





# Journal on Firearms and Public Policy

Volume 14

The Journal on Firearms and Public Policy is the official publication of the Center for the Study of Firearms and Public Policy of the Second Amendment Foundation.

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**Volume 14**

**Fall 2002**

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# Exposing the Second Amendment: Federal Preemption of State Militia Legislation

By J. Norman Heath <sup>al</sup>

*Opponents of the individual rights view of the Second Amendment often argue that the Amendment only protects state government powers over state militias. This article examines the caselaw and other legal history involving federal/state conflicts over control of state militias. In this conflict, one would expect the Second Amendment to have always played an important role—if, indeed, the Amendment were meant to constrain federal powers over the militia. In fact, the Second Amendment has played essentially no role in American militia-control jurisprudence. Federal preemption of state militia powers is one of the most well-established propositions of constitutional law. Examining the development of this preemption, beginning with the seminal case of *Houston v. Moore*, illustrates the unremitting assertion of federal supremacy, as well as the fictitious nature of the “states’ right” theory of the Second Amendment. This article was originally published in the Fall 2001 issue of the University of Detroit Mercy Law Review, volume 79, pages 39-73.*

*‘Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress . . . .’ United States Supreme Court, *Houston v. Moore*, 18 U.S. (5 *Wheaton*) 1, 24 (1820).*

## I. INTRODUCTION

In 1814 a Pennsylvania militiaman failed to muster when called to federal service. He was then tried, convicted, and fined by a military tribunal convened under authority of the state of Pennsylvania. This simple exercise of military authority in wartime raised federal issues of sufficient complexity that after six years of legal wrangling, the matter arrived before the United States Supreme Court. The case upholding the validity of the

conviction was *Houston v. Moore*,<sup>1</sup> and the majority opinion in the case has since been cited by the high court more than thirty times.<sup>2</sup> The federal issues confronted were whether a state could adjudicate or legislate concurrently with the federal government. The Court's opinion in *Houston* held that Congress, exercising its legislative powers under the Militia Clauses of the federal constitution, had preempted the power of the state legislatures to regulate the militia.<sup>3</sup>

Second Amendment scholarship appears to have overlooked this matter of Congressional preemption of state militia legislation, yet federal preemption has a profound effect on the question of whether the Second Amendment protects state militia authority or an individual right.<sup>4</sup> Since the Third Circuit ruled in 1942 that the Second Amendment, "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power,"<sup>5</sup> many people have come to understand the Second Amendment as representing only an immunity held by state governments against interference from Congress. Subsequent courts have concurred that the amendment, "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms."<sup>6</sup>

But despite the body of lower court jurisprudence, a persistent and contentious debate over the exact nature of the Second Amendment's guarantee has been conducted in the legal press.<sup>7</sup> A preponderance of scholars now appear to embrace what the Sixth Circuit once labeled, "the erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States."<sup>8</sup> It would seem almost obvious that the legal community, in debating the validity of these lower federal court decisions, ought first to have ascertained what authority the states retain over the militia under existing U.S. Supreme Court jurisprudence, and the means, express or implied, by which state power has been preserved. To engage in a credible disquisition on the nature of the Second Amendment a scholar should first be familiar with that body of jurisprudence which relates to actual control of the militia.

Despite the critical importance of such an inquiry, the relevant case law seems barely to have been touched by the scholarly literature.<sup>9</sup> This article seeks to remedy that shortcoming. The

following analysis tests the validity of the disputed lower federal court Second Amendment jurisprudence by identifying the actual status of the militia with regard to the power of Congress to preempt state enactments. If the lower federal court Second Amendment decisions are founded in Supreme Court militia jurisprudence, then we can reasonably dismiss the “individual right” interpretation of the amendment. Conversely, if the Constitution as expounded by the high court leaves Congress with the power to preempt the states’ ability to maintain well-regulated militia, then it would follow that the Second Amendment, if it is to have any meaning at all, must refer to a right to keep and bear arms that is held directly by citizens and is not conditional on state sponsorship.

This analysis is preceded by the observation that the Second Amendment has never been interpreted unambiguously by the U.S. Supreme Court.<sup>10</sup> The amendment has been definitively interpreted by lower federal courts as protecting only state authority from Congressional interference, or as protecting a “collective right” exercisable only through the agency of state government, which is effectively the same as declaring the amendment a protection of state legislation.<sup>11</sup>

The analysis which follows shows that federal power over the militia is not limited by the Second Amendment. Federal regulation, even if deficient or onerous to the states, can preempt state militia regulation. More unexpectedly, the following analysis also reveals that the Supreme Court has long considered militia jurisprudence to be an archetype for federal preemption. Landmark decisions on commerce regulation and other subjects have been patterned after explanations of federalism propounded in *Houston v. Moore*, a militia case. Two centuries of Supreme Court pronouncements on the militia contradict the modern lower-court gun-case assertions about the Second Amendment. The “states’ right” alleged to reside in the amendment vanishes when exposed to the light of actual militia jurisprudence. Those who argue that Second Amendment protection belongs to the people, as expressly stated in the amendment itself, are being answered with a shadow-doctrine having no existence outside gun case dicta.

## II. MILITIA PREEMPTION AND THE MARSHALL COURT: STATE MILITIA LAW HELD INVALID

Professor Laurence H. Tribe identifies in Supreme Court jurisprudence three modes of federal preemption exercisable by Congress against the states: (1) “express preemption,” where Congress has in so many words declared its intention to preclude state legislation of a described sort in a given area; (2) “implied preemption,” where Congress, through the structure or objectives of its enactments has by implication precluded a certain kind of state regulation in an area; and (3) “conflict preemption,” where Congress did not necessarily focus on preemption of state regulation at all, but where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives.<sup>12</sup>

In addition, Professor Tribe recognizes:

Because congressional purposes can be either substantive or jurisdictional, a state action may be struck down as an invalid interference with the federal design either because it is in substantive conflict with the operation of a federal regulation or program or because, whatever its substantive impact, it intrudes jurisdictionally upon a field that Congress has validly reserved for exclusively federal regulation. It is this latter phenomenon that some describe as field (or “occupying the field”) preemption—which, it is worth stressing, may fall into any of the three categories set forth above.<sup>13</sup>

In *Houston v. Moore*, a delinquent militiaman had been convicted by a military tribunal consisting of state militia officers acting under authority of a Pennsylvania statute which provided for the enforcement of certain provisions of the federal Militia Act of February 28, 1795,<sup>14</sup> or any subsequent militia laws Congress might enact.<sup>15</sup> Houston’s counsel argued against the validity of his client’s conviction by the state of Pennsylvania for an offense against the federal government.<sup>16</sup>

The following federal issues were thus raised: (1) Does a militiaman enter federal service immediately upon receiving an order to muster? (2) Are the states competent to legislate concurrently with Congress in an area of delegated power once that

power has been exercised by Congress? (3) Is a military tribunal founded under state authority competent to enforce federal law?

On the first question, the Supreme Court ruled that Houston, though having been called to federal service, had not yet entered that service, because the relevant federal statute appeared to designate actual arrival at the point of rendezvous as the beginning of federal service.<sup>17</sup> But settling the matter of Houston's not having entered federal service did not dispose of the case in favor of the state and its agent, because the argument had been raised that the state law authorizing the court martial had been preempted by Congressional legislation.

On that second question, the preemption of the state law, the Justices appear to have very thoroughly debated the matter and agreed only inasmuch that state militia law would be preempted by federal law in all cases of actual conflict between the state and federal militia acts. Justice Bushrod Washington, who wrote the Court's opinion, adopted the broadest view of preemption, one that would later be known as "field preemption," by which any exercise by Congress of its militia powers entirely displaced state legislation, whether conflicting or not. In setting forth the facts of the case, Justice Washington noted the extent of the federal legislation, and remarked on its deficiencies:

The [federal militia] laws which I have referred to amount to a full execution of the powers conferred upon Congress by the constitution. They provide for calling forth the militia . . . They also provide for organizing, arming, and disciplining the militia . . . This system may not be formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest. But to my apprehension, the whole ground of Congressional legislation is covered by the laws referred to.<sup>18</sup>

Justice Washington then went on to rule that state militia legislation was federally preempted, following this course of reasoning:

It may be admitted at once, that the militia belong to the States, respectively, in which they are enrolled, and that they are subject; both in their civil and military capacities, to the jurisdiction and laws of such State, except so far as those laws are controlled by acts of Congress constitutionally made . . . Congress has provided for all these subjects, in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defence. After this, can the State governments enter upon the same ground--provide for the same objects as they may think proper, and punish in their own way violations of the laws they have so enacted? . . . From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of Congress, shall be a certain fine; if that provided by the State legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of Congress is, nevertheless, thwarted and opposed . . . This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the State governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other. Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it

has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.<sup>19</sup>

Justice Washington thus concluded his exposition of federal preemption by repeating his observation that the federal militia laws of the day were deficient for the purpose of maintaining a well regulated militia, but held that passage of those deficient laws nonetheless preempted state legislation. The Court's opinion asserted that the power of the states to legislate over the militia had vaporized on May 8th, 1792, with the passage of the first federal act organizing the nation's militia.<sup>20</sup>

On the final question (whether a state military tribunal could enforce a federal military law), the Court, considering the implications of the Militia Act of February 28, 1795 (which did not specifically preclude the states from enforcing federal military law) and the Judiciary Act (which the Court said precluded the states from enforcing federal criminal and civil law, but did not cover military law), ruled in the affirmative.<sup>21</sup> Houston's conviction was valid, not because Pennsylvania had the power to legislate over the militia, but because the Court found that Congress had implicitly granted Pennsylvania the authority to enforce the federal law.<sup>22</sup>

But the decision and the various holdings were far from unanimous. "Two of the [seven] judges are of the opinion that the law in question is unconstitutional, and that the judgement below ought to be reversed," admitted Justice Washington, while, "The other judges are of the opinion that the judgment ought to be affirmed; but they do not concur, in all respects, in the reasons which influence my opinion."<sup>23</sup>

The matter of federal preemption of state legislation seems to have been warmly debated by the Court; both the concurring opinion by Justice Johnson and the dissent by Justice Story included discussions of the question. Justice Johnson was somewhat more generous to state authority than Justice Washington had been:

It is obvious, that in those cases in which the United States may exercise the right of exclusive legislation, it

will rest with Congress to determine whether the general government shall exercise the right of punishing exclusively, or leave the States at liberty to exercise their own discretion. But where the United States cannot assume, or where they have not assumed, this exclusive exercise of power, I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also . . . . But it is contended, that if the States do possess this power over the militia, they may abuse it. This is a branch of the exploded doctrine, that within the scope in which Congress may legislate, the States shall not legislate. That they can not, when legislating within that ceded region of power, run counter to the laws of Congress, is denied by no one; but, as I before observed, to reason against the exercise of this power from the possible abuse of it, is not for a court of justice. When instances of this opposition occur, it will be time enough to meet them.<sup>24</sup>

Using Professor Tribe's criteria, then, Justice Johnson would have placed authority for punishing militia-men in the area of "conflict preemption," by which the states can exercise concurrent power provided the state law is not in direct conflict with the Congressional act.

Justice Story wrote a dissenting opinion, in which Chief Justice John Marshall joined.<sup>25</sup> Their dissent was founded in a view of federalism that was ultimately more nationalist than Justice Washington's. Story and Marshall objected to the enforcement of federal law by a state tribunal, their reading of the Militia Acts and Judiciary Act being very different from those of the majority:

If, then, we strip the case before the Court of all unnecessary appendages, it presents this point, that Congress had declared that its own Courts Martial shall have exclusive jurisdiction of the offence; and the State of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own Courts upon the merits of every case of alleged delinquency. Can a



more direct collision with the authority of the United States be imagined?<sup>26</sup>

But while the dissent was nationalist on the issue of concurrent adjudication, Story and Marshall, like Justice Johnson, took a somewhat more generous view of concurrent state legislative authority over the militia:

It is almost too plain for argument, that the power here given to Congress over the militia [by Article I, Section 8, Clauses 15 and 16], is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities . . . Nor does it seem necessary to contend, that the power “to provide for organizing, arming, and disciplining the militia,” is exclusively vested in Congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the States, it may well leave a concurrent power in the latter. But when once Congress has carried this power into effect, its laws for the organization, arming, and discipline of the militia, are the supreme law of the land; and all interfering State regulations must necessarily be suspended in their operation. It would certainly seem reasonable, that in the absence of all interfering provisions by Congress on the subject, the States should have authority to organize, arm, and discipline their own militia . . . If, therefore, the present case turned upon the question, whether a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to Congress; and if not, then it is retained by the States. The fifth [sic] amendment to the constitution, declaring that [and here Justice Story actually quotes the Second Amendment in its entirety] “a well regulated militia being necessary to the security of a free State, the right of the people to

keep and bear arms shall not be infringed,” may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested.<sup>27</sup>

The last passage provides striking judicial evidence of the eminent jurists’ view of the Second Amendment in this early period. Justice Story, and evidently Chief Justice Marshall himself, considered the Second Amendment as having no important bearing on the preservation of state militia powers from the preemptive effects of Congressional legislation. Rather, the amendment was mere “plain reading” evidence, illustrative of the notion that the states have an interest in militia.<sup>28</sup> Marshall hadn’t mentioned the amendment at all when he considered nearly identical controversies in 1794 and 1815.<sup>29</sup>

The other important observation to draw from the dissent is that Justices Story and Marshall would have made state militia regulation subject to “conflict preemption.” They believed that in Houston such a conflict did exist: “Upon the whole, with whatever reluctance, I feel myself bound to declare, that the clauses of the militia act of Pennsylvania now in question, are repugnant to the constitutional laws of Congress on the same subject, and are utterly void . . . .”<sup>30</sup>

But years later Justice Story embraced Justice Washington’s broad ‘field preemption’ holding. In the landmark fugitive slave case of 1842, *Prigg v. Pennsylvania*,<sup>31</sup> writing for the majority Story cited the opinion from which he had dissented (on other grounds) in Houston for the proposition that:

[I]f Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as

expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognised by this Court, in the case of *Houston v. Moore*, 5 Wheat. Rep. 1, 21, 22; where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for state legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed.<sup>32</sup>

In *Houston v. Moore*, the Supreme Court did not dispose of all possible questions relating to Congressional preemption of state militia legislation. But the justices did establish parameters for such preemption: the states' ability to regulate militia was either entirely precluded by any Congressional action, or was precluded only to the extent of the Congressional action. After a thorough and divisive consideration of the issue, all three justices who wrote opinions clearly agreed that in event of conflict, state militia regulation must yield to federal law. The Second Amendment, overlooked by most of the Court, was thought to have no important bearing on the matter even by the one justice who bothered to mention it.

### III. FEDERAL "INTERFERENCE" WITH STATE MILITIA UPHELD

#### A. The Marshall Court Affirms Federal Powers, and Denies State Powers

Although *Houston v. Moore* appears to be the only case in which the Supreme Court has ruled directly on the constitutionality of specific state militia legislation in terms of federal preemption, the issue has managed to insinuate itself at the high court from time to time, illustrating the effects of Congressional exercise of its powers over the militia. The next militia case to reach the high court, *Martin v. Mott*,<sup>33</sup> followed *Houston* by only seven years.

*Martin v. Mott* was a replevin case arising originally from the delinquency and subsequent conviction of a New York militiaman called to federal service by the president as authorized by Congress under the 1795 act. Unlike *Houston*, however, Jacob

E. Mott had been convicted by a court martial convened under federal authority.<sup>34</sup> Mott's counsel therefore argued against the legitimacy of the congressional act which authorized the president to call forth the militia, and against the propriety of the particular federal order which his client had failed to obey. Where *Houston v. Moore* had tested the legitimacy of state militia legislation, *Martin v. Mott* was to test the legitimacy of federal militia legislation and executive militia powers.

The Court, with Justice Story writing the opinion, held in *Martin v. Mott* that the provisions of the federal Militia Act of February 28, 1795 were constitutional where they conferred upon the President the power to call forth the militia to repel invasion. This power had been delegated to Congress by Article I, Section 8, Clause 15 of the Constitution, but the Court held that the legislature could constitutionally transfer the power to the executive.

One of the important related issues resolved in *Martin v. Mott* was whether the president had sole authority to determine in a given situation whether the militia were genuinely necessary for the constitutionally-designated purposes of executing the laws, repelling invaders, or suppressing insurrection. During the War of 1812, the governors of several New England states had protested that they, not the president, were to determine whether an emergency really existed, and whether the militia were to be made available to the federal government. Otherwise, as the Supreme Judicial Court of Massachusetts advised the governor, "subjecting them to the command of the president, would place all the militia in effect at the will of Congress and produce a military consolidation of the States without any constitutional remedy."<sup>35</sup> Evidently it did not occur to jurists of that period that the Second Amendment might be invoked as a remedy for federal interference with the militia.

The Court's decision in *Martin v. Mott* resolved the question in favor of federal authority.<sup>36</sup> The states cannot refuse to deliver the militia to federal service when called forth by the president.

Thus in two cases, decided seven years apart and straddling the landmark preemption case *Gibbons v. Ogden*,<sup>37</sup> the Supreme Court recognized the power of Congress to preempt state militia legislation, and denied the states the power to question or interfere with a federal requisition of militia.

### B. The Taney Court Finds Unforeseen Federal Powers

The delegation of militia power by Congress to the President was to have stunning implications in the 1849 case *Luther v. Borden*,<sup>38</sup> which arose from events that occurred when the Governor of Rhode Island declared martial law in 1842. Rhode Island, unlike the other states, did not enact a new constitution following the Revolution, but continued to operate under its old constitution dating from the time of the Crown charter. Because this constitution sharply restricted suffrage, a number of citizens “rebelled” in 1842, writing their own constitution and creating their own legislature, and electing one Thomas W. Dorr to the new “governorship.”

Most of the legal issues in the case that reached the Supreme Court involved the alleged illegal entry of a militia officer (under state authority) into the home of one of the rebels. Counsel for the erstwhile rebel argued against the legitimacy of the declaration of martial law by claiming that the insurrectionary government had the support of the majority of citizens, and conversely that the established government did not.<sup>39</sup>

Chief Justice Taney, writing for the majority, conceded that under Article IV, Section 4, of the Constitution, the federal government had an obligation to guarantee the citizens of every state a republican government, and that attendant to that obligation was the power to decide which of two rival claimants was the legitimate government of a state. But Chief Justice Taney refused to accept that arbitrating such a dispute was the jurisdiction of the federal courts, instead ruling it was a political question to be resolved by Congress.

Going further, Chief Justice Taney held that by having placed in the President, by the Militia Act of 1795, the power to call forth the militia to suppress insurrections, Congress had also vested in the Executive the remarkable authority to determine which of two rivals was the legitimate government of a state. The Court in *Martin v. Mott* had recognized that Congress, in passing the 1795 act, had given the President the power to order the state militias into federal service to repel invasions. But another clause of the same act delegated to the President the authority to call forth the militia of the several states to suppress an insurrection against the government of a single state, when requested by the executive of a state in which the insurrection was

taking place. According to Chief Justice Taney, in order to determine the legitimacy of such a request for militia the President had necessarily to make a determination of the legitimacy of the state executive making the request.<sup>40</sup>

Thus Congress, exercising its powers under the Militia Clauses, had delegated to the President the authority to declare a domestic emergency and then pass sole judgment on the legitimacy of a state government.

