

Gun Control: Separating Reality from Symbolism

*Don B. Kates, Jr.**

I. INTRODUCTION

This Essay is a distillation of two speeches. The first was given in November, 1993 to the University of Minnesota Law School's Federalist Society; a conservative organization. The second, which largely followed the text of the first, was given at the University of Florida Law School under the kind sponsorship of the American Civil Liberties Union's (ACLU) Gainesville Chapter. Some people would perceive the ACLU and the Federalist Society as almost diametrically contradictory sponsors.¹ Yet, the speeches coalesced around a common theme, though the ACLU speech included some additional discussion of civil liberty and rights issues.

The common theme of my two speeches is the apparent disregard by gun control (more correctly, gun prohibition) advocates of civil liberties and civil rights issues, the largely adverse criminological research conclusions, and Second Amendment constitutional scholarship. Thus, both my speeches stressed the remarkable discrepancy between scholarship (whether social scientific or constitutional) and the "accepted wisdom" that disarming ordinary, law abiding, and responsible citizens is both desirable and constitutional.^(pg.354)

In emphasizing this remarkable discrepancy, I did not, and do not, repudiate my long-standing advocacy of moderate, rational gun controls—by which I mean laws aimed against gun ownership by the criminal and the irresponsible, but not against ownership by law abiding, responsible adults.² Nor do I repudiate my conclusion that the constitutional right to arms allows such controls, including controls that I, as a criminologist, would oppose because they are not cost-effective.³ But, as I will discuss, criminological research and analysis over the past decade has

* Don B. Kates, Jr., a San Francisco criminologist and civil liberties lawyer, attended Reed College and Yale Law School. Besides publishing numerous articles on gun control, Mr. Kates was the editor for *FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY* (1984); *49 LAW & CONTEMPORARY PROBLEMS* (1986) (firearms regulation issue); and *5 LAW & POL'Y Q.* (1983) (gun control issue).

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Of course, errors either of fact or interpretation are my sole responsibility.

¹ In a speaking tour last Spring, I gave the same speech on successive days at Harvard Law School at the invitation of the Federalist Society and at Boston College at the invitation of the ACLU.

² See, e.g., *FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY* 531 (Don B. Kates ed., 1984); Don B. Kates, *Firearms and Violence: Old Premises, Current Evidence*, in *VIOLENCE IN AMERICA* 210 (Ted R. Gurr ed., 1969).

³ See, e.g., Don B. Kates, *Handgun Prohibition And the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204 (1983) [hereinafter *Original Meaning*]; 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1639 (1986). Compare Stephen P. Halbrook, *What the Founder's Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 *LAW & CONTEMP. PROBS.* 151 (Winter 1986) (where a leading gun advocate and consultant to the National Rifle Association (NRA) criticizes my work) with Don B. Kates, *The Second Amendment: A Dialogue*, 49 *LAW & CONTEMP. PROBS.* 143 (Winter 1986).

grown progressively more adverse to arguments for disarming the law abiding or for any reduction in their access to ordinary defensive firearms.⁴ I also argue that constitutional scholarship (pg.355) over the same period erases any doubt that the Second Amendment guarantees law abiding, responsible adults full freedom of choice to possess firearms.⁵

The failure of anti-gun advocates to recognize the vast corpus of contrary scholarship reflects the fact that the "great American gun war" is really a culture conflict. It is less about criminology than about ideology and morality.⁶ In saying this, I do not mean to deny that most Americans, including most gun owners, support numerous moderate controls which the gun lobby opposes. But, this broad popular support is based on a desire to mitigate the social harms associated with firearms. Such pragmatic concerns are largely tangential to the cultural and moral concerns that motivate the

⁴ In addition to the publications discussed in depth *infra*, see David J. Bordua, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in *THE SOCIAL ECOLOGY OF CRIME* 156 (James M. Byrne & Robert J. Sampson eds., 1986); COLIN GREENWOOD, *FIREARMS CONTROL: A STUDY OF CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES* (1972); Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, in *PSYCHOLOGY & SOCIAL POLICY* 223 (Peter Suedfeld & Philip E. Tetlock eds., 1992); Charles W. Turner & Jacques-Philippe Leyens, *The Weapons Effect Revisited: The Effects of Firearms on Aggression*, in *PSYCHOLOGY & SOCIAL POLICY* 201 (Peter Suedfeld & Philip E. Tetlock eds., 1992); B. Bruce-Briggs, *The Great American Gun War*, *THE PUB. INTEREST*, Fall 1975, at 37; Bruce L. Danto M.D., *Firearms and Violence*, 23 *INT'L J. OFFENDER THERAPY* 135 (1979); Bruce L. Danto M.D., *Firearms and Their Role in Homicide and Suicide*, 1 *LIFE THREATENING BEHAV.* 10 (1971); Chris W. Eskridge, *Zero-Order Inverse Correlations Between Crimes of Violence and Hunting Licenses in the United States*, 71 *SOC'Y & SOC. RES.* 55 (1986); John Kaplan, *The Wisdom of Gun Prohibition*, 455 *ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI.*, May 1981, at 11; John Kaplan, *Controlling Firearms*, 28 *CLEV. ST. L. REV.* 1 (1979); Raymond G. Kessler, *Enforcement Problems of Gun Control: A Victimless Crimes Analysis*, 16 *CRIM. L. BULL.* 131 (1980); Gary Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 *J. QUANTITATIVE CRIMINOLOGY* 249 (1993); Gary Kleck & Miriam A. DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 *J. QUANTITATIVE CRIMINOLOGY* 55 (1993); Alan J. Lizotte & Jo Dixon, *Gun Ownership and the Southern Subculture of Violence*, 93 *AM. J. SOC.* 383 (1987); Alan J. Lizotte, *The Costs of Using Gun Control to Reduce Homicide*, 62 *BULL. N.Y. ACAD. MED.* 539 (1986); Alan J. Lizotte & David J. Bordua, *Firearms Ownership for Sport and Protection: Two Divergent Models*, 45 *AM. SOC. REV.* 229 (1980); Mark H. Moore, *The Bird in the Hand: A Feasible Strategy for Gun Control*, 2 *J. POL'Y ANALYSIS & MGMT.* 185 (1983); R. J. Mundt, *Gun-Control and Rates of Firearms Violence in Canada and the United States*, 16 *CANADIAN J. SOC.* 345 (1990); Douglas R. Murray, *Handguns, Gun Control Law and Firearm Violence*, 23 *SOC. PROBS.* 81 (1975); Lance K. Stell, *Guns, Politics and Reason*, 9 *J. AM. CULTURE* 71 (1986); Charles L. Rich, M.D. et al., *Guns and Suicide: Possible Effects of Some Specific Legislation*, 147 *AM. J. PSYCHIATRY* 342 (1990); James D. Wright, *Second Thoughts About Gun Control*, 91 *THE PUB. INTEREST* 23 (1988).

⁵ SENATE SUBCOMMITTEE ON THE CONSTITUTION, COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., *THE RIGHT TO KEEP AND BEAR ARMS* (Comm. Print 1982); ROBERT J. COTTROL, *GUN CONTROL AND THE CONSTITUTION* (1993); Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 72 (James W. Ely, Jr. & David J. Bodenhamer eds., 1993); 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1639 (1986); STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS* (1989); STEPHEN P. HALBROOK, "THAT EVERY MAN BE ARMED:" THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Stephen P. Halbrook, *The Second Amendment as a Phenomenon of Classical Political Philosophy*, in *FIREARMS AND VIOLENCE* 363 (Don B. Kates ed., 1984); DAVID T. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* (1986); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988); Don B. Kates, *Minimalist Interpretation of the Second Amendment*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 130 (1991); JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); William Marina, *Weapons, Technology, and Legitimacy: The Second Amendment in Global Perspective*, in *FIREARMS AND VIOLENCE* 385 (Don B. Kates ed. 1984); OXFORD COMPANION TO THE UNITED STATES SUPREME COURT 763 (1992); READER'S COMPANION TO AMERICAN HISTORY 477 (1991); DAVID E. YOUNG, *THE ORIGIN OF THE SECOND AMENDMENT* (1991).

