns became progressively more efficient and widely owned during the five centuries after the invention of firearms.<sup>101</sup> During much of this period, because the entire adult male population of England was deemed to constitute a militia, every military age male was required to possess arms for use in militia training and service.<sup>102</sup>

The same requirement was true in America during the period of colonial and post-colonial settlement. Indeed, the basic English militia laws were superseded by the colonies’ even more specific and demanding legal requirements of *universal* gun ownership. Under those laws, virtually all colonists and every home were required to have guns. Depending on the colony’s laws, male youths were deemed of military age at 16, 17, or 18, and every military age man, except for the insane, infirm, and criminals, had to have arms. They were subject to being called for inspection, militia drill, or service, all of which legally required them to bring and present their guns. To arm those too poor to afford guns, the laws required that guns be purchased for them and that they make installment payments to pay back the cost.<sup>103</sup>

It bears emphasis that these gun ownership requirements were not limited to those subject to militia service. Women, seamen, clergy, and some public officials were automatically exempt from militia call up, as were men over the upper military age, which varied from 45 to 60, depending on the colony. But every household was required to have a gun, even if all its occupants were otherwise exempt from militia service, to deter criminals and other attackers. Likewise,



all respectable men were theoretically required to carry arms when out and abroad.<sup>104</sup>

These laws may not have been fully enforced (except in times of danger) in areas that had been long-settled and peaceful. Nevertheless, “by the eighteenth century, colonial Americans were the most heavily armed people in the world.”<sup>105</sup> Yet, far from more guns equaling more death, murders in the New England colonies were “rare,” and “few” murderers in all the colonies involved guns “despite their wide availability.”<sup>106</sup>

America remained very well armed yet homicide remained quite low for over two hundred years, from the earliest settlements through the entire colonial period and early years of the United States. Homicide in more settled areas only began rising markedly in the two decades before the Civil War.<sup>107</sup> By that time the universal militia was inoperative and the universality of American gun ownership had disappeared as many people in long-settled peaceful areas did not hunt and had no other need for a firearm.<sup>108</sup>

The Civil War acquainted vast numbers of men with modern rapid-fire guns, and, in its aftermath, provided a unique opportunity to acquire them. Before the Civil War, reliable multi-shot rifles or shotguns did not exist and revolvers (though they had been invented in the 1830s) were so expensive they were effectively out of reach for most of the American populace.<sup>109</sup> The Civil War changed all that. Officers on both sides had to buy their own revolvers, while sidearms were issued to noncommissioned officers generally, as well as those ordinary soldiers who were in the artillery, cavalry, and dragoons.<sup>110</sup> The fact that over two million men served in the Union Army at various times while the Confederates had over half that number suggests the number of revolvers involved.<sup>111</sup>

At war's end, the U.S. Army and Navy were left with vast numbers of surplus revolvers, both those they had purchased and those captured from Confederate forces. As the Army plummeted to slightly over 11,000 men,<sup>112</sup> hundreds of thousands of military surplus revolvers were sold at very low prices. In addition, when their enlistments were up, or when they were mustered out at war's end, former officers and soldiers retained hundreds of thousands of both revolvers and rifles. These commandeered arms included many of the new repeating rifles the Union had bought (over the



fervent objections of short-sighted military procurement officers) at the command of President Lincoln, who had tested the Spencer rifle himself. After his death the Army reverted to the single-shot rifle, disposing of all its multi-shots at surplus and thereby ruining Spencer by glutting the market.<sup>113</sup>

Thus over the immediate post-Civil War years “the country was awash with military pistols” and rifles of the most modern design.<sup>114</sup> The final three decades of the century saw the introduction and marketing of the “two dollar pistol,” which were very cheap handguns manufactured largely out of pot metal.<sup>115</sup> In addition to being sold locally, such “suicide specials” were marketed nationwide through Montgomery Ward catalogs starting in 1872 and by Sears from 1886.<sup>116</sup> They were priced as low as \$1.69, and were marketed under names like the “Little Giant” and the “Tramp’s Terror.”<sup>117</sup>

Thus, the period between 1866 and 1900 saw a vast diffusion of commercial and military surplus revolvers and lever action rifles throughout the American populace. Yet, far from rising, homicide seems to have fallen off sharply during these thirty years.

Whether or not guns were the cause, homicide steadily declined over a period of five centuries coincident with the invention of guns and their diffusion throughout the continent. In America, from the seventeenth century through the early nineteenth century murder was rare and rarely involved guns, though gun ownership was universal by law and “colonial Americans were the most heavily armed people in the world.”<sup>118</sup> By the 1840s, gun ownership had declined but homicide began a spectacular rise through the early 1860s. From the end of the Civil War to the turn of the twentieth century, however, America in general, and urban areas in particular, such as New York, experienced a tremendous spurt in ownership of higher capacity revolvers and rifles than had ever existed before, but the number of murders sharply declined.<sup>119</sup>

In sum, the notion that more guns equals more death is not borne out by the historical evidence available for the period between the Middle Ages and the twentieth century. Yet this conclusion must be viewed with caution. While one may describe broad general trends in murder rates and in the availability of firearms, it is not possible to do so with exactitude before recent times. Not



until the late 1800s in England, and the mid-1900s in the United States were there detailed data on homicide. Information about the distribution of firearms is even more sparse. For instance, Lane's generalizations about the rarity of gun murders and low American murder rates in general are subject to some dispute because Professor Randolph Roth has shown that early American murder rates and the extent to which guns were used in murder varied greatly between differing areas and time periods.<sup>120</sup>

### C. Later and More Specific Macro-Historical Evidence

Malcolm presents reliable trend data on both gun ownership and crime in England for the period between 1871 and 1964. Significantly, these trend data do not at all correlate as the mantra would predict: Violent crime did not increase with increased gun ownership nor did it decline in periods in which gun ownership was lower.<sup>121</sup>

In the United States, the murder rate doubled in the ten-year span between the mid-1960s and the mid-1970s. Since this rise coincided with vastly increasing gun sales, it was viewed by many as proof positive that more guns equals more death. That conclusion, however, does not follow. It is at least equally possible that the causation was reversed: that is, the decade's spectacular increases in murder, burglary, and all kinds of violent crimes caused fearful people to buy guns.<sup>122</sup> The dubiousness of assuming that the gun sales caused the rise in murder rather than the reverse might have been clearer had it been known in this period that virtually the same murder rate increase was occurring in gun-less Russia.<sup>123</sup> Clearly there is little basis to assume guns were the reason for the American murder rate rise when the Russian murder rate exhibited the same increase without any involvement of guns.

Reliable information on both gun ownership and murder rates in the United States is available only for the period commencing at the end of World War II. Significantly, the decade from the mid-1960s to the mid-1970s is a unique exception to the general pattern that, decade-by-decade, the number of guns owned by civilians has risen steadily and dramatically but murder rates nevertheless have remained stable or even declined. As for the second half of the Twentieth Century, and especially its last quarter,



a study comparing the number of guns to murder rates found that over the 25-year period from 1973 to 1997, the number of handguns owned by Americans increased 160% while the number of all firearms rose 103%. Yet over that period, the murder rate declined 27.7%.<sup>124</sup> It continued to decline in the years 1998, 1999, and 2000, despite the addition in each year of two to three million handguns and approximately five million firearms of all kinds. By the end of 2000 the total American gunstock stood at well over 260 million—951.1 guns for every 1,000 Americans—but the murder rate had returned to the comparatively low level prior to the increases of the mid-1960s to mid-1970s period.<sup>125</sup>

In sum, the data for the decades since the end of World War II are further evidence failing to bear out the more guns equals more death mantra. The per capita accumulated stock of guns has increased, yet there has been no correspondingly consistent increase in either total violence or gun violence. The evidence is consistent with the hypothesis that gun possession levels do not have any impact on violence rates.<sup>126</sup>

#### D. Geographic Patterns within Nations

Once again, if more guns equals more death and fewer guns equals less death, areas within nations with higher gun ownership should in general have more murders than those with less gun ownership in a similar area. But, in fact, the reverse pattern prevails in Canada,<sup>127</sup> “England, America, and Switzerland, [where the areas] with the highest rates of gun ownership were in fact those with the lowest rates of violence.”<sup>128</sup> A recent study of all counties in the United States has again demonstrated the lack of relationship between the prevalence of firearms and homicide.<sup>129</sup>

This inverse correlation is one of several that seems to contradict more guns equals more death. For decades the gun lobby has emphasized that, in general, the American jurisdictions where guns are most restricted have consistently had the highest violent crime rates and those with the fewest restrictions have the lowest violent crime rates.<sup>130</sup> For instance, robbery is highest in jurisdictions which are most restrictive of gun ownership.<sup>131</sup> As to one specific control, the ban on carrying concealed weapons (CCW) for protection, “violent-crime rates were highest in states [that flatly ban car-



rying concealed weapons], next highest in those that allowed local authorities discretion [to deny] permits, and lowest in states with nondiscretionary” concealed weapons laws under which police are legally required to license every qualified applicant.<sup>132</sup> Also of interest are the extensive opinion surveys of incarcerated felons, both juvenile and adult, in which large percentages of the felons replied that they often feared potential victims might be armed and aborted violent crimes because of that fear.<sup>133</sup> The felons most frightened about confronting an armed victim were those “from states with the greatest relative number of privately owned firearms.”<sup>134</sup>

### E. Geographic Comparisons: European Gun Ownership and Murder Rates

This topic has already been addressed at some length in connection with Tables 1–3, which contain the latest data available. Tables 4–6, contain further, and somewhat more comprehensive, data from the early and mid-1990s.<sup>135</sup> These statistics reinforce the point that murder rates are determined by basic socio-cultural and economic factors rather than mere availability of some particular form of weaponry. Consider Norway and its neighbors Sweden, the Netherlands, and Denmark. Norway has far and away Western Europe’s highest household gun ownership rate (32%) but also its lowest murder rate. The Netherlands has the lowest gun ownership rate in Western Europe (1.9%) and Sweden lies midway between (15.1%) the Netherlands and Norway. Yet the Dutch gun murder rate is higher than the Norwegian, and the Swedish rate is even higher, though only slightly.<sup>136</sup>

*Table 4: Intentional Deaths: United States vs. Continental Europe Rates*

In order of highest combined rate; nations having higher rates than the United States are indicated by asterisk (suicide rate) or + sign (murder rate).

<b>Nation</b>	<b>Suicide</b>	<b>Murder</b>	<b>Combined rates</b>
Russia	41.2*	30.6+	71.8
Estonia	40.1*	22.2+	62.3
Latvia	40.7*	18.2+	58.9
Lithuania	45.6*	11.7+	57.3
Belarus	27.9*	10.4+	38.3
Hungary	32.9*	3.5	36.4

Ukraine	22.5*	11.3+	33.8
Slovenia	28.4*	2.4	30.4
Finland	27.2*	2.9	30.1
Denmark	22.3*	4.9	27.2
Croatia	22.8*	3.3	26.1
Austria	22.2*	1.0	23.2
Bulgaria	17.3*	5.1	22.4
France	20.8*	1.1	21.9
Switzerland	21.4*	1.1 <sup>‡</sup>	24.1
Belgium	18.7*	1.7	20.4
United States	11.6	7.8	19.4
Poland	14.2*	2.8	17.0
Germany	15.8*	1.1	16.9
Romania	12.3*	4.1	16.4
Sweden	15.3*	1.0	16.3
Norway	12.3*	0.8	13.1
Holland	9.8	1.2	11.0
Italy	8.2	1.7	9.9
Portugal	8.2	1.7	9.9
Spain	8.1	0.9	9.0
Greece	3.3	1.3	4.6

Notes: Data based in general on U.N. DEMOGRAPHIC YEARBOOK (1998) as reported in David C. Stolinsky, *America: The Most Violent Nation? 5 MED. SENTINEL 199-201 (2000)*. It should be understood that, though the 1998 Yearbook gives figures for as late as 1996, the figures are not necessarily for that year. The Yearbook contains the latest figure each nation has provided the U.N., which may be 1996, 1995, or 1994.

N.B. This data should be considered in light of Tables 1 and 3 and the Explanatory Note which precedes Table 3.

<sup>‡</sup> The Swiss homicide figure that Stolinsky reports is an error because it combines attempts with actual murders. We have computed the Swiss murder rate by averaging the 1994 and 1995 Swiss National Police figures for actual murders in those years given in RICHARD. MUNDAY & JAN. A. STEVENSON, *GUNS AND VIOLENCE: THE DEBATE BEFORE LORD CULLEN 268 (1996)*.