The Court's construction in *Luther v. Borden* strongly asserted national supremacy via the Militia Clauses. However, it must be admitted that there may have remained one small exception to federal control of the militia. Seemingly, the President could not, without a request from the governor or legislature, compel the militia service of the citizens of Rhode Island in the suppression of an insurrection in their home state, but he could compel the militia service of the citizens of Connecticut or Massachusetts, or even Florida, over the objections of the governors of those states, to suppress the same Rhode Island insurrection, if invited to do so by one of the rival governors of Rhode Island. This possible limitation might arise from the language of Article IV, Section 4, which provides that the national government shall protect the state governments from "domestic violence" upon application of the state legislature or executive.<sup>41</sup> If so, then the limitation is not merely an idiosyncrasy of the Militia Act of 1795. It might therefore be said that in Article IV, Section 4, is some protection for state militia powers. On the other hand, under the current National Guard arrangements this effect appears to have been circumvented. The National Guard, having simultaneous status as the Army Reserve, can be brought into federal service at any time for any legal purpose.<sup>42</sup>

#### IV. *THE SELECTIVE DRAFT LAW CASES*: A FATAL BLOW TO THE "STATES' RIGHT" THEORY

In 1903, after one hundred and eleven years of neglect, the Militia Act of 1792 was repealed, and the process of reorganizing the militia into the National Guard began. The National Defense Act of 1916 created new obligations on the organized militia, affiliating them closely with the regular army.<sup>43</sup>

With the approach of American entry into the First World War, questions arose concerning the susceptibility of the Na-

tional Guard, as well as the citizenry at large, to the draft. The matter came to the Supreme Court's attention in *The Selective Draft Law Cases*,<sup>44</sup> in which the constitutionality of conscription was upheld, and the limited militia powers reserved to the states under Article I, Section 8, Clause 16 were found to be subordinate to the delegated power of Congress to raise armies.

Surprisingly, the Court had little precedent on which to rely in ruling on the constitutionality of conscription. The leading case on the subject appeared to be the hoary,<sup>45</sup> an 1863 Pennsylvania decision upholding the constitutionality of the draft. On first consideration, the Pennsylvania high court ruled against the constitutionality of the draft, and on November 9th, 1863 issued an injunction against it.<sup>46</sup>

A passage in one of two concurring opinions presented a "states' right" interpretation of the Second Amendment. Agreeing with the court majority that the Civil War draft was unconstitutional, Justice Thompson claimed that conscription by the national government would threaten the sovereignty of the states, and make every citizen vulnerable to being subjected to military law. He contended that it violated the Second Amendment because it allowed Congress to eliminate the militia, "by absorbing the militia into the army . . . calling them out individually without requisition on the states . . ."<sup>47</sup>

Justice Thompson was not explicit as to whether he believed the drafted militiamen, or the state governments, or both, had standing under the Second Amendment. Other than that ambiguity, it is clear he invoked the amendment as a protection of state militia. In any event, the Supreme Court of Pennsylvania quickly reversed itself, and on January 16th, 1864, lifted its injunction and declared the draft constitutional.<sup>48</sup>

Fifty-four years later the U.S. Supreme Court definitively upheld the constitutionality of conscription in *The Selective Draft Law Cases*. However, at the time of the original *Kneedler* injunction there was no governing jurisprudence on conscription, so on the basis of two paragraphs in a concurrence to an overruled decision one could fairly argue that the "states' right" model was legally viable for nine weeks in the winter of 1863-64. Justice Thompson's short-lived contention about the Second Amendment proves one thing: the "states' right" interpretation has not merely been overlooked in militia jurisprudence, it has been re-

jected. Jurists confronting questions of federalism and the militia have undoubtedly been conscious of the amendment, but have rarely seen fit to mention it even in passing, and have never detailed how the states may wield it against federal interference.

In deciding *The Selective Draft Law Cases*, the Supreme Court completely ignored the amendment and delivered a fatal blow to claims of state immunity from threats to the existence of the militia.

In a unanimous opinion, the Court found that the state militia could be abolished by the expedient of absorbing militiamen into the federal army: 'There was left therefore under the sway of the states undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared.'<sup>49</sup>

In affirming the power of Congress to conscript from the organized militia as well as from the unenrolled citizenry, the Court held to a version of federal preemption more limiting to the states than that espoused by Justice Washington in *Houston v. Moore*. Congress can exercise its delegated army power to even the extent of overriding the reserved state militia powers.<sup>50</sup> The Court described both the delegated and reserved militia powers as existing primarily for the purpose of reducing the necessity for Congress to exercise its power to raise armies. Chief Justice White's opinion made no mention of the hazards of a standing army to the security of a republic, which in the framing period had been of great concern. Instead, the Court seems to have viewed Congress' militia powers as a convenience which alleviated some of the expense and trouble of maintaining large standing forces. Under *The Selective Draft Law Cases* Congress can abolish the state militia by conscripting all able bodied men directly into the regular army.<sup>51</sup> In deciding the case, the Supreme Court took note of *Kneedler v. Lane*, but disregarded the suggestion that the Second Amendment protected the existence of state militia.



V. *HAMILTON V. REGENTS*: A LONE CITATION

## A. State-Mandated Training Upheld, with Caveat

There is one Supreme Court decision in which the Second Amendment was cited for the proposition that the states retain certain powers. However, the case, *Hamilton v. Regents*,<sup>52</sup> involved no contest between state and federal acts and placed no limit on federal power. Nor did it even involve a question of militia power per se. *Hamilton* was a suit brought by pacifist college students objecting to a California state requirement that they take military training while attending state-funded universities. The Supreme Court held that:

Undoubtedly every state has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States Army or in state militia . . . or as members of local constabulary forces or as officers needed effectively to police the state . . . . So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government and transgresses no right safeguarded to the citizen by the Federal Constitution, the state is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment; *Houston v. Moore*, 5 Wheat. 1, 16, 17; *Dunne v. People* (1879) 94 Ill. 120, 129, 34 Am. Rep. 213; 1 Kent's Commentaries, 265, 389. Cf. *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580.<sup>53</sup>

Here the Second Amendment, as well as *Houston v. Moore* and *Dunne v. People*, were cited for the proposition that the states retain the authority to provide or even require certain training of their citizens in preparation for service in the militia or police or other such organizations, or even in preparation for service in the federal army, with the proviso that any such training must be "within retained powers and not inconsistent with any exertion of national authority." Again, this leaves the militia power, if the case refers to state militia power at all, subject to "conflict pre-emption." It would be quite remarkable if the Court had held the

authority of the states to train its citizens were protected from federal interference, because Article I, Section 8, Clause 16 specifically reserves to the states the authority to train the militia according to the discipline prescribed by Congress. The immediate question in *Hamilton* was not whether state authority was protected from Congress, but whether it was protected from claims of immunity by students of state universities. The citation to the Second Amendment is thus obscure, because it seems to imply that the constitutional function of the Second Amendment consists of protecting the state governments from their own citizens. This would certainly make the Second Amendment unique among the Bill of Rights, and is surely not the construction intended by the constitutional framers, nor probably by the Court in *Hamilton*. It seems much more likely that the Court cited the Second Amendment in this case, as had Justice Story in his *Houston* dissent, merely as being illustrative of the importance of the militia to the states. The Court's opinion in *Hamilton* explicitly recognized that state legislation in this area was subordinate to national legislation.

#### B. The Cases Cited in *Hamilton* Briefly Discussed

Justice Butler's citation to two pages of the *Houston* opinion gives the appearance of referring to a passage supporting the preservation of state militia powers, but this reflects an error in reading; upon close examination one can see that Justice Washington was merely paraphrasing an argument of the defendant's counsel, which he ultimately rejected.<sup>54</sup> Support for concurrent state power was voiced in the *Houston* concurring and dissenting opinions, but in both cases with the stipulation that state legislation must not conflict with that of Congress. *Presser v. Illinois*,<sup>55</sup> a Supreme Court case cited for comparison by the *Hamilton* court, dates from 1886, and involved an Illinois man convicted of illegally parading a company of armed men in violation of a section of the Illinois state militia law. Presser's counsel began by arguing that the entire militia law of Illinois was an unconstitutional trespass upon Congress's authority to organize and arm the militia. Counsel cited *Houston v. Moore* in support of this contention.<sup>56</sup>

The Supreme Court, however, held that the specific sections of the Illinois statute under which Presser had been charged,

prohibiting the formation or parading of unauthorized “private militia,” were severable from those sections which had the purpose of organizing the state militia, and which might or might not be invalid.<sup>57</sup> The Supreme Court therefore declined to review the validity of state militia legislation in this case, but left it open to question with pointed language:

We have not found it necessary to consider or decide the question thus raised, as to the validity of the entire Military Code of Illinois, for, in our opinion, the sections under which the plaintiff in error was convicted may be valid, even if the other sections of the act were invalid. For it is a settled rule ‘that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable.’<sup>58</sup>

Presser’s counsel also raised a Second Amendment defense, which the Court rejected because the Second Amendment, like the rest of the Bill of Rights, had not by 1886 been incorporated against the states.

Another case cited by the *Hamilton* court, *Dunne v. People*,<sup>59</sup> an Illinois state high court decision, does argue for the preservation of state militia power from Congressional preemption of the “field” type. While not binding on the federal courts, *Dunne* deserves comment if only because of its citation by the U.S. high court. *Dunne* involved a militiaman claiming exemption from jury duty under a section of the Illinois militia law. Failing to appear as requested by the Criminal Court of Cook County, Dunne was fined by a county judge who refused to accept the validity of the state law. In a political atmosphere charged by tensions over labor disputes, private militias, and the constitutionality of the National Guard, Dunne and the prosecutor agreed to ask the opinion of the state supreme court as to the validity of Illinois’ militia laws under the federal constitution.<sup>60</sup>

The Illinois high court obliged with a nineteen-page opinion repeatedly asserting the authority of the state of Illinois to enact legislation organizing the state militia along its own lines, provided that the militia were also available for federal use, re-organized for such occasions along the lines required by federal

law. Paradoxically, the Illinois court also admitted that, “[w]hen Congress has once acted within the limits of the power granted in the constitution, its laws for organizing, arming and disciplining the militia are supreme, and all interfering regulations adopted by the States are thenceforth suspended, and for the same reasons all repugnant legislation is unconstitutional.”<sup>61</sup>

The court in *Dunne* alluded to the Second Amendment in three places, once quoting the amendment’s ‘preamble’ as illustrating the necessity of the militia to the states, then quoting the entire amendment for the same proposition, and later distinguishing between Illinois’ prohibition of unauthorized military companies, and, “[t]he right of the citizen to ‘bear arms’ for the defence of his person and property,” which, the court said, “is not involved, even remotely, in this discussion.”<sup>62</sup>

Ultimately, the Illinois high court did not regard the Second Amendment as having more than illustrative significance to matters of federal preemption. Instead the court relied on constitutional construction and a marked misreading of *Houston v. Moore*. The *Dunne* opinion was sufficient for the political purposes of the day, but is remembered now less for its own merits than for having been cited in *Hamilton*, and both decisions allowed that state militia powers are subject to what in Professor Tribe’s terms would be called “conflict preemption.”<sup>63</sup>

#### VI. *PERPICH V. DEP’T OF DEFENSE*: AFTER ALL THESE YEARS, WHERE IS THE ‘STATES’ RIGHT’?

*The Selective Draft Law Cases* decision in 1918 had addressed only one of the state/federal issues arising when the federal government appropriates the militia. With the passage of the Dick Act in 1903, and the National Defense Act of 1916, Congress imposed a “dual enlistment” system on the National Guard.<sup>64</sup> Under this system, still in effect, any person joining the National Guard is also required to accept membership in the reserve units of the regular armed forces. The members of the “state militia” are thus simultaneously members of the federal army.<sup>65</sup> This method of overhauling the militia system, while rejuvenating a moribund institution, created a tangle for anyone attempting to understand the state/federal relationship with regard to the militia. A 1917 article in the *Yale Law Journal* by Major and Judge Advocate S.T. Ansell presciently observed:

The National Guard, then, is organized militia placed in a special federal status. The grave question is: Whence came the federal power to impose the new and additional status of the militia of the several states? Is the source of authority to be found in the “power” to provide for organizing, arming and disciplining the militia, or in the power “to raise and support armies”? Or is it not to be found at all? Is the National Guard still but the militia of the several states subject only to the limited constitutional use of the federal government, or is it indeed an army of the United States over which the power of Congress is unlimited? The question is fundamental, and though it received scant consideration in Congress, it may be expected to persist, if not to plague . . . . The [National Defense] act is prickly with doubt, and it is not over-cautious to say that it will be a long time before judicial authority will have shown the way of handling it with assurance.<sup>66</sup>

Ansell was correct in his prediction; the constitutional difficulties he observed went unhandled by judicial authority for 73 years, until the Supreme Court ruled in *Perpich v. Dep't of Defense*<sup>67</sup> that the dual enlistment system of the National Guard was a constitutional exercise of Congress' power to raise armies. *Perpich* involved a direct challenge by the states to Congressional authority over the militia. The issue in *Perpich* however, was not Congressional preemption of state legislation, but rather the constitutionality of Congress' repeal of its own provision which had previously allowed governors to decline to send National Guard units outside the United States on training missions. The conflict in *Perpich* was between federal legislative and state executive powers, and was resolved decisively in favor of the federal government.<sup>68</sup>

Most of the *Perpich* opinion is devoted to a recapitulation of the evolution of the National Guard. The Court's reasoning in upholding the arrangements created by Congress was essentially the same as that found in *The Selective Draft Law Cases*. In *Perpich* it was decided that under its power to raise armies, Congress can constitutionally create a system (the National Guard) whereby

the state militia are simultaneously enrolled in the Army or Air Force reserve, and can be called forth for any reason, including overseas training, in their federal, regular-army capacity.

In response to the objections of Governor Perpich of Minnesota that this arrangement, by which Congress can strip the states of their militia indefinitely and at any time, was unconstitutional, the Supreme Court did not cite the Second Amendment, but instead noted three facts: (1) The overseas training missions to which Governor Perpich objected usually involved limited numbers of Guardsmen, leaving the state an adequate force; (2) The Montgomery Amendment of 1986 (to the militia code) allowed the Governor to withhold consent to such training missions if the Guard were needed for an actual state emergency;<sup>69</sup> and (3) Congress, under 32 U.S.C. Section 109(c) allows the states to keep, at their own expense, “defense forces” which are exempt from conscription into national service.<sup>70</sup> These “forces,” being not subject to federal call, are not the “militia” of Article I, Section 8, which is explicitly subject to federal call, and is presumably the same militia referred to in the Second Amendment.<sup>71</sup>

In other words, Congress, by statute, allows the states some accommodation for “defense forces,” but not for militia. Congress is apparently not required to make any accommodation for militia by any constitutional provision other than Clause 16 of Article I, Section 8.

In discussing the constitutional underpinnings of the decision, the Court observed:

This Court in *Tarble’s Case*, 13 Wall. 397 (1872), had occasion to observe that the constitutional allocation of powers in this realm gave rise to a presumption that federal control over the Armed Forces was exclusive. Were it not for the Militia Clauses, it might be possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia. The Militia Clauses, however, subordinate any such structural inferences to an express permission while also subjecting state militia to express federal limitations.<sup>72</sup>

Here the Court clearly declined an opportunity to identify the Second Amendment as an express protection of state power. Instead the Court described the Militia Clauses, which reserve to the states the power to appoint officers and to train the militia according to the discipline prescribed by Congress, as the sole obstacle to federal prohibition of state militia. If the Second Amendment represents the protection of state power from federal preemption, the Justices would have been remiss in not citing it in the above passage. In fact, in this most recent decision involving a direct challenge by the states to federal interference with the militia, the Second Amendment was nowhere to be seen.

It would be a mistake, however, to read these Supreme Court militia-related cases only as “negative evidence” of the nature of the Second Amendment. These cases are much more significant for what they do say about federal preemption of state militia authority than for what they don’t say about “the right of the people to keep and bear arms.”

Lower federal courts have persistently maintained that the Second Amendment protects a state-held power from federal interference, or that it protects individual activity from Congressional infringement only within state-sponsored military activity. But in so ruling, these courts have adopted the untenable position that the Second Amendment guarantees the state governments an immunity which the U.S. Supreme Court has, for 180 years, consistently ruled does not exist. Rather than representing bits of dicta with implications for the Second Amendment, the Supreme Court militia-law rulings stand in direct contradiction to the numerous lower federal court gun-case rulings; they render the lower court rulings transparently and fatally flawed.

Whatever right one believes is protected by the Second Amendment, surely it cannot be made contingent on military activity that the states are ultimately powerless to authorize. The suggestion that the Congressionally-mandated National Guard system has somehow circumvented or supplanted a right expressly guaranteed to the people is a fallacy of the most obvious sort: “The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts . . . if the latter part be true, then written constitu-

tions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.”<sup>73</sup>

When a gun possession case comes before a district or appeals court, we are told that the Second Amendment protects only state militia authority from Congressional interference, but when an actual militia case comes before the Supreme Court, we find the specified immunity does not exist. The jurisprudence of the circuit courts of appeals is indeed circular.