⁶ This point first appears in B. Bruce-Briggs, *The Great American Gun War*, 45 *THE PUB. INTEREST* 37 (Fall 1976); see also Don B. Kates, *Bigotry, Symbolism, and Ideology in the Battle Over Gun Control*, 1992 *PUB. INTEREST L.J.* 31; Lance K. Stell, *Guns, Politics and Reason*, 9 *J. AM. CULTURE* 71 (1986); William R. Tonso, *Social Science and Sagecraft in the Debate Over Gun Control*, 5 *LAW & POL'Y Q.* 325 (1983).

anti-gun movement of organizations like Handgun Control, Inc. (HCI) or the former National Coalition to Ban Handguns (NCBH), now the Coalition Against Gun Violence.⁷ (pg.356)

The anti-gun movement is motivated by an ethical/cultural imperative that its adherents believe will lead to a better and more civilized nation. Epitomizing this ethical/cultural imperative are denunciations of "the fear we have of each other." This fear represents "the worst instincts in the human character" and is illustrated by "the need that some homeowners and shopkeepers believe they have for weapons to defend themselves." It follows, therefore, that banning the barbarism of defensive firearms ownership is a crucial step in the "civilizing process."⁸ Given their essentially non-pragmatic, noncriminological perspective, anti-gun advocates naturally have little interest in the pragmatic questions of whether prohibitory gun policies will disarm criminals or actually reduce violence.⁹ To them, these concerns are irrelevant and unimportant because their purpose for outlawing defensive firearms ownership is moral, cultural, and symbolic. They seek laws to affirm symbolically their moral vision while simultaneously rejecting and condemning the contrary moral vision of gun owners. A law banning defensive gun ownership will inculcate their views that: "[T]he only reason for guns in civilian hands (pg.357) is for sporting purposes;"¹⁰ that personal self-defense

⁷ The broad, popular "pro-control" view is distinguishable from the "anti-gun" sentiments that motivate the organized "gun control" movement. "Pro-control" recognizes, and seeks, an accommodation between, society's obvious need to regulate deadly weapons and the interest of law abiding, responsible adults to possess firearms for personal defense. In contrast, the "anti-gun" view deems defensive gun ownership immoral and unethical because there is no legitimate interest in possessing defensive firearms—regardless of whether such a ban serves any pragmatic purpose. The "pro-gun" view claims that the right to possess arms should not be subject to restrictions or, even more absurdly, that whatever restrictions now exist are, for some unarticulated reason, correct; but any different or greater restriction is *prima facie* bad.

⁸ *Guns and the Civilizing Process*, THE WASH. POST, September 26, 1972, at A16. See also Marilyn Geewax, *We're in a Pickle with Kids*, THE ATLANTIC CONST., August 20, 1993, at A12 (arguing that the crazy gun lobbyists "say guns don't kill people. No guns are doing something even worse—they are killing civilization."); *Gun Toting: A Fashion Needing Change*, 93 SCI. NEWS 613, 614 (1968) (describing gun ownership as "simply beastly behavior"); Richard Hofstadter, *America as a Gun Culture*, AM. HERITAGE, October 1970, at 82 (applying D. H. Lawrence's denunciation of the American soul as "hard, isolated, stoic, and a killer" to gun owners); Jeanne Shields, *Why Nick?*, NEWSWEEK, May 8, 1978, at 23 (describing the NRA as "macho men who don't understand the definition of a civilized society").

⁹ During the past 30 years, commentators have written more about gun control than all other criminal topics combined. Yet, significantly, the anti-gun lobby has not produced a single discussion of how to disarm the millions of people who believe that they have both the need and the constitutional right to have handguns for family defense. The anti-gun lobby's enforcement of its goal to disarm citizens is addressed only by ominous comments such as President Clinton's off-handed endorsement of "major weapon sweeps" to confiscate and destroy illegal firearms. Remarks in a Town Meeting in Sacramento, 29 WEEKLY COMP. PRES. DOC. 1965, 1980 (Oct. 3, 1994). Equally off-hand—and equally ominous—substitutes for any comprehensive study or discussion of the practical enforceability of banning guns are: The call by Richard Wigod, the president of the Los Angeles County Medical Association called for a "military attack" on ghetto areas "mak[ing] a sweep through those neighborhoods, tak[ing] all the weapons," Paul Cotton, *CDC Investigators Explore New Territory in Aftermath of Unrest in Los Angeles*, 267 J. AM. MED. ASS'N., June 10, 1972, at 3001 (quoting Richard Wigod), and the comments of LeRoy Martin, Superintendent of the Chicago Police Department, that to seize guns "some constitutional rights of citizens should be suspended." Lauren Ina, *To Fight Crime, Official Would Suspend Rights*, THE WASH. POST, July 13, 1991, at A6 (quoting LeRoy Martin).

¹⁰ *Keeping the Battle Alive*, TAMPA TRIBUNE, October 21, 1993, (quoting Handgun Control, Inc. Chairperson Sarah Brady). See also *Firearms Legislation: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. pt. 2, at 628 (1975) (prepared statement of Robert L. Repogle, M.D., Professor University of Chicago) (asserting that "[t]he only legitimate use of a handgun that I can understand is for target shooting."); *Legislation to Modify the 1968 Gun Control Act: Hearings Before the Subcomm. of Crime of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. pt. 1, at 128 (1987) (statement of the Presbyterian Church, USA) (arguing that it does not seek to ban rifles and shotguns because they are used for sport, but wants to end handgun sales because there is no other reason to own a handgun ... than to kill someone with it."); Erik Eckholm, *A Little Gun Control, a Lot of Guns*, THE N.Y. TIMES, August 15, 1993, § 4, at 1 (stating that Sarah Brady, the Chairwoman of HCI, desires to legislate "a system of 'needs-based licensing,' with different requirements for hunters, target shooters, and security guards") (apparently self-defense would not be a ground for handgun licensing); *Taming the Monster: The Guns Among Us*, L.A. TIMES, December 10, 1993, pt. B, at 6 (arguing that "under our [the TIMES editorial board] plan, individuals could own sporting weapons

and the ownership of arms for protection of home and family is morally wrong;¹¹ and that defensive gun ownership is a form of vigilantism,¹² "anarchy, not order under law," a usurpation of an exclusive function of the state.¹³

The non-pragmatically ethical, rather than criminological, focus of anti-gun ideology is epitomized by liberal sociologist Laurence Ross' review of the definitive criminological text on firearms in American life: Professor Gary Kleck's *Point Blank: Guns and Violence in America*. As a social scientist, Ross commends Kleck's meticulous clarification of the (pg.358) exaggerations and falsehoods that constantly obfuscate the issues. For example, "fewer than 1% of all guns, and fewer than 2% even of handguns will ever be used in a violent crime" and "more people are killed in swimming pool accidents than firearms accidents."¹⁴ Also, Ross does not quarrel with Kleck's finding that handguns are more often used by the law-abiding to repel crimes than by felons in committing them. Thus, Ross does not deny (though neither does he dwell on) the fact that handguns save far more innocent lives than criminals misusing them take each year. However, Ross asserts that "despite the masses of data and the cleverness of his analysis and argument, Kleck has missed the point." According to Ross, Kleck

[E]mbrace[s] a society based on an internal as well as an external balance of terror. The social order is seen to rest adequately on masses of potential victims using the threat of gun violence to deter masses of potential armed criminals. [This] spectacle is one that ought to *disgust* rather than cheer *the civilized observer*.¹⁵

Advocates like Ross commonly assert that gun control is "worth it" if it saves even one life. But Ross' remarks show that this argument means less than otherwise appears. For, when it turns out that it is defensive gun ownership that saves lives, it also turns out that saving lives is not "worth it"—at least not to Ross who is very candid about this observation. Ross approvingly notes that the tragic "fate of James Brady" provided the "impetus for attempts at broader gun control." He actually

only if they had submitted to a background check and passed a firearm safety course. Other special, closely monitored exceptions could be made, such as for serious collectors."); *Taming the Monster: How Far to Go*, THE L.A. TIMES, October 22, 1993, pt. B, at 6 (arguing that federal law should allow ordinary citizens "ownership of sporting and hunting weapons [and then only] under certain conditions.").