*Table 5: European Gun/Handgun Violent Death*

Nation	Suicide with hand-gun	Murder with hand-gun	Percent of households with guns	Percent of households with handguns
Belgium	18.7	1.7	16.6%	6.8%
France	20.8	1.1	22.6%	5.5%

W. Germany	15.8	1.1	8.9%	6.7%*
Holland	9.8	1.2	1.9%	1.2%
Italy	8.2	1.7	16.0%	5.5%
Norway	12.3	0.8	32.0%	3.8%
Sweden	15.3	1.3	15.1%	1.5%
Switzerland	20.8	1.1**	27.2%	12.2%

Notes: For derivation of the homicide rates, see notes to Table 1. The data on household firearms ownership come from British Home Office figures printed in RICHARD. MUNDAY & JAN A. STEVENSON, GUNS AND VIOLENCE: THE DEBATE BEFORE LORD CULLEN 30, 275 (1996)

\* Note that the data here are for *West* Germany and were obtained when that nation still existed as an independent entity. See *infra* Tables 1 & 4 for later (but differently derived) data for the current nation of Germany.

\*\* Again, the Swiss homicide figure that Stolinsky reports is an error because it combines attempts with actual murders. See notes for Table 4.

Table 6: European Firearms-Violent Deaths

Nation	Suicide	Suicide with gun	Murder	Murder with gun	Number of guns per 100,000 population
Austria	N/A	N/A	2.14	0.53	41.02 *
Belarus	27.26	N/A	9.86	N/A	16.5
Czech Republic	9.88	1.01	2.80	0.92	27.58
Estonia	39.99	3.63	22.11	6.2	28.56
Finland	27.28	5.78	3.25	0.87	411.20 **
Germany	15.80	1.23	1.81	0.21	122.56
Greece	3.54	1.30	1.33	0.55	77.00
Hungary	33.34	0.88	4.07	0.47	15.54
Moldova	N/A	N/A	17.06	0.63	6.61
Poland	14.23	0.16	2.61	0.27	5.30
Romania	N/A	N/A	4.32	0.12	2.97
Slovakia	13.24	0.58	2.38	0.36	31.91
Spain	5.92	N/A	1.58	0.19	64.69
Sweden	15.65	1.95	1.35	0.31	246.65

Notes: It bears emphasis that the following data come from a special U.N. report whose data are not fully comparable to those in Tables 1 and 2 because they cover different years and derive from substantially differing sources.<sup>137</sup> This special report is based on data obtained from the governments of the nations set out below, especially data on gun permits or other official indicia of gun ownership in those nations.<sup>138</sup> The data on suicide and murder in those nations also come from their governments as do the similar data in Tables 1 and 2, but for later years, and also include data on the





number of firearm homicides and firearm suicides which are not available from the U.N. source used in Tables 1 and 2.

\* This may well be an undercount because an Austrian license is not limited to a single firearm but rather allows the licensee to possess multiple guns.

\*\* The source from which Table 2 derives also gives figures for Finland, which we have omitted there because they are earlier and closely similar except in one respect: instead of official ownership figures for guns, they give a survey-based figure for households having a gun: 23.2%

These comparisons are reinforced by Table 6, which gives differently derived (and non-comparable) gun ownership rates, overall murder rates, and rates of gun murder, for a larger set of European nations.<sup>139</sup> Table 6 reveals that even though Sweden has more than double the rate of gun ownership as neighboring Germany as well as more gun murders, it has 25% less murder overall. In turn, Germany, with three times the gun ownership rate of neighboring Austria has a substantially lower murder rate overall and a lower gun murder rate. Likewise, though Greece has over twice the per capita gun ownership rate of the Czech Republic, Greece has substantially less gun murder and less than half as much murder overall. Although Spain has over 12 times more gun ownership than Poland, the latter has almost a third more gun murder and more overall murder than the former. Finally, Finland has 14 times more gun ownership than neighboring Estonia, yet Estonia's gun murder and overall murder rates are about seven times higher than Finland's.

#### F. Geographic Comparisons: Gun-Ownership and Suicide Rates

The mantra more guns equals more death and fewer guns equals less death is also used to argue that "limiting access to firearms could prevent many suicides."<sup>140</sup> Once again, this assertion is directly contradicted by the studies of 36 and 21 nations (respectively), which find no statistical relationship. Overall suicide rates were no worse in nations with many firearms than in those where firearms were far less widespread.<sup>141</sup>

Consider the data about European nations in Tables 5 and 6. Sweden, with over twice as much gun ownership as neighboring Germany and a third more gun suicide, nevertheless has the lower overall suicide rate. Greece has nearly three times more gun ownership than the Czech Republic and somewhat more gun suicide, yet the





overall Czech suicide rate is over 175% higher than the Greek rate. Spain has over 12 times more gun ownership than Poland, yet the latter's overall suicide rate is more than double the former's. Tragically, Finland has over 14 times more gun ownership than neighboring Estonia, and a great deal more gun-related suicide. But how tragic is it for Finland, really, when in fact Estonia turns out to have a much higher suicide rate than Finland overall?

There is simply no relationship evident between the extent of suicide and the extent of gun ownership. People do not commit suicide because they have guns available. In the absence of firearms, people who are inclined to suicide just kill themselves some other way.<sup>142</sup> Two examples seem as pertinent as they are poignant. The first concerns the 1980s increase in suicide among young American males, an increase that, although relatively modest, inspired perfervid denunciations of gun ownership.<sup>143</sup> What these denunciations failed to mention was that suicide of teenagers and young adults was increasing throughout the entire industrialized world, regardless of gun availability, and often much more rapidly than in the United States. The only unusual aspect of suicide in the United States was that it involved guns. The irrelevancy of guns to the increase in American suicide is evident because suicide among English youth actually increased 10 times more sharply, with "car exhaust poisoning [being] the method of suicide used most often."<sup>144</sup> By omitting such facts, the articles blaming guns for increasing American suicide evaded the inconvenience of having to explain exactly what social benefit nations with few guns got from having their youth suicides occur in other ways.

Even more poignant are the suicides of many young Indian women born and raised on the island of Fiji. In general, women are much less likely to commit suicide than are men.<sup>145</sup> This statistic is true of Fijian women overall as well, but not of women in the large part of Fiji's population that is of Indian ancestry. As children, these Indian women are raised in more-or-less loving and supportive homes. But upon marriage they are dispersed across the island to remote areas where they live with their husbands' families. These families are not loving to them and are, in fact, often overtly hostile, a situation the husbands do little to mitigate. Indian women on Fiji have a suicide rate nearly as high as that of Indian men, a rate many times greater than that of non-Indian Fijian women.<sup>146</sup> It also bears emphasis that the overall Fijian suicide rate far exceeds that of the United States.





The method of suicide is particularly significant. Fijian women of Indian ancestry commit suicide without using guns, perhaps because guns are unavailable. About three-quarters of these women hang themselves, while virtually all the rest die (in agony) from consuming the agricultural pesticide paraquat. The recommendation of the author whose article chronicles all these suicides is so myopic as to almost caricature the more guns equals more death mindset: To reduce suicide by Indian women, she recommends that the Fijian state stringently control paraquat.<sup>147</sup> Apparently she thinks decreased access to a horribly agonizing means of death will reconcile these women to a life situation they regard as unendurable. At the risk of belaboring what should be all too obvious, restricting paraquat will not improve the lives of these poor women. It will only reorient them towards hanging, drowning, or some other means of suicide.

Guns are just one among numerous available deadly instruments. Thus, banning guns cannot reduce the amount of suicides. Such measures only reduce the number of suicides by firearms. Suicides committed in other ways increase to make up the difference. People do not commit suicide because they have guns available. They kill themselves for reasons they deem sufficient, and in the absence of firearms they just kill themselves in some other way.

## CONCLUSION

This Article has reviewed a significant amount of evidence from a wide variety of international sources. Each individual portion of evidence is subject to cavil—at the very least the general objection that the persuasiveness of social scientific evidence cannot remotely approach the persuasiveness of conclusions in the physical sciences. Nevertheless the burden of proof rests on the proponents of the more guns equal more death, fewer guns equals less death mantra, especially since they argue public policy ought to be based on that mantra.<sup>148</sup> To bear that burden would at the very least require showing that a large number of nations with more guns have more death and that nations that have imposed stringent gun controls have achieved substantial reductions in criminal violence (or suicide). But those correlations are not observed when a large number of nations are compared across the world.

Over a decade ago, Professor Brandon Centerwall of the Univer-



city of Washington undertook an extensive, statistically sophisticated study comparing areas in the United States and Canada to determine whether Canada's more restrictive policies had better contained criminal violence. When he published his results it was with the admonition:

If you are surprised by [our] finding[s], so [are we]. [We] did not begin this research with any intent to "exonerate" handguns, but there it is—a negative finding, to be sure, but a negative finding is nevertheless a positive contribution. It directs us where not to aim public health resources.<sup>149</sup>

## ENDNOTES

1. *See, e.g.*, John Godwin, *Murder USA: The Ways We Kill Each Other* 281 (1978) ("Areas with the highest proportion of gun owners also boast the highest homicide ratios; those with the fewest gun owners have the lowest."); N. Pete Shields, *Guns Don't Die, People Do* 64 (1981) (quoting and endorsing an English academic's remark: "We cannot help but believe that America ought to share the basic premise of our gun legislation—that the availability of firearms breeds violence."); Janice Somerville, *Gun Control as Immunization*, *Am. Med. News*, Jan. 3, 1994, at 9 (quoting public health activist Katherine Christoffel, M.D.: "Guns are a virus that must be eradicated . . . . Get rid of the guns, get rid of the bullets, and you get rid of the deaths."); Deane Calhoun, *From Controversy to Prevention: Building Effective Firearm Policies*, *Inj. Protection Network Newsl.*, Winter 1989–90, at 17 ("[G]uns are not just an inanimate object [sic], but in fact are a social ill."); *see also* Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s* (2006); Susan Baker, *Without Guns, Do People Kill People?* 75 *Am. J. Pub. Health* 587 (1985); Paul Cotton, *Gun-Associated Violence Increasingly Viewed as Public Health Challenge*, 267 *J. Am. Med. Ass'n.* 1171 (1992); Diane Schetky, *Children and Handguns: A Public Health Concern*, 139 *Am. J. Dis.Child.* 229, 230 (1985); Lois A. Fingerhut & Joel C. Kleinman, *International and Interstate Comparisons of Homicides Among Young Males*, 263 *J. Am. Med. Ass'n.* 3292, 3295 (1990).

2. *See* William Alex Pridemore, *Using Newly Available Homicide Data to Debunk Two Myths About Violence in an International Context: A Research Note*, 5 *Homicide Stud.* 267 (2001).

3. *See* George Newton & Franklin Zimring, *Firearms & violence in American life: A Staff Report Submitted to the National Commission on the*

Causes & Prevention of Violence, 119 & n.3 (1970).

4. Russian law did and does flatly prohibit civilian possession of handguns and limits long guns to licensed hunters. *Id.* For more on the stringency of enforcement, see Raymond Kessler, *Gun Control and Political Power*, 5 *Law & Pol'y Q.* 381, 389 (1983), and Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 *Emory L. J.* 1139, 1239 (1996) (noting an unusual further element of Soviet gun policy: the Soviet Army adopted unique firearm calibers so that, even if its soldiers could not be prevented from returning with foreign gun souvenirs from foreign wars, ammunition for them would be unavailable in the Soviet Union).

5. See Pridemore, *supra* note 2, at 271.

6. Russian homicide data given in this article were kindly supplied us by Professor Pridemore from his research in Russian ministry sources.

7. The highest U.S. homicide rate ever reported was 10.5 per 100,000 population in 1980. See Jeffery A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 *J.L. & Econ.* 615, 624–25 tbl.1 (2001). As of 2001 the rate was below 6. *Id.* The latest rates we have for the Ukraine, Belarus, and other former Soviet nations in Europe come from the mid-1990s when all were well above 10 and most were 50% to 150% higher. *Id.*

Note that the U.S. rates given above are rates reported by the FBI. There are two different sources of U.S. murder rates. The FBI murder data is based on reports it obtains from police agencies throughout the nation. These data are significantly less complete than the alternative (used in this article unless otherwise explicitly stated) rates of the U.S. Public Health Service, which are derived from data collected from medical examiners' offices nationwide. Though the latter data are more comprehensive, and the Public Health Service murder rate is slightly higher, they have the disadvantage of being slower to appear than the FBI homicide data.

8. Gary Kleck, *Targeting Guns: Firearms and their Control* 20 (1997) (discussing patterns revealed by studies in the United States).

9. Our assertions as to legality of handguns are based on U.N. Econ. & Soc. Council, *Comm'n on Crime Prevention & Crim. Justice, United Nations International Study on Firearms Regulation* 26, table 2-1 (1997 draft).