#### VII. MILITIA PREEMPTION INFORMS OTHER AREAS OF JURISPRUDENCE

Might it be possible to extrapolate from Supreme Court jurisprudence in non- militia areas some further indication of how federal preemption applies to the militia powers? The danger in such an exercise would seem to lie in assuming that federal preemption of state militia powers is analogous to federal preemption of other state powers. The Supreme Court, however, has spared us any such concerns over speculative assumptions by repeatedly citing the militia as an example of Congress’ ability to preempt state power. Justice Story’s exposition of “field preemption,” seen above in *Prigg v. Pennsylvania*, is but one example. The Court’s field preemption holding in the *Houston* militia case was also cited favorably by the Court in *Cooley v. Board of Wardens*,<sup>74</sup> a landmark commerce case, for the proposition, “that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations.”<sup>75</sup> In *Gilman v. Philadelphia*,<sup>76</sup> an interstate commerce case, the Court cited *Houston* for the proposition that the states retain concurrent powers of legislation except where the Constitution has explicitly made federal power exclusive, or prohibited such power to the states, or, “[w]here, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.”<sup>77</sup> In *The Legal Tender Cases*,<sup>78</sup> Justice Bradley in his concurring opinion listed the militia powers among those that characterize the supremacy of the federal government:

The United States is not only a government, but it is a National government, and the only government in this



country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands, and interstate commerce; all which subjects are expressly or impliedly prohibited to the State governments. It has power to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline, and call into service the militia of the whole country.<sup>79</sup>

*Clafin v. Houseman*<sup>80</sup> involved a question of possible overlapping state and federal court jurisdiction, and here the Supreme Court again endorsed the version of ‘field preemption’ propounded by Justice Washington in 1820: “[t]he act of Congress having instituted courts-martial, as well as provided a complete code for the organization and calling forth of the militia, the entire law of Pennsylvania on the same subject might well have been regarded as void.”<sup>81</sup> Justice Brandeis, speaking out in his *Gilbert v. Minnesota*<sup>82</sup> dissent against a state law that prohibited public speech-making by pacifists, asserted, as Justice Bradley had in *Gilman*, that national defense and the militia were areas primarily of federal concern, and noting *Houston* said that:

[T]he responsibility for the maintenance of the Army and Navy, for the conduct of war and for the preservation of government, both state and federal, from “malice domestic and foreign levy” rests upon Congress. It is true that the States have the power of self-preservation inherent in any government to suppress insurrection and repel invasion; and to that end they may maintain such a force of militia as Congress may prescribe and arm . . . *Houston v. Moore*, 5 Wheat. 1. But the duty of preserving the state governments falls ultimately upon the Federal Government, *Luther v. Borden*, 7 How. 1 . . . . And

the superior responsibility carries with it the superior right. The States act only under the express direction of Congress.<sup>83</sup>

Three decades later, when the Supreme Court finally did strike down a state sedition law in *Pennsylvania v. Nelson*,<sup>84</sup> Chief Justice Warren had recourse to *Houston v. Moore* in dispensing with the offensive legislation:

Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable. We are not unmindful of the risk of compounding punishments which would be created by finding concurrent state power. In our view of the case, we do not reach the question whether double or multiple punishment for the same overt acts directed against the United States has constitutional sanction. Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment. Cf. *Houston v. Moore*, 5 Wheat. 1, 31, 75; *Jerome v. United States*, 318 U.S. 101, 105.<sup>85</sup>

In *Missouri Pacific v. Porter*,<sup>86</sup> another interstate commerce case, the Court cited *Houston* in saying of Congress that,

Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.<sup>87</sup>

More recently, Justice O'Connor cited *Houston v. Moore* both for concurrent jurisdiction and legislative preemption in her ma-

majority opinion in *Tafflin v. Levitt*,<sup>88</sup> which involved concurrent jurisdiction of state courts in civil cases arising under federal law:

We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. See, e.g., *Houston v. Moore*, 5 Wheat. 1, 25-26, (other citations omitted). . . This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim. See, e. g., *Clafin*, *supra*, at 137 ('Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction') (citations omitted); see also *Houston*, *supra* at 25-26.<sup>89</sup>

In his concurring opinion in the same case, Justice Scalia, joined by Justice Kennedy, also found a useful guidepost in *Houston v. Moore*: "It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction—an exercise of what one of our earliest cases referred to as 'the power of congress to withdraw' federal claims from state-court jurisdiction."<sup>90</sup>

The Supreme Court, with each of the foregoing citations, accepted that the power of Congress to preempt state militia legislation is analogous to the power of Congress to preempt state legislation in other areas of delegated power.<sup>91</sup> These high court decisions refute the notion that the Second Amendment creates an exception to Congressional power over the "state" militia. The Supreme Court considers the militia to be a model of how Congress can limit the power of the states.<sup>92</sup>

The famous 1824 case *Gibbons v. Ogden*<sup>93</sup> resulted in one of the most important preemption decisions ever issued by the high court. *Gibbons* was an interstate commerce case, but the losing counsel, casting about for evidence to support the power of the states to regulate concurrently with Congress, seized on Justice

Story's *Houston v. Moore* dissent from four years earlier, citing it seven times for its espousal of the concurrence of state militia powers, as well as citing Justice Johnson's concurring opinion three times for the same proposition, and also making the same erroneous cite to Justice Washington's paraphrasing of counsel noted above in discussing *Hamilton v. Regents*.<sup>94</sup> In all, the losing counsel in *Gibbons* selectively cited from *Houston v. Moore* eleven times for a losing proposition: concurrent authority of the states to legislate over an area in which Congress has exercised a delegated power.<sup>95</sup>

The argument, perhaps designed to appeal to Justices Story and Johnson, seems to have failed to impress either one of them, for the Court's decision in *Gibbons* was unanimous in striking down the state legislation at issue and propounding a version of "field preemption." It would be a mistake, of course, to make too much of the citations offered by counsel in *Gibbons*, and their apparent rejection by the Marshall court. But it is intriguing that four years before deciding *Gibbons* the Justices engaged in a thorough and divisive debate over the preemptive effect of federal legislation on state militia law. Nearly every legal scholar to have written about *Gibbons* has not hesitated to compare it to *Sturges v. Crowninshield*,<sup>96</sup> an 1819 bankruptcy case which involved a concurrent power question but only an easily disposed-of question relating to federal preemption (Congress had enacted, then repealed, its own bankruptcy regulation).

Far from being an isolated decision on an arcane subject, *Houston* is of seminal importance to federalism as expounded by the high court. G. Edward White recognized the significance of *Houston v. Moore* in his *History of the Supreme Court*:

The question whether, if Congress is delegated an exclusive regulatory power over a delineated area, and does not exercise it, or only partially exercises it, the states may exercise any regulatory powers in this area was, as we shall see, the fundamental issue in the Commerce Clause cases . . . But as significant as this question was, it had not been addressed in detail by the Marshall Court before *Houston*.<sup>97</sup>

## VIII. THE CONCRETE EFFECTS OF MILITIA PREEMPTION

One more legal controversy involving the militia deserves recognition here: the antebellum attempts by the Massachusetts Legislature to re-define militia eligibility. At the Massachusetts Constitutional Convention of 1853 delegates proposed amending the state constitution to allow for the enrollment in the militia of non-white citizens.<sup>98</sup> The measure was taken up specifically in response to a petition by free blacks, and from the discussion which followed it appears that a good deal of sympathy existed for granting their request. Nonetheless, in a remarkably earnest debate, delegates eager to avoid a “nullification” controversy argued persuasively that the state could not constitutionally enroll in the militia any citizen who would be excluded from such service under federal militia law. This argument was premised on general constitutional grounds, not racial distinctions, and was accepted as legally valid even by the abolitionist Charles Sumner, who otherwise supported black militia enrollment.<sup>99</sup>

The applicable federal law in 1853 was still the Militia Act of 1792, which required the enrollment of all free, white, male citizens.<sup>100</sup> Advocates of black militia enrollment were not able to muster a legally-credible response to the argument that state authority in this area had been federally preempted, since it was plain to everyone that Congress held the power to “organize, arm, and discipline” the militia, and had legally exercised it.<sup>101</sup>

But the enrollment issue was not forgotten, and took on a new urgency following *Dred Scott v. Sandford*,<sup>102</sup> in which Chief Justice Taney had reasoned away Scott’s standing in part with the observation that federal law excluded Scott and all other black Americans from militia service, which Chief Justice Taney called, “one of the highest duties of the citizen.”<sup>103</sup> Had the state of Massachusetts successfully enrolled free blacks in the militia, their names would have been included in the muster rolls returned to the federal government, and they would have become liable to federal service—a powerful argument for their standing in federal court, and possibly undermining the *Dred Scott* decision.<sup>104</sup>

In late 1859, and again in early 1860, the Massachusetts House and Senate passed legislation which struck the word “white” from the state militia eligibility requirements. Both attempts met with gubernatorial vetoes.<sup>105</sup> Governor Nathaniel P.

Banks had consulted the Massachusetts Supreme Judicial Court, as well as his attorney general, on the constitutionality of the legislation. The Supreme Judicial Court issued a unanimous advisory opinion announcing that, in their view, Massachusetts could not constitutionally enroll in the militia any person who was excluded under federal militia law.<sup>106</sup> The state high court's opinion included no citations indicating the source of the doctrine, but a similar opinion issued days earlier by the state attorney general had cited *Houston v. Moore* as the governing case.<sup>107</sup>

The implications of the Massachusetts enrollment controversy are significant: the state legislature sought to arm its citizens as militia; the Supreme Judicial Court, recognizing that Congress had exercised the power to “organize and arm” the militia, declared, “The general government having authority to determine who shall and who may not compose the militia, and having so determined, the state government has no legal authority to prescribe a different enrolment.”<sup>108</sup>

A clearer example of federal preemption as it relates to the Second Amendment could hardly be found than the inability of Massachusetts to enroll militiamen. If the states cannot constitutionally place arms in the hands of their citizens in defiance of deficient and inhibiting federal militia regulations, then in what way does the Second Amendment serve to protect the state militia or a state-sponsored right to bear arms? The federal government, not the states, holds the authority to define the organized militia, and thus to dictate who may be armed as organized militia.<sup>109</sup> According to the Massachusetts Supreme Judicial Court, the Second Amendment was irrelevant to the matter of the state's ability to arm militia: “Nor is this question, in our opinion, affected by the second article of the amendments of the Constitution, of the following tenor: ‘A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.’”<sup>110</sup>

## IX. CONCLUSION

The federal court gun-possession case pronouncements bearing on the militia and federalism are irreconcilable with the actual constitutional status of state militia regulation as expounded by the U.S. Supreme Court. Intentionally or otherwise, jurists have deluded themselves and the legal community into

accepting the convoluted proposition that plenary power to organize and arm the militia was both delegated to Congress (through the Militia Clauses) and reserved to the states (under the Second Amendment).<sup>111</sup>

If such a phenomenon exists in the U.S. Constitution it is remarkable that the Supreme Court has never cited the Second Amendment as an example of “dual sovereignty,” “dual federalism,” or “new federalism” in the course of its endless labors to define the boundaries of state and federal power. In actual Supreme Court jurisprudence, there is no constitutional provision other than Article I, Section 8, Clause 16 which limits Congressional interference with the “state” militia. The Court’s repeated citations to the preemption of state militia law when adjudicating state-federal conflicts in other areas of regulation greatly reinforce the conclusion that state militia powers are ordinary in their susceptibility to federal preemption.

Because the Second Amendment is not a prophylactic benefiting state legislative or executive powers, it must represent either a nonsensical protection of federal militia powers from federal interference,<sup>112</sup> or it represents some type of right held directly by the people. Any benefit to the state governments from the Second Amendment must be incidental to a citizen-held right binding on the federal government.

The dwindling proponents of the ‘states’ right’ interpretation of the amendment cannot point to a single instance of a militia-related federal law being invalidated on Second Amendment grounds, despite the Supreme Court having had multiple opportunities spread over two centuries to invoke the amendment for that purpose. The suspicious obstinance of the lower federal courts in clinging to the “states’ right” interpretation presents a serious obstruction to the proper adjudication of the nature and scope of the Second Amendment right, and thus serves only to exacerbate and prolong the current public-policy impasse regarding gun ownership. The American public deserves a more considered, consistent, and constitutional approach to the delineation of the Second Amendment right. The decisions of the lower federal courts in Second Amendment cases cannot ultimately withstand high court scrutiny; a consistent body of Supreme Court jurisprudence spanning 180 years places federal preemp-

tion of state militia powers among the most well-settled propositions in American constitutional law.

## NOTES

a1. J. Norman Heath is a private scholar currently residing in Massachusetts. This paper is dedicated to the memory of Harold Lee Heath 1918- 2000. The author wishes to thank Charles Eichhorn, Esq; Mark Fuller; Dr. Steve West; Prof. Milton Cantor, Prof. Daniel Gordon, Prof. Ron Story, Prof. Emeritus Dean Alfange, Prof. Janet Rifkin, and Barbara Morgan M.L.S, J.D., all of the University of Massachusetts at Amherst; Prof. Joyce Lee Malcolm; David Hardy, Esq.; Prof. Glenn Reynolds; Robert Dowlut, Esq.; David Kopel, Esq.; Clayton Cramer; Prof. Laurence H. Tribe; Prof. Eugene Volokh; David I. Caplan, Esq.; The National Institute on Firearms and Society, a bipartisan educational group which graciously helped offset the author's submission-related expenses; and his wife, Holly, who is still waiting for a great many chores to get done.

1. 18 U.S. (5 Wheat.) 1 (1820).

2. The Court's opinion has actually been cited by the high court 35 times. There are another 30 or so cites to the concurring or dissenting opinions, though the dissent seems later to have been in part repudiated by its author. See *infra* text accompanying notes 31-32. *Houston* has been cited as precedent for a variety of propositions which are more or less closely related, involving double jeopardy, concurrent jurisdiction, and concurrent legislative power; See also *infra* note 92.

3. The Militia Clauses are clauses 15 and 16 of Article I, section 8 of the U.S. Constitution:

The Congress shall have the Power... .. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions. To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

4. The Second Amendment to the U.S. Constitution reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

5. *U.S. v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942).

6. *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971).

7. It is referring the reader to a very small sampling of the recent body of work to mention William Van Alstyne, "The Second Amendment and the Personal Right to Arms," 43 *Duke L.J.* 1236-55 (1994); Sanford Levinson, "The Embarrassing Second Amendment," 99 *Yale L.J.* 637-59 (1989); Keith Ehrman & Dennis Henigan, "The Second Amendment in the Twentieth Century: Have



You Seen Your Militia Lately?,” 15 *U. Dayton L. Rev.* 5 (1989); Akhil Amar, “The Bill of Rights as a Constitution,” 100 *Yale L.J.* 1131, 1162-75 (1991); and David C. Williams, “The Militia Movement and Second Amendment Revolution: Conjuring with the People,” 81 *Cornell L. Rev.* 879-952 (1996). The total number of articles published on the subject, dating back at least to 1874, is in the hundreds. See “The Right to Keep and Bear Arms for Private and Public Defence,” 1 *Cent. L.J.*, 259-61, 273-75, 285-87, 295-96 (1874) (John F. Dillon, & S.D. Thompson, eds.).

8. *U.S. v. Warin*, 530 F.2d 103, 108 (6th Cir. 1976). At this writing, the Fifth Circuit Court of Appeals has heard arguments in *U.S. v. Emerson*, a gun possession case in which, for the first time in sixty years, a district court has thrown out an indictment on Second Amendment grounds. See also *U.S. v. Cody Hutzell*, 217 F. 3d 966, 969 (8th Cir. 2000); *U.S. v. Spruill*, 61 F. Supp. 2d 587 (W.D. Texas 1999). Both of the latter cases appear to treat the Second Amendment right as individual, albeit of limited scope.

9. A few authors have dropped strong hints pointing in this direction. See Gregory Lee Shelton, “In Search of the Lost Amendment: Challenging Federal Firearms Regulation through the State’s Right Interpretation of the Second Amendment,” 23 *Fla. St. U. L. Rev.* 105 (1995); Glenn Harlan Reynolds & Don B. Kates, “The Second Amendment and State’s Rights: A Thought Experiment,” 36 *Wm. & Mary L. Rev.* 1737 (1995); David Kopel, “The Second Amendment in the Nineteenth Century,” 1998 *BYU L. Rev.*, 1359; Robert Dowlut, “The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots,” 8 *Stan. L. & Pol’y Rev.* 25-40 (1997); Stephen Halbrook, “The Right of the Workers to Assemble and to Bear Arms,” 76 *U. Det. Mercy L. Rev.* 943 (1999).

10. The last Supreme Court case, and possibly the only meaningful one, to address the Second Amendment was *U.S. v. Miller* 307 U.S. 174 (1939), which has been interpreted by both courts and scholars as standing alternately for the proposition that the Second Amendment protects only the possession of firearms in actual, government-sponsored militia service, or only the possession of those kinds of firearms which might be useful in a citizen militia. Miller was an evidence case and was remanded to the district court for further proceedings, which never took place because the defendant absconded after the quashing of the indictment by the district court and was thereafter murdered. In fact the defense made no appearance at all before the Supreme Court; arguments were heard only from the federal prosecutor. Every aspect of the debate over *Miller* has already been beaten to death in the journals, and its only relevance to the topic of this article is that there is no consensus on exactly what the *Miller* decision means. The court in *Cases v. U.S.*, 131 F.2d 916, 922 (1st Cir. 1942), for example, found *Miller* of limited value as precedent: “[I]f the rule of the Miller case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus,” while most subsequent courts have chosen to find in *Miller* a rule for broad application, see list *infra* note 11.

11. See e.g., *U.S. v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988), “Later cases have analyzed the second amendment purely in terms of protecting state

militias, rather than individual rights”; *U.S. v. Cody*, 460 F.2d 34, 37 (8th Cir. 1972), “We find no evidence that the prohibition of 922(a)(6) obstructs the maintenance of a well regulated militia”; *U.S. v. Warin*, 530 F.2d 103, 106-08 (6th Cir. 1976), “It is also established that the collective right of the militia is limited to keeping and bearing arms, the possession or use of which at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.... It would unduly extend this opinion to attempt to deal with every argument made by defendant and *amicus curiae*... all of which are based on the erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States”; *U.S. v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974), “The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms. . . .”; *U.S. v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992), “The purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia.”; *U.S. v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981), “[I]t is further held that the right guaranteed by the Second Amendment is a collective right to bear arms rather than an individual right, and has application only to the right of the state to maintain a militia and not to the individual’s right to bear arms”; *U.S. v. Kraase*, 340 F. Supp. 147, 148 (E.D. Wis. 1972), “Second amendment protection to Mr. Kraase might arise if proof were offered at the trial demonstrating that his possession of the weapon in question had a reasonable relationship to the maintenance of the ‘well-regulated Militia’”; *Vietnamese Fisherman’s Assoc. v. Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982), “By its express language, that Amendment prohibits only such infringement on the bearing of weapons as would interfere with ‘the preservation or efficiency of a well regulated militia,’ organized by the State.” See also *U.S. v. Oakes*, 564 F.2d 384 (10th Cir. 1977); *U.S. v. Decker*, 446 F.2d 164 (8th Cir. 1971); *U.S. v. Johnson, Jr.*, 441 F.2d 1134 (5th Cir. 1971); *Thompson v. Dereta*, 549 F. Supp. 297 (D. Utah 1982); *U.S. v. Gross*, 313 F. Supp. 1330 (S.D. Ind. 1970).

12. Laurence H. Tribe, *American Constitutional Law* § 6-28, at 1176-77 (3d ed. 2000).

13. *Id.* at 1177.

14. 1 Stat. 424, ch. 36 (1795).

15. Section 21 of the Act of the State of Pennsylvania, of the 28th of March, 1814.

16. *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 3-4.(1820)

17. *Id.* at 16, 20-21, 24.

18. *Id.* at 15. The federal militia acts mentioned were those of May 2, 1792; Feb. 28, 1795; and April 18, 1814 (emphasis added).

19. *Id.* at 21-24 (emphasis added).

20. 1 Stat . 271, ch. 33 (1792), “An Act More Effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States.”