¹¹ Though implicit in the sources already cited, the immorality of owning a firearm for self-defense is most explicitly avowed by the Board of Church and Society of the United Methodist Church which founded, and still sponsors, NCBH. The Methodist Board of Church and Society deems it a victim's moral duty to submit to whatever a criminal demands rather than do anything that might imperil a rapist's life. The editor of its official publication rhetorically poses the question "Is the Robber My Brother" and answers "yes," arguing that although the burglary victim or the "woman accosted in the park by a rapist is [not] likely to consider the violator to be a neighbor whose safety is of immediate concern, [c]riminals are members of the larger community no less than are others. As such they are our neighbors or, as Jesus put it, our brothers." Allen Brockway, *But the Bible Doesn't Mention Pistols*, ENGAGE-SOCIAL ACTION FORUM, at 39-40 (May, 1977) (This article also appears in a separate pamphlet put out by the Methodist Board of Church and Society under the title *Handguns in the United States*.) For secular arguments to the same effect, see columns by the distinguished cultural historian, Garry Wills, reviling "gun fetishists," "gun nuts" as "anti-citizens," "traitors, enemies of their own *patriae*," who are arming "against their own neighbors."

¹² *Legislation to Modify the 1968 Gun Control Act: Hearings Before the Subcomm. of Crime of the House Comm. on the Judiciary*, 99th. Cong., 1st & 2d Sess. pt. 1., at 141 (1987) (testimony of Harold Massey, Program Coordinator for the General Board of Church and Society of the United Methodist Church).

¹³ RAMSEY CLARK, *CRIME IN AMERICA* 88 (1970).

¹⁴ H. Laurence Ross, *Book Review*, 98 AM. J. SOC. 661 (1992) (reviewing GARY A. KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* (1991)).

¹⁵ *Id.* (Emphasis added).

welcomes "more [such shooting] incidents, more heinous ones with more tragic or more important victims, [as the impetus for us] to develop the necessary determination" to move beyond "narrow controls" to the desired goal of banning and confiscating all guns.¹⁶

Readers may make their own judgments on the morality of such willingness (even eagerness) to see people crippled and killed as a way of promoting ideological, symbolic, and heuristic goals. My point is to show that the willingness to sacrifice what the anti-gun movement is ostensibly seeking to preserve explains the anti-gun ideology's disregard for criminological and historical facts, as well as civil liberties issues.^(pg.359)

II. THE SECOND AMENDMENT¹⁷

My position here, like that of virtually every other scholar who has recently addressed the issues, discomfits both extremes in the gun debate. Let me begin with the common denial by anti-gun advocates that the right to arms applies to individuals. They claim that the Second Amendment only guarantees states the right to armed militias. This position is not just wrong, but frivolous—something that no knowledgeable person can honestly argue in light of modern research.

True, both the American Bar Association and the ACLU endorse this frivolous states' right claim.¹⁸ But scholarly research over the past fifteen years has destroyed what scant historical support it ever had. Among thirty-six law review articles addressing the Amendment since 1980, only four take the states' right position. Three of those articles were written by paid employees of anti-gun groups and the fourth by a politician. All four were presented in symposia after the anti-gun groups and/or individuals were invited to submit articles detailing their position.¹⁹

In striking contrast, numerous law review articles conclude that ^(pg.360) the Second Amendment protects the individual's right to own guns.²⁰ This conclusion is also endorsed by outstanding liberal

¹⁶ *Id.*

¹⁷ Commentators have argued that the Ninth and Fourteenth Amendments could prevent any gun-ban legislation independent of the Second Amendment. See Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms*, 11 YALE L. & POL'Y R. 509 (1993); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

¹⁸ A former member of the ACLU National Board, Prof. William Van Alstyne, comments acidly "it is quite beyond the scope of this brief essay to attempt to account for the ACLU's stance. The ACLU must account for itself—insofar as it can." William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, to be Published 43 DUKE L.J. (April, 1994).

¹⁹ Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately*, 15 U. DAYTON L. REV. 5 (1989) (written by the general counsel of HCI); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982) (written by non-lawyer lobbyist for the National Coalition to Ban Handguns); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U.L. REV. 107 (1991) (written by general counsel of HCI); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLIN L. REV. 383 (1983). See also Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLIN L. REV. 69 (1986) (conceding that the Second Amendment does guarantee a right of personal security, but arguing that banning and confiscating all guns will result in personal security); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (arguing that although the Second Amendment is an individual right, and its purpose was to allow the populace to arm itself, it is no longer applicable in present society because only one half of the households have weapons).

²⁰ For example, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Stephen P. Halbrook, *What the Founders Intended: A Linguistic Analysis of the Right to Bear Arms*, 49 LAW & CONTEMP. PROBS. 151 (1986); Don B. Kates, *The Second Amendment and the Ideology of Self Protection*, 9 CONST. COMMENTARY 87 (1992); Don B. Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second*

constitutional scholars like Akhil Amar, Sanford Levinson, and William Van Alstyne who do not own guns and neither expected nor desired that the historical evidence would force them into bed with the gun lobby.²¹ I will note only three elements of that vast corpus of historical evidence which support my position.

A. The States' Right View—A 20th Century Invention

The very concept that the Second Amendment only guarantees that states will have the right to maintain a militia, while denying individuals the right to bear arms, is an invention of this century's gun control debate. The Founding Fathers seem not to have had even the remotest inkling of such a concept.²² Nor did any pre-twentieth century case or commentary depart from the individual right to arms concept.²³ Also, (pg.361) the Second Amendment's author, James Madison, endorsed a commentary explaining that the Second Amendment was intended to protect people against the confiscation of their own weapons. This commentary was widely published and republished before Congress when it enacted the Bill of Rights.²⁴

In discussing the Bill of Rights, Madison and his contemporaries addressed the right to bear arms in the same breath as the freedoms of speech, press, and religion. They consistently lumped

Amendment, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); F. Smith Fussner, *Book Review*, 3 CONST. COMMENTARY 582 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)); and Joyce Lee Malcolm, *Book Review*, 54 GEO. WASH. L. REV. 582 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)).

²¹ Personal communications with Professors Amar, Levinson and Van Alstyne, albeit the latter, having read Amar and Levinson, did anticipate that the evidence would validate their views.

²² JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994). *See also* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (1984) (arguing that the Founders never intended the Second Amendment to apply only to states and their militia and "[i]f anyone entertained this notion in the period during which the Constitution and bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis").

²³ *See, e.g.*, J. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1st pub. 1833, repub. 1893) ("One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms."). Professor Levinson, emphasized Justice Story's importance as a source of constitutional learning, quotes Justice Story's reference to "[t]he right of the citizens to keep and bear arms" as a deterrent to "the usurpation and arbitrary power of rulers" and a means for "the people to resist and triumph over them." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 649 (1989) (quoting 3 J. STORY, COMMENTARIES § 1890) (emphasis added). To the same effect, Professor Levinson cites Thomas Cooley and Theodore Schroeder. *Id.* at 644-47 (citing St. G. Tucker (1803) and Rawle (1825) as 18th and 19th century commentators who endorsed the individual right view without apparent consciousness that any other view was possible); Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONSTITUTIONAL COMMENTARY 87 n.1 (citing Pomeroy (1868), Von Holst (1885), Schouler (1897), J. Tucker (1899), Putney (1908), and Black (1910)).

²⁴ The Federalist commentary's full comment on the Second Amendment was:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article [i.e., amendment] in their right to keep and bear their private arms.

Original Meaning, *supra* note 3, at 224 (Footnote omitted).

these rights together under such descriptions as "*human* rights," "*private* rights," rights "respecting personal liberty," and "essential and sacred rights."²⁵

This evidence cannot be squared with the anti-gun interpretation of the Second Amendment as embodying Anti-Federalist objections to the federal government's military-militia powers in Article I, Section 8 Clauses 15 and 16 of the original Constitution. Madison, a leading Federalist defender of the Constitution, categorically denied that his amendments would reduce federal power in any respect.²⁶ The Anti-Federalists agreed, objecting that the Bill of Rights did not incorporate their concerns in this respect, and proposed additional amendments which would do so. These proposed amendments were rejected.²⁷

Moreover, Madison's own proposal for integrating his amendments (pg.362) into the Constitution was not to add them at the end (as they have been), but to interlineate them into the portions of the original Constitution they affected or to which they related. If he had thought the Second Amendment related to the military-militia provisions, he would have included it in Article I, Section 8. Instead, he planned to insert the right to arms with freedom of religion, the press, and other personal rights in Section 9 following the rights against bills of attainder and ex-post facto laws.