10. Joyce Lee Malcolm, *Guns and Violence: The English Experience* 204 (2002).

11. Hans Toch & Alan J. Lizotte, *Research and Policy: The Case for Gun Control*, in *Psychology & Social Policy* 223, 232 (Peter Suedfeld & Philip E. Tetlock eds., 1992); see also *id.* at 234 & n.10 (“[T]he fact that national patterns show little violent crime where guns are most dense implies that guns do not elicit

aggression in any meaningful way. . . . Quite the contrary, these findings suggest that high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.”).

Approaching the matter from a different direction, from the earliest data (nineteenth century on), the American jurisdictions with the most stringent gun controls are in general precisely the ones with the highest murder rates. Conversely, American states with homicide rates as low as Western Europe's have high gun ownership, and no controls designed to deny guns to law-abiding, responsible adults. Many possible reasons may be offered for these two facts. But regardless of their explanation, they do not suggest that gun control reduces murder.

For examination of a wide variety of studies finding little evidence in support of the efficacy of gun controls in reducing violence, see James B. Jacobs, *Can Gun Control work?* 111–20 (2002); Kleck, *supra* note 8, at 351–77; John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* 19–20 (1998); James D. Wright et al., *Under the Gun: Weapons, Crime and Violence in America* 307–08 (1983); Matthew R. DeZee, *Gun Control Legislation: Impact and Ideology*, 5 *Law & Pol'y Q.* 367, 369–71 (1983).

12. Kleck, *supra* note 8, at 22–23.

13. Barnett & Kates, *supra* note 4, at 138–42.

14. In the period between 1900 and 1935, Arkansas, Hawaii, Michigan, Missouri, New Jersey, New York, North Carolina, Oregon, and South Carolina adopted laws variously requiring a license to own a handgun or to buy one or banning handgun purchase altogether, and “Saturday Night Special”-type bans existed in Tennessee, Arkansas, and various other Southern states. Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in *Restricting Handguns: The Liberal Skeptics Speak Out* 7, 14–15 (Don B. Kates, Jr. ed., 1979).

15. Charles F. Wellford et al., Nat'l Research Council, *Firearms and Violence: A Critical Review* 6–10 (2004). It is perhaps not amiss to note that the review panel, which was set up during the Clinton Administration, was composed almost entirely of scholars who, to the extent their views were publicly known before their appointments, favored gun control.

16. Task Force on Community Preventive Services, Centers for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 *Mortality & Morbidity Wkly. Rep. (RR-14 Recommendations & Rep.)* 11, 16 (2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>. The CDC is vehemently anti-gun and interpreted its results to show not that the “more guns equals more death” mantra is er-

roneous but only that the scores of studies it reviewed were inconclusive.

17. Malcolm, *supra* note 10, at 219.

18. *Id.* at 209.

19. See Esther Bouten et al., *Criminal Victimization in Seventeen Industrialized Countries*, in *Crime Victimization in Comparative Perspective: Results from the International Crime Victims Survey, 1989–2000* at 13, 15–16 (Paul Nieuwebeerta ed., 2002). The surveys involved were conducted under the auspices of the governments of each nation and the general supervision of the University of Leiden and the Dutch Ministry of Justice.

20. See, e.g., *Gun Crime Growing “Like Cancer,”* BBC News, May 21, 2003, <http://news.bbc.co.uk/1/hi/England/3043701.stm>; David Bamber, *Gun Crime Trebles as Weapons and Drugs Flood British Cities*, Telegraph Online (London), Feb. 27, 2002, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2002/02/24/nguns24.xml>; Jason Bennetto, *Firearms Amnesty to Tackle Surge in Gun Crime*, Independent (London), Dec. 27, 2002, at 1; Ian Burrell, *Police Move to Tackle Huge Rise in Gun Crime*, Independent (London), Jan. 15, 2001, at 3; Daniel Foggo & Carl Fellstrom, *“We Are Reeling with the Murders, We Are in a Crisis with Major Crime,”* Sunday Telegraph (London), Mar. 13, 2005, at 4; Johann Hari, *The British Become Trigger Happy*, New Statesman (London), Nov. 5, 2001, at 35; Philip Johnston, *Gun Crime Rises Despite Dunblane Pistol Ban*, Daily Telegraph (London), Jul. 17, 2001, at 05; David Leppard & Rachel Dobson, *Murder Rate Soars to Highest for a Century*, Sunday Times (London), Oct. 13, 2002, at 1; Adam Mitchell, *Gun Killings Double as Police Claim Progress*, Daily Telegraph (London), Aug. 17, 2001, at 13; John Steele, *Police Fear a New Crime Wave as School-Age Muggers Graduate to Guns*, Daily Telegraph (London) Jan. 3, 2002, at 04; Jon Ungoed-Thomas, *Killings Rise as 3m Illegal Guns Flood Britain*, Sunday Times (London), Jan. 16, 2000; Peter Woolrich, *Britain’s Tough Gun Control Laws Termed Total Failure: Land of Hope and Gunrunning*, Punch Mag., May 3, 2000.

21. See, e.g., Carl Bakal, *The Right to Bear Arms* 10–11, 31, 279 (1966); Ramsey Clark, *Crime in America* 104–05, 109 (1970); Amitai Etzioni & Richard Remp, *Technological Shortcuts to Social Change* 136 (1973); National Coalition to Ban Handguns, *A Shooting Gallery Called America* (undated, unpaginated pamphlet); Shields, *supra* note 1, at 63–64; Irwin Bloch, *Gun Control Would Reduce Crime*, reprinted in *Would Gun Control Reduce Crime* 197 (David Bender ed., 1989); Robert S. Drinan, *Banning Handguns Would Reduce Crime*, reprinted in *Guns & Crime* 45–46 (Tarara Roleff ed., 1999).

22. Malcolm, *supra* note 10, at 164–216. We should clarify that the twin trends toward more violent crime and more gun control began long before the 1990s, and just culminated then.

23. Daniel Foggo, *Don't Bother About Burglary, Police Told*. Sunday Telegraph (London), Jan. 12, 2003, at 1 (“Police have been ordered not to bother investigating crimes such as burglary, vandalism and assaults unless evidence pointing to the culprits is easily available, The Sunday Telegraph can reveal. Under new guidelines, officers have been informed that only ‘serious’ crimes, such as murder, rape or so-called hate crimes, should be investigated as a matter of course. In all other cases, unless there is immediate and compelling evidence, such as fingerprints or DNA material, the crime will be listed for no further action.”).
24. Steve Doughty, *Let Burglars Off With Caution Police Told*. Daily Mail (London), Apr. 3, 2006, at 4.
25. Matthew Beard, *Armed Police to Man Checkpoints in London as Drug-Related Crime Soars*, Independent (London), Sept. 7, 2002, at 2.
26. See Melissa Kite, *Tories Launch Bill to Give Householders the Power to Tackle Intruders*, Sunday Telegraph (London), Dec. 26, 2004, at 4; see also Renee Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. Econ. & Pol’y 331 (2007).
27. In March 2006, Kansas and Nebraska became the 39th and 40th states, respectively, to pass “shall issue” concealed carry legislation. In Kansas, the state legislature voted to overturn the governor’s veto of the bipartisan legislation. *Kansas House Overrides Concealed-Guns-Bill Veto*, Deseret Morning News, Mar. 24, 2006. In Nebraska, the governor signed the bill as passed by the state legislature. Kevin O’Hanlon, *Concealed-Weapons Bill Adopted*, Lincoln Journal Star, Mar. 31, 2006.
28. Don Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* 62, 64 (Timothy D. Lytton ed., 2005).
29. See John R. Lott Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 1 (1997); see also John R. Lott, Jr., *More Guns, Less Crime* 19 (2d. ed. 2000). This conclusion is vehemently rejected by anti-gun advocates and academics who oppose armed self-defense. See, e.g., Franklin Zimring & Gordon Hawkins, *Concealed Handguns: The Counterfeit Deterrent*, Responsive Community, Spring 1997, at 46; Albert W. Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?*, 31 Val. U. L. Rev. 365, 366 (1997); Daniel W. Webster, *The Claims That Right-to-Carry Laws Reduce Violent Crime Are Unsubstantiated* (Johns Hopkins Center for Gun Policy and Research, 1997); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. Legal Stud. 209, 209 (1998); Ian Ayres & John J. Donohue III, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 Stan. L. Rev. 1193, 1197 (2003).



Several critics have now replicated Lott's work using additional or different data, additional control variables, or new or different statistical techniques they deem superior to those Lott used. Interestingly, the replications all confirm Lott's general conclusions; some even find that Lott *underestimated* the crime-reductive effects of allowing good citizens to carry concealed guns. See Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & Econ. 615, 615 (2001); David B. Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J.L. & Econ. 635 (2001); John R. Lott, Jr. & John E. Whitley, *Safe-Storage Gun Laws: Accidental Deaths, Suicides, and Crime*, 44 J.L. & Econ. 659 (2001) Thomas B. Marvell, *The Impact of Banning Juvenile Gun Possession*, 44 J.L. & Econ. 691 (2001); Jeffrey S. Parker, *Guns, Crime, and Academics: Some Reflections on the Gun Control Debate*, 44 J.L. & Econ. 715 (2001); Bruce L. Benson & Brent D. Mast, *Privately Produced General Deterrence*, 44 J.L. & Econ. 725 (2001); David E. Olson & Michael D. Maltz, *Right-to-Carry Concealed Weapon Laws and Homicide in Large U.S. Counties: The Effect on Weapon Types, Victim Characteristics, and Victim-Offender Relationships*, 44 J.L. & Econ. 747 (2001); Florenz Plassmann & T. Nicolaus Tideman, *Does the Right to Carry Concealed Handguns Deter Countable Crimes? Only a Count Analysis Can Say*, 44 J.L. & Econ. 771 (2001); and Carlisle E. Moody, *Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness*, 44 J.L. & Econ. 799 (2001); see also Florenz Plassman & John Whitley, *Confirming 'More Guns, Less Crime,'* 55 Stan. L. Rev. 1313, 1316 (2003). In 2003 Lott reiterated and extended his findings, which were subsequently endorsed by three Nobel laureates. See John R. Lott, Jr., *The Bias Against Guns* (2003).

30. See John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. Econ. 379 (2001).

31. See Bureau of Justice Statistics, Key Facts at a Glance: Incarceration Rate, 1980–2004 (Oct. 23, 2005), <http://www.ojp.usdoj.gov/bjs/glance/tables/incrttab.htm>, citing Allen Beck & Paige Harrison, Bureau of Justice Statistics, *Correctional Populations in the United States 1997* (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus97.pdf>, and Allen Beck & Paige Harrison, Bureau of Justice Statistics, *Prisoners in 2004*, (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

32. Thomas Bonczar & Tracy L. Snell, Bureau of Justice Statistics Bulletin, *Capital Punishment 2003* (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>.

33. See generally FBI, *Violent Crime*, [http://www.fbi.gov/ucr/05cius/offenses/violent\\_crime/index.html](http://www.fbi.gov/ucr/05cius/offenses/violent_crime/index.html); FBI, *Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1986–2005*, [http://www.fbi.gov/ucr/05cius/data/table\\_01.html](http://www.fbi.gov/ucr/05cius/data/table_01.html).

34. See Gordon Barclay et al., *International Comparisons of Criminal Justice Statistics 1999*, Home Office Stat. Bull. (Research Development and Statistics, U.K. Home Office, London, U.K.) (2001), available at <http://www.homeoffice.gov.uk/rds/pdfs/hosb601.pdf>.
35. See Cass R. Sunstein & Adrian Vermuele, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stanford L. Rev. 703 (2005).
36. See Delbert S. Elliott, *Life-Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 Colo. L. Rev. 1081, 1089 (1998) (emphasis added).
37. See *infra* Part III.
38. See *supra* notes 3–9 and Table 1.
39. See *supra* Table 1 and *infra* Tables 2–3.
40. Kleck, *supra* note 8, at 254. Though we have quoted the finding as to murder rates, the study also found no correlation to suicide rates. *Id.*
41. Martin Killias et al., *Guns, Violent Crime, and Suicide in 21 Countries*, 43 Can. J. Criminology & Crim. Just. 429, 430 (2001). It bears emphasis that the authors, who are deeply anti-gun, emphasize the “very strong correlations between the presence of guns in the home and *suicide committed with a gun*”—as if there were some import to the death being by gun rather than by hanging, poison, or some other means. *Id.*; see also *infra* Part III.
42. World Health Organization, *Small Arms and Global Health*, 11 (2001) (emphasis added). This irrelevancy is endlessly repeated. See, e.g., Wendy Cukier, *Small Arms and Light Weapons: A Public Health Approach*, 9 Brown J. World Aff. 261, 266, 267 (2002) (“Research has shown that rates of *small arms* death and injury are linked to small arms accessibility . . . . In industrialized countries, studies have shown that accessibility is related to *firearm* death rates . . . . Other approaches have examined the rates of death *from firearms* across regions, cities, high income countries, and respondents to victimization surveys.” (emphasis added, internal citations omitted); see also Neil Arya, *Confronting the Small Arms Pandemic*, 324 British Med. J. 990 (2002); E.G. Krug et al., *Firearm-Related Deaths in the United States and 35 Other High and Upper-Middle-Income Countries*, 27 Int’l J. Epidemiology 214 (1988).
43. See Jacobs, *supra* note 11, at 120 (“[I]f the Brady Law did have the effect of modestly reducing firearms suicides . . . this effect was completely offset by an increase of the same magnitude in nonfirearm suicide” resulting in the same number of deaths); see also Kleck, *supra* note 8, at 265–92 (summary and review of studies regarding guns and suicide). Indeed, though without noting the significance, the WHO report states that out of sample of 52 countries, “firearms accounted for only one-fifth of all suicides, just



ahead of poisoning . . . . [Self-]strangulation, [i.e. hanging] was the most frequently used method of suicide.” World Health Organization, *supra* note 42, at 3.