21. *Moore*, 18 U.S. at 26-31. 1 Stat. 424, ch. 36 (1795), “An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the act now in force for those purposes.” The judiciary act mentioned was evidently that of 1789.
22. This explanation of the Court’s decision in *Houston* is confirmed by Justice Story in *Martin v. Mott*, 25 U.S. 19, 34 (1827), and by Justice O’Connor in *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990). See also Tribe, *American Constitutional Law* § 6-2, at 1036 n.35 (3d ed. 2000).
23. *Moore*, 18 U.S. at 32. Justice Johnson went even further, remarking In this case, it will be observed, that there is no point whatever decided, except that the fine was constitutionally imposed upon the plaintiff in error. The course of reasoning by which the judges have reached this conclusion are various, coinciding in but one thing, viz., that there is no error in the judgment of the State Court of Pennsylvania. *Id.* at 47. As shown later in this article, however, the Supreme Court has many times accepted the precedential value of *Houston*. David B. Sweet has commented that in *Houston*, “there was apparently a majority result without a majority opinion.” David B. Sweet, *Annotation*, “Supreme Court’s Construction and Application of Federal Constitution’s Militia Clause (Art. I, § 8, Cls. 15 and 16), Allocating Power Over Militia Between Congress and States,” 110 *L. Ed.* 2 738, 746 (1992). In fact there was a Court’s opinion, approved by a majority. The high court at the time consisted of seven members: Justice Washington wrote the Court’s opinion; a concurring opinion was written by Justice Johnson alone; Justice Story wrote a dissent, and added at page 76: “In this opinion I have the concurrence of one of my brethren.” The unnamed justice joining Story was none other than Chief Justice John Marshall. *Writings of John Marshall*, at viii (Boston: Munroe 1839); G. Edward White, *History of the Supreme Court* vols. III-IV, 536-37. So it appears that the Court’s opinion represented the views of Justices Washington, Duvall, Livingston, and Todd, not in every particular, but to a greater extent than the concurrence or dissent.
24. *Moore*, 18 U.S. at 34, 45 (emphasis added).
25. Justice Story assisted in the publishing of Marshall’s writings, where the *Houston* dissent was published alongside Marshall’s own opinions and labeled as, “an expression of Marshall’s view, as well as his [Story’s] own, upon a somewhat dark point.” *Writings of John Marshall*, at viii. It seems Marshall actually delegated the writing of the opinion to Story, providing him with a sketch of his ideas. White, *supra*, note 23.
26. *Moore*, 18 U.S. at 71-72.
27. *Id.* at 49-50, 50-54 (emphasis added).
28. Cf. *Dukakis v. Dep’t of Defense*, 686 F. Supp. 30 (D. Mass. 1988), 36, *aff’d* 859 F.2d 1066 (1st Cir. 1988).
29. See *Meade v. Deputy Marshal*, 16 F. Cas. 1291 (C.C.D.Va. 1815) (No. 9372) (decided by Marshall while sitting as a circuit judge in Virginia); *Calendar of Virginia State Papers* vol. VII 347-48, (Richmond, 1888) (publishing Marshall’s Oct. 1794 advisory opinion as Attorney General of Virginia).
30. *Moore*, 18 U.S. at 75-76.

31. 41 U.S. (16 Pet.) 539 (1842) (Chief Justice John Marshall died in 1835).
32. *Id.* at 617-18.
33. 25 U.S. (12 Wheat.) 19 (1827).
34. *Id.* at 29.
35. William Hyslop Sumner, *Militia Laws of the United States and of the Commonwealth of Massachusetts... And A Discussion of an Important Constitutional Question 114* (Dedham, MA: Gazette Office, 1815) (quoting an advisory opinion reported at Opinion of the Justices 8 Mass. 549 (1812)) (Only three of the seven justices were available for the opinion, the rest being outside Boston at the time. For a contemporary discussion of the controversy, see *Id.*, 109-36).
36. *Martin*, 25 U.S. at 29. *Cf. McCall's Case*, 15 F. Cas. 1225, 1229-30 (E.D. Pa. 1863) (No. 8669).
37. 22 U.S. (9 Wheat.) 1 (1824).
38. 48 U.S. (7 How.)1 (1849).
39. *Id.* at 16, 18.
40. *Id.* at 42-45.41. U.S. Const. art. IV § 4 of the Constitution reads: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."
42. See *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990), in which was found constitutional the system by which the National Guard not only can be federalized, but essentially has a federal status simultaneous with its state affiliation.
43. 39 Stat. 166, ch. 134 (1916) (National Defense Act of June 3, 1916).
44. 245 U.S. 366 (1918).
45. *Kneedler v. Lane*, 45 Pa. 238; 1863 Pa. LEXIS 152 (Sup. Ct. Penn., 1863) (upholding conscription). Cited at 245 U.S. 366, 388.
46. *Kneedler v. Lane*, 45 Pa. 238; 1863 Pa. LEXIS 151, Nov. 9, 1863; Decided; *Kneedler v. Lane*, 3 Grant 465; 1863 Pa. LEXIS 268 (Sup. Ct. Penn., E. Dist., November 9, 1863) (granting an injunction against national conscription). *Kneedler v. Lane*, 45 Pa. 238, includes both a decision against the constitutionality of the draft and the subsequent reconsideration which found the draft constitutional.
47. *Kneedler v. Lane*, 45 Pa. 238; 1863 Pa. LEXIS 151, at 271-72; *Kneedler v. Lane*, 3 Grant 465; 1863 Pa. LEXIS 268 (Sup. Ct. Penn., E. Dist., November 9, 1863), at 498. Both citations include the concurring opinion cited.
48. *Kneedler v. Lane*, 3 Grant 523; 1864 Pa. LEXIS 201 (Sup. Ct. Penn., E. Dist. January 16, 1864) and *Kneedler v. Lane*, 45 Pa. 238; 1863 Pa. LEXIS 152 (Sup. Ct. Penn., 1863).
49. *Selective Draft Cases*, 245 U.S. at 383 (emphasis added).
50. See also *Cox v. Wood*, 247 U.S. 3, 6 (1918).
51. *Cf. McCall's Case*, 15 F. Cas. 1225 (E.D. Pa. 1863) (No. 8669); *Ex Parte Dostal*, 243 F. 664 (1917); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Dukakis v.*

*Dep't of Defense*, 686 F. Supp. 30, 36 (D. Mass. 1988); *Perpich v. Dep't of Defense*, 496 U.S. 334 (1990).

52. 293 U.S. 245 (1934).

53. *Id.* at 260-61 (emphasis added).

54. At pages sixteen and seventeen of the Court's opinion in *Houston v. Moore*, Justice Washington paraphrases an argument of counsel which, after analyzing it at pages twenty-one through twenty-four, he clearly rejects. See also *infra*, note 92.

55. 116 U.S. 252 (1886).

56. *Id.* at 255-57.

57. *Id.* at 264.

58. *Id.* at 263.

59. 94 Ill. 120 (1879).

60. *Id.* at 123. See also Stephen Halbrook, "The Right of the Workers to Assemble and to Bear Arms," 76 *U. Det. Mercy L. Rev.* 943, 969-72 (1999).

61. *Dunne*, 94 Ill. at 129.

62. *Id.* at 126, 132, 140.

63. A federal appeals court decision from the same year as *Hamilton* noted the reserved power of the states under Article I, Section 8, Clause 16 to appoint officers to the militia, and in reference to this held that the states may "govern" the militia when it is not in federal service. *U.S. v. Dern*, 74 F.2d 485, 487 (D.C. 1934). The court in that case found it necessary to reconcile two federal laws, one granting federal recognition and pay to state-appointed National Guard officers, the other an appropriations rider denying federal pensions to militia officers who simultaneously accepted federal pay as a benefit of National Guard service. The New York officer in question received a federal pension for having been wounded while in Army service during the First World War. The appeals court's holding legitimized the state commission held by the officer, while yet denying him either his federal pension or his federal National Guard recognition and pay. The federal court did not mention the Second Amendment; the sole authority cited for the particular holding was a state case, *People ex rel. Leo v. Hill*, 27 N.E. 789 (N.Y. 1891). In *Hill*, it had been decided that federal law permitted state legislatures to authorize the governor to disband militia companies. *Hill*, 27 N.E. at 791. There are other state court opinions affirming the power of the states to provide administration to the militia in various ways. Some find the source of state power in federal statutes. See *Commonwealth v. Thaxter*, 11 Mass. (11 Tyng) 386, 391-392 (1814); *Commonwealth v. Allen*, 16 Mass. (16 Tyng) 523, 524 (1820) (affirming *Thaxter*); *Joseph Adams, Petitioner for Cert.*, 21 Mass. (4 Pick.) 25, 28-29 (1826); *Opinion of the Justices*, 39 Mass. (22 Pick.) 571 (1838); *Smith v. Wanser*, 52 A. 309, 312 (N.J. App. 1902). See also *Texas Nat. Guard Armory Board v. McCraw*, 126 S.W. 627, 631, 640 (Tex. Sup. Ct. 1939). Other state decisions hold the power to be inherent in the states. See *State ex rel. Lannig v. Long*, 66 So. 377, 378 (La. Sup. Ct. 1914); *State ex rel. Madigan v. Wagener*, 77 N.W. 424 (Minn. Sup. Ct. 1898); *People ex rel. Gillet v. DeLamater*, 287 N.Y.S. 979, 984 (N.Y. App. Div. 1936). *State v. Johnson*, 202 N.W. 191, 192 (Wis. 1925), identified the

Second Amendment as evidence for declaring the militia a state entity in a worker's compensation case, but *State ex rel. Atwood v. Johnson*, 175 N.W. 589, 597 (Wis. 1919), which also cited the Second Amendment, recognized the potential for federal preemption: "[I]n matters of concurrent jurisdiction between the federal government and the states the state has the right to legislate where such legislation is not in conflict with the act of Congress." 175 N.W. at 597.

64. 32 Stat. 775, ch. 196 (1903) (Dick Acts (Militia)) (National Defense Act 39 Stat. 166, ch. 134 (1916)).

65. *Perpich v. Dep't of Def.*, 496 U.S. 334, 346 (1990).

66. S.T. Ansell, "Legal and Historical Aspects of the Militia," 26 *Yale L.J.*, 471, 480 (1917). Ansell also cited *Houston v. Moore* as authority for the following: "Of course, all state law upon the subject of militia organization, including age limits, is in abeyance, since the National Defense Act so completely covers that field. Federal law alone governs." *Id.* at 475-76.

67. 496 U.S. 334 (1990).

68. It should be noted, however, that the statutory construction of the National Guard system leaves the states responsible for some tort claims and certain administrative duties. See *Maryland ex rel v. U.S.*, 381 U.S. 41 (1965). Guardsmen can in some instances retain limited state employment without federal recognition. See *infra* note 109.

69. *Perpich*, 496 U.S. at 351-52. "The Montgomery Amendment was enacted as § 522 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. [No.] 99-661, § 522, [sic] 100 Stat. 3871." *Id.* at 337 n. 2.70. *Id.* at 352. 32 U.S.C. Sec. 109 (c) reads:

In addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, or the District of Columbia may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces.

32 U.S.C. § 109(c) (2001).

71. Cf. Opinion of the Justices, 80 Mass. (14 Gray) 614 (1859), 619:

We do not intend, by the foregoing opinion, to exclude the existence of a power in the state to provide by law for arming and equipping other bodies of men, for special service of keeping guard, and making defence, under special exigencies, or otherwise, in any case not coming within the prohibition of that clause in the Constitution, art. I sec. 10, which withholds from the State the power to 'keep troops'; but such bodies, however armed or organized, could not be deemed any part of 'the Militia,' as contemplated and understood in the Constitution and laws of Massachusetts and of the United States, and as we understand, in the question propounded for our consideration.

*Id.* at 619.

72. 496 U.S. 334-54. The cited *Tarble's Case* itself involved no question concerning the militia, but rather the power of a state court to issue a writ of habeas corpus in the case of an alleged minor who had enlisted in the regular army. The Supreme Court denied that a state court had power to issue such a writ. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871).

73. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).

74. 53 U.S. (12 How.)299 (1851).

75. *Id.* at 319.

76. 70 U.S. (3 Wall.) 713 (1865).

77. *Id.* at 730.

78. 79 U.S. (12 Wall) 457 (1870).

79. *Id.* at 555.

80. 93 U.S. 130 (1876).

81. *Id.* at 141-42 (emphasis added).

82. 254 U.S. 325 (1920).

83. *Id.* at 338.

84. 350 U.S. 497 (1956).

85. *Id.* at 509-10.

86. 273 U.S. 341 (1927).

87. *Id.* at 346.

88. 493 U.S. 455 (1990).

89. *Id.* at 458-59.

90. *Id.* at 470 (quoting *Houston v. Moore*, 5 Wheat. 1, 26 (1820)).

91. If anything, preemption of state militia regulation is actually more clear-cut than other legislative exercises of supremacy. Even the modest stipulation, “[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), rarely applies to militia controversies, since it refers to conflicting exercises of delegated federal and reserved state powers, and not to the simultaneous exercise of a single delegated power by both parties. Conflicts in organizing the militia fall into the last category, and thus outside the small area of deference described in *Rice*. An exception would be cases involving the appointment of officers. See *infra* note 109.

92. Where *Houston v. Moore* is cited for the proposition of concurrent power, it is usually with reference to sections of Justice Story’s dissenting opinion (which the author appears to have partially repudiated in *Prigg v. Pennsylvania*) or it is with the caveat that any legislation passed by the states cannot be repugnant to that of Congress. For example, *McPherson v. Blacker*, 146 U.S. 1, 41 (1892), lately of such importance in the disputed presidential election, cited *Houston* for the proposition that, “The state law yields only to the extent of the collision,” and Justice Taney in *Thurlow v. Massachusetts*, 46 U.S. 504 (1 How.), 584-85 (1847), noted, incorrectly as it happens,

Thus, in the case of *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, it was held, that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia did not preclude the States from legislating on the same subject, provided the law of the State was not repugnant to the law of Congress. And every State in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed, unless they came in conflict with the law of Congress.

*Id.* (emphasis added). In fact the Court's opinion in *Houston v. Moore* denied the validity of such legislation. Not only was validity of state legislation brought into question in *Houston*, it had been questioned by John Marshall in *Meade v. Deputy Marshal*, 16 F. Cas. 1291 (C.C.D. Va. 1815) (No. 9,372); in *Commonwealth v. Thaxter*, 11 Mass. 386 (1814); in *Opinion of the Justices*, 39 Mass. 571 (1838); and other cases. See *supra* text accompanying note 63.

93. 22 U.S. (9 Wheat.) 1 (1824).

94. *Houston*, 18 U.S. (5 Wheat) at 16-24.

95. There were two attorneys for the respondent, representing Ogden and the State of New York respectively, and between them they cited *Houston* in eight places, at pages 33, 34, 35, 41, 44, 84, 86, and 130, of 22 U.S. 1 (1824), but the citation at page 35 was to three different opinions, and the citation at page 41 was to two, resulting in a total of eleven citations.

96. 17 U.S. (4 Wheat.) 122 (1819).

97. White, *supra* note 23, at 538.

98. *Official Report of the Debates and Proceedings in the State Convention 2*, at 71, 73, 75-76, 80 (Boston: White and Potter, 1853) [hereinafter *Debates and Proceedings*]. Hal Goldman, "Black Citizenship and Military Self-Presentation in Antebellum Massachusetts," *Historical Journal of Massachusetts*, vol. XXVI No. 2, Summer 1997, 170-77 [hereinafter Goldman, "Black Citizenship"].

99. See *Debates and Proceedings*, *supra* note 98, at 69, 89, 90-93; Goldman, "Black Citizenship," *supra* note 98 at 175-76.

100. 1 Stat. 271, ch. 33 (1792). With certain exemptions, see for example, *Opinion of the Justices*, 39 Mass. 571 (1838).

101. U.S. Const. art. I, § 8, cl. 15-16, see *supra* text accompanying note 3.

102. 60 U.S. (1 How.) 393 (1856).

103. *Id.* at 415-16, 420.

104. See F.W. Bird, *Review of Gov. Banks' Veto of the Revised Code on Account of Its Authorizing the Enrollment of Colored Citizens in the Militia*, esp. 11, 45-47 (Boston: N.P. Jewett Co., 1860).

105. *Id.* at 1; *Documents Printed By Order of the Senate of the Commonwealth of Massachusetts, Senate Document No. 71 and 148* (Boston: Wm. White, 1860).

106. *Opinion of the Justices*, 80 Mass. 614 (1859). There were six justices serving at the time.

107. *Acts and Resolves Passed by the General Court of Massachusetts*, 696-702 (Boston: Wm. White, 1860).



108. 80 Mass. 614, 619 (1859).

109. No longer on the basis of race, but certainly on the basis of age, profession, or many other restrictive factors which Congress might enumerate, including gender, See *Rostker v. Goldberg*, 453 U.S. 57 (1981). Congress can exclude from militia enrollment all persons with occupations it deems critical to national interests; this conceivably includes anyone from air traffic controllers to short-order cooks. See *Opinion of the Justices*, 39 Mass. 571 (1839). Important questions have arisen as to the ability of the states to retain commissioned officers who have been disqualified from federal service, in light of the expressly reserved power to appoint officers. Some of these cases involve federal preemption of state militia law. But while the outcomes have varied somewhat with statutory interpretation, the constitutional supremacy of Congress in prescribing the organization, arming, discipline, and training of the militia has not been questioned. Nor has the Second Amendment figured at all in these considerations of state power to enroll militia. Most recently, the “Don’t Ask, Don’t Tell” policy has resulted in a gay California National Guard officer losing his federal status but retaining limited state status: *Holmes v. California National Guard*, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); *Holmes v. California National Guard*, 109 Cal. Rptr. 2d 154; 2001 Cal. App. LEXIS 508 (Cal Ct. App., First Dist. Div. 3, filed 29 June 2001). Cf. *Tennessee v. Dunlap*, 426 U.S. 312, 48 L. Ed. 660 (1976).

110. 80 Mass. 614, 619-20 (1859).

111. A statement found on the American Bar Association’s website reads, “The United States Supreme Court and lower federal courts have consistently interpreted this Amendment only as a prohibition against Federal interference with State militia and not as a guarantee of an individual’s right to keep or carry firearms.” at <<http://www.abanet.org/gunviol/secondamend.html>> The basis for the A.B.A.’s claim that the U.S. Supreme Court endorses the ‘states’ right’ interpretation of the amendment is almost certainly to be found in a disputed reading of *U.S. v. Miller*, see *supra* text accompanying note 10.

112. According to former Solicitor General Seth Waxman, this problematic interpretation might even be the preferred one. In a letter he wrote to a member of the National Rifle Association, dated 22 August 2000, later posted on the NRA’s website, Waxman first identified the “right” as federal: “the ‘obvious purpose’ of the Second Amendment was to effectuate Congress’s power to ‘call forth the Militia to execute the Laws of the Union...’” (emphasis added). He then went on to offer an ambiguous explanation that contradicted the previous one: “[the]courts have uniformly held that it [the Second Amendment] precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia.” Finally, the Solicitor General alluded to, “the right of the states to maintain a militia that was being preserved...” (emphasis added), at <<http://www.nra.org/research/20000901-AntiGunGroups-001.shtml>> Thus, in three short paragraphs, the Department of Justice endorsed three contradictory interpretations of the amendment, none of which recognized a “right of the people” of any description. The Second Amendment debate is characterized by a puzzling tendency to question the validity of the “individual right” reading while failing to examine at all the validity of the “states’ right” interpretation. Solicitor General Waxman’s letter seems to have

capitalized on this pattern by relying on the neglect of the reader to critically examine the positive, rather than negative, assertions being made.

# Research Agenda on Guns, Violence, and Gun Control

Gary Kleck

*In the last two decades, social scientists began serious, extensive study of firearms issues. This research attention marks a significant change from the academy's lack of interest in earlier decades regarding serious research about guns and gun control. Gary Kleck, Professor of Criminology at Florida State University, has done more than any other scholar to improve and advance firearms-related quantitative social science research. In this essay, Kleck outlines suggested research directions for further quantitative scholarship.*

The intention of this paper is to identify topics related to the links among guns, violence and gun control that have not yet been adequately studied, and to very briefly outline the kinds of research that might add useful knowledge about these topics. In each section a topic is listed, followed by one or more possible research projects. There is no intention to be exhaustive in coverage. Instead, only the more important issues that have not already been adequately addressed in past research are listed. The research projects are limited (with one exception) to those that are reasonably feasible, and are only broadly outlined, rather than described with the kind of detail that would be provided in a research proposal. Supporting citations have been kept to a minimum to save space; interested readers may find relevant information in the pertinent chapters of my book, *Targeting Guns* (Aldine de Gruyter, 1997).