To reiterate, the idea of the Second Amendment as something other (or less) than a guarantee of an individual right to arms is a purely twentieth Century invention that prior generations, especially the Constitution's authors, did not contemplate.

B. General Attitude of the Founders Toward Firearms

Historical research demonstrates the Founders out-"NRAing" even the NRA in expressing what one intellectual historian has described as their "almost religious [attitude] about the relationship between men and arms" in a free society.²⁸ "One loves to possess arms" wrote Thomas Jefferson, the premier intellectual of his day, to George Washington on June 19, 1796.²⁹ Also, Jefferson went to the trouble of translating and laboriously copying in longhand into his personal compilation of great quotations and wise sayings a flowery, elaborate Eighteenth Century version of the slogan "when guns are outlawed only outlaws will have guns."³⁰ And Jefferson's model state

²⁵ *Id.* at 223-25 (emphasis added) (quoting Madison, Fisher Ames, Albert Gallatin, and James Monroe).

²⁶ JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 159 (1994).

²⁷ *Id.* at 163; *Original Meaning*, *supra* note 3, at 225.

²⁸ *Original Meaning*, *supra* note 3, at 229 (quoting Charles J. Asbury, *The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution* 88 (1974) (unpublished Ph.D. dissertation, University of Michigan) (available at the Michigan Graduate Library)).

²⁹ 9 WRITINGS OF THOMAS JEFFERSON 341 (A.A. Lipscomb ed. 1903).

³⁰ Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 90-91 (1992). Citing the following passage from Cesare Beccaria who wrote:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted

constitution (pg.363) guaranteed that "[n]o free man shall be debarred the use of arms in his own lands."³¹

Likewise, Thomas Paine both denied that arms controls would disarm criminals and deemed it a positive social good that decent people be armed against them:

[T]he peaceable part of mankind will be continually overrun by the vile and abandoned, while they neglect the means of self-defense.... The supposed quietude of a good man allures the ruffian; ... [but] arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world.... Horrid mischief would ensue were [the good] deprived of the use of them ... the weak will become a prey to the strong.³²

In an earlier article, Paine also noted:

I am thus far a Quaker that I would gladly argue with all the world to lay aside the use of arms, and settle matters by negotiation, but unless the whole will, the matter ends, and I take up my musket and thank heaven he [sic] has put it in my power.³³

The Founders' belief in the social value (and sacred personal right) of bearing arms derived from the English philosophers Algernon Sidney and John Locke and the legal commentator William Blackstone. Blackstone ranked "arms for an [individual] defense" as a "natural right of resistance and self-preservation, when the sanctions of society are found insufficient to restrain the violence of oppression."³⁴ Blackstone saw the right of individual gun ownership as preserving to England its (pg.364) free government and to Englishmen their liberties.³⁵

Sidney was executed for asserting his belief in the right to revolt against tyranny. Prior to his death, he and Locke defended that right as an aspect of personal self-defense: "Swords were given to men, that none might be Slaves, but such as know not how to use them."³⁶ "Innocent persons

and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.

CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 145 (1819).

³¹ THE JEFFERSONIAN CYCLOPEDIA 51 (John P. Foley ed., 1967).

³² Thomas Paine, 1 THE WRITINGS OF THOMAS PAINE 56 (Moncure D. Conway ed., G.P. Putman Sons 1894).

³³ A.J. AYER, THOMAS PAINE 8 (1988) (quoting Thomas Paine as managing editor of the Pennsylvania Magazine (1775)).

³⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *143-44.

³⁵ *Id.* Blackstone also stated:

The *defense* of one's self, or the mutual and reciprocal defence of such as stand in relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.

3 WILLIAM BLACKSTONE, COMMENTARIES *3-4.

³⁶ ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 270 (photo. reprint 1968) (3d ed. 1751).

[would] be exposed to the violence of the most wicked, if men might not justly defend themselves against injustice."³⁷

The Founders *unanimously* agreed with this philosophy. "The great object," thundered Anti-Federalist Patrick Henry, "is that every man be armed." Madison and other Federalists also reviled despots for being "afraid to trust the people with arms" and extolled "the advantage of being armed, which the Americans possess over the people of almost every other nation."³⁸

In sum, because the Founders firmly included the right to arms among the natural rights they hailed as "essential and sacred," "human rights," and "private rights," there is no reason to read the Second Amendment's guarantee of "the right of the people to keep and bear arms" any way but literally.

C. The Text of the Second Amendment

As the United States Supreme Court recently observed, the phrase "right of the people" is consistently used throughout the Bill of Rights to refer to the rights of citizens against government.³⁹ To reject its literal meaning and instead swallow the states' right view, one must believe that when the First Congress drafted the Bill of Rights it used "right of the people" in the First Amendment to mean an individual right; although it later used the same phrase in the Second Amendment (pg.365) to describe a right of the states; and then, in the Fourth and Ninth Amendments Congress again used the phrase to describe an individual's right. Further, one must ignore that the Tenth Amendment specifically distinguishes "the states" from "the people," but the Second Amendment does not.⁴⁰

D. Limitations on the Right to Arms

Having addressed the anti-gun view, the gun lobby position may be briefly dispatched by noting that the Amendment does *not* read: "Congress shall make no law of which the gun lobby disapproves." For historical reasons, that I have outlined at great length, the right to arms is subject to numerous limitations, including: Not extending to felons, children, or the insane; and it is limited to ordinary small arms (including semi-automatic firearms), but does not include possession of weapons of mass destruction.

The NRA has implicitly recognized much of this insofar as it has consistently promoted laws against gun possession by felons and the insane. Yet, with manifest inconsistency, the gun lobby, at least until recently, denied the constitutionality of background checks, licensing, or other devices to preclude such undesirables from obtaining firearms.⁴¹

³⁷ *Id.* at 267.

³⁸ THE FEDERALIST No. 46, at 298 (James Madison) (Henry C. Lodge ed., G.P. Putnam's Sons 1895).

³⁹ United States v. Verdugo-Urquidez, 494 U.S. 1092, *reh'g denied*, 494 U.S. 1092 (1990).

⁴⁰ If that were not absurd enough, consider the implications if the same non-sensical construction was applied to the requirement that the House of Representatives shall be selected "by the people of the several states." U.S. CONST. art. I, § 2, cl. 1. If the literal and plain meaning of such language can be disregarded as "collective," it follows that where Article I, § 2, cl. 1 says "the people" of a state, it really means "the state;" thus, the state legislature or Congress would be free to decree that the states' house delegations are to be appointed by the state legislature (or even the governor) rather than popularly elected.

⁴¹ The NRA, and most of the rest of the gun lobby, now acknowledge the legitimate use of an instant background check. The gun lobby follows Stephen P. Halbrook's position. Mr. Halbrook admits that "artillery pieces, tanks, nuclear devices, and other heavy ordinances are not constitutionally protected," and civilians do not have a Second Amendment right to possess them. Furthermore, "grenades, bombs, bazookas, and other devices which ... have never been commonly possessed for self-defense" are

In sum, the Second Amendment guarantees responsible, law-abiding adults an absolute right to choose to own ordinary small arms. But, that right is subject to reasonable and rapid screening mechanisms designed to exclude criminals and the irresponsible, and to numerous other restrictions as well.^(pg.366)

III. MODERN CRIMINOLOGICAL VIEWS OF GUN CONTROL

It may surprise readers that modern criminologists reject gun control as a fruitful strategy. For many years, zealots virtually monopolized academic writing on guns, seeking to validate their loathing for guns and gun owners.⁴² Neutral scholars eschewed the gun issue and the gun lobby, though able to exert great pressure on legislators, was incapable of, and uninterested in, addressing intellectually sophisticated audiences.