44. In 1999, the latest year for which we have Russian data, the American suicide rate was 10.7 per 100,000 people, while the Russian suicide rate was almost 41 per 100,000 people. William Alex Pridemore & Andrew L. Spivak, *Patterns of Suicide Mortality in Russia*, 33 *Suicide & Life-Threatening Behavior* 132, 133 (2003); Donna L. Hoyert et al., *Deaths: Final Data for 1999*, Nat'l Vital Stat. Rep., Sept. 21, 2001, at 6.

45. *See* Krug et al., *supra* note 42, at 218–19.

46. *Id.* at 216. Two of those nations, Brazil and Estonia, had more than twice the overall murder rates of the United States. David C. Stolinsky, *America: The Most Violent Nation?*, 5 *Med. Sentinel* 199, 200 (2000). Readers may question the value of comparing the United States to those particular nations; however, this comparison was first suggested by Krug. Krug et al., *supra* note 42, at 215 (using thirty-six countries, having among the highest GNP per capita as listed in the World Bank's 1994 World Development Report). All we have done is provide full murder rate information for these comparisons.

47. Kleck, *supra* note 8, at 254; Killias et al., *supra* note 41, at 430.

48. *See infra* notes 127-29 and accompanying text. For at least thirty years gun advocates have echoed in more or less identical terms the observation that twenty percent of American homicide is concentrated in four cities with the nation's most restrictive gun laws. *See Firearms Legislation: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 94th Cong. 2394 (1975) (statement of Neal Knox). In October 2000, the head of a gun advocacy group ridiculed a Handgun Control “scorecard” for its misleading attempts to inversely correlate violent crime rates to the extent of the various states’ gun controls. He points out that, in fact, the states with the most restrictive gun laws consistently have higher murder rates than states with less restrictive laws, while those with the least controls had the lowest homicide rates. Larry Pratt, *HCI Scorecard* (2000), <http://gunowners.org/op0042.htm>.

49. It is noteworthy that the correlation between more gun control and more crime seems to hold true in other nations, though much less strikingly than in the United States. *See* Miron, *supra* note 29, at 628.

50. Colin Greenwood, *Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales* 243 (1972).

51. *Id.*

52. *See supra* Tables 1–2 and notes 10–15; *see infra* Table 3 and notes 125–



127.

53. David Kairys, *A Carnage in the Name of Freedom*, Philadelphia Inquirer, Sept. 12, 1988, at A15 (emphasis added), *quoted in* Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 Akron L. Rev. 113, 118 n.28.

54. Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 St. Louis U. Pub. L. Rev. 243, 265–66 (1993) (emphasis added), *quoted in* Vandall, *supra* note 53, at 119, n.32.

55. Robert J. Spitzer, *The Politics of Gun Control* 147 (3rd ed. 1995) (emphasis added).

56. Violence Policy Center, *Who Dies? A Look at Firearms Death and Injury in America*, <http://www.vpc.org/studies/whointro.htm> (last visited Nov. 17, 2006).

57. National Coalition to Ban Handguns, *supra* note 21.

58. *See* David M. Kennedy & Anthony J. Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 Homicide Stud. 263, 267 (1998).

59. *See* Elliott, *supra* note 36, at 1093.

60. *Id.*

61. Gerald D. Robin, *Violent Crime and Gun Control* 48 (1991) (quoting Gary Kleck, *The Assumptions of Gun Control*, in *Firearms and Violence* 23, 43 (Don B. Kates ed., 1984)).

62. Mark Cooney, *The Decline of Elite Homicide*, 35 Criminology 381, 386 (1997).

63. Gary Kleck & Don B. Kates, *Armed: New Perspectives on Gun Control* 20 (2001).

64. Roger Lane, *Murder in America: A History* 259 (1997).

65. A. Swersky & E. Enloe, *Homicide in Harlem* 17 (1975).

66. Anthony A. Braga et al., *Youth Homicide in Boston: An Assessment of Supplementary Homicide Report Data*, 3 Homicide Stud. 277, 283–84 (1999).

67. *See id.*

68. Dean G. Rojek, *The Homicide and Drug Connection*, in *The Varieties of Homicide and Its Research: Proceedings of the 1999 Meeting of the Homicide Research Working Group* 128 (P.H. Blackman et al. eds., 2000) [hereinafter *The Varieties of Homicide*].

69. Jo Craven McGinty, “New York Killers, and Those Killed, by the Numbers,” *N.Y. Times*, April 28, 2006, at A1.

70. Gus G. Sentementes, *Patterns Persist in City Killings*, Baltimore Sun, Jan. 1, 2007, at A1.

71. Anthony A. Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, Massachusetts*, 9 Police Q. 20, 29–31 (2006) (“Some 95% of homicide offenders, 82% of aggravated assault offenders, 65% of homicide victims, and 45% of aggravated gun assault victims were arraigned at least once in Massachusetts courts before they committed their crime or were victimized. Individuals that were previously known to the criminal justice system were involved in a wide variety of offenses and, on average, committed many prior crimes . . . . On average, aggravated gun assault offenders had been arraigned for 12 prior offenses, homicide offenders had been arraigned for 9 prior offenses . . . .”).

72. Wade C. Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 Homicide Stud. 160, 161–62 (1998).

73. Linda Langford et al., *Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders in Massachusetts, 1991-1995*, in *The Varieties of Homicide*, supra note 66, at 51, 55, 59.

74. Murray A. Straus, *Domestic Violence and Homicide Antecedents*, 62 Bull. N.Y. Acad. Med. 446, 454 (1986); see also Murray A. Straus, *Medical Care Costs of Intrafamily Assault and Homicide*, 62 Bull. N.Y. Acad. Med. 556, 557 (1986).

75. Paige Hall Smith et al., *Partner Homicide in Context*, 2 Homicide Stud. 400, 410 (1998) (reporting cases only where there was sufficient background information on the parties).

76. *Id.* at 411.

77. Robin, supra note 61, at 47–48. See also Kathryn E. Moracco et al., *Femicide in North Carolina, 1991-1993*, 2 Homicide Studies 422, 441 (1998).

78. See, e.g., Spitzer, supra note 55; Jeremiah A. Barondess, Letter to the Editor, *Firearm Violence and Public Health*, 272 J. Am. Med. Ass’n 1406, 1409 (1994) (responding to criticism of his article, Karl P. Adler et al., *Firearm Violence and Public Health: Limiting the Availability of Guns*, 271 J. Am. Med. Ass’n 1281 (1994)); Kairys, supra note 52.

79. Kleck, supra note 8, at 236 (analyzing the U.S. Bureau of Justice Statistics data on murder defendants being prosecuted in 33 U.S. urban counties).

80. Current federal law prohibits gun possession by minors, drug addicts, and persons who have been involuntarily committed to mental institutions or convicted of felonies or domestic violence misdemeanors. 18 U.S.C. § 922(g) (2000). As to state gun laws, see, for example, Cal. Penal Code §§ 12021, 12072, 12101, 12551 (Deering 2006). For a summary of the general patterns of federal and state gun laws, see Jacobs, supra note 11, at

19–35.

81. See Wright et al., *supra* note 11, at 137–38 (“[T]here is no good reason to suppose that people intent on arming themselves for criminal purposes would not be able to do so even if the general availability of firearms to the larger population were sharply restricted. Here it may be appropriate to recall the First Law of Economics, a law whose operation has been sharply in evidence in the case of Prohibition, marijuana and other drugs, prostitution, pornography, and a host of other banned articles and substances—namely, that demand creates its own supply. There is no evidence anywhere to show that reducing the availability of firearms *in general* likewise reduces their availability to persons with criminal intent, or that persons with criminal intent would not be able to arm themselves under any set of general restrictions on firearms.”).

82. This article will not discuss the defensive use of firearms beyond making the following observations: while there is a great deal of controversy about the subject, it is a misleading controversy in which anti-gun advocates’ deep ethical or moral objections to civilian self-defense are presented in the guise of empirical argument. The empirical evidence unquestionably establishes that gun ownership by prospective victims not only allows them to resist criminal attack but also deters violent criminals from attacking them in the first place. See Joseph F. Sheley & James D. Wright, *In the Line of Fire: Youths, Guns, and Violence in Urban America* 63 (1995), and James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* 154 (1986) for a discussion of DOJ-funded surveys of incarcerated adult and juvenile felons. See also Lott, *The Bias Against Guns*, *supra* note 29, at 8–11, 227–40; David B. Kopel, *Lanymers, Guns, and Burglars*, 43 *Ariz. L. Rev.* 345 (2001); Lawrence Southwick, Jr., *Self-Defense with Guns: The Consequences*, 28 *J. Crim. Just.* 351 (2000).

The legitimate question is not *whether* victim gun possession allows for self-defense and deters criminal violence, but how extensive and important these benefits are. See Kleck & Kates, *supra* note 63, at 213–342; Lott, *supra* note 11; Philip J. Cook & Jens Ludwig, *Defensive Gun Uses: New Evidence from a National Survey*, 14 *J. Quantitative Criminology* 111 (1998); Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, Nat’l Inst. Just.: Research in Brief (U.S. Dep’t of Justice, Washington, D.C., 1997); Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 *J. Crim. L. & Criminology* 188 (1995).

83. Kates, *supra* note 28, at 63.

84. Kleck, *supra* note 8, at 74 (collecting survey responses).

85. Kates, *supra* note 28, at 64.

86. Jacobs, *supra* note 11, at 14 (collecting studies).

87. Kates, *supra* note 28, at 70 (collecting studies).

88. Lott, *supra* note 11; John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry*, 26 J. Legal Stud. 1 (1997); David B. Mustard, *Culture Affects Our Beliefs About Firearms, But Data are Also Important*, 151 U. Penn. L. Rev. 1387 (2003). These studies are highly controversial. See Kates, *supra* note 28, at 70–71, for discussion of critics and criticisms.

89. Toch & Lizotte, *supra* note 11, at 232. Professor Toch was a consultant to the 1960s Eisenhower Commission, and until the 1990s he endorsed its conclusions that widespread handgun ownership causes violence and that reducing it would reduce violence. Franklin Zimring, one of the architects of those conclusions, has admitted that they were made speculatively and essentially without an empirical basis. Franklin E. Zimring & Gordon Hawkins, *The Citizen's Guide to Gun Control xi-xii* (1987) (“In the 1960s after the assassinations of President John F. Kennedy, Dr. Martin Luther King, Jr., and Senator Robert F. Kennedy, it [gun control] became a major subject of public passion and controversy . . . [sparking a debate that] has been heated, acrimonious and polarized . . . It began in a factual vacuum [in which] . . . neither side felt any great need for factual support to buttress foregone conclusions. *In the 1960s, there was literally no scholarship on the relationship between guns and violence and the incidence or consequences of interpersonal violence, and no work in progress.*”) (emphasis added).

As for the findings of the subsequent body of research, Professor Toch has written:

[W]hen used for protection firearms can seriously inhibit aggression and can provide a psychological buffer against the fear of crime. Furthermore, the fact that national patterns show little violent crime where guns are most dense implies that guns do not elicit aggression in any meaningful way . . . . Quite the contrary, these findings suggest that high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.

*Id.* at 234 & n.10.

90. Kleck, *supra* note 8, at 71.

91. See Malcolm, *supra* note 10, at 232–33; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. Crim. L. & Criminology 10, 21 (1995).

92. See Lott, *supra* note 11, at 39 (“[W]hite gun ownership exceed[ed] that for blacks by about 40% in 1996”). See generally Kleck, *supra* note 8, at 71.