## I. GUNS IN THE HANDS OF CRIMINALS

### A. Distinguishing the Effects of Criminal Gun Ownership Rates from the Effects of Noncriminal Gun Ownership Rates

The best available macro-level evidence indicates that levels of gun ownership in the general population (i.e. criminals and noncriminals combined) have no net effect on rates of crime or

violence, including homicide rates (Kleck and Patterson 1993; Kleck 1997, pp. 24a-256), even though evidence on individual crime incidents indicates that when criminals use guns in attacks, the victim is more likely to die (Kleck and McElrath 1991; Kleck 1997, pp. 242-243). One way to tie these and other findings together is to hypothesize that gun ownership among criminals does, on net, have violence-increasing effects, but that these effects are balanced out by violence-reducing effects of gun ownership and defensive use by noncriminals. Yet no research has been done that separately measures criminal gun ownership levels and noncriminal gun ownership levels.

*Research Project:* This research has not already been done largely because there are no indicators currently available that are known to credibly distinguish between criminal and noncriminal gun levels. Thus, persuasive research on this topic may have to await the development of the necessary indicators. Therefore law enforcement agencies should be encouraged to develop indicators of criminal gun possession/carrying levels, which could serve not only scholarly research purposes but also as valuable indicators of whether law enforcement efforts are succeeding in reducing criminal gun possession.

The measure that best combines utility and feasibility is the percent of arrestees found in possession of a gun at the time of arrest. This does not require police to acquire any new information, but rather merely to record on arrest reports something they already know. Thus it is feasible and cheap, as well as useful. When and if many law enforcement agencies begin to routinely record this information it will be possible to separately assess the impact of criminal gun possession on violence rates, and directly estimate the impact of gun laws and enforcement policies on criminal gun possession.

#### B. The Impact of Gun Theft on Crime Rates

The primary route by which guns get from noncriminals to criminals is via theft, mostly residential burglary (Wright and Rossi 1986). Thus, it is reasonable to hypothesize that higher gun theft rates would increase gun possession among criminals, and thereby increase crime rates. No research has ever been done on this, even though the FBI gathers data on the dollar value of guns reported stolen to law enforcement agencies.

*Research Project:* Because the FBI data on stolen guns pertain to individual cities and towns, a city-level analysis of crimes could be done. This would be a cross-sectional design because there is little data available on likely confounding variables at the city level for multiple time periods between censuses. The data would pertain to a census year such as 1990 or 2000 because many crime-relevant variables are measured for cities at the census years and thus could be statistically controlled to isolate the impact of stolen gun rates. The key independent variable in the statistical analysis would be the value of guns reported stolen (perhaps adjusted for the local cost of living) divided by city population, and the dependent variables would be the rates of Uniform Crime Reports (UCR) Index crimes.

### C. Weapon/Ammunition Lethality

The most persuasive rationale for gun control is that guns are more lethal than any other weapons likely to be substituted if guns were denied to those who would use the guns to attack others (or commit suicide). Yet, there is virtually no reliable information on the relative lethality of either guns vs. nongun weapons, or of different types of guns or ammunition, as distinct from the differing “lethality” of those who use the weapons. Since people with more deadly intentions are likely to use weapons they believe are more deadly, it is difficult to separate weapon lethality from user lethality. Much is claimed, but little is firmly known, about the relative lethality of guns vs. long-bladed knives, “assault weapons” vs. other guns, handguns compared to rifles and shotguns, or “cop killer” bullets vs. other bullets.

Some of the most scientifically sound information comes from laboratory ballistics tests (unknown to most violence researchers) in which projectiles are fired into blocks of standardized ballistic gelatin designed to simulate human tissue. These tests in effect hold constant the “lethality” of the shooter, but cannot compare guns with other weapons or, even regarding guns, simulate the full set of real-world circumstances that affect the impact of guns and ammunition on the human body. In any case, it would be helpful if the laboratory data could be supplemented by detailed information on real-world shootings.

*Research Project:* In one or more large cities, information would be gathered on both fatal and nonfatal assaultive injuries,

involving both guns and other weapons that might be substituted for guns if they were not available. The ideal project would combine (1) the sort of detailed medical information on the wounds suffered that is available only from medical sources such as emergency room personnel and medical examiners with (2) detailed information on the circumstances of the shooting that is normally available only from police sources. Thus, the cooperation of at least one large city hospital in a high-crime area and the local police department would be required. One would like to know the impact of different kinds of weapons and ammunition on the seriousness of the injury produced, separate from the effects of other determinants of injury seriousness. One would also like to obtain information on how many separate wounds were inflicted, the location of the wounds, any vital organs that were struck, the range at which the attack was launched, the angle the projectile entered the body, whether the projectile struck some object before hitting the victim, struck bone in the victim's body, fragmented, or exited the victim's body, and whether the victim was heavily muscled or was wearing thick clothing.

Regarding the weapon, if it was a knife, one would like to know its length; if a blunt instrument, its weight. If it was a gun, one like to know type (revolver, semi-auto pistol, rifle, shotgun), caliber or gauge, barrel length, magazine capacity, number of shots fired, mass and shape of the bullets or shot fired, and the muzzle velocity of the ammunition. Each attribute of the weapon(s) and injuries inflicted in an attack would be separately coded for a statistical analysis in which the dependent variables would be measures of injury seriousness (lethal/nonlethal; number of wounds; seriousness of nonlethal wounds), and the key independent variables would be attributes of the weapons used in the attack, while other determinants of injury seriousness would be statistically controlled.

#### D. How Guns are Used in Crime

We know little about crucial tactical details of gun use in crimes, such as how the gun got into the crime situation and to whom the gun belonged. These issues are important to assessing the degree to which gun crime can be reduced by restricting the carrying of guns in public places or keeping guns locked up.

*Research Project:* A multi-state survey of imprisoned felons should address the question of how the gun was introduced into the crime situation, among felons who have committed violent crimes with guns. Did the offender carry the gun to the scene intending to use it in the crime, or for some other purpose such as self-protection, or make use of a gun that was already at the scene? To whom did the crime gun belong—the offender, the victim, someone else in the victim’s household, or some third party? Was the gun loaded or locked at the time the offender decided to use it to commit a crime?

To some degree, some of this same kind of information could also be obtained by close examination of police offense reports and interviews with victims or investigating officers. A prison survey would, however, also have additional uses mentioned elsewhere in this agenda.

## II. GUNS IN THE HANDS OF CRIME VICTIMS AND PROSPECTIVE VICTIMS

### A. The Accuracy of Estimates of Defensive Gun Use Frequency

The best available survey evidence indicates that the most common way in which guns are used in connection with crimes is not offensive use by the perpetrators but rather defensive use by the victims (Kleck and Gertz 1995). Strongly pro-control scholars have speculated, without empirical support, that surveys grossly overestimate defensive gun use (DGU) frequency because false positive reports (claiming a DGU that did not occur) enormously outnumber false negative reports (denying a DGU that did occur).

*Research Projects:* This topic is of enough interest that an extensive separate agenda addressing the possible sources of error in survey estimates of DGU frequency has been produced, listing 18 different projects that could be done (see Part IX of this article).

In addition, new surveys on DGUs could improve on previous ones by using larger samples and by asking about details of DGUs concerning where the guns were located prior to the DGU and how they were stored. That is, was the gun loaded and/or unlocked? About how long did it take to make the gun

ready to use, after the person had decided to retrieve it? Comparing time estimates between those whose guns were locked in various ways (and/or unloaded) and those whose guns were unlocked would shed light on how often and to what degree laws requiring guns to be kept unloaded would delay defensive gun use.

#### B. Deterrent Effects of Gun Ownership among Prospective Victims

Are criminals ever deterred from attempting crimes by the prospect of running into an armed victim? If so, do they simply substitute some other victim, without any net reduction in crime? How do criminals react to the belief that gun carrying by prospective victims has increased? Do they refrain from some crimes, or do they arm themselves more heavily to deal with armed victims?

*Research Project:* The prison survey mentioned in section I.D. could be used to more thoroughly investigate topics only briefly touched on by Wright and Rossi (1986) in their 1982 survey of prison inmates in 10 states. Specifically, felons could be questioned about whether they had ever refrained from committing crimes because they knew or suspected that a prospective victim possessed a gun, the basis for their belief that the victim had a gun, what type of crime was involved, whether the gun was carried on the person, in a vehicle, or in the home of the potential victim, and what the offender would have done as a substitute for victimizing the armed victim.

### III. EFFECTS OF GUNS ON SUICIDE

#### A. Fatality Rates of Suicide Methods

The most common argument that gun availability affects suicide is that attempts by shooting are more likely to be fatal than attempts using other methods. Yet it has been almost 30 years since any serious attempt was made to compare fatality rates among suicide methods. This dated information indicated that the fatality rate was 80% for attempts by hanging, 77% for attempts by carbon monoxide poisoning, and 75% for drowning attempts, while data from the 1990s indicate the rate for guns to



be an essentially identical 78%. More recent data covering all major methods is needed

*Research Project:* In a large city researchers would conduct a systematic search of the records of hospitals, walk-in medical centers, private physicians' offices, and any other place where nonfatal injuries from suicide attempts were likely to be treated. By combining this information with data on suicide deaths by method from the county medical examiner, fatality rates by method could be computed.

#### B. The Impulsiveness of Suicide Attempts

Probably the second most common argument that gun availability affects suicide is that guns provide a quick method of suicide for people who were seriously intent on committing suicide for only a short period of time. Attempts by adolescents might be especially impulsive. Since attempts using alternative methods such as hanging require somewhat more time to carry out, some impulsive deaths might be prevented if a gun were not available. The key piece of missing information is how much time elapses between the moment that a person resolves to make a serious suicide attempt and begins to act on this decision, and the time they actually carry out the attempt.

*Research Project:* Normally this information could not be recovered after the fact because it is known only to the attempter. However, persons who attempt suicide but do not die might be able to provide estimates. Since at least 20% of attempters using even the most lethal methods survive, there are ample numbers of survivors for all methods if a sufficiently large population were studied, such as that of a large city or urban county. Lists of suicide survivors could be compiled from the same medical sources as were listed for the previous project, and as many as possible would be interviewed, perhaps by suicide prevention counselors.

#### C. Does Gun Ownership Affect Whether People Commit Suicide?

A few case-control studies comparing persons who committed suicide with either suicide attempters or community controls have been done, but are unsatisfactory because so few confounding factors were controlled. There is substantial potential

for improvement, especially with respect to measuring personality or cultural traits that could affect both gun ownership and suicidal behavior. For example, gun owners often characterize themselves as self-reliant, and it is possible that self-reliance could, among depressed people, become self-blame. Those who see themselves as masters of their own fate may tend to blame themselves for their troubles, which could encourage suicide.

*Research Project:* A serious case-control study of guns and suicide is long overdue. A serious study would entail a systematic search through the prior literature for known or suspected suicide risk factors that may also be associated with gun ownership—an effort that clearly was not made with prior case-control studies. Persons who committed suicide, those who attempted it but survived, and nonsuicidal community controls could then be assessed for as many of these possible confounding risk factors as possible. (Psychologists have applied personality assessment inventories even to deceased persons, by questioning close relatives and intimates about the deceased.) By controlling for a respectable number of genuine confounders, more credible conclusions could be drawn about the impact of gun possession on the attempting and committing of suicide.

#### IV. GUN ACCIDENTS

Very little is known about the shooters in gun accidents, excluding those where the injury is self-inflicted, because most information on participants pertains to victims. A study that is now a third of a century old was the last one to shed much light on the attributes of accidental shooters, showing that they were general risk-takers who often had been involved in assaults, motor vehicle accidents, and alcohol-related offenses, and had often been given traffic tickets for speeding and reckless driving. More information of this sort, of more recent vintage would be valuable.

Likewise it would be useful to know more details about the circumstances in which gun accidents occur. For example, were the guns locked and/or loaded prior to the incident? Was the shooter the authorized owner of the gun, or an unauthorized user? If many shooters in accidents are not authorized users, this increases the accident-reduction potential of locking guns, since authorized users would normally possess the key or combination

to disengage a lock. Likewise, how many accidents occurred after an unauthorized user defeated a locking device of some kind? This information would bear on the effectiveness of various devices in blocking unauthorized gun use, if the locks are conscientiously used.

*Research Project:* Because gun accidents, especially fatal ones, are rare (only about 900 in 1998 in the entire U.S.), either a very large city would have to be studied over many years, or multiple fairly large cities or counties would need to be studied for a sufficient number of cases to be available. Police offense reports and (for fatal cases) medical examiner reports would provide some information on shooters and circumstances of shootings, while interviews with shooters, victims of nonfatal accidents, and witnesses could provide more information, on both fatal and nonfatal shootings. Finally, searches of criminal history files (including traffic offenses) could shed more light on prior risk-taking behavior by shooters.

A closely related research project, which could be combined with the descriptive study, would be a case-control study comparing accidental shooters with a representative sample of gun owners in the general population. This could shed light on factors that affect accident involvement, the impact on accidents of gun safety training, and the effectiveness of various gun storage practices and different locking devices.

#### V. CRIMINAL ACQUISITION OF GUNS

How and from where/whom do criminals get guns? It has been 18 years since Wright and Rossi (1986) interviewed imprisoned felons to address these questions, making their information dated. Further, even in 1982, their questioning of felons left many questions unanswered. They asked only about the origins of the felon's most recently acquired gun, rather than guns connected with particular kinds of crimes. This made it impossible to determine, e.g., how murder guns, or robbery guns, were acquired.

*Research Project:* The multi-state survey of imprisoned felons discussed previously could question felons about guns used in the most recent gun crime they committed. The focus of questions would be on the combination of:

- (1) types of sources of guns (licensed dealers in stores, relatives, crime victims, etc.) and
- (2) modes of acquisition (purchase, theft, trade, gift, inheritance, borrowed).

Careful distinctions, not made in the Wright-Rossi study, would be made between licensed and other sellers, licensed dealers operating in stores vs. licensed dealers operating out of their homes, licensed dealers operating at gun shows vs. nonlicensees selling guns at gun shows, illicit dealers who make a living from significant numbers of illicit sales vs. thieves and drug dealers who occasionally sell a few guns, and intrastate illicit dealers vs. interstate illicit dealers.

For juveniles, important distinctions could also be made between buying a gun themselves directly from a licensed dealer vs. making such a purchase using a “straw purchaser,” i.e. a legally eligible older person who bought the gun on their behalf. Another important distinction relevant to youth would be between guns given to them by a parent and guns the youth stole or “borrowed” from his parents without their knowledge.

#### VI. GUN CONTROL OPINION AND SOURCES OF SUPPORT FOR GUN CONTROL

Why do people support gun control? The obvious answer to this question is that supporters want to reduce violence and crime, and believe that gun control laws will help accomplish this. This answer, however, is at best only a very partial explanation in light of the fact that many, possibly most, supporters believe gun laws will have little or no impact on violence.

Conversely, it is not obvious why people oppose gun laws. Gun ownership is not a sufficient reason for opposition, given that many gun owners in fact support a wide variety of moderate restrictions on guns, and nearly all support at least a few kinds of controls. Virtually all survey research on these questions has been confined to analysis of responses to questions about gun purchase permits. As a result, little is known about determinants of positions on other gun measures or whether patterns of support significantly differ by type of control measured considered. Also, survey work has not convincingly established the strength

of commitment to gun control positions, as opposed to merely establishing whether the person favors or opposes a measure.

*Research Project:* A national survey could explore the determinants of support for, or opposition to, gun control. The survey should measure opinions on a wide variety of gun control measures, both those proposed and those already law, ranging from popular but weak measures like waiting period provisions to less popular but strict controls like bans on the private possession of handguns or all guns.

Strength of commitment could be measured by self-reported past actions taken on behalf of a position rather than mere verbal claims about the strength of one's views. Examples would include writing a letter to the editor, attending a meeting concerning the topic, voting for a political candidate largely on the basis on his or her gun control positions, joining an organization devoted to the issue, or contacting an elected representative to express one's views on the issue.

Some of the possible determinants of gun control positions that have previously received little or no attention are: anti-government attitudes (suspicion of the intentions of government officials; skepticism about the efficacy of governmental actions in reducing social problems); attitudes towards the use of force for self-protection; self-reliance; number of friends or relatives who own guns; and the value placed on guns as sources of recreation or aesthetic objects.

## VII. ENFORCEMENT OF GUN LAWS

Many people believe that unenforced laws are unlikely to reduce crime. Gun control opponents commonly ask "Why pass more gun laws if we are unable or unwilling to enforce the ones we already have?" This has recently become one of the chief rhetorical tactics of the National Rifle Association (NRA) in countering demands for more gun control laws. Yet, we know almost nothing about how much existing gun laws are enforced, in the sense of police making arrests for violations, which laws are enforced more than others, or why some gun laws are not enforced while others are. For example, how often do police make arrests for violations of registration or gun owner licensing laws, where these kinds of laws exist at the state level?

The FBI's Uniform Crime Reports data on arrests addresses only "weapons violations," lumping gun violations of all types together and not even distinguishing between violations involving guns and those involving other weapons. Very limited information currently suggests that enforcement is largely confined to arrests for unlawful carrying of concealed weapons in public places.

*Research Project:* There may already be a great deal of information on enforcement of gun laws in law enforcement agencies' files, in computerized datasheets, and possibly even in departmental reports and internal memoranda receiving little or no circulation outside the agency. One simple project therefore would begin by contacting the thousands of law enforcement agencies in the nation and asking what information they already have on hand on arrests for gun violations, beyond what they report to the FBI.

If such material is not available from a wide variety of agencies, more detailed information would have to be compiled by researchers themselves, by going through police arrest reports to identify exactly what kind of legal violation and what kind of weapon was involved. The project should cover a variety of jurisdictions in multiple states, so as to generate data on the full array of gun laws.

## VIII. EFFECTS OF GUN CONTROL MEASURES

### A. Macro-level Assessment of the Impact of New Laws

Interrupted time series studies of changes in crime before and after a new law are worthless for judging the impact of the gun law. They cannot separate effects of the laws from effects of any other confounding changes occurring at the same time, and they can be (and often are) selectively applied to one or a few unrepresentative areas that artificially favor the analyst's biases about the effectiveness of the laws. The method should not be used any further, as it is prone to abuse and as likely to generate misinformation as useful evidence (Britt et al. 1996).

Thorough cross-sectional comparisons of jurisdictions with different laws have already been carried out, utilizing multivariate controls for many other confounding factors (Kleck and Patter-

son 1993), but this approach cannot detect short-term effects of new laws.