The anti-gun zealots' monopoly of the gun issue ended when the National Institute of Justice funded a massive study, the results of which became the cornerstone of all scrupulous and objective criminological work in this area. The enormous grant was intended to allow sociologists James D. Wright and Peter Rossi to evaluate the previous literature and distill from it an analysis of the role of firearms in violence and an agenda for gun control policy. To their surprise, Wright and Rossi found the literature so biased and shoddy that it provided no basis for policy-making.⁴³ In private they described it as "result oriented trash;"⁴⁴ in public, they merely admitted that their research caused them to re-examine and disavow the strong anti-gun views with which they began it.⁴⁵

Subsequent criminological research has repudiated virtually every element of the conventional argument for banning handguns or any guns, to the general public. Kleck has shown that widespread gun ownership by the law-abiding does *not* promote homicide, and that ^(pg.367) handguns are used by victims to defeat crimes about three times more often than they are misused by criminals committing crimes. The response to these findings has been little more than ad hominem claims that because Kleck is a minion of the gun lobby, his scholarship should not be taken seriously.⁴⁶ This is as false as it is irrelevant. Kleck is not a member of the NRA, and has never

not allowed because they kill both homicidal criminals and bystanders. Stephen P. Halbrook, *What the Founders Intended: A Linguistic Analysis of the Right to Bear Arms*, 49 LAW & CONTEMP. PROBS. 151, 160 (1986).

⁴² Sociologist William Tonso used this literature as a case study of Florian Znaniecki's concept of "sagecraft," the prostitution of scholarship by partisan academic "sages" who invent, select, or misinterpret data to validate preordained conclusions. William R. Tonso, *Social Science and Sagecraft in the Debate Over Gun Control*, 5 LAW & POL'Y Q. 325, 325-26, 332-33 (1983).

⁴³ See JAMES D. WRIGHT ET AL., NATIONAL INSTITUTE OF JUSTICE, WEAPONS, CRIME AND VIOLENCE IN AMERICA: A LITERATURE REVIEW AND RESEARCH AGENDA (1981).

⁴⁴ Personal communication with James Wright.

⁴⁵

The progressive's indictment of American firearms policy is well known and is one that both the senior authors of this study *once shared*. This indictment includes the following particulars: ... [Law abiding people buy guns] because they feel the need to protect themselves; eventually, they end up shooting one another.... If there were fewer guns around, there would obviously be less crime.... *The more deeply we have explored the empirical implications of this indictment, the less plausible it has become.*

JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 319 (1983) (emphasis added).

⁴⁶ An overt, published example is the answer given (defending their own prior study) by the extreme anti-gun public health writers John H. Sloan, Frederick P. Rivara, and Arthur Kellermann. 323 NEW ENG. J. MED. 136 (1990) (Letter to the Editor). Because their study involved comparing Canadian and American violence, it is useful to consider the evaluation of a Canadian criminologist. In the course of a highly favorable review of Kleck's book, Professor Gary A. Mauser comments,

taken a dime from the gun lobby.⁴⁷ Far from being biased favorably toward the gun lobby, Kleck has consistently supported rational, moderate controls that the gun lobby has opposed.⁴⁸ Moreover, like Wright and Rossi, Kleck admitted:

When I began my research on guns in 1976, *like most academics, I was a believer in the "anti-gun" thesis*, i.e. the idea [that] gun availability has a net positive effect on the frequency and/or seriousness of violent acts. It seemed then like self-evident common sense which hardly needed to be empirically tested. However, as a modest body of reliable evidence (and an enormous body of not-so-reliable evidence) accumulated, many of the most able specialists in (pg.368) this area shifted from the "anti-gun" position to a more skeptical stance, in which it was negatively argued that the best available evidence does not convincingly or consistently support the anti-gun position. This is not the same as saying we know the anti-gun position to be wrong, but rather that there is no strong case for it being correct. The most prominent representatives of the skeptic position would be James Wright and Peter Rossi, authors of the best scholarly review of the literature.⁴⁹

Actually, Wright has also moved beyond skepticism to embrace Kleck's view "that the best currently available evidence, imperfect though it is (and must always be), indicates that general gun availability has no measurable net positive effect on rates of homicide, suicide, robbery, assault, rape, or burglary in the U.S."⁵⁰

I think it significant that I know of no criminologist who doubted the value of gun control laws being forced by the evidence to disavow their position. In contrast, beside Kleck, numerous other social scientists have had to repudiate anti-gun premises which they championed when they

It is not too strong to say that many [gun] studies are an abuse of scholarship in that they invented, selected, or misinterpreted data in order to validate their *a priori* conclusions.... A particularly egregious example is, *Handgun Regulations, Crime, Assaults and Homicide*, by John Sloan and his associates, which appeared in Volume 319 of the *New England Journal of Medicine* in 1988.

Gary A. Mauser, *Gun Control in the United States*, 3 CRIM. L.F. 147, 148, 148 n.3 (1992) (Reviewing Gary A. Kleck, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991)).

⁴⁷ Gary A. Kleck, POINT BLANK: GUNS AND VIOLENCE IN AMERICA, *Author's Voluntary Disclosure Notice* (1991). In addition, the American Society of Criminology has given Kleck's work its highest award, the Hindelang Award, deeming his work "the most outstanding contribution to criminology" in the past several years. Hindelang Award presented at the 1993 annual meeting, Phoenix AZ, Oct. 29, 1993.

⁴⁸ Gary A. Kleck, *Policy Lessons from Recent Gun Control Research*, 49 L. & CONTEMP. PROBS. 35 (1986); POINT BLANK, *supra* note 46, at ch. 11. Interestingly, the one criticism levelled against Kleck by the reviewer in the liberal magazine Commonwealth was that his pro-control recommendations forged beyond the limitations of the data available to justify gun laws. Kevin Doyle, *Who Buys Guns?*, COMMONWEALTH, June 5, 1992, at 25-26.

Indeed, Kleck's earliest publication concluded that increased gun ownership had some effect in increasing the homicide rate—a position Kleck was later forced to disavow based on more extensive evidence and analysis. Compare Gary A. Kleck, *Capital Punishment, Gun Ownership and Homicide*, 84 AM. J. SOC. 882 (1979) with *The Relationship between Gun Ownership Levels and Rates of Violence in the United States*, in FIREARMS AND VIOLENCE 99 (Don B. Kates ed., 1986).

⁴⁹ Gary A. Kleck, Address to the National Academy of Sciences (1990).

⁵⁰ *Id.* See James D. Wright, *Second Thoughts About Gun Control*, 91 PUB. INTEREST 23 (1988) (noting that although he continues to endorse banning felons, juveniles, and the mentally impaired from obtaining guns, his current "opinion [is] that a compelling case for 'stricter gun control' [for ordinary citizens] cannot be made.").

began their research, including Hans Toch,⁵¹ Ted R. Gurr,⁵² and Brandon Centerwall.⁵³(pg.369)

None of these social scientists are devotees of the gun lobby and none deny that controls aimed at disarming criminals have their place in any crime reductive strategy. Unfortunately, as the works quoted attest, three facts limit the importance of any level or form of gun control in reducing crime. First, violence results from basic socio-economic and cultural factors that are not altered by merely curbing availability of a particular weapon. Even with murders by firearm excluded, the U.S. murder rate still exceeds the total gun and non-gun murder rates of most Western European

⁵¹ Hans Toch notes that he participated in and fully endorsed the conclusion of the 1969 National Commission on the Causes and Prevention of Violence "that ... reducing the availability of the handgun will reduce firearms violence." Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, in *PSYCHOLOGY & SOCIAL POLICY* 223 (Peter Suedfeld & Philip E. Tetlock eds., 1992). But, Toch continues, subsequent research has progressively undermined this conclusion. Though violence is primarily a male phenomenon, "rates of male firearms ownership tend to be inversely correlated with violent crime rates, a curious fact if firearms stimulate aggression. 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." *Id.* at 232. In contrast to the male pattern, women's gun ownership is generally low, but "when violent crimes are high, women arm themselves for protection." *Id.* at 233. Of course, "[t]his does not imply that urban women are responsible for the urban crime problem." *Id.* It is simply rational behavior because "when 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." *Id.* at 234. "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.