93. See Lott, *supra* note 11, at 39. See generally Kleck, *supra* note 8, at 71.

94. The murder rate of young urban African Americans is roughly 600% higher than that of their rural counterparts. *See* Lois A. Fingerhut et al., *Firearm and Nonfirearm Homicide Among Persons 15 Through 19 Years of Age*, 267 J. Am. Med. Ass'n 3048, 3049 tbl.1.
95. Jan M. Chaiken & Marcia R. Chaiken, *Varieties of Criminal Behavior* 62–63 (1982).
96. *Id.* at 65.
97. *Id.* at 123, 125, 219 tbl. A.19 (1982).
98. Wright & Rossi, *supra* note 82, at 76.
99. Lane, *supra* note 64, at 14.
100. *Id.* at 151. *See generally id.* ch. 1.
101. Malcolm, *supra* note 10, at 19–20.
102. *See generally* Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 1–15 (1994); Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 37–53 (1984); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 214–16 (1983) [hereinafter *Original Meaning*].
103. Malcolm, *supra* note 102, at 138–41; *Original Meaning*, *supra* note 102, at 214–16. Typical laws (quoted with original spelling and punctuation) appear from the following sources: Archives of Maryland 77 (William Hand Browne ed., Baltimore, Maryland Historical Society 1883) (“[T]hat every house keeper or housekeepers within this Province shall have ready continually upon all occasions within his her or their house for him or themselves and for every person within his her or their house able to bear armes one Serviceable fixed gunne of bastard muskett boare” along with a pound of gunpowder, four pounds of pistol or musket shot, “match for match locks and of flints for firelocks”); Narratives of Early Virginia 273 (Lyon Gardiner Tyler ed., photo. reprint 1974) (1907) (requiring that everyone attend church on Sunday, further providing that “all suche as beare armes shall bring their pieces swordes, poulder and shotte” with them to church on penalty of a fine.); Records of the Governor and Company of the Massachusetts Bay in New England 84 (Nathaniel B. Shurtleff ed., Boston, William White, 1853) (ordering towns to provide their residents with arms if they could not provide their own “for the present, & after to receive satisfaction for that they disburse when they shall be able”); Records of the Colony of Rhode Island and Providence Plantations, in New England 79-80, 94 (John Russell Bartlett ed., Providence, A. Crawford Greene & Brother, 1856) (requiring, respectively: “[T]hat every man do come armed unto the meeting



upon every sixth day,” and also that militia officers go “to every inhabitant [in Portsmouth and] see whether every one of them has powder” and bullets; and “that noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon.”); The Code of 1650, Being a Compilation of the Earliest Laws and Orders of the General Court of Connecticut 72 (Hartford, Silas Andrus 1822) (“That all persons that are above the age of sixteene yeares, except magistrates and church officers, shall beare arms . . . and every male person within this jurisdiction, above the said age, shall have in continuall readines, a good muskitt or other gunn, fitt for service, and allowed by the clark of the band.”).

104. *See id.* For collections of many of the relevant laws, see Clayton E. Cramer, Gun Control in Colonial New England, (unpublished manuscript, available at <http://www.claytoncramer.com/GunControlColonialNewEngland.PDF>) (last visited Nov. 19, 2006); Clayton E. Cramer, Gun Control in Colonial New England, Part II (unpublished manuscript, available at <http://www.claytoncramer.com/GunControlColonialNewEngland2.PDF>) (last visited Nov. 19, 2006); Clayton E. Cramer, Gun Control in the Middle & Southern Colonies, (unpublished manuscript, available at <http://www.claytoncramer.com/MiddleSouthernColonialGunControl.PDF>) (last visited Nov. 19, 2006); Clayton E. Cramer, Militia Statutes, <http://www.claytoncramer.com/primary.html#MilitiaLaws> (last visited Nov. 19, 2006).

105. John Morgan Dederer, *War in America to 1775*, at 116 (1990).

106. Lane, *supra* note 64, at 48, 59–60.

107. *Id.* at 344.

108. The enthusiasm modern gun advocates express for the ancient militia far exceeds the enthusiasm felt by the Englishmen and Americans who were actually subject to the obligations involved. Guns were expensive items even for those owners who were supplied them by the colonies since they were required to pay the colonies back over time. And the duty of militia drill was a constant source of irritation to men who had little time for leisure and urgent need to devote their time to making a living for themselves and their families. By the turn of the nineteenth century, at the earliest, the universal militia was in desuetude and replaced in the 1840s by colorfully garbed volunteer formations whose activities were more social than military.

109. Revolver inventor Samuel Colt’s first business failed in 1840. It revived itself only with sales to officers and the military during the Mexican-American War (1846–1848), and sustained itself through the 1850s with sales to

wealthy Americans and Europeans. *See generally* Joseph G. Bilby, *Civil War Firearms* 157 (1996); Lee Kennett & James LaVerne Anderson, *The Gun in America* 90 (1975); Lane, *supra* note 64, at 109. Colt's sales flourished as foreign armies adopted his revolver and wide sales took place in the commercial market across Europe, Kennett & Anderson, *supra* at 90, especially after Colt's prize-winning exhibit at the 1851 Great Industrial Exhibition in London. *See generally* Joseph G. Rosa, *Colonel Colt London* 13–29 (1976).

110. *See generally* Bilby, *supra* note 109, at 157–72. The revolvers involved were by no means all Colts: “[T]he Federal government also purchased large numbers of Remington, Starr and Whitney revolvers, as well as the guns of other [American] makers, including the bizarre looking Savage, with its second ‘ring trigger’ which cocked the arm, and the sidehammer Joslyn.” *Id.* at 158. Vast numbers of guns were also purchased in Europe where, in the first 15 months of the war, the Union bought over 738,000 firearms (including long arms as well as revolvers). Allan R. Millett & Peter Maslowski, *For the Common Defense: A Military History of the United States of America* 216 (1984). Some Union infantry units were issued revolvers and many enlisted infantrymen in other units bought their own. Bilby, *supra* note 106, at 160.

111. These figures are just estimates. While at least somewhat reliable figures exist for how many men served at any one time in the Union Army, *see supra* note 107, that number is not co-extensive with how many served in total. Some Union soldiers served throughout the war, re-enlisting when their original enlistments were up. Others mustered out and were replaced with new recruits. Still others deserted long before their terms were up, again requiring replacements. Some scoundrels enlisted just for the enlistment bonus, and deserted as soon as they could; some of these went through the enlistment and desertion process multiple times, collecting a new bonus under a new name time after time. *The World Almanac and Book of Facts* 2006, at 77 (2006) gives figures of 2,128,948 for the Union Army and 84,415 for the Marines and estimates the Confederate Army between 600,000 to 1,500,000.

112. Russell F. Weigley, *History of the United States Army* 262 (1967) (“The names of 1,000,516 officers and men were on the [Union Army’s] rolls on May 10, 1865; by [the end of 1866, the draft had ended and] . . . only 11,043 volunteers remained . . .”).

113. Kennett & Anderson, *supra* note 107, at 92–93.

114. David T. Courtwright, *Violent Land: Single Men and Social Disorder from the Frontier to the Inner City* 42 (1996).

115. Kennett & Anderson, *supra* note 107, at 99.

116. *Id.* at 98–99.

117. *Id.* at 98–100. An 1879 issue of *Scientific American* contains an advertisement for COD purchasing of the \$2.75 "Czar" revolver, presumably an attempt to capitalize on the Smith & Wesson "Russian," a very high quality weapon that Smith & Wesson manufactured for the Russian government and sold through the 1870s. *Sci. Am.*, June 14, 1879, at 381. The 1884 Price List-Firearms Catalog for N. Curry & Brother, arms dealers of San Francisco, lists prices from \$2.00 for the 7 shot "Fashion" and "Blue Jacket" revolvers to \$2.50 and \$3.50 for the "Kitemaug" and "Ranger" revolvers to various Colt and Smith & Wesson revolvers selling at from \$15.00 to \$17.00.

118. Dederer, *supra* note 103, at 116

119. *See* Lane, *supra* note 63, at 181, 307; Eric H. Monkkonen, *Murder in New York City* 21, 30–31, 38 (2001).

120. Randolph Roth, *Guns, Gun Culture, and Homicide: The Relationship Between Firearms, the Uses of Firearms, and Interpersonal Violence*, 59 *Wm. & Mary Q.* 223, 234–40 (2002).

121. *See* Malcolm, *supra* note 10, app. at 258 (appendix). The handgun ownership data cited are tax data and so doubtless fail to count the pistols owned by criminals and others who failed to pay taxes. The extremely low numbers of gun crimes, however, do not support the notion that there were numerous criminal owners of guns, or at least that they used the guns for crime.

122. In contrast to the more guns equals more death mantra, studies suggest that crime rate increases fuel gun buying, rather than the other way around. *See, e.g.*, Douglas C. Bice & David D. Hemley, *The Market for New Handguns: An Empirical Investigation*, 45 *J.L. & Econ.* 251, 253, 261–262 (2002); Lawrence Southwick, Jr., *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*, 25 *Atlantic Econ. J.* 256, 256, 272 (1997); Kleck, *supra* note 8, at 79–81.

123. In 1965, the Russian homicide rate stood at 5.9 per 100,000 population while the American rate was 5.4. As of 1975, both Russian and American rates had nearly doubled, the Russian to 10.3 and the American to 9.7. *See* Pridmore, *supra* note 2, at 272 fig.2.

124. Don B. Kates & Daniel D. Polsby, *Long-Term Nonrelationship of Widespread and Increasing Firearm Availability to Homicide in the United States*, 4 *Homicide Stud.* 185, 190–91 (2000).

125. *See* communication from Gary Kleck, Professor, Florida State University, to Don B. Kates and Gary Mauser (Feb. 26, 2003) (on file with Harvard

Journal of Law and Public Policy).

126. Kleck, *supra* note 8, at 17–19.

127. See Philip C. Stenning, *Gun Control: A Critique of Current Policy*, Pol'y Options, Oct. 1994, at 13, 15.

128. Malcolm, *supra* note 10, at 204; see also BBC News, *Handgun Crime 'Up' Despite Ban*, July 16, 2001, [http://news.bbc.co.uk/2/hi/uk\\_news/1440764.stm](http://news.bbc.co.uk/2/hi/uk_news/1440764.stm) (noting that English areas with very low numbers of firearms have higher than average gun crime while areas with the highest levels of legally held guns do not).

129. Tomislav Kovandzic, Mark E. Schaffer, & Gary Kleck, *Gun Prevalence, Homicide Rates and Causality: A GMM Approach to Endogeneity Bias* 39–40 (Ctr. for Econ. Policy Research, Discussion Paper No. 5357, 2005) available at <http://ssrn.com/abstract=878132>.

130. See e.g., National Rifle Association Institute for Legislative Action (NRA-ILA), *More Guns, Less Crime* (Sept. 26, 2006), <http://www.nraila.org/Issues/FactSheets/Read.aspx?idequals206&issueequals007>; NRA-ILA, *The War Against Handguns* (Feb. 15, 2001), [www.nraila.org/Issues/FactSheets/Read.aspx?idequals17](http://www.nraila.org/Issues/FactSheets/Read.aspx?idequals17); NRA-ILA, *Right-to-Carry 2006* (Oct. 3, 2006), [www.nraila.org/Issues/FactSheets/Read.aspx?idequals18](http://www.nraila.org/Issues/FactSheets/Read.aspx?idequals18); NRA-ILA, *The Brady Handgun Violence Prevention Act, Does it Live Up to its Name?* (July 28, 1999), [www.nraila.org/Issues/FactSheets/Read.aspx?idequals73](http://www.nraila.org/Issues/FactSheets/Read.aspx?idequals73).

131. See, e.g., Philip J. Cook, *The Effect of Gun Availability on Robbery and Robbery Murder: A Cross Section Study of Fifty Cities*, 3 Pol'y Stud. Rev. Ann. 743, 770 (1979).

132. Lott, *supra* note 11, at 43.

133. Wright & Rossi, *supra* note 81, at 147, 150.

134. *Id.* at 151.

135. Tables 4–6 were previously published as appendices to *Kates*, *supra* note 81, app. at 81 tbl.1, 82 tbl.2, 83 tbl.3.

136. See *infra* Table 5.

137. The data derive from a much more extensive survey of legal firearms ownership in numerous nations which was carried out by researchers provided by the Government of Canada under the auspices of the United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice in 1997. The entire survey is published as a report to the Secretary General on April 25, 1997 as E/CN.15/1997/4. That report is analysed in some detail in an unpublished paper (“A Cross Sectional Study of the Relationship Between Levels of Gun Ownership and Violent

Deaths”) written by the leading English student of firearms regulation, retired Chief Superintendent of English police Colin Greenwood of the Firearms Research and Advisory Service. I am indebted to Chief Superintendent Greenwood for the opportunity to review his paper. Note that in the table which follows I have focused only on European nations.