Another useful approach is pooled cross-sections time-series studies, otherwise known as multiple time series (MTS) designs, applied to entire sets of legal jurisdictions. This approach could be used with monthly crime data, but these data are available only for unrepresentative subsets of states and are of dubious reliability (many agencies submit only annual reports or very irregularly submit reports covering shorter periods). This methodology can nevertheless detect reasonably short-term effects even when applied to annual data. Further, it avoids the problem of selectively studying just a few unrepresentative jurisdictions, and provides respectable sample sizes (roughly equal to the number of areas studied, times the number of time periods). Also, the inclusion of dummy variables for individual states and years reduces the problem of confounding variables somewhat, and at least a few possible confounding variables can be directly measured for states on an annual basis and thus directly controlled in a statistical analysis. Marvell and Moody (1995) provide a reasonable general model of how the MTS design can be used to assess gun law impact.

*Research Project:* The MTS design should be applied to state-level annual data covering the 50 states and D.C. for the full period for which requisite UCR data and gun law information are available—probably at least 1968-98. The core of the project would be detailed coding (by law students?) of whether each one of an exhaustive list of types of gun laws were in effect in a given state in a given year. The baseline set of laws in effect at the beginning of the study period would be established using statute books pertaining to that time point, then Session Laws (available in any good law library) would be used to identify every significant change in gun law passed by the state legislature during a given session, along with its effective date. Thus, every year in every state would be coded 1 or 0, denoting whether a given type of gun restriction was in effect. The standard fixed effects models would be estimated, with the dependent variables being the UCR Index crime rates, the suicide rate and the fatal gun accident rate. Where data permitted, gun and nongun varieties of these rates would be separately analyzed for homicide, suicide, robbery, and aggravated assault (e.g. gun homicide and nongun

homicide rates). Interest would focus on whether gun law dummy variables had significant negative coefficients, indicating that crime or violence rates were lower in places and times where a given legal restriction on guns was in effect.

Modified versions of this design might also be applied to counties and large cities, to incorporate local gun ordinances. The gun law information for cities might even be supplemented by Lexis-Nexis searches for news stories describing changes in local gun policies that did not involve statutory change, such as gun “buy-back”/amnesty programs and police crackdowns on unlicensed carrying of guns.

#### B. Use of Gun Registration Records.

The principle goal of the Brady Campaign (BC) is to get the Brady II bill passed, which mandates federal licensing of gun owners and registration of guns. BC argues that registration will help police solve gun crimes, yet offers no evidence that police have actually solved significant numbers of crimes with registration records that otherwise would have gone unsolved, despite the fact that at least eight states already register handguns (California, Hawaii, Maryland, Massachusetts, New Jersey, New York, Pennsylvania) and thus provide ample opportunity to determine the degree to which police in fact solve crimes and obtain convictions through the use of registration records (U.S. Bureau of Justice Statistics 1996).

*Research Project:* Examine the records of cleared violent crimes involving guns, drawn from the files of police departments in large cities located in the registration states—as many departments as will cooperate with the research. Based on a careful reading of offense and arrest records, and interviews with investigating offices, coders would assign each solved gun crime to one of the following categories:

- (1) there was no evidence that registration records were used in any way,
- (2) registration records were somehow used, but were incidental or unimportant in identifying or convicting a perpetrator,



- (3) the use of the records was important but not necessarily essential to the identification or conviction of a perpetrator, or
- (4) use of the records was essential to identifying/convicting a criminal.

### C. Criminal Responses to New Gun Controls

How do criminals anticipate they would respond if new gun controls were implemented? If laws were effective in denying guns to some criminals, how would they adapt to the change in circumstances?

*Research Project:* The prison survey could be used to inquire about this topic. For example, it would be useful to know how criminals anticipate they would respond if they were unable to acquire a handgun. Would they (a) do without a weapon of any kind, (b) substitute less lethal weapons such as knives or blunt instruments, or (c) substitute a more lethal weapon such as a sawed-off shotgun or rifle? Wright and Rossi (1986) addressed this topic briefly in 1982; a new survey could not only update their information, but could also make careful distinctions not made in the earlier survey, between weapon substitution in (a) the weapons kept for self-protection in the criminal's home, (b) weapons carried in public places for self-protection, and (c) weapons carried specifically to commit crimes.

### IX. ASSESSING THE VALIDITY OF SURVEY ESTIMATES OF DEFENSIVE GUN USE: A RESEARCH AGENDA

A number of steps might be taken to explore some of the sources of error in surveys estimating defensive gun use (DGU) frequency. Some sources are probably unmeasurable, precluding any definitive statements about the net effect of all of the sources of error. Nevertheless, the following proposals address the more measurable sources of error, and present some general strategies for estimating or exploring them. The general design for assessing many of these sources of error would be that of the survey experiment, in which respondents (Rs) are randomly assigned to various survey conditions. Many of the methodological conditions could be randomly varied together, using factorial survey methods.

### A. Survey Organization Effects

To what degree are Rs influenced by the fact that they are interviewed by employees of the Census Bureau, working on the National Crime Victimization Survey (NCVS), when they are questioned about self-protective actions? This project would require the cooperation of the U.S. Census Bureau, and thus might be difficult to implement. A sample could be generated by conventional random digit dialing (RDD) procedures, except that two survey organizations would be simultaneously doing so: the Census Bureau, and some good-quality private survey firm. Both would use the same interview schedules, except that at the start of the interview, the Census interviewers would (accurately) tell Rs that they were from the Census Bureau, as in the NCVS, while the private firm interviewers would mention their firm's name.

### B. Purpose-of-Interview Effects

Within each survey organization sample, Rs would be randomly assigned as to whether they would be told, at the start of the interview, that the survey was designed to gather information for the U.S. Justice Department (as is done in the NCVS).

### C. Anonymity Effects

Within each survey organization sample, Rs would be randomly assigned as to whether they would be asked for their names and addresses (as is done in the NCVS) at the beginning of the interview, using the same questions to do so as in the NCVS. These Rs would only be assured that their responses would be held in confidence. The other Rs would be guaranteed complete anonymity, and explicitly assured that they were randomly selected and that the interviewers did not know their names.

### D. Question Sequence Effects

Within each survey organization sample, Rs would be randomly assigned as to whether they would be (1) first asked questions about whether they had been a victim of crime in the past 12 months, and then asked (if they reported a victimization) whether they had used a gun for self-protection, or would (2)

first be asked whether they had used a gun for self-protection, followed by questions getting at details of the alleged DGU, including the type of crime the R thought was involved.

E. Question Wording Effect: General vs. Specific Prompts.

Within each survey organization sample, Rs would be randomly assigned as to whether they would be asked a general question about whether they used any self-protection in connection with a reported incident, vs. a more focused question specifically asking about use of a *gun* for self-protection.

F. Question Wording Effect: Stressing the Reporting of Minor Events/Incidents with Favorable Outcomes

Within each survey organization sample, Rs would be randomly assigned as to whether they would be asked a DGU question that stressed that even minor crime events, and those where the victim was not injured and did not lose property, are relevant, vs. a question that did not stress this. This procedure could provide information on the effects of Rs failing to report minor or successful DGU incidents.

G. Question Wording Effect: Stressing the Reporting of Incidents Involving Intimates

Within each survey organization sample, Rs would be randomly assigned as to whether they would be asked a DGU question that stressed that incidents where guns were used to defend against a family member or someone close to the R would be relevant.

H. Direct Interviews of All Household Members Age 12 and Over

Random subsamples of households contacted via RDD would be exposed to the Census NCVS procedure of interviewing every member of the household age 12 and over regarding personal (as opposed to household) victimizations. In other households, a single adult informant would be interviewed, providing information on behalf of all household members as to

whether any of them had experienced a DGU, as has been done in many prior DGU surveys.

#### I. Covering the Adolescent Population

The foregoing procedures would allow coverage of persons age 12 to 17 (as is done in the NCVS), in addition to those age 18 and over, to determine how much larger aggregate DGU estimates would be if those involving adolescents were included.

#### J. Covering Households without Telephones

Local studies could be conducted in which computerized utility and voter registration records were compared with telephone directories to identify persons apparently lacking telephone service. Using the names and addresses in these lists, face-to-face interviews could be conducted in which the same basic interview schedule was used with both persons without telephones and persons with telephones. Lack of telephone service could be confirmed early in the interviews with those on the phoneless list, then the usual DGU questions would be asked. DGU frequency would then be compared between households with and without telephones.

#### K. Sample Size and Repeat Users

If the sample size could be greatly increased, e.g. to 10,000 cases, it would allow more stable estimates of repeat DGU experiences. In past surveys there were no more than a few dozen repeat users, yet these few could have large effects on incidence estimates because the overall sample sizes were small enough that a few Rs reporting unusually large numbers of DGU experiences would greatly increase the total number of reported incidents. Under these conditions it would be worthwhile applying the same thorough questioning to every claimed incident that in past surveys was applied only to a single (typically the most recent) incident, to uncover false positives.

#### L. Recall Period Effects

Rs would be randomly assigned to be asked about their experiences in the past 6 months (the NCVS recall period), 12 months, or five years (the Kleck-Gertz recall periods). This

could provide information on the effects of forgetting incidents, especially minor one.

#### M. Telescoping Effects

A two-wave panel design could be used, with one survey using a one-year recall period being followed by another survey of the same Rs (recontacted by calling the same telephone numbers and asking for anyone in the household who had previously been interviewed on this topic) a year later. The second wave of interviews would be “bounded”—interviewers would be able to tell if an incident 12-24 months old was being telescoped into the past-12-months recall period, since such an incident would have been reported in the first wave of interviews. This would permit a fairly direct estimate of the inflation of DGU estimates due to telescoping.

#### N. Follow-up Interviewing to Detect and/or Resolve Inconsistencies

For those Rs reporting a DGU, follow-up interviews could be conducted, perhaps 30 days later, to see if Rs gave consistent accounts of the events, and also to try to resolve any inconsistencies that were apparent in the initial interviews.

#### O. In-Depth Interviewing of Rs Reporting a DGU

All Rs reporting a DGU could be asked if they would be willing to discuss their experiences at greater length. Those agreeing could be given longer interviews, possible tape-recorded when allowed by Rs. These interviews would focus on determining (1) the exact nature of the threat or crime that the R thought was being committed against them, (2) what precisely the R did with their gun, and (3) whether an objective observer might have thought the R was the aggressor rather than the victim. The in-depth interviews might also utilize the full NCVS incident report question sequence, so as to nail down whether a crime by NCVS standards was being committed against the R when the alleged DGU occurred, as well as to obtain further information on details of the events.

These interviews could also include a question concerning whether the R thought that anything they did, including posses-

sion of the gun at that time and place, was unlawful. This would provide some baseline information on how often DGU-involved Rs thought they had reason to conceal the event from police or other strangers, such as survey interviewers, among Rs willing to report DGUs. This would probably be a minimum estimate because such concerns would almost certainly be greater among those were not willing to report a DGU at all.

#### P. Cross-checking with Police Reports

Rs reporting a DGU would be asked if they reported the event to police; if they did, they would be asked what law enforcement agency they reported the event to, and the approximate date. The agencies involved would be asked for records of the events, and these records would be compared with the Rs' accounts. This would provide information only on a nonrepresentative subset of alleged DGUs, presumably the more legitimate ones, but still could provide some useful information about those kinds of incidents. Police reports, for example, might be more likely to reveal provocative behavior by the "victim" that would suggest that their actions were not purely defensive.

#### Q. Reverse Record Checks

The reverse of the foregoing would be to identify recent (past 6 or 12 months) crime incidents in police files in several large cities in which victims reported using guns for self-protection. Using the names, addresses, and/or telephone numbers of these victims in the police reports, these persons could be contacted and (without the interviewers saying how they got the R's name) given the same interview as was applied to members of the general population, to see if these "known cases" would report a DGU. This could not get at DGUs that victims were not willing to report to anyone, police or survey, interviewers, but it could provide a minimal baseline estimate of underreporting of DGUs to survey interviewers.

#### R. Questions to Explore Sources of Reluctance to Report DGUs

This procedure would be intended to investigate possible reasons why Rs with a genuine DGU experience might fail to

report them. All Rs in gun-owning households would be asked whether they would be likely to report a hypothetical DGU to an interviewer in a survey. They would be presented with DGU scenarios in which certain elements were randomly varied, including whether or not:

- (1) the R was in a public place, unlawfully carrying a firearm,
- (2) R was in their home, in possession of an unregistered gun in a place where registration was required,
- (3) the DGU was against a person with a close relationship to the R,
- (4) the R was certain their gun use was genuinely defensive and they were in the right, but the police might nevertheless view the R as the aggressor.

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# Missing Guns: Are the Canada Firearms Centre Estimates Off-Target?

By G. Larry Mays & Rick Ruddell

*By comparing the number of fatal firearms accidents and suicides per 100,000 firearms in Canada and the United States this article finds that the rate of accidental shootings and suicides is considerably higher in Canada. The authors propose that these findings are a consequence of underreporting the true number of firearms in Canada. The findings suggest that the number of firearms in circulation in Canada is at least 10 million, about forty percent greater than estimated by the Canada Firearms Centre. Such findings have implications for evaluating the success of Bill C-68, legislation that made it mandatory to license all Canadian gun owners and register all firearms. G.L. Mays is a Professor in the Department of Criminal Justice at New Mexico State University. Rick Ruddell is an Assistant Professor in the Department of Political Science at California State University, Chico. This study was completed with the support of the Social Sciences and Humanities Research Council of Canada dissertation grant award 752-00-0357.*

Criminologists, public policy analysts and advocates of the public health model of harm reduction have long debated the relationships between firearms and fatalities, whether these fatalities are the result of accidents, assaults or self-harm (Centerwall, 1991; Cook and Ludwig, 2000; Cukier, 1998; Lott, 1998; Polsby and Kates, 1998; Zimring and Hawkins, 1997). Within the United States and Canada, these political debates generally have focused on the balance between the merits of legislation and the restrictions to individual rights (Davis, 2000; Kopel, 1991; 1992; Mauser, 1998). An important starting point in these debates is estimating the number of firearms in circulation, or gun density, at different levels of analysis. Developing a reliable and valid indicator of the gun density is important to evaluate whether legislative interventions are necessary and whether they are successful to better understand the criminal misuse of firearms, and the relationships between firearms and morbidity or

mortality (Cook and Ludwig, 1997; Dandurand, 1998). While there is widespread agreement concerning the importance of accurately establishing gun density, researchers have identified many limitations to different methods of estimating the true rate of firearms ownership and the gun density (Gabor, 1994; Kleck, 2001; Mauser, 2001; Stenning, 1994; 1996).

In particular scholars have questioned whether Canadian firearms legislation should be a model for gun control in the United States (Kopel, 1991; 1992; Ram, 1995). Bill C-68 recently has mandated that all Canadian firearms owners be licensed by January 1, 2001, and all firearms registered by January 1, 2003. Critics of these gun-control initiatives, however, have suggested that rates of non-compliance with the legislation already are very high (Breitkreuz, 2001a; Smithies, 2001). To better understand the degree of compliance with the legislation, however, we first need to understand how many firearms currently are owned in Canada.

Current estimates of the firearms in circulation in Canada range from 5 million (Angus Reid, 1991) to 21 million firearms (Canadian Institute for Legislative Action, 2000). The federal government's Canada Firearms Centre officially estimates the gun density of 7.4 million firearms, and approximately 1.2 million of these firearms are registered handguns (Canada Firearms Centre, 1998; Dandurand, 1998). The substantial variation between these estimates is troubling for researchers interested in evaluating the ongoing success of mandatory licensing and firearms registration.

This study compares suicide and accidental death data from Canada and the United States as a function of the number of fatalities per 100,000 firearms, rather than considering the more commonly used suicide or accidental death rate per 100,000 persons in the population. We contrast the Canadian data against statistics from the United States, as there is generally widespread agreement about the gun density in that nation (Brady Campaign, 2002; Canada Firearms Centre, 1998). Our strategy is to focus on what we do know, the number of firearms accidents and suicides in Canada and the United States, as well as the gun density in the United States, and use these data to estimate the true gun density in Canada. By changing the focus from firearms fatalities in the population to the number of guns in circulation,

we propose that our approximation of the number of firearms in Canada may be more accurate than those estimated by the Canada Firearms Centre.

#### I. GUN DENSITY—A CANADIAN PERSPECTIVE

The study of firearms density is fraught with methodological problems (Cook and Ludwig, 1997; Gabor, 1994; 1997; Kleck and Kovandzic, 2001; Mauser, 2001). There are definitional problems, for instance, about what constitutes a firearm. In January 2001 non-powder firearms in Canada, commonly called BB or pellet guns, officially became firearms if their muzzle velocity exceeded 500 feet per second (Canada Firearms Centre, 2001). As a result of this legislative change, the gun density in Canada increased overnight, although many persons do not consider pellet guns as actual firearms. Another consequence of this change is that owners of these pellet guns became criminals if they lacked a possession license. Despite these recent definitional changes and the fact that this change increased the number of officially defined firearms in circulation, this paper focuses on the density of powder firearms.<sup>1</sup>

Another factor that influences the validity of gun density estimates is the fact that firearms have a long service life. Cartridge and black powder firearms sold over one hundred years ago, although antiquated, still are reasonably safe and functional if used with low velocity ammunition, which is commonly available. As a result, these antiques contribute to the existing stock of firearms. Unless they are destroyed, become inoperable, or are exported, these firearms will remain in circulation for generations, and they may have a similar capacity for lethality as their recently manufactured counterparts. Many of these antiquated firearms might not be in active use, and typically end up forgotten or hidden in closets, dresser drawers or hanging on basement walls.

An additional methodological problem is that researchers generally have relied upon self-report data from national surveys to estimate gun density in Canada (GPC Research, 2001; Mauser, 2001). These surveys frequently have found that the population reporting firearms ownership has ranged from a low of 17 percent of households to a high of 31 percent (GPC Research,

2001). Table 1 demonstrates the estimated prevalence of household firearms ownership with these different studies.

Table 1. Survey Research Estimating the Percentage of Canadian Households Reporting Firearms Ownership

Survey	Year	Sample Size	Households Reporting gun ownership
International Crime Survey	1989	2074	31.0
Mauser and Margolis	1990	393	30.0
Angus Reid	1991	10103	23.0
International Crime Survey	1992	2152	27.0
Pollara	1992	1100	33.0
Pollara	1993	1100	30.0
Pollara	1994	1200	30.0
Angus Reid	1994	1504	30.0
Mauser and Buckner	1995	1505	23.0
International Crime Survey	1996	2134	23.5
Environics	1997	2008	17.0
Angus Reid	1998	6819	21.0
GPC Research	2000	6145	17.0

Mean Percentage of Firearms Owning Households: 1989 to 1994 = 29.25

Mean Percentage of Firearms Owning Households: 1995 to 2000 = 20.30

Source: GPC Research. January, 2001 and Mauser, November 2001

One important finding from Table 1 is the rate of household gun ownership, or at least the rate of reported gun ownership, seems to be declining over time. The average gun prevalence declined from an average of 29.25 percent of households in the surveys conducted from 1989 to 1994, contrasted against the 20.30 percent of households in surveys conducted from 1995 to 2000. However, given the introduction of federal gun control initiatives, survey respondents may be reluctant to report firearms ownership accurately. By contrast, anecdotal evidence suggests that some Canadian firearms owners are abandoning their firearms due to the new requirements for licensing and registration, like they did during the national firearms amnesties of 1978 and 1992 (Hung, 2000). As relatively few firearms in Canada are ever surrendered to the police (Antonowicz, 1997, Breikreuz,

2002a), one may extrapolate that the stock of firearms is consolidating into fewer households, or owners, over time.