⁵² Professor Ted Robert Gurr, a key staff member of the Eisenhower Commission, has issued up-dated editions of the Commission's research reports to reflect subsequent research. His introduction to the latest update summarizes his own present views on gun control:

Americans looking for simple solutions to high crime rates and to political assassinations have repeatedly proposed and sometimes imposed restrictions on gun ownership. Since about two-thirds of murders and all recent assassinations have been committed with guns, the argument goes, dry up the guns and violence will decline. In a country with an estimated stock of 60 million handguns and more than 100 million long guns, not even the most Draconian policies could remove guns from the hands of people who were determined to get and keep them. Those determined gun owners include far more citizens concerned about defending themselves and their homes than predatory criminals. The irony of most gun control proposals is that they would criminalize much of the citizenry but have only marginal effects on professional criminals.

Moreover, an overemphasis on such proposals diverts attention from the kinds of conditions that are responsible for much of our crime, such as persisting poverty for the black underclass and some whites and Hispanics; the impact of post-industrial transition on economic opportunity for working-class youths; and the shortage of prison facilities that makes it difficult to keep high risk, repeat offenders off the streets."

Admittedly, if no one had guns, assaults carried out with less deadly weapons and modern medicine would save more of the victims. But we must [also consider that] ... guns can be an effective defense. [UCLA historian Roger] McGrath's historical evidence [from the 19th Century] shows that widespread gun ownership deterred [burglary and robbery] while simultaneously making brawls more deadly. Modern studies, summarized by Kates, also show that widespread gun ownership deters crime. Surveys sponsored by both pro- and anti-gun groups show that roughly three-quarters of a million private gun owning citizens report using weapons in self-defense [annually], while convicted robbers and burglars report that they are deterred when they think their potential targets are armed.

TED R. GURR, 1 VIOLENCE IN AMERICA 17-18 (1989).

⁵³ Brandon Centerwall stated:

If you are surprised by my findings, so am I. I 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.

Brandon Centerwall, *Homicide and the Prevalence of Handguns: Canada and the United States, 1976 to 1980*, 134 AM. J. EPIDEMIOLOGY 1245, 1264 (1991).

countries. If all the guns could be made to disappear, most gun murders would still occur, but would be committed with other (though less) deadly weapons. Second, the guns aren't going to all disappear; enough illegal guns will always be (pg.370) available in any society to arm those who want to misuse them. Third, criminals and the irresponsible persons we most want to disarm will always be least likely to comply with gun bans, and thus, be least affected by them.

I shall address these crucial points below in Section V, but will first discuss some civil rights and liberties implications of the gun control struggle.

IV. RACISM AND GUN CONTROL

President Clinton's signing of the Brady Bill occasioned calls for even more restrictive gun laws from the mayors of New York and Los Angeles. This is ironic because those cities' failure to protect vulnerable minorities shows why banning guns is neither prudent nor fair. In the 1992 Los Angeles riots, armed Koreans were left to defend their properties and themselves against thugs as the police abandoned vast areas of South Central Los Angeles during the rioting.⁵⁴ Likewise, Orthodox Jews of the Lubavitcher (Hasidic) sect were subjected to a virtual pogrom when New York City police were withdrawn from the Crown Heights area in the August 1991 riots.⁵⁵

Regrettably, gun control has often been intended, and even more often operated, to disarm vulnerable minorities. The earliest English arms control law (1181) targeted Jews and left them helpless against pogroms. Our Second Amendment guarantee of the right to arms reflects our Founders' knowledge that France first disarmed all but its nobility, and then disarmed the Protestant nobles to help force their conversion to Catholicism; and that England's Catholic King James II was overthrown for trying to disarm Protestants, who then disarmed Catholics.

In addition, while slavery existed in America, blacks were disarmed. Immediately after the Confederate surrender at Appomattox in 1865, Southern legislatures enacted special laws to keep blacks in perpetual peonage—including disarming them. To prohibit such interference with the constitutional right to arms, Congress enacted the Civil Rights Act of 1866 and the Fourteenth Amendment in 1868. Southern "Black Codes" being thus abrogated, the South turned to (pg.371) superficially neutral gun laws, including the earliest Saturday Night Special laws and South Carolina's ban on handgun sales. These laws, and others like them, were intended and enforced to render blacks defenseless against the Ku Klux Klan. As a Florida Supreme Court Justice commented in voiding a 1941 conviction of a white man under a nineteenth century law: "The Act was passed for the purpose of disarming negro laborers, ... [it was] never intended to be applied to the white population."⁵⁶

Nevertheless, blacks carried arms to help preserve the lives of civil rights workers during the early years of the modern civil rights movement when Washington shrank from curbing Klan terrorism for fear of offending the South's all-white electorate. Martin Luther King Jr. preached non-resistance to non-lethal violence, not to outright lynching. His and other civil rights leaders'

⁵⁴ See, e.g., Jane Gross, *Smell of Fear in Los Angeles*, N.Y. TIMES, May 2, 1992, at A1, A21.

⁵⁵ It took four days before New York City Mayor David Dinkins sent in police to curb the rioting. Sam Allis, *Racial Unrest, An Eye for An Eye*, TIME, September 9, 1991, at 20.

⁵⁶ *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring opinion). The statute under which Watson was convicted made it a crime for a person to "carry around with him a pistol, Winchester rifle or other repeating rifle or for [having same] in his manual possession." *Id.* at 701 (citation omitted). The statute exempted sheriffs and other officers. *Id.*

bodyguards carried concealed handguns illegally and some leaders even carried their own gun as well.⁵⁷

Thus, when criminals knew their victims were armed, the result was not more violence, but less. Encountering armed resistance, Klansmen usually backed off.⁵⁸ And police, though inactive when unarmed civil rights workers were beaten or murdered, discovered the need to step in and neutrally keep the peace when the victims appeared ready to defend themselves.⁵⁹ (pg.372)

V. SOME MAJOR ANTI-GUN MYTHS

I conclude this Essay by exposing four myths which have had major import in building the pseudo-criminological argument for banning all guns or handguns to the general public.

A. *The Argument Against Armed Self-Defense*

In common with other anti-gun organizations, HCI advises victims attacked by rapists or other violent felons to submit rather than physically resist *in any way*. According to HCI, "the best defense against injury is to put up no defense—give them what they want or run."⁶⁰ But, criminological data show that victims who resist with a gun are both far less likely to be raped or robbed and only half as likely to be injured as those who submit, throwing themselves on the tender

⁵⁷ Don B. Kates, *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 ed., 1979) [hereinafter RESTRICTING HANDGUNS].

⁵⁸ See *id.* at 186.

⁵⁹ *Id.* at 188. Impressive evidence of the deterrent effect of victim gun ownership appears in a National Institute of Justice-sponsored survey of 2,000 felons in state prisons across the U.S. of which 34% "said they had been 'scared off, shot at, wounded or captured by an armed victim,' and about two-thirds (69%) had at least one acquaintance who had this experience." Don B. Kates, *Value of Civilian Arms Possession*, 18 AM. J. CRIM. LAW 113, 144 (1991) (quoting JAMES D. WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 154-55 (1986)). Answering another question, 34% of the felons said that in contemplating a crime they either "often" or "regularly" worried that they "[m]ight get shot at by the victim;" and 57% agreed that "[m]ost criminals are more worried about meeting an armed victim than they are about running into the police." *Id.* at 144-45. See also FIREARMS AND VIOLENCE, *supra* note 2, at 342-43. In 1982, the Kennesaw city council passed a highly publicized ordinance which required that a gun be kept in every household. The resulting publicity dramatized to potential criminals that Kennesaw residents owned firearms and were willing to use them. Consequently, crime in Kennesaw dropped off at a dramatic rate. Serious crime dropped by 74.4% from 1981-82. Similar results appeared from a highly publicized 1966 program in which civilian women received defensive handgun training from the Orlando, Florida police. As of 1967, rape had dropped from a level of 35.91 per 100,000 inhabitants to only 4.18. The surrounding areas and Florida in general experienced either constant or increasing rape rates over the same period, as did the United States in general. This decrease did not reflect a continual downward trend for Orlando, because the trend had been erratic but upward for several previous years. Burglaries also dropped in the Orlando area. See *id.* at 340-41.