138. The gun ownership data in Table 2 derive from a random telephone survey on gun ownership in various nations. Chief Superintendent Greenwood’s paper is contemptuous of such data, inter alia because people may be unwilling to acknowledge owning guns to telephoning pollsters. For similar doubts see Don B. Kates & Daniel D. Polsby, *Long Term Non-Relationship of Firearm Availability to Homicide*, 4 Homicide Stud. 185–201 (2000). But that was in the context of comparing survey data on the number of guns owned to production and important data that are unquestionably more comprehensive and superior in every way. Chief Superintendent Greenwood himself admits that the special U.N. report data are not necessarily comprehensive and are problematic in various other respects. Even assuming they are clearly superior to the survey data, the latter cover multiple nations that the special U.N. report does not. Given that neither source is indubitable, it seems preferable to have such information on those nations as the survey data reveal, rather than no data at all.

139. Table 6 covers different years from Table 5; its comparative gun ownership figures derive from government records rather than survey data, and it gives rates for gun murders data that are not available in the sources from which Table 5 is taken. See the explanatory note that precedes Table 6.

140. Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467, 467, 471–72 (1992); see also Antoon Leenaars, et al., *Controlling the Environment to Prevent Suicide: International Perspectives*, 45 Can. J. Psychiatry 639 (2000).

141. See Killias et al., *supra* note 41, at 430 (study of 21 nations); Krug, *supra* note 42 (study of 36 nations).

142. See Kleck, *supra* note 8, at ch. 8. See also WHO, *supra* note 42, at 3 (showing that around the world “firearms accounted for only one-fifth of all suicides, just ahead of poisoning . . . [s]trangulation, i.e. (hanging) was the most frequently used method of suicide”).

143. See, e.g., Jeffrey H. Boyd & Eve K. Moscicki, *Firearms and Youth Suicide*, 76 Am. J. Pub. Health 1240 (1986); James A. Mercy et al., *Public Health Policy for Preventing Violence*, 12 Health Aff. 7 (1993); Daniel W. Webster & Modena E. H. Wilson, *Gun Violence Among Youth and the Pediatrician’s Role in Primary Prevention*, 94 Pediatrics 617 (1994); Lois A. Fingerhut & Joel C. Kleinman, *Firearm Mortality Among Children and Youth*, Nat’l Center Health Stat. Ad-



vance Data, Nov. 3, 1989, at 1.

144. Keith Hawton, *By Their Own Young Hand*, 304 *Brit. Med. J.* 1000 (1992); *see also Teenage Deaths Increasing Across Europe*, *Crim. & Just. Int'l*, Nov.–Dec. 1991, at 4.

145. World Health Organization, *Suicide Rates by Country*, [http://www.who.int/mental\\_health/prevention/suicide/country\\_reports/en/index.html](http://www.who.int/mental_health/prevention/suicide/country_reports/en/index.html) (follow hyperlinks to specific countries) (last visited Jan. 18, 2007). For example, in the United States, suicide rates for males exceed those for females by a 17.9-4.2 margin (2002 data). In Denmark, the margin is 19.2-8.1 (2001 data), in Austria, the margin is 27.0-8.2 (2004 data), and in Belgium, the margin is 31.2-11.4 (1997 data).

146. *See* Ruth H. Haynes, *Suicide in Fiji: A Preliminary Study*, 145 *Brit. J. Psychiatry* 433 (1984).

147. *Id.* at 437. More or less the same situation seems to prevail in the substantially Indian-populated nation of Sri Lanka (formerly Ceylon). It “has one of the highest suicide rates in the world . . . . Suicides are especially frequent among young adults, both male and female. Compared to the U.S., the suicide rate for males ages 15 to 24 years in Sri Lanka is nearly four times greater; the female rate nearly 13 times greater. *The most common mode of suicide is ingestion of liquid pesticides.*” Lawrence R. Berger, *Suicides and Pesticides in Sri Lanka*, 78 *Am. J. Pub. Health* 826 (1988) (emphasis added).

148. (1) Those who propose to change the status quo bear the burden of proving that change is a good idea; (2) those who propose a new policy bear the burden of proving that the policy is a good idea; and (3) in a free society those who propose to abolish a personal liberty passionately valued by millions bear the burden of proving that abolishment is a good idea.

149. Brandon S. Centerwall, *Author's Response to "Invited Commentary: Common Wisdom and Plain Truth"*, 134 *Am. J. Epidemiology* 1264, 1264 (1991).





# ARMED RESISTANCE TO THE HOLOCAUST

By David B. Kopel

*Contrary to myth of Jewish passivity, many Jews did fight back during the Holocaust. They shut down the extermination camp at Sobibor, rose up in the Warsaw Ghetto, and fought in the woods and swamps all over Eastern Europe. Indeed, Jews resisted at a higher rate than did any other population under Nazi rule. The experience of the Holocaust shows why Jews, and all people of good will, should support the right of potential genocide victims to possess defensive arms, and refutes the notion that violence is necessarily immoral.*

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Keywords: Holocaust, Resistance, Firearms, Genocide

This Article examines the record of violent Jewish resistance to the Holocaust. It suggests that Jewish resistance was extensive, and succeeded in saving many lives. The record also explains that a key impediment to even more effective resistance was the lack of firearms, as well as Jewish unfamiliarity with arms during the pre-war years. The article dispels the myth of Jewish passivity during the Holocaust, and the myth that courageous civilians with firearms are helpless against a powerful, genocidal tyranny.

## EVIL PEOPLE

When we examine the record of Jews and the Holocaust, it is necessary to tell the story of some people who behaved very wickedly. Although their violations may have been the result of the great stresses and pressures of the time, it cannot be denied that these people performed terrible acts. If you, reader, are a pacifist, then you must not apply these words to the Nazis alone. For a committed pacifist, these words must also apply to the Jews who used violence to resist the Holocaust. If violence—especially deadly violence—is always and everywhere immoral, then the Jews who violently resisted





Hitler acted immorally. Rather than killing the extermination camp guards at Sobibor, the Jews should have allowed themselves to be slaughtered. Rather than waging partisan warfare in the woods of Eastern Europe, the Jews should not have picked up guns.

If you can honestly say that the story of Jewish resistance to Hitler is horrific rather than honorable, if you sincerely believe that the Jews did the wrong thing when they fought back, then you may wear the title of a consistent pacifist. If, on the other hand, you think that the Jews were not blameworthy for what they did, then you are not a complete pacifist. If Jewish violence against Hitler was right, then violence is not always and everywhere wrong.

People may disagree about the prudence or the appropriateness of violence in different circumstance—but the disagreement is about circumstances. The nature of disagreement recognizes that, in at least some circumstances, violence is not wrongful. Indeed, the failure to use violence may itself be wrongful.

Let us now examine the record of defensive Jewish violence during the Holocaust.

## SOBIBOR

Despite pleas from Jewish organizations, the Allies never bombed the train tracks leading to the extermination camps. Historians still argue about whether the Allied decision was correct; some argue that the missions were too dangerous, that the bombers were needed elsewhere, or that the tracks could have been quickly repaired. Whatever the merits of the Allied refusal, the fact remains that every extermination camp in Nazi Europe continued operating until Allied ground forces advanced to the general area. There was never any offensive aimed specifically at an extermination camp.

The one extermination camp that was put out of business early was Sobibor, in Poland. As detailed in the book and movie *Escape from Sobibor*, and in memoirs of the survivors, Sobibor was a horribly efficient camp, gassing thousands of people per day.<sup>1</sup> The camp was run by Germans with the assistance of several dozen Ukrainian guards. Much of the day-to-day work of the camp, such as carpentry, sewing uniforms, and processing the dead bodies, was performed by a crew of specially-selected Jews, who performed the work in







exchange for, temporarily, being allowed to live.

When some Soviet Jewish prisoners of war were brought into the camp, the P.O.W.s began organizing an escape. Although there was a constant danger that Jewish spies, in exchange for favored treatment, might reveal the plans to the Nazis, the plan went forward. With crude improvised weapons, the inmates hurriedly killed a few Nazi officers, and obtained the keys to the camp armory.

In the wild battle that ensued, 600 prisoners tried to flee; about 400 of them escaped the camp boundaries, and about half of them survived the land mine field around the camp. More escapees were caught later, but a band of 60 men and women, led by the Soviet officer Alexander Perchersky, made contact with Soviet partisans.<sup>2</sup> Ten SS troops were killed, and one was wounded. Thirty-eight Ukrainian guards were killed or wounded, while forty Ukrainian guards took the opportunity to desert.<sup>3</sup>

Four days after the revolt, a special German unit obliterated the Sobibor camp, attempting to keep the revolt a secret.<sup>4</sup> A death camp which had already murdered six hundred thousand people was put out of operation forever.<sup>5</sup>

“Violence never solves anything” is one of the platitudes which American schoolchildren are told over and over. Sobibor shows that the platitude is a deadly falsehood. Violence solved Sobibor. The solution to Hitler’s Final Solution was violence—the violent destruction of the Nazi regime. The Jews at Sobibor did their part.

Sobibor was the greatest camp revolt, but it was not the only one. Jews rose up at four other extermination camps and eighteen forced labor camps or death camps.<sup>6</sup> Of these, the August 1943 revolt of 700 inmates at Treblinka was the most successful. The prisoners used improvised explosives to set fires, and home-made knives to kill guards. The huge fire disabled much of Treblinka. About 150 to 200 prisoners escaped, and of them, a dozen survived until the end of the war.<sup>7</sup> None would have survived had they remained passive, and all seven hundred died with honor.

Of all the German concentration and extermination camps that were built throughout Europe, it was *only* the Jewish camps where there were revolts. (Except for a rebellion by Soviet prisoners of war at the Ebensee camp.)<sup>8</sup>





## THE WARSAW GHETTO

Before the war, about ten percent of Poland's population was Jewish. In the middle ages, Poland had been a welcoming, tolerant, and free nation, and many Jews emigrated there. But when Poland regained its independence in 1919 thanks to the Versailles Treaty, the nation quickly degenerated into a military dictatorship which encouraged anti-Semitism.

In Poland, as in other Eastern European areas under Nazi military rule, all the Jews in a city would be ordered to move into a walled ghetto. Movement in and out of the ghetto was very strictly controlled. The Germans would set up a *Judenrät* of collaborationist Jews to run the ghetto, and to punish any attempts at rebellion. The *Judenrät* received special privileges from the Nazis. Often, the *Judenrät* was told that as long as the ghetto worked hard to produce factory goods for the Germans, the ghetto would be allowed to survive.

Eventually, the Germans would begin deporting large numbers of people from the ghetto—ostensibly for resettlement in labor camps, but almost always for extermination. The *Judenrät* would be required to select the Jews to be deported. Eventually, the whole ghetto would be depopulated, and the area would be declared *Judenrein* (Jew-free).

In Warsaw, the large pre-war Jewish population was initially supplemented by large numbers of Jews who were shipped in from other cities. The Jews were forced to live on starvation rations, and many thousands in the ghetto died from starvation or contagious disease. The Germans eventually cut the size of the ghetto in half, consolidating the survivors into extremely crowded conditions. Deportations to the death camps continued to depopulate the ghetto.

In late 1942, Emmanuel Ringelblum, the well-educated author of a diary of life in the Warsaw Ghetto, wrote:

Whomever you talk to, you hear the same cry: The resettlement never should have been permitted. We should have run into the street, set fire to everything in sight, have torn down the walls, and escaped to the Other Side. The Germans would have taken their revenge. It would have cost tens of thousands of lives, but not 300,000. Now we are ashamed of ourselves,





disgraced in our own eyes, and in the eyes of the world, where our docility has earned us nothing. This must not be repeated now. We must put up a resistance, defend ourselves against the enemy, man and child.<sup>9</sup>

On January 18, 1943, the Germans rounded up seven thousand Jews and sent them to the extermination camp at Treblinka; they killed six hundred more Jews right in Warsaw. But on that day, an uprising began. In the beginning, the Jewish Fighting Organization had about 600 volunteers; the Jewish Military Association had about 400, and there were thousands more in spontaneous small groups.<sup>10</sup> The Jews had only ten handguns, but the Germans did not realize how under-armed the Jewish fighters were.

After four days of fighting, the Germans on January 21 pulled back from the ghetto, to organize better. Another diary written in the Warsaw ghetto exulted:

In the four days of fighting we had made up for the same of Jewish passivity in the first extermination action of July, 1942.