There are other methodological weaknesses about using survey instruments to solicit information about firearms ownership, regardless of the country under examination (Mauser and Kopel, 1992; Smithies, 2001). For instance, some individuals may not report firearms ownership accurately due to the perceived stigma associated with being a gun owner (Mauser and Kopel, 1992). In Canada, at least one percent of the respondents refused to answer questions about firearms ownership in one national poll (Angus Reid, 1991). Recently, three percent of the respondents in a national poll sponsored by the Canada Firearms Centre reported that they hunted or shot targets, but did not own a firearm (GPC Research, 2001). These types of responses may be indicative of underreported gun ownership. Finally, polls that do not accurately survey rural households, or regions of higher firearms ownership, may contribute to inaccurate estimates of the true gun density (Dandurand, 1998; Kopel, 1991; Mauser and Kopel, 1992).

A further limitation of survey research is the fact that female respondents are unlikely to report firearms ownership accurately. Mauser (2001) and Kleck (2001) both found that the married women are likely to underreport household firearms ownership in surveys. There are two possible reasons for this underreporting. First, these respondents may not be aware that there are firearms in the household. Second, for unknown reasons, these married female respondents may be less willing to self-declare firearms ownership than their spouses. This finding is important when one considers that urban females are most likely to be surveyed in typical media polls (Mauser and Kopel, 1992).

The Government of Canada has estimated that each household reporting firearms ownership represent 1.23 firearms owners (Canada Firearms Centre, 1998). With a total of 11.8 million households in Canada (GPC Research, 2001), 17 percent of all households would represent 2,467,380 firearms owners. With an estimated 7.4 million firearms in circulation, each of these gun owners in Canada would own approximately three firearms.

In addition to asking respondents directly about their firearms ownership, scholars also have evaluated alternative methods of measuring the firearms density. Kleck (2001) for instance,

examined 18 different measures of firearms density at the city and state levels of analysis. These measures included tracking firearms offences, sales of gun magazines, NRA memberships, and the number of firearms dealers per capita at the city and state levels of analysis. Kleck (2001) found that the most valid predictor of gun ownership at the city level in the United States was the number of firearms suicides. Consistent with this approach we also examine firearms suicides in our comparative analysis of gun density.

Perhaps one of the most politically neutral methods of establishing the gun density is through examination of historical import and export data. Such data suggest that the 7.4 million firearms reported in Canada is a low estimate (Breitkreutz, 2002). While there is an intuitive appeal to using these types of historical records, there are also methodological problems with this approach. Historically, rifles and shotguns in Canada were not subject to much regulation, and this may have resulted in under-reporting. Import and export data also neglect the large number of firearms manufactured in Canada until the 1970s when they were first officially counted (Breitkreutz, 2002). Additionally, some firearms have been lost, have become inoperable, or were deactivated over time. Other firearms are informally exported to other nations, such as the United States, without formal notification to either country (Cukier, 2001).

Furthermore, many firearms, especially handguns, have been illegally imported into Canada, usually from the United States (Axon and Moyer, 1994; Canada Firearms Centre, 1997; Dandurand, 1998). Veterans also have returned to Canada with war trophies, which were seldom declared. Finally, persons may construct rudimentary firearms easily with limited mechanical ability, although the low price and easy access to factory-produced firearms would realistically limit this source of homemade weapons. Any of these factors would reduce the validity of such methods of estimating Canada's gun density through import and export data.

## II. DATA AND METHODS

Different research methods have produced widely disparate estimates of the gun density in Canada. This Article contrasts suicide and accidental firearms fatality data from the United

States to evaluate whether Canadian gun density data are accurate. Our approach is admittedly simplistic; however, we base our analyses on suicide and accidental death data, which are commonly collected in both nations, and have a high degree of reliability and validity (Centers for Disease Control and Prevention, 1997; Hung, 2001). These data are contrasted against the gun density estimates in both nations. While there is wide disagreement in the Canadian literature about the number of firearms in Canada (Canada Firearms Centre, 1998; Gabor, 1994; Mauser, 2001; Stenning, 1994; 1996) there tends to be considerable agreement about the number of firearms circulating in the United States, at least nationally (Brady Campaign, 2002; Cook and Ludwig, 1997).

Based on the estimates that are available, we argue that Canada should have a lower rate of firearms suicides and accidents than the United States. First, in Canada fewer guns are used for personal defense (Kopel, 1991; 1992) and most often against animal attacks (Mauser, 1996). Blackman (1984) found that approximately five percent of Canadians cited self-defense as the primary rationale for owning a firearm, compared to 25 percent of their counterparts in the United States. Cook and Ludwig (1997), for instance, used survey data to estimate that 14 million Americans carried firearms for personal defense in 1994. In fact, it is unlikely that a firearms possession or acquisition license would be granted to Canadians who reported that their firearms were intended for defense, and persons who have used firearms for personal defense in Canada are more likely to be held criminally responsible than their counterparts in the United States (Mauser, 1996). Personal defense firearms are more likely to be left loaded, carried concealed, and left unattended in the home or vehicle than firearms used for recreational purposes.

We propose that if the percentage of firearms left loaded and unsecured in the United States is higher, then the rate of firearms accidents is likely to be higher than they appear to be in Canada where owners are legally required to keep firearms unloaded and secured. Moreover, previous Canadian firearms legislation, such as Bill C-51, enacted in 1977, may have reduced access to firearms by unauthorized users. This legislation “grandfathered” fully automatic firearms to existing owners, placed restrictions on other military-style rifles and required all purchas-

ers of firearms to produce Firearms Acquisition Certificates (FAC) issued by the police. Concurrent with this legislation, many provinces made it mandatory to successfully complete hunter safety training prior to being issued hunting licenses. As a result of these legislative changes in Canada, the access to firearms for untrained, mentally ill, or suicidal persons may be more difficult than in the United States, at least in the short-term. As Cukier (2001) correctly notes, however, the large number of firearms circulating in secondary markets in both nations make it likely that these persons could obtain firearms over the long-term.

Again, we can infer that these legislative requirements, over a period of two decades, would reduce the likelihood of accidental or suicide fatalities in Canada. This seems especially likely when contrasted against the United States, where federal legislation to screen purchases from firearms dealers was enacted in 1994.

Annual national-level firearms mortality data were obtained from the U.S. Centers for Disease Control's Morbidity and Mortality Weekly Reports (MMWR). An examination of these data finds that accidental firearms fatalities have been decreasing over time, while firearms suicides have remained relatively stable over time (Cherry et al., 1998). Data from 1994 to 1997 were collected and averaged into a yearly total to reduce the influence of any unusual annual variation.

The MMWR data were contrasted against the Canada Firearms Centre's annual firearm mortality statistics (Hung, 2001). Firearms mortality data from 1994 to 1997 were collected and averaged into a yearly total to reduce the influence of any annual variation. Again, these statistics demonstrate that accidental firearms fatalities have decreased significantly over time in both nations. The dates selected for this study were influenced by data availability; more recent Canadian firearms mortality data were not available.

Studies of firearms fatalities traditionally have compared the fatality rate per 100,000 persons in the population. By contrast, we have chosen to examine the fatality rate per 100,000 firearms. As there is widespread agreement about the numbers of firearms circulating in the United States, we believe that this is a valid indicator of the gun density. If the Canada Firearms Centre gun



density information is also accurate, we hypothesized that the firearms fatalities in Canada, at least accidental deaths and suicides, would be similar to the rates in the United States.

Table 2 indicates that the accidental and suicide deaths, per 100,000 firearms in Canada, however, is significantly higher than the rate per 100,000 firearms in the United States when we consider a gun density of 7.4 million firearms. When we estimated the Canadian gun density using a total of ten million firearms, however, the Canadian and American rates converged.<sup>2</sup>

Table 2. Firearm Fatalities per 100,000 firearms in the United States (1995 -1998) and Canada (1994 -1997): Estimated Gun Density

Panel A: United States

U.S. average Number of Accidental Fatalities (1994- 97) = 1174	U.S. average number of Suicides (1994-97) = 18,250.	U.S. average number of Homicides (1994-97) = 15,092
.536 accidental deaths per 100,000 guns Estimated 219 million guns	8.33 suicides per 100,000 guns Estimated 219 million guns	6.89 homicides per 100,000 guns Estimated 219 million guns

Estimate of 219 million firearms was developed from Cook and Ludwig (1997) data estimating 192 million firearms in 1994, and ATF (2001) sales data documenting an average of 4.5 million firearms sold in the US since 1994.

Panel B: Canada

Canada average number of Accidental Fatalities (1994-97)= 44.5	Canada average number of Suicides (1994-97) = 895	Canada average number of Homicides (1994-97) = 162
.601 accidental deaths per 100,000 guns Estimated 7.4 million guns	12.09 suicides per 100,000 guns Estimated 7.4 million guns	2.19 homicides per 100,000 guns Estimated 7.4 million guns
.445 accidental deaths per 100,000 guns Estimated 10 million guns	8.95 suicides per 100,000 guns Estimated 10 million guns	1.62 homicides per 100,000 guns Estimated 10 million guns

Estimate of 7.4 million firearms in Canada (Canada Firearms Centre, 1998).

There are a number of possible reasons for the finding that accidental and suicide firearms fatalities are higher in Canada than the United States. First, the officially reported measure of gun density in Canada, 7.4 million firearms, may be inaccurate and the number is closer to the alternative we have proposed of ten million firearms. A second plausible reason for a higher firearms fatality rate in Canada may be as a consequence of the fact that handguns are rarely encountered in Canada (Canada Firearms Centre, 1998; Dandurand, 1998) and these firearms have a reduced capacity for lethality compared with rifles or shotguns (Di Maio, 1999). Using a similar argument, some may suggest that emergency care in hospitals in the United States is more effective at enhancing survivability of gunshot wounds—especially when contrasted against the survivability of gunshot wounds in rural Canada, where access to a trauma center may be several hours away.

If the estimate of a total gun density of 7.4 million firearms in Canada is correct, then Canadian gun owners are more accident-prone and apt to use a firearm for suicide than their American counterparts. While a plausible alternative explanation, we discount this possibility based on the fact of the safety-oriented initiatives legislated in Bills C-51, C-17 and C-68. In addition, given the fact that fewer Canadians use their firearms for personal defense than in the United States (Blackman, 1984; Mauser, 1996), there are likely fewer loaded and unsecured firearms found in Canada.

### III. DISCUSSION

The present study suggests that the gun density in Canada may be considerably greater than estimated by the Canada Firearms Centre. This finding tends to affirm studies that estimated the gun density in Canada is in excess of 10 million firearms (Breitkreuz, 2001). This finding has implications for Canadian justice policy as well as criminological research. First, the success of Bill C-68 rests on the assumption that there are 2.3 million firearms owners in Canada, of whom approximately 2.2 have complied with the legislation (Canada Firearms Centre, 2001a).

Certainly, a considerable number of Canadians may not be in compliance with the provisions of Bill C-68 and have not obtained firearm possession licenses. One organized group, the

Law-Abiding Unregistered Firearms Association, actively is flouting disobedience to the legislation and members have refused to obtain possession licenses (Law-Abiding Unregistered Firearms Association, 2001). Political critics of the legislation also have found that First Nations populations almost universally are boycotting the licensing requirements (Breitkreuz, 2001a). This pattern of non-compliance parallels that of Australia, Britain and New Zealand after similar laws were enacted in those nations (Mauser and Buckner, 1997).

Gross underreporting of the true gun density has significant implications for a Canadian firearms control bureaucracy eager to demonstrate its effectiveness: By deliberately underestimating the number of firearms—and their owners—the Canada Firearms Centre can claim widespread compliance with Bill C-68. Unfortunately, we believe that the estimates of the gun density presented here are more accurate than the official government estimates.

By January 1, 2003, all firearms in Canada must be registered. The outcome of this exercise will be instructive for legislators and policy analysts in the United States. Canadians, more than U.S. citizens, tend to be more likely to comply with firearms legislation that favors the collective rather than the individual (Davis, 2000; Kopel, 1991, 1992; Mauser, 1998).

Mandatory licensing and firearms registration are expensive programs. With approximately one-tenth the population of the United States, the government of Canada has spent some \$700 million dollars on implementation of this legislation (House of Commons Standing Committee on Justice and Human Rights, 2002) and critics have suggested that this money would be better invested in other crime-control strategies (Gunter, 2002).

#### IV. CONCLUSION

The number of firearms in circulation in a country has implications for several cultural features, as well as policy and practical impacts. Any policy aimed at restricting firearms ownership and use needs to be evaluated in order to determine what licensing, registration, control, and enforcement mechanisms are worth the money they cost. If not, more efficacious measures should be developed and implemented.

However, in order to evaluate any policy, an accurate base estimate of the number of firearms available must be included in the calculations. In the United States, a nation of pervasive firearms ownership, the estimates of firearms prevalence are reasonably agreed upon within certain ranges. In Canada, the Canada Firearms Centre provides the “official” estimates of firearms prevalence. If these official estimates are accurate, then Canadian firearms accidents and suicides per 100,000 firearms in circulation are substantially above those of the United States. By contrast, if firearms prevalence in Canada is significantly underestimated officially, then the accidental shooting and suicide rates of the two nations are very similar.

#### NOTES

1. Despite the fact that we have not considered non-powder firearms in our analysis, a number of scholars have identified the risks that these firearms pose for serious injury (American Academy of Pediatrics, 1987) and death (Lawrence, 1990).
2. Similar analyses were conducted using Australian and British statistics, using official accidental death data and estimated firearms density. We found that Canada’s rate of accidental death was higher per 100,000 firearms than any of these other nations. Unlike the United States there are no generally agreed upon rates of firearms density in these nations, however, so this finding is only tentative.

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# Trigger-Happy: Re-thinking the “Weapons Effect”

Paul Gallant & Joanne D. Eisen

*The “Weapons Effect” hypothesis suggests that guns can psychologically control people and cause them to be violent. In this article, Paul Gallant and Joanne D. Eisen analyze previous research about the weapons effect and examine more recent studies to test their agreement with the hypothesis. The authors conclude that evidence does not support the “Weapons Effect” hypothesis, and therefore, firearms policies premised on the existence of a “Weapons Effect” may be harmful. Paul Gallant and Joanne D. Eisen are Senior Fellows at the Independence Institute in Golden, Colorado.*

“The accessibility of a firearm permits the instantaneous metamorphosis of a law-abiding (hot-headed?) person into a murderer.” Those words were penned by Lester Adelson<sup>1</sup> twenty-two years ago. Adelson had perfectly articulated the “weapons effect” hypothesis: guns provoke impulsive, violent responses, and the presence of firearms anywhere (except in the hands of certain government employees) is therefore to be feared.

An armed neighbor, going berserk without warning, is the stuff of nightmares. Can firearm madness suddenly afflict any of us simply because of proximity to a gun? If so, with firearms present in about half of all American households, is there not ample reason to fear our next-door neighbors and their children?

On April 9, 2002, 42-year-old Seaside Heights, New Jersey, off-duty police officer Ed Lutes “snapped” and went on a shooting rampage.<sup>2</sup> Armed with a handgun and a rifle, Lutes killed five people and wounded his own police chief, before turning one of the guns on himself and committing suicide. The incident received national media attention.

Lutes had no known history of mental illness. As more information about the incident came to light, it was learned that the relationship between Lutes, a decorated 15-year veteran and member of his department’s S.W.A.T. team,<sup>3</sup> and many of his neighbors was less than cordial. A law enforcement source said

that one of the victims had recently been acquitted of sexually assaulting a member of Lutes' family.<sup>4</sup>

Few of us like all our neighbors. But then, few of us set out on a homicidal rampage to eliminate those neighbors whom we dislike. Was the presence of a firearm responsible for Ed Lutes' shooting rampage, and if so, in what way?

According to the weapons effect hypothesis,<sup>5</sup> the presence of a firearm triggered an already-angered Lutes to violence.<sup>6</sup> However, two other assumptions about firearm-related violence have become murkily intertwined with the weapons effect hypothesis. The accessibility thesis<sup>7</sup> tells us that the pervasive presence of firearms in Lutes' life was the predominant factor that allowed him to override what he perhaps viewed as a too-easily forgiving criminal justice system. The instrumentality thesis<sup>8</sup> tells us that if Lutes had not had access to a firearm, he would have used a less lethal means for acting out his aggression, and six people might still be alive today, albeit injured.<sup>9</sup>

This triad comprises the key premises used to justify many contemporary restrictive gun initiatives.

## I. PREVIOUS RESEARCH

### A. Berkowitz and LePage

The weapons effect hypothesis dates back to a 1967 article by psychologists Leonard Berkowitz and Anthony LePage.<sup>10</sup> "Weapons as Aggression-Eliciting Stimuli"<sup>11</sup> summarized the results of their experiment on 100 male undergraduate psychology students at the University of Wisconsin. Berkowitz and LePage proposed that the mere sight of a firearm could trigger aggression from an "already angered" person because of the learned association between violence and guns.

In this experiment, each subject was paired off with a partner. Test subjects were informed that they were participating in a study of "physiological reactions to stress" during problem-solving tasks. The subjects did not know that their partners were actually confederates of the two researchers.

During the experiment, subject and confederate were placed in separate rooms. Mild electric shocks, the "stress" component, were administered by the confederate. The subject was told that the number of shocks would be based on the quality of his per-

formance of a task; the greater the number of shocks administered, the poorer job performance was judged to be.<sup>12</sup> However, the number of shocks administered by the confederate was predetermined (either one shock, or seven), and was independent of the performance of the subject.

Berkowitz and LePage reasoned two groups of subjects would be created. The group of “angered” subjects received the maximum number of shocks, thereby making them “physically uncomfortable.” The researchers believed they were made to feel “humiliated.” The control group of “unangered” subjects received just one shock from their confederate partner.

For the second part of the experiment, the pair exchanged rooms and the subject was seated at the table upon which the “shock key” was placed. The subject then “graded” the confederate partner’s job performance. Some of the time, a 12-gauge shotgun and .38-caliber revolver were casually and inadvertently, the subject was told, left in plain view on the table. In all instances, subjects were told the guns were to be “disregarded.”

Berkowitz and LePage interpreted the number of shocks administered to the confederate lab partner as a measure of aggressive behavior on the part of the subject.<sup>13</sup> The “angered” group of subjects administered a greater number of electric shocks to the confederate, and held the shock key down longer, when the shotgun and revolver were left on the table next to the subject, compared to when nothing or neutral objects such as badminton racquets and shuttlecocks were present.

Berkowitz and LePage concluded: “If a person holding a gun fires it, we are told either that he wanted to do so (consciously or unconsciously) or that he pulled the trigger ‘accidentally.’ The findings summarized here suggest yet another possibility: The presence of the weapon might have elicited an intense aggressive reaction from the person with the gun, assuming his inhibitions against aggression were relatively weak at the moment.” In discussing the experiment in *Psychology Today* a year later, Berkowitz flatly stated: “Guns not only permit violence, they can stimulate it as well. The finger pulls the trigger, but the trigger may also be pulling the finger.”<sup>14</sup>

### B. Failed Attempts at Replication

As Kellermann has pointed out, “the strongest proof of the validity of any study is independent replication by others.”<sup>15</sup> Subsequent attempts to reproduce the findings of Berkowitz and LePage have met with mixed results, even when researchers strictly followed the original design and procedures.<sup>16</sup>

Several researchers discovered that the presence of firearms appeared to create an aggression-inhibiting effect, *i.e.* a negative weapons effect. As Toch and Lizotte noted, “many studies have failed to replicate the Berkowitz and LePage findings and some have even reported opposite findings.”<sup>17</sup>

It would be worthwhile to further examine aggression-inhibiting effects of weapons to achieve a better understanding of this laboratory phenomenon. If such an effect were indeed valid, both inside and outside the laboratory, then understanding the effect might help in defining policies that make for a less violent society.