⁶⁰ NELSON SHIELDS, GUNS DON'T DIE PEOPLE DO 124-25 (1981) (authored by HCI's Chairman). The standard anti-gun treatise against self-defense is MATTHEW G. YEAGER, U.S. CONFERENCE OF MAYORS, HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY? (1976). This is unfortunate because the evidence it presents is irrelevant. It deals with victims using all methods of resistance, without breaking out results for victims who used firearms. That is a vital distinction because a firearm is the only method of resistance that consistently allows victims a reasonable chance of success, given that criminals are generally younger, stronger, and in better condition. The treatise cautions that any form of "physical resistance to robbery" is prohibitively dangerous. For example, it twice-repeats the point (each time in italics) that: "*a victim is more than eight times as likely to be killed when using a self-protective measure*" of any kind, and that "*victims who resist experience much higher rates of fatality and injury.*" And again (in italics) "*a victim is three times more likely to be injured when taking a self-protection measure than when not.*" *Id.* at 17-18.

mercies of rapists or robbers.⁶¹ Running away or screaming is also far more dangerous and far less effective than resisting with a gun.(pg.373)

B. Supposed Correlation Between Gun Ownership and Homicide Trends

Does acquiring a gun induce large numbers of previously law-abiding people to rape, rob, and murder? Or do perceptions that crime is high or rising induce law-abiding people to buy guns, thereby producing a coincidence of high crime rates and increased gun sales? It is an article of faith in anti-gun literature that the mere availability of firearms to law-abiding, responsible adults "causes" them to murder.⁶² During and after the fifteen year period, 1960-74, anti-gun authors regularly cited the coincidence of increasing sales of guns, especially handguns, with increasing homicide rates as proof that the former caused the latter.⁶³ They did not even consider the possibility that it may have instead been the high crime rate which fueled the gun sales. This omission exemplifies the unsophisticated failure to explore inconvenient concepts and facts upon which the anti-gun case is built. Application of the same puerile "reasoning" to the fact that the personnel size of police forces steadily expanded as the crime rate grew during the period between 1960-1974 would impel the conclusion that "police cause crime."

In any event, during the next fifteen year period, 1974-88, handgun sales continued apace but homicide first substantially stabilized and then substantially declined. No mention of this embarrassing coincidence will be found in any publication by an anti-gun author or organization. Indeed, to obscure the fact of declining homicide, the anti-gun authors have instead begun giving a combined total for gun murders, gun suicides, and accidental gun deaths.⁶⁴ This has the additional effect of obscuring, as will be discussed below, the marked decline in fatal gun accidents which has accompanied the proliferation of the much safer handgun to replace rifles and shotguns in the home (pg.374) defense role.

But some anti-gun advocates, finding it impossible to wean themselves from the fatuous statistical coincidence argument, have continued to make it by simply misrepresenting the facts. In 1979, the U.S. Public Health Service decided that while firearms may not be a disease, they are a public health menace which ought to be eliminated.⁶⁵ To support this decision, it has funded the Centers for Disease Control (CDC) to produce work supposedly proving their position. Accordingly, an official CDC Report solemnly informed Congress in 1989 that since the early 1970s firearms

⁶¹ POINT BLANK, *supra* note 46; Don B. Kates, *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991).

⁶² Anti-gun advocates have even claimed that "three out of four deaths could have been prevented, were a handgun not available." Robert F. Drinan, *Gun Control: The Good Outweighs the Evil*, 3 CIV. LIBERTIES REV. 44, 47-51 (1976) (citation omitted). See also Samuel S. Fields, *Does Blame for Handgun Crime Lie at the Factory Gate?*, BUS. & SOC'Y REV. 51 (Spring 1983); *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35 (1979).

⁶³ See, e.g., *Handgun Prohibition and Social Necessity*, *supra* note 62, at 37.

⁶⁴ See, e.g., SUSAN P. BAKER ET AL., THE INJURY FACT BOOK 90-91 (1984); Stephen P. Teret, *Public Health and the Law, Litigating for the Public's Health*, 76 AM. J. PUB. HEALTH 1027, 1028 (1986).

⁶⁵ See HEALTHY PEOPLE: THE SURGEON GENERAL'S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION, THE U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE 9-21(1979); PHS, HEALTHY PEOPLE THE SURGEON GENERAL'S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION: BACKGROUND PAPERS, THE U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE (1979).

availability and homicide rates have risen in parallel.⁶⁶ No supporting reference is given because the actual trend data are diametrically opposite. Since the early 1970s the handgun stock has increased sixty-nine percent, but handgun murders declined twenty-seven percent; and a forty-seven percent increase in all types of guns was accompanied by a thirty-one percent decline in gun murder overall.⁶⁷

The non-coincidence of gun murders and gun ownership rates in the 1974-88 period does *not* disprove the anti-gun belief that the availability of firearms to law-abiding, responsible adults causes them to murder one another. As noted above, violence reflects basic socioeconomic and cultural factors with the mere availability of particular weaponry playing at most a marginal part. Thus, if those basic factors reduce homicide, it is possible for gun ownership to increase while homicide decreases, even if the increased gun ownership otherwise (pg.375) would promote homicide to some minor extent.

Nevertheless, the idea that widespread gun ownership increases homicide is contraindicated by the invariable finding of studies trying to link gun ownership to violence rates that there is either no relationship or even a *negative* relationship—for example, cities and counties with high gun ownership suffer less violence than demographically comparable areas with lower gun ownership.⁶⁸

C. Accidental Firearm Deaths

Given current levels of crime and fear, millions of Americans feel it prudent or necessary to keep a loaded firearm in their home for self-defense—a practice from which no amount of preachment seems able to dissuade them. Thus, it may confidently be assumed that an absence of handguns would impel many to substitute long guns for handguns in the home for defense.⁶⁹

Necessarily, such substitution on a large scale would greatly increase accidental fatalities because a loaded long gun kept for home defense is much more problematic than a similarly kept handgun. If kept loaded and ready for rapid defensive deployment, a long gun is much more difficult

⁶⁶ DOROTHY P. RICE ET AL., COST OF INJURY IN THE UNITED STATES: A REPORT TO CONGRESS 23 (1989) (stating that "[s]ince the early 1970s the year-to-year fluctuations in firearm availability has paralleled the numbers of homicides.").

⁶⁷ POINT BLANK, *supra* note 46, at 50 (showing: (1) that, on the average 2 million new handguns per year were purchased by Americans between 1974 and 1987; (2) that in the same period 5 million new guns of all guns types were purchased per year; and (3) that the accumulated handgun stock increased from 39 million to 65.8 million in that period and the total gun stock increased from 134.5 million to 198.3 million, an increase from 187.9 to 270.6 in handguns per 1000 Americans and from 627.0 to 815.5 in all guns per 1000 Americans. In contrast, handgun homicides declined 27%. In 1974, when the total U.S. population was 211 million, handguns were involved in nearly 11,125 murders (54% of all murders). By 1988, the total U.S. population was 245 million and handguns were involved in roughly 8,278 murders (45% of all murders). Homicide by all means also declined, though at a lesser rate (almost 10%).

⁶⁸ See, e.g., David J. Bordua, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in THE SOCIAL ECOLOGY OF CRIME (James M. Byrne & Robert J. Sampson eds., 1986); David J. Bordua & Alan J. Lizotte, *Patterns of Legal Firearms Ownership: A Situational and Cultural Analysis of Illinois Counties*, 2 L. & POL'Y Q. 147 (1979); Alan J. Lizotte and David J. Bordua, *Firearms Ownership for Sport and Protection: Two Divergent Models*, 45 AM. SOC. REV. 229 (1980); Gary A. Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIMINOLOGY 249 (1993); David McDowall, *Gun Availability and Robbery Rates: A Panel Study of Large U.S. Cities, 1974-1978*, 8 L. & POL'Y Q. 135 (1986); Douglas R. Murray, *Handguns, Gun Control Law and Firearm Violence*, 23 SOC. PROBS. 81 (1975).