Not only the Germans were shocked by the unexpected resistance, Jews too were astonished. They could not imagine until then that the beaten, exhausted victims could rise against a mighty enemy who had conquered all of Europe. Many Jews who were in the streets of Warsaw during the fighting refused to believe that on Zamenhof and Mila Streets Jewish boys and girls had attacked Germans. The large-scale fighting which followed convinced all that it was possible.<sup>11</sup>

In February 1943, Polish Home Army transferred 50 revolvers (many of them defective), 50 hand grenades, and four pounds of explosives to the Jews in the Warsaw ghetto. The Warsaw Jews also manufactured their own explosives, including Molotov cocktails. But, wrote Ringelblum, "their most potent weapon was their deep sense of national pride and responsibility."<sup>12</sup>

On February 16, 1943, Heinrich Himmler ordered that the Warsaw ghetto be exterminated on April 19. The plan was to give Hitler a *Judenrein* Warsaw as a present for his April 20 birthday.





On that night of April 19, the Warsaw Jews partook of the Pass-over Seder. Since September 1939, they had eaten the bitter herbs of slavery. Now, they were drinking the wine of freedom.

The Nazi Minister of Propaganda, Joseph Goebbels, wrote in his diary, “the joke cannot last much longer, but it shows what the Jews are capable of when they have arms in their hands.”<sup>13</sup>

The Nazis brought in tanks. The Jews were ready with explosives. First one tank and then a second were immobilized in the middle of the street, in flames, their crews burned alive. Ringelblum recalled:

Now the fighters as well as the non-combatant Jews who have crawled out of their hiding places have reached the pinnacle of jubilation....According to one eyewitness account, “The faces who only yesterday reflected terror and despair now shone with an unusual joy which is difficult to describe. This was a joy free from all personal motives, a joy imbued with the pride that that ghetto was fighting.”

Another eyewitness describes the confusion in the German ranks: “There runs a German soldier shrieking like an insane one, the helmet on his head on fire. Another one shouts madly ‘Juden...Waffen...Juden...Waffen!’”<sup>14</sup> [Jews...weapons!]

Eventually, the Jewish forces began to run out of ammunition.<sup>15</sup> The Warsaw Jews, like the Jews throughout Europe, were unable to produce their own ammunition. There was hardly any gun culture among European Jews of the 1930s, so few Jews had the equipment for “reloading”—the home manufacture of ammunition.

Stymied in house-to-house fighting, the Germans began to burn the ghetto to the ground on April 22. The Warsaw Ghetto fire was probably the largest urban fire in Europe since Nero’s fire in Rome.<sup>16</sup> On April 23, Himmler ordered SS Major General Jürgen Stroop to finish things quickly, and Stroop promised to complete his job that same day. But he could not.

A poster appeared in Warsaw that day in which the JFO assured the Christian Polish resistance that the Jews would never surrender. The poster promised, “You have seen and will see that every door-





stop in the ghetto is and will continue to be a fortress. We may all perish in the struggle but we shall not surrender....Long live the brotherhood of weapons and the blood of fighting Poland! Long live Freedom! Death to the murderous and criminal occupants."<sup>17</sup>

On May 16, Stroop reported that the Jewish ghetto in Warsaw "no longer exists." Himmler ordered a celebratory event: blowing up a beautiful large synagogue which had been built in 1877. The explosion could be felt all over Warsaw. Yet on that very day, Jewish fighters carried out more attacks in Warsaw. Fighting continued until July. Some Jews managed to hide in the ghetto until August 1944, when they joined the Polish uprising that month.<sup>18</sup> The Germans had suffered over a thousand casualties in the first week of fighting alone.<sup>19</sup>

The Warsaw Jews knew they had almost no chance of survival. They decided that it was better to die fighting than to die in a gas chamber. It was better to kill at least some of the killers, than to let them massacre Jews with impunity. Ringelblum wrote, "We took stock of our position and saw that this was a struggle between a fly and an elephant. But our national dignity dictated to us that the Jews must offer resistance and not allow themselves to be led wantonly to slaughter."<sup>20</sup>

Warsaw was the first mass civilian uprising against the Nazis anywhere in Europe. On April 23, the Jewish commander, 25-year-old Mordechai Anielewicz, had written, "I have a feeling that great things are happening, that what we have undertaken is of tremendous significance."<sup>21</sup> He was right.

As the West learned about the Warsaw Revolt, the Western media began to change its attitude towards Jews. "They concluded that the Jews had earned the right to be regarded not as supplicants, but as allies."<sup>22</sup> An article in *Harper's* explained, "As the British press was the first to admit, the Jews now have a new and different claim for consideration, a claim not of passive victims, but of active allies and partners who have fought the common enemy."<sup>23</sup>

## MORE RESISTANCE

Warsaw was a spectacular battle, but it was not the only ghetto uprising. In the Jewish ghetto in Czestochowa, Poland, a Jewish resis-





tance group manufactured home-made grenades, and escaped into the woods to wage partisan warfare.<sup>24</sup> There were five other uprisings in Polish ghettos, and still more in Lithuania and Byelorussia.<sup>25</sup>

For example, Bialystok, which is now part of modern Belarus, belonged to Poland before the war. The Soviets took the city in 1939, because the Hitler-Stalin Pact entitled them to the eastern third of Poland. The Nazis overran Bialystok in June 1941, when they invaded the U.S.S.R. Some Jews began organizing resistance as soon as the Germans took over. But arms were so difficult to find that even by the winter of 1941, there was not a single firearm in the entire ghetto. Thus, “All the activities and negotiations” for active resistance “came to an end at the weak focal point—arms.”<sup>26</sup>

Preparing for a German attack on the ghetto, Jewish improvised “cold” weapons, such as a light bulb filled with sulfuric acid or primitive knives created by sharpening rusty iron rods. They also studied judo. But they knew that their cold weapons and martial artistry could only be used in personal self-defense; firearms were essential for the ghetto to be able to repulse a German assault.<sup>27</sup> In the summer of 1942, a rifle and two handguns were obtained. There could have been more weapons, since the fleeing Soviet armies had left many rifles lying around. However, the Nazis warned that any Jew found with a gun would be executed, and so many Jews abandoned or destroyed any rifle they found, lest the Nazis discover it during a search.<sup>28</sup>

Some Jews from the ghetto began slipping into the woods for partisan warfare. There, they received no help from the Allies, but managed to steal some weapons from the Germans, and to manufacture some explosives. The partisans were hampered by a shortage of firearms.<sup>29</sup> Of the Jews who escaped to fight in the forest, about forty percent survived the war.<sup>30</sup>

In August 1943, the Soviet army was rolling the Germans back. Before the Soviets could reach the Jews, the Germans determined to liquidate them. The 40,000 Jews in Bialystok fought the best they could for several days, but they were greatly underarmed, and the Germans received significant intelligence assistance from Jewish “police” collaborators.<sup>31</sup>

Jews in the Marcinkonis, Lithuania, ghetto revolted too. Although the revolt was suppressed, some Jews escaped to the forests,





where they were able to buy three rifles from a friendly peasant. "The possession of firearms made the Jews feel more secure."<sup>32</sup> The Jews joined up with the Davidov company, a group of Soviet partisans working in the area. The Jews' knowledge of the region helped the Davidov company carry out many successful acts of sabotage against railroads, spies, and other targets.

The Bialystok/Marcinkonis pattern was more common than the Warsaw pattern; ghetto revolts were usually suppressed in a few days. The most effective Jewish resistance fighters were not those who made a last stand in the ghetto, but those who could flee to the woods to conduct partisan warfare. Partisan warfare was much easier in the thick woods and swamps of eastern Poland, Byelorussia, and Lithuania than in western Poland.

The Jews of Minsk, Belarus, had a survival rate "50 percent greater than in any other section of eastern Europe." The higher survival rate "was due to primarily to early organization of an underground to stand up to the enemy." Approximately 10,000 of the 80,000 Jews in Minsk escaped to the wood to fight as partisans.<sup>33</sup> Half of them survived the war.<sup>34</sup>

Among the most famous partisans "Uncle Misha" (*Diadia Misha*). He led 16 other Jews out of the ghetto in Volhynia, Russia. They started with only one gun and five rounds of ammunition, but they grew into a mighty band of one hundred partisans.<sup>35</sup>

## VILNA

Vilna, Lithuania, was a great center of Jewish learning, compared by some visitors to Jerusalem.

Plans for resistance began in January 1942. The Jews' only weapons were smuggled in from nearby German arms factories where the Jews performed slave labor. Hopeful of liberation by the Russian army, many of the Vilna Jews did not support the partisans. Partisan resistance postponed by three weeks the German plans to transport all the inhabitants of the Vilna ghetto to death camps, but the deportation of 40,000 Jews was accomplished by the end of September 1943.<sup>36</sup>

A young poet named Abba Kovner led the resistance movement, known as the Avengers, in the woods around Vilna. His lieu-





tenants, and bedmates, were teenage girls, Vitka Kempner and Ruzka Korczak.

The Avengers were the first partisans in Nazi Europe to blow up a German train.

Towards the end of the war, the Avengers shepherded huge numbers of Jews to Palestine, in violation of the British blockade.

Before the war, Ruzka had belonged to left-wing Zionist youth group called “The Young Guard” (*HaShomer HaTz’a’ir*) which trained Jews in self-defense, and taught the older boys how to shoot.<sup>37</sup> Abba was not religious, but he was a fervent Zionist, loving to read the Bible stories of Jewish warriors, and aiming to emulate the Jewish Bible heroes.<sup>38</sup>

In the Vilna Ghetto, it was Abba Kovner who first perceived that the tightening of the Nazi oppression was not just a temporary imposition by a local German official; it was a step towards the total destruction of the Jews. The only way out, he argued, was “Revolt and armed defense. This is the only way which promises any dignity for our people.”<sup>39</sup>

Other Jews countered that revolt was hopeless because the Germans were so strong, and that collective reprisals by the Germans would just lead to more Jewish deaths. Ruzka Korczak retorted that the stories of Jewish heroism could not remain only “a part of our ancient history. They must be part of our real life as well.” The next generation of Jews must have something to admire. “How good will they be if their entire history is one of slaughter and extermination? We cannot allow that. It must also have heroic struggles, self-defense, war, even death with honor.”<sup>40</sup>

## LITTLE WANDA WITH THE BRAIDS

Vilna was typical, in that the young people were usually the ones who wanted to fight, and the elders usually counseled against causing trouble. Most of the partisan leaders and fighters were young.

Niuta Teitelbaum was a beautiful 24-year-old Jewish Polish woman who looked like she was sixteen. She was an expert smuggler of people and weapons, and instructed women’s partisan cells. Her units blew up trains, artillery emplacements, and other German targets.







Once, wearing traditional Polish clothing and a kerchief on her hair, she talked her way past a series of Gestapo guards, whispering that she was going to see the SS commander on “private business.” Alone with the commander in his office, she drew a revolver, shot him dead, and calmly left the building.<sup>41</sup> She demonstrated that some Jews still had the spirit of Ehud and Judith.

### SURVIVAL RATES

Getting into the woods was no guarantee of survival. Typically, Jews from working-class backgrounds had an easier time adjusting to life in the woods than did the educated elite.<sup>42</sup> As soon as the Germans took over a city, they tended to kill the Jewish educated class first.<sup>43</sup>

In the woods and swamps of Eastern Europe, the Jewish partisans were often attacked by local civilians, or by non-Jewish partisan groups, including remnants of the Russian or Polish armies. For Jews who joined Soviet partisan units, the death rate was as high as 80 percent—compared to an overall death rate for non-Jewish Soviet partisans of 33-52 percent.<sup>44</sup>

The most amazing survival rate was in the Bielski Brothers Jewish partisan force. Unlike other partisan units, the three Bielski Brothers took in the elderly, women, and children. Eventually, the Bielski partisans grew to over 1,200 people. Ninety-five percent of them survived.<sup>45</sup> Although the Bielskis fought hard, they decided that saving Jews was more important than killing Germans. Tuvia Bielski remarked, “I would rather save one old Jewish woman than kill ten German soldiers.”<sup>46</sup> He did plenty of both. The Bielski Brothers were the largest Jewish partisan force anywhere in Europe. On the day the Bielski unit was disbanded, it comprised 1,140 Jews, including 149 armed combatants.<sup>47</sup> Just in the period from the fall of 1943 to the summer of 1944, the Bielski fighters carried out 38 combat missions, destroying two locomotives, 23 train cars, 32 telegraph poles, and four bridges.<sup>48</sup> Over the course of the war, the Bielski unit killed 381 enemy fighters, as well as collaborators.<sup>49</sup>





## PASSIVE JEWS?

In 1942-43, Jews constituted half of all the partisans in Poland.<sup>50</sup> Overall, about thirty thousand Jewish partisans fought in Eastern Europe. There were armed revolts in over forty different ghettos, mostly in Eastern Poland.<sup>51</sup>

In other parts of Europe, Jews likewise joined the resistance at much higher rates than the rest of the population. Unlike in Eastern Europe, Jews were generally able to participate as individuals in the national resistance, rather than having to fight in separate units.