Similar observations were made by Carlson, *et al.*,<sup>18</sup> who acknowledged the occurrence of “frequent failures to replicate the weapons effect” and that “outcomes opposite to the predicted direction of [the] effect are fairly common.” To systematically assess how subjects react to unpleasant cues in their environment, they analyzed the results of twenty-three experiments. Among the cues to which subjects were exposed in an attempt to elicit aggression were: hostile verbalizations, actual weapons or pictures of weapons, bumper stickers with a hostile theme, the pointing out of unpleasant physical characteristics of the subject, and even Ku Klux Klan-like clothing. Although some cues aroused significant aggression, in those studies limited to the use of actual weapons there was as much inhibition of aggression as there was stimulation of aggression, and “a nonsignificant, near-zero average effect-size value was obtained.”

Kleck<sup>19</sup> analyzed twenty-one “weapons effect” studies and observed that “The ‘weapons effect’ has been detected only among people with no prior experience with guns.” He also observed, “the more closely the experiments simulated real-world situations . . . the less likely they were to support the weapons hypothesis.” This is not surprising in view of the fact that the consequences of the actions of the experimental aggressors were neither serious nor permanent. It is quite another thing when the

consequences of one's actions can be lethal, or when there is a significant risk of punishment by the law.

### C. Subject Non-cooperation

Toch and Lizotte also questioned whether the results of this type of laboratory study could be extrapolated to the real world.<sup>20</sup> The problem lies in the inherent limitations of laboratory settings. In a discussion of the attempts of subsequent researchers to replicate the original findings of Berkowitz and LePage, Zillmann<sup>21</sup> emphasized the fact that the weapons were placed at the center of attention during the experiment, noting that "This element of procedure has sparked considerable controversy and in fact has led to the faulting of the original findings."

Zillmann also pointed out that many subjects, on seeing the weapon, instinctively understood that there was some hidden motive for its presence despite the elaborate cover story provided by the various researchers.<sup>22</sup> One team of researchers found that hostility was directed toward them because of the fabricated cover story, rather than toward the lab partner. This, they believed, may have accounted for the fact that some subjects "were non-cooperative, seeming eager to thwart the experimenter's efforts and to 'louse up' the experiment."<sup>23</sup>

Ellis, et al,<sup>24</sup> noted: "We tried various ways of convincing the subject that the weapons he saw belonged to his student-partner—he was going hunting after the experiment, he was from ROTC, and so on. None of these worked. On more than one occasion subjects actually burst out laughing at our efforts. The reaction seemed to us to be perfectly justified." What average person would expect to find a shotgun and revolver casually lying next to him in the course of a psychology experiment?<sup>25</sup>

The only evidence in the literature that appears to support the validity of a weapons effect hypothesis outside the laboratory setting is derived from a study on homicides in Ohio.<sup>26</sup> The interpretation of this data, however, is dependent on the objectivity of the researchers; and the intellectual honesty of the convicted offenders they studied.

One of the stated purposes of the study was to "identify situational or environmental factors related to the homicide." The researchers interviewed 50 persons convicted of committing a firearm-related homicide between 1982 and 1985. They noted,

“Forty-eight percent [of the perpetrators] reported they didn’t intend to shoot the victim when they drew the weapon ... [F]indings from this investigation suggest that the homicide was an impulsive act committed with a readily accessible firearm. .”

If the perpetrator had no intention of firing the gun, then one might logically conclude that the perpetrator had no control over his or her actions. Therefore, “the trigger pulled his finger,” and “the gun made him do it.”

While Wright and Rossi also noted a high percentage of “weapons effect excuses” from this same type of data, their interpretation was entirely different. They ascribed an ulterior motive for claiming that the firing of the gun “just happened” as an attempt by the perpetrator “to present his gun use in as sympathetic fashion as possible.”<sup>27</sup>

Since violent criminals today know that they will be held less culpable for their actions by a judge and a jury (and society) by offering such an excuse, many criminals do just that. They reinforce the perception that the weapons effect hypothesis has validity, a perception readily accepted (and perpetuated) by those who are gullible or politically-biased.

#### D. Anderson’s Word-Response Tests

Anderson, et al,<sup>28</sup> gave *prima facie* validity to the weapons effect hypothesis. Their study, consisting of two separate experiments, was intended to validate the cognitive priming process,<sup>29</sup> the currently accepted theoretical mechanism by which the weapons effect is thought to operate.

Citing the original Berkowitz and LePage experiment, they stated: “[M]ore than three decades later, it is clear that this ‘weapons effect’ is real. It has been observed...in field settings as well as the psychological laboratory....It is clear that the presence of a weapon—or even a picture of a weapon—can make people behave more aggressively. In essence, the gun helps pull the trigger.”

The authors, however, cited no evidence to support their claim that the weapons effect has been observed “in field settings,” or that people behave more aggressively in the presence of a weapon outside the artificiality of a laboratory setting. They simply identified research that was done in the outdoors instead of in a laboratory room.

In a 1975 experiment, for example, Turner, *et al.*,<sup>30</sup> had a confederate stop his pick-up truck at an intersection and remain stationary after the traffic light had turned green. The subjects in the experiment were the drivers stuck behind the immobile truck. Sometimes the truck had a rifle mounted on a gun rack plainly visible to the driver of the car, and sometimes there was no rifle present. Aggression was measured by the amount of horn-honking that ensued when the driver of the car was unable to proceed.

While this may technically be classified as an experiment conducted in a “field setting” since it was conducted outside of a conventional laboratory, to claim that the outcome had any relation to the “weapons effect” is scientific sleight-of-hand and outright misrepresentation. All the horn-honking in the world does not translate to a real-world manifestation of the “weapons effect” as defined by Berkowitz and LePage.

In Anderson’s first experiment, the subject sample consisted of 35 undergraduate students, approximately an equal number of men and women ranging in age from 18 to 24 years enrolled at the University of Missouri (Columbia). Subjects were told that the purpose of the study was “a test of reading ability of various types of words.”

Stimuli were presented to the subject on a computer screen in the form of “prime” words, and “target” words which were categorized as either “aggressive” or “non-aggressive.” Two categories of prime words were used: weapon words (*shotgun, machete, fist, bullet, dagger, and grenade*), and animal words (*rabbit, bug, dog, bird, butterfly, and fish*).

For the experimental procedure, a prime word was presented to each subject for 1.25 seconds, followed by a blank screen of 0.5 seconds duration. Then, a target word was presented. The subject’s task was to recite the target word as quickly as possible. The computer was equipped with a microphone to measure the time between the presentation of the target word and the first sound made by the subject.

In this part of the study, the researchers found that, on animal-primed trials, subjects were 0.005 seconds<sup>31</sup> slower at naming aggressive target words than at naming non-aggressive words. For weapon-primed trials, however, subjects named aggressive target words 0.009 seconds faster than they named non-

aggressive words. The authors claimed that these results provided “clear support for the priming interpretation of the weapons effect,” *i.e.* that “the mere cognitive identification of a weapon increases the accessibility of aggression-related concepts in semantic memory.”

In the second experiment, the subject sample consisted of 32 male and 61 female psychology students also enrolled at the University of Missouri (Columbia). This time, subjects were told they were participating in a study of “accuracy and speed at reading.”

Instead of words, however, the prime stimuli consisted of black-and-white line drawings of weapons (guns, swords, and clubs—3 different pictures for each category, for a total of 9 weapons) and of plants (fruits, trees, and flowers, also 3 different pictures for each category).<sup>32</sup> The prime stimulus was presented as in the previous experiment, and the subject was instructed to call out the category as quickly as possible. Again, a blank screen appeared for 0.5 seconds. Then the target word was presented and remained visible on the screen until the subject called it out.<sup>33</sup>

The researchers found that after exposure to plant pictures subjects were 0.005 seconds faster at naming aggressive target words compared to non-aggressive words. However, after exposure to weapon pictures, subject reaction time decreased, and subjects were 0.011 seconds faster at naming aggressive target words compared to non-aggressive words. “Thus,” the authors state, “the overall weapons effect was 6 ms” (0.006 seconds). In making this statement, it is clear that the authors have confused a measurement of the theoretical cognitive priming process with the so-called “weapons effect” in essence creating a “weapons effect” out of thin air.

The authors concluded: “These two experiments demonstrate that simply identifying weapons increases the accessibility of aggressive thoughts . . . that thinking about weapons increases accessibility of aggressive concepts in general....Does the gun pull the trigger? Extant research suggests that it does. Our research demonstrates one way that exposure to weapons might increase aggressive behavior—by increasing the accessibility of aggressive thoughts.”

But did the authors really demonstrate what they claimed?



Insomuch as “gun” might well be associated with “shoot” or “murder,” when it comes to the non-weapon primes they selected, there is no such logical link. For example, while butterfly was used as a prime word, the words “flutter,” “fly,” and “cocoon” were nowhere to be found. If the idea was to explore whether a certain word would trigger a class of words, such as “gun” triggering the entire class of aggressive words, why did not the authors compare this effect with similar effects for animal primes? The word “rabbit” is likely to trigger “carrot,” “ears,” “chew,” and “hop,” but that was not tested. In addition, potentially threatening primes like “lion,” “shark,” or “rattlesnake” should have been used to determine whether these would have elicited the same aggressive tendencies. If they had been used, and the same effect found regardless, the argument would be much more compelling.<sup>34</sup>

Although the currently accepted explanation of priming processes may have merit, the presumption that these laboratory pathways lead to inappropriate action outside the laboratory setting has not been scientifically validated. There is no evidence that aggressive action will follow even the most aggressive thoughts. Using scientific-sounding language to obfuscate the lack of hard data implicating the weapon as the culprit constitutes subversion of the scientific method. The researchers’ statement “if a person is struck in the back and experiences pain—the activation input gained from the mere presence of the gun may be sufficient to trigger the retaliation script...” amounts to the political abuse of science.

## II. PREDICTIVE VALUE OF THE WEAPONS EFFECT HYPOTHESIS

Aside from laboratory replication, another means of determining the validity of a hypothesis is to examine how well it predicts the future, compared to what would be expected on the basis of chance alone. In the case of the weapons effect hypothesis, those predictions have not fared well.

### A. Ordinary People

If guns facilitated the transformation of ordinary people into killers, it would be reasonable to expect to find ordinary people killing victims all over the country. They are not. Instead, we

know that the best predictor of violent behavior by a person is not proximity to a weapon, but prior violent behavior. Adelson insisted that “The killers are ‘typical Americans’, 70 percent of their victims are friends or relatives.”<sup>35</sup> Yet as Suter pointed out, “the FBI’s definition of acquaintance and domestic homicide requires only that the murderer knew or was related to the decedent. That dueling drug dealers are acquainted does not make them ‘friends.’”<sup>36</sup>

It would also be reasonable to expect that, if the weapons effect hypothesis were correct, as the number of guns in America rose, so should firearm-related violence. During the last fifty years, per capita firearm ownership increased by more than 250 percent, and the size of the civilian gun stock increased by 500 percent.<sup>37</sup> In 1945, the size of the civilian gun stock (long guns and handguns) was estimated to be about 47 million guns. By 1975, this figure had jumped to nearly 140 million and by 1994 that figure had jumped to about 236 million. The weapons effect hypothesis predicts that we should have seen a steady increase in violence, and we did not.<sup>38</sup> In fact, while the last 20 or so years were characterized by significant fluctuations in the overall U.S. homicide rate,<sup>39</sup> the Centers for Disease Control and Prevention reported that, between 1993 and 1997, the firearm-related death rate had dropped to the lowest level in more than 30 years.<sup>40</sup>

In a pivotal study on defensive gun use in America, Kleck and Gertz<sup>41</sup> found that only 24% of people who use guns defensively actually fired the gun. As Kleck later commented, “More commonly, guns are merely pointed at another person, or perhaps only referred to (“I’ve got a gun”) or displayed, and this is sufficient to accomplish the ends of the user.”<sup>42</sup> How, then, is it possible to reconcile the weapons effect hypothesis with the finding that even when being criminally attacked or threatened, 76% of defensive gun users did not fire their gun?

#### B. The Rochester Study

Of particular relevance to the weapons effect hypothesis is some of the data from the Rochester Youth Development Study.<sup>43</sup> This ongoing study tracked approximately 1,000 7th and 8th grade adolescents for a period of 4-1/2 years—until they reached 11th and 12th grade, respectively.<sup>44</sup>

The subjects were students from the Rochester, New York, public school system who, at the commencement of the study, were in attendance during the 1987-88 academic year. The researchers noted that the sample population represented the entire range of 7th and 8th grade students. They intentionally, however, selected more students from high-crime areas, and fewer from low-crime areas, because their goals were to identify factors that led to delinquency and drug use, and to develop policy initiatives for reducing such activity.

One aspect of the study's analysis was to determine how the pattern of firearm acquisition and possession by juveniles affected their behavior. For this part, the subjects were limited to males,<sup>45</sup> and three groups of adolescents were identified: those who owned legal guns initially comprised 3% of the sample (approximately 20 boys); those who owned illegal guns comprised 7% of the sample (approximately 47 boys). The remainder, about 605 boys, reported that they did not own a gun. This information on gun ownership was obtained at the time the youngsters were in 9th and 10th grades when most were 14 and 15 years of age.<sup>46</sup>

It is of special interest that the least violent of these three juvenile groups were young gun-owners who had been "socialized" into gun ownership through a family member--usually the father. As the researchers noted: "Parents who own legal guns socialize their children into the legitimate gun culture. Those parents who do not own guns are unlikely to socialize their children in that manner."

Among the study's specific findings were that children who acquired guns in a lawful manner (from relatives) never committed firearm-related crimes (0%), whereas children who acquired guns illegally often did so (24%; compare this to 1% in the non-gun-owning sample who did so). Children who acquired guns in a lawful manner were less likely to commit any kind of street crime (14%) than children who did not own guns (24%), or than children who acquired a gun illegally (74%).

The presence of firearms in their lives apparently reduced socially undesirable aggressive behavior among the group of legal gun-owning children. This phenomenon should be explored more fully in order to determine how placing a lethal weapon in the hands of an adolescent can restrain aggressive impulses.

Although the Rochester study was not intended to be an investigation of the weapons effect hypothesis, the study provides another means of assessing validity of the hypothesis. If there is a weapons effect, adolescents should have exhibited it, since the emotional stability of this age group tends to be more turbulent than in adulthood.<sup>47</sup> As any parent of an adolescent knows, heated, passionate arguments and other lesser conflicts are inevitable during this period. While firearm-related crime committed by some of the gun-owning boys did take place, delinquent behavior facilitated with the use of a gun is premeditated, not an “act of passion.” Premeditated violent crime does not fall under the purview of the impulsive behavior predicted by the weapons effect.

Every one of the study’s youngsters had a gun within easy reach or knew where to find one quickly.<sup>48</sup> Lizotte and Krohn<sup>49</sup> noted that “those desiring a handgun have no trouble obtaining them from an underground economy.” Yet not one of the subjects grabbed for a gun in the heat of the moment and shot his mother, his father, his sister, or his brother. Doors may have slammed shut with explosive force, expletives may have been lobbed around—but bullets didn’t whiz by. How can this finding be reconciled with the predictions of the weapons effect hypothesis?

### III. IMPLICATIONS OF THE ROCHESTER STUDY

The lesson to be learned, however, is more than just the lack of weapons effect validity: the Rochester study shows how attempts to extinguish America’s traditional gun culture may result in unintended societal problems. The differences in behavior between the group of young gun-owners who have been socialized into the gun culture through the family, and those who have not, are significant and their ramifications profound.

For example, let us review the issue of firearm safety. That gunowners in the U.S. are overwhelmingly safety conscious can be inferred from the ever-downward spiral of firearm-related accidental deaths which continues to this day.<sup>50</sup> It is reasonable to assume that when an adult presents a gun to a child, the safety of the child—and those around him—become of paramount concern to that adult. The adults have a high stake in teaching the child to safely and responsibly handle that gun, respect for

what the gun can do, and a detailed knowledge of how the gun works.

Contrast the teenager who is taught about guns by an adult family member with the youngster who acquires a gun illegally—from the black market, or from a friend (who may have acquired the gun illegally, too). All knowledge about the use and workings of that firearm is learned in a clandestine manner necessitated by the legal consequences of discovery of possession of that firearm.

Because of today's almost unintelligible, often contradictory and complex maze of firearm laws—especially those that pertain to possession and use in an urban setting—adults are increasingly unable to take children to the local range for target practice, or to seek out the help of professionals for safety and marksmanship training. Under such circumstances, knowledge of how a gun works, and what it is capable of, is determined by what is learned on the street and what is seen in the movies and other media—not necessarily accurate sources for the responsible handling of firearms.

In America, firearm ownership continues, for the most part, to be kept in the family, handed down from one generation to the next. But near-prohibitory firearm controls will ensure that the primary modality for youngsters to learn about guns changes. Summarizing the Rochester evidence, Lizotte and Tesoriero concluded: “Boys who own legal guns are socialized by their parents and pose no threat to society...general policies should *not* be targeted at youth (and their fathers) who own guns for legitimate purposes.” (emphasis in original). Removing adults from the cycle of firearm ownership may threaten the present declining trend of firearm-related accidents and may also perversely change the nature of America's traditional peaceable sporting gun culture.

Weapons effect fear is being used to incrementally destroy the most socially beneficial means of introducing children to a wholesome gun culture. During the last decade, the number of schools that have rifle teams dramatically declined.<sup>51</sup> Only in certain locations, it appears, are gun-owning parents willing to make a determined commitment and resist social pressures within the school system.<sup>52</sup>

## IV. REDUCING GUN AVAILABILITY

Since any one of us might become an unpredictable perpetrator of firearm rage, weapons effect proponents use their model as a justification for decreasing firearm availability to everyone. Kleck termed this the “blunderbuss” approach, premised on the supposition that “it is impossible to distinguish between low-risk and high-risk candidates for gun ownership, that everyone is a potential killer, and that serious acts of violence and other criminal acts committed with guns are common among people with no previous record of violence.”<sup>53</sup>

This rationale forms the basis of gun surrender programs, which encourage firearm owners to turn in their guns to the government in exchange for money or some other inducement. Such programs would make sense if the weapons effect hypothesis were indeed valid. Even if criminals did not give up their guns, fewer non-criminals would succumb to the aggression-evoking madness caused by proximity to a firearm, thereby resulting in lowered levels of firearm-related violence.

Has this been the case?

In April 2000, the Clinton administration allocated \$2.6 million to fund the BuyBack America campaign, an 84-community program designed to “buy back<sup>54</sup> unwanted guns and raise awareness about gun safety.” Kansas City, Kansas, mayor