⁶⁹ POINT BLANK, *supra* note 46, at 281. This is readily conceded by gun control advocates who, in their ignorance of firearms, believe that long guns are safer than handguns and so claim that such substitution would decrease accidental death. Sam Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35, 51 (1979).

to secure and keep away from a child. Moreover, long guns are both more likely to accidentally discharge, and deadlier when discharged, than handguns.⁷⁰

The trend data indicate the magnitude of the risks involved if a handgun-only ban induced a return to reliance on loaded long guns for (pg.376) home defense. The supposed evil of the "proliferation of handguns" since 1967 has resulted in the handgun largely displacing the long gun as the weapon kept loaded in the home for self-protection. Not coincidentally, since 1967 accidental firearm deaths have *decreased* by almost sixty percent.⁷¹

From the available data, it may be estimated that if eighty-five percent of loaded handguns in American homes in the year 1980 had been long guns, the number of fatal gun accidents would have more than quadrupled, from 1,244 to approximately 5,346. Or, to put it another way, roughly an additional 4,100 lives per year would be lost in accidental shootings in the home if a handgun ban resulted in loaded long guns being kept for home defense in the same numbers as handguns are now kept.

Anti-gun advocates avoid these embarrassing facts and enhance their argument by simply misrepresenting the number of accidental firearms deaths. For example, to support his "communitarian" firearms prohibition program, Amitai Etzioni repeatedly claims that 14,000 Americans die each year in gun accidents. The actual figure is 1,400. Testimony by the American Academy of Pediatrics urging that Congress adopt stringent anti-gun policies exaggerated by more than fifty percent the number of children under age of fifteen killed in firearms accidents annually.⁷²

HCI uses an advertisement which pictures an infant playing with a pistol. In fact, fortunately, less than fifteen children and infants under age five die in handgun accidents each year. Of course, every one of those deaths is a terrible, needless tragedy. But, it is less than one-twentieth the tragedy of the 380 such infants who accidentally drown in swimming pools each year. Yet, nobody would likely demand a ban on new swimming pools and certainly nobody would require that all those who currently own pools fill them in. Of course, handguns and swimming pools are very different things that may merit very different policy responses. Among the relevant differences are that, unlike handguns, pools are not used to defend against 2.1 million crimes each year, nor do pools save innumerable innocent lives.

Moreover, studies of the adults whose recklessness causes gun (pg.377) accidents (whether directly or by allowing guns to fall into the hands of children) find that these irresponsible perpetrators closely resemble the average murderer in attitude and life history. Those "who cause such accidents are disproportionately involved in other accidents, violent crime and heavy drinking."⁷³ To reiterate, while there are compelling arguments for gun control (such as laws seeking to disarm irresponsibles), the argument for disarming the general public cannot be made on any theory of saving lives or reducing crime. Its real basis is the desire of persons holding certain moral

⁷⁰ POINT BLANK, *supra* note 46, at 280-81. *See also Original Meaning, supra* note 3, at 261-63 (1983) (concluding, *inter alia*, that the dangers are particularly great for small children because the trigger mechanisms on long guns are easier to operate and because long guns are more easily discharged without actually firing the gun).

⁷¹ POINT BLANK, *supra* note 46, at 275.

⁷² 1985-86 *Hearings on Legislation to Modify the 1968 Gun Control Act, Before the Subcommittee on Crime of the House Judiciary Committee*, v.1, 164 (1985) (American Academy of Pediatrics representative Dr. Joseph Greensher testifying that "one child under age 15 each day [is killed in a firearm accident] .").

⁷³ Philip J. Cook, *The Role of Firearms in Violent Crime: An Interpretative Review of the Literature*, in CRIMINAL VIOLENCE 269 (Marvin E. Wolfgang & Neil A. Weiner eds., 1982). *See also* James Q. Wilson & Richard J. Herrnstein, CRIME AND HUMAN NATURE 19 (1985) (stating that "[y]oung men who drive recklessly and have many accidents tend to be similar to those who commit crimes.").

and cultural views to have those views symbolically validated by the law and the contrary view of others condemned.

D. The Average Person as Murderer

Finally, we come to the argument that law abiding, responsible people must be disarmed because murders are supposedly committed by ordinary people in the heat of anger—thousands of "gun murders [are] done by law-abiding citizens who might have *stayed* law-abiding if they had not possessed firearms."⁷⁴ This is simply false. The point most often invoked as supporting it is that "[m]ost murders are committed by a relative or close acquaintance of the victim."⁷⁵ The statement itself is technically false because most murders are not committed by a "close" acquaintance. Often, victim and perpetrator are at least somewhat acquainted because "acquaintance homicide" often means a drug addict killing his dealer in the course of robbing him; a loan shark or bookie killing a non-paying customer; and gang members, drug dealers, and members of organized crime "families" killing each other. Concomitantly, it is manifestly a non sequitur to infer from acquaintance, or even blood relationship, that the killer is an ordinary citizen rather than a long-time criminal. That would only follow if ordinary citizens differ from criminals in that a criminal neither knows (pg.378) anyone nor is related to anyone.

The other data supposedly proving murderers to be ordinary citizens is citation of FBI statistics as showing that seventy-three percent of murders "were committed by previously law abiding citizens ... in arguments with family members or acquaintances."⁷⁶ But this is either a fabrication or an embarrassing gaffe. Far from showing that seventy-three percent of murderers had no prior record, the Uniform Crime Report (UCR) cited and other FBI data on the issue, invariably show seventy to eighty percent of murder arrestees have prior arrests for violent felony or burglary.⁷⁷ These data are confirmed by numerous local studies over the past forty years.⁷⁸ Additionally, FBI national data for an earlier five year period showed that arrested murderers who had an adult criminal record had an average prior criminal career of at least six years duration, including four major felony arrests.⁷⁹

Also, it may not be inferred that the remaining twenty to twenty-five percent of murderers are ordinary law-abiding people. There are two reasons why only seventy to eighty percent of murderers have prior adult criminal records. First, ten to fifteen percent of murderers are juveniles who, by definition, cannot have such records. Second, wife murderers generally have long prior histories of violence which have not resulted in arrest because they attacked spouses and other family

⁷⁴ I took this quote from an undated, unpaginated National Coalition to Ban Handguns pamphlet titled "A Shooting Gallery Called America" which also asserts "that most murders are committed by previously law abiding citizens where the killer and the victim are related or acquainted."

⁷⁵ *Id.*

⁷⁶ Lindsay, THE CASE FOR FEDERAL FIREARMS CONTROL 22 (1973) reprinted in *Firearms Legislation Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess., v.II, 1549, 1574 (supposedly citing the Federal Bureau of Investigation's Uniform Crime Report for 1972, but without specifying a page number).

⁷⁷ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT 35-38 (1972).

⁷⁸ See Gary A. Kleck & David J. Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & POL'Y Q. 271, 292 (1983); Gary A. Kleck, *Capital Punishment, Gun Ownership and Homicide*, 84 AM. J. SOC. 882, 893 (1979).

⁷⁹ PROFILE OF OFFENDERS ARRESTED, FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORT, 43 (1970-75).

members.⁸⁰ As a leading authority on domestic homicide notes: "The day-to-day reality is that most family murders are preceded by a long history of assaults Intrafamily homicide is typically just one episode in a long standing syndrome of violence."⁸¹ (pg.379)

In sum, virtually all murders are committed by the same kind of aberrants who are responsible for fatal gun accidents—people whose striking lack of concern for human life and safety is demonstrated by life histories of violence, substance abuse, and dangerous accidents. Certainly our laws should target such irresponsibles for disarmament. But, there is no basis for thinking gun ownership by responsible, law abiding adults is a crime risk. On the contrary, it is one of the most effective deterrents we have against crime.

⁸⁰ Police have long been loathe to arrest in such situations. Moreover, in approximately 50% of relatively serious cases, the police have no opportunity to make an arrest because the victim fails to report the attack out of belief that it is a private affair, or that the police will not take action, or out of fear of retaliation. *See* U.S. BUREAU OF JUSTICE, PREVENTING DOMESTIC VIOLENCE AGAINST WOMAN (August 1986); VIOLENT CRIMES BY STRANGERS AND NON-STRANGERS (January 1987) (statistics based on National Crime survey responses rather than police reports).

⁸¹ Murray A. Straus, Ph.D., *Domestic Violence and Homicide Antecedents*, 62 BULL. OF N.Y. ACAD. OF MED. 446, 454, 457 (1986); Murray Straus, *Medical Care Costs of Intrafamily Assault and Homicide*, 62 N.Y. ACAD. OF MED. 556, 557 (1986).