For example, in France, Jews amounted to less than one percent of French population, but comprised about 15-20 percent of the French Resistance.<sup>52</sup>

In Greece too, Jews were disproportionately involved in the resistance. In Thessaly, a Jewish partisan unit in the mountains was led by the septuagenarian Rabbi Moshe Pesah, who carried his own rifle. The Athenian Jew Jacques Costis commanded the team which demolished the Gorgopotoma Bridge, thereby breaking the link between the mainland and Peloponnesian Peninsula, and interfering with the delivery of supplies to Rommel's *Afrika Korps*—which was aiming to capture Egypt, and then sweep into British Palestine, there to carry out the wishes of Hitler's ally the Grand Mufti of Jerusalem that all the Jews be exterminated.

## ARMS ARE FOR LIVING

Although Jews resisted Hitler more so than any other group behind Nazi lines, the majority of Jews did not engage in armed resistance. Many Jews failed to realize until too late that Hitler was different from their previous enemies. Hitler had been telling the truth when he said he meant to wipe out all the Jews; unlike almost all prior enemies of the Jews, Hitler did not intend merely to exploit them economically, to move them to new locations, or to kill only some of them.

Another huge barrier to resistance was that the Jews were unarmed. Except in the Zionist self-defense units, there was no gun culture among most of Europe's Jews. Pre-war Poland, the home of the largest number of Jews who were murdered, was a poorly armed





nation. The anti-Semitic government was hostile to gun ownership by workers.<sup>53</sup>

Unlike all the other undergrounds in Europe, the Jewish partisans received no weapons from the Allies.<sup>54</sup> Holocaust scholar Nechama Tec summarizes: “As regards resistance, in practical terms, the Allies had virtually no interest in the Jews. This indifference translated into a rejection of all known Jewish pleas, including those requesting arms and ammunition. It goes without saying that the Jews experienced a chronic arms shortage.”<sup>55</sup> (The U.S. and Britain did supply arms to the French Resistance, which had a large number of Jews. The Americans and British also supplied arms to the Soviet Union, which in turn supplied some arms to Soviet partisan units, and some of the Soviet units included Jews.)

According to Emmanuel Ringlebaum’s history of the Warsaw Ghetto, “We state firmly that had the responsible Polish authorities extended moral support and helped us with arms, the Germans would have had to pay for the sea of Jewish blood shed in July, August, and September 1942,” as Jews were deported to Treblinka.<sup>56</sup>

Writes the Holocaust historian Abram L. Sachar:

The indispensable need, of course, was arms. As soon as some Jews, even in the camps themselves, obtained possession of a weapon, however pathetically inadequate—a rifle, an ax, a sewer cover, a homemade bomb—they used it and often took Nazis with them to death.<sup>57</sup>

Thus, writes Sachar, “the difference between resistance and submission depended very largely upon who was in possession of the arms that back up the will to do or die.”<sup>58</sup>

The Warsaw ghetto commander, Mordechai Anielewicz, believed that:

We should have trained the youth in use of live and cold ammunition. We should have raised them in a spirit of revenge against the greatest enemy of the Jews, of all mankind, and of all times....<sup>59</sup>

In 1967, the International Society for the Prevention of Crime held a Congress in Paris on the prevention of genocide. The Con-





gress concluded that

defensive measures are the most effective means for the prevention of genocide. Not all aggression is criminal. A defense reaction is for the human race what the wind is for navigation—the result depends on the direction. The most moral violence is that used in legitimate self-defense, the most sacred judicial institution.<sup>60</sup>

## NO MORE GENOCIDE

Today, almost every religious group in the world has deplored the Holocaust. The only significant exceptions are in the Muslim world; Hitler's admirers at the time included the Grand Mufti of Jerusalem (the mentor of Yassir Arafat) and the 1943 founders of the Ba'ath Party in Iraq and Syria.

There is a difference, though, between retrospectively deploring the Holocaust, and taking action to prevent future genocides. It is nice for human rights groups to encourage democracy and a free press, but neither are guarantees against genocide. Adolf Hitler obtained power legally in Weimar Germany, a democratic nation with a free press. It is also nice for religious groups to encourage war crimes trials for people who perpetrate genocide. The trials of Serbian and Rwandan mass murderers may have some deterrent effect.

The historical record shows that, almost without exception, genocide is preceded by a very careful government program that disarms the future victims of genocide. Genocide is almost never attempted against an armed population. Armenia, Bosnia, Cambodia, China, Guatemala, Rwanda, the Soviet Union, Sudan, Uganda, Zimbabwe and Nazi Europe are among the places where genocidal tyrants made very sure that the victim populations were as disarmed as possible; only after disarmament did genocide begin.<sup>61</sup> However much gun prohibition activists may scoff at the idea of civilian resistance to genocide, the governments which carry out genocide take the idea of armed civilians quite seriously.

Armed Jews (or armed Cambodians, or Chinese, or other genocide victims) would not necessarily be able to fight open-field battles against standing armies. But to deter genocide, an armed population





does not have to fight such battles.

The kind of people who specialize in perpetrating genocide are bullies. How many bullies are willing to take a chance of getting shot by the intended victim? If potential massacre victims can plausibly threaten to harm at least a few of their attackers, then the calculus of the attackers may change dramatically.

Besides directly facilitating the ability of armed soldiers to control unarmed civilian genocide victims, there is a second way in which disarmament promotes genocide. As the American Founder Joel Barlow wrote, “Disarmament palsies the hand and brutalizes the mind: an habitual disuse of physical force totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression.”<sup>62</sup>

If every family in the world owned a good-quality rifle and an ample supply of ammunition, genocide would be greatly reduced, and perhaps eliminated. Not all countries with severe gun controls perpetrate genocide; but no genocidal governments allow any but the most politically reliable segments of the population to own guns. Because every government which in the last hundred years which has engaged in genocide has first disarmed its victim population, there is reason to believe that those governments see a relationship between gun control and the maintenance of the government’s murderous power.

Today, the United Nations and gun prohibition lobbies are attempting to outlaw civilian gun ownership, especially by “non-state actors”—persons who are not approved by the government. Only the intransigence of the U.S. delegation at the 2001 and 2006 U.N. gun control conferences prevented the creation of binding international law to forbid firearms transfer to “non-state actors”—an international law which would have prohibited the supplying of firearms to the American revolutionaries in 1776 and to the Jews in British Palestine in 1945-48, and to the resistance movements in every nation whose government formally surrendered to Hitler. The victims of contemporary genocides have the same moral right to fight for their lives as did the Jews in the Holocaust. Accordingly, Israel and all other freedom-loving nations should be in the forefront of opposition to international efforts to prohibit gun ownership by groups which are targeted for genocide or are at risk of being targeted.



## ENDNOTES

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10. Ber Mark, "The Warsaw Ghetto Uprising," in Suhl, pp. 104-06.
11. Tuvia Borzykowski, *Between Tumbling Walls*, transl., Mendel Kohansky (Western Galilee, Israel: Ghetto Fighters' House, 2d ed. 1976), pp. 29-30.
12. Yuri Suhl, Introduction to *They Fought Back*, p. 15.
13. Suhl, p. 15.
14. Ringelblum in *They Fought Back*, p. 110.
15. Mark, p. 104.
16. *Ibid.*, p. 119.
17. *Ibid.*, pp. 120-21.
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22. Abram L. Sachar, *The Redemption of the Unwanted: From the Liberation of the*



*Death Camps to the Founding of Israel* (N.Y. St. Martin's Pr., 1983), p. 54.

23. William Zukerman, "The Revolt in the Ghetto," *Harper's Magazine*, vol. 187 (no. 1120, Sept. 1943), p. 355.

24. William Glicksman, "The Story of Jewish Resistance in the Ghetto of Czestochowa," in *They Fought Back*, pp. 81-89.

25. Bauer, pp. 31-32.

26. Chaika Grossman, *The Underground Army: Fighters of Bialystok Ghetto*, transl., Schmuel Beerl (N.Y.: Holocaust Library, 1987)(1<sup>st</sup> pub. in Israel 1965), pp. 29, 47.

27. Grossman, pp. 96-98.

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29. Nechama Tec, *Resilience and Courage: Women, Men, and the Holocaust* (New Haven, Conn.: Yale Univ. Pr., 2003), p. 257.

30. Tec, *Resilience*, p. 257.

31. Reuben Ainsztein, "Bialystok Ghetto Revolt," in Suhl, pp. 151-59; Tec, *Resilience*, pp. 256-57; Sachar, pp. 55-56.

32. Leby Koniuchowski, "The Revolt of the Jews of Marcinkonis," in Suhl, p. 178.

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34. Yuri Suhl, "The Resistance Movement in the Ghetto of Minsk," in *They Fought Back*, p. 256.

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36. Abraham H. Foxman, "The Resistance Movement in the Vilna Ghetto," in Suhl, pp. 163-74.

37. Cohen, pp. 14-15.

38. *Ibid.*, pp. 41-42.

39. *Ibid.*, p. 46.

40. *Ibid.*, pp. 46-68.

41. Sachar, p. 50.

42. Tec, *Resilience*, p. 287.

43. *Ibid.*, p. 287.

44. *Ibid.*, pp. 353-54; Tec, *Jewish Resistance*, p. 11; Yechiel Granatstein, *The War of a Jewish Partisan: A Youth Imperiled by his Russian Comrades and Nazi Conquerors*, transl., Charles Wengrov (Brooklyn, N.Y.: Mesorah Pubs., 1986).



45. Tec, *Resilience*, p. 354.

The Bielski Brothers saved even more Jews than Oskar Schindler, the German industrialist hero of the movie *Schindler's List*. Although it is well known in Hollywood that the movie's producer, Steven Spielberg, owns an enormous and expensive gun collection, Spielberg, apparently in search of an Academy Award, deferred to Hollywood sensibilities and omitted an important fact from the movie. As reported by Schindler's widow, when Schindler liberated the Jews, he gave them battlefield rifles.

46. Peter Duffy, *The Bielski Brothers* (HarperCollins: N.Y., 2002), p. x. During the war, Asael Bielski married Haya Dziencielski. He had no ring to give her, so he instead presented her a small German Mauser handgun. Duffy, p. 67.

47. *Ibid.*, p. 259.

48. *Ibid.*, p. 265.

49. *Ibid.*, p. 282. Tuvia Bielski argued that "size in itself offered safety, and history was proving him right. Scattered, small groups of Jewish runaways, even if armed, were at a disadvantage. Most were attacked and destroyed as soon as they were formed. Russian, Belorussian, and Polish partisans, while sometimes glad to destroy small Jewish units, were reluctant to attack a large group." Nechama Tec, *Defiance: The Bielski Partisans* (N.Y.: Oxford Univ. Pr., 1993), p. 180.

50. Bauer, p. 28.

51. Holocaust Exhibition, Imperial War Museum, London (viewed by author May 2003).

52. Sachar, p. 66; Suhl, *They Fought Back*, p. 302; Tec, *Jewish Resistance*, p. 2.

53. Grossman, p. 3.

54. Suhl, p. 13.

55. Tec, *Jewish Resistance*, p. 17.

56. Quoted in Suhl, p. 14.

57. Sachar, pp. 47-48.

58. *Ibid.*, p. 60.

59. Emmanuel Ringelblum, "Comrade Mordechai," in *They Fought Back*, pp. 102-03.

60. V.V. Stanciu, "Reflections on the Congress for the Prevention of Genocide," in *Yad Vashem Studies on the European Jewish Catastrophe and Resistance*, vol. 7, ed., Livia Rothkirchen (Jerusalem, Israel: Yad Vashem, 1968), p. 187.





61. Aaron Zelman & Richard W. Stevens, *Death by "Gun Control": The Human Cost of Victim Disarmament* (Milwaukee: Jews for the Preservation of Firearms Ownership, 2001); David B. Kopel, Paul Gallant & Joanne D. Eisen, "Is Resisting Genocide a Human Right?" *Notre Dame Law Review*, vol. 81, no. 4 (2006): 1275-1346, <http://www.davekopel.com/2A/Foreign/genocide.pdf>; David B. Kopel, Paul Gallant & Joanne D. Eisen "Guns Ownership and Human Rights," *Brown Journal of World Affairs*, vol. 9, no. 2 (Winter/Spring 2003): 3-13, <http://www.davekopel.com/2A/Foreign/Brown-Journal-Kopel.pdf>.

62. Joel Barlow, *Advice to the Privileged Orders in the Several States of Europe: Resulting from the Necessity and Propriety of a General Revolution in the Principle of Government* (Ithaca, N.Y.: Cornell Univ. Pr., 1956)(1<sup>st</sup> pub. London, 1792), p. 45. Barlow was a prominent Federalist intellectual, and one of the "Connecticut Wits." He wrote extensively about the importance of moral character in sustaining the American republic.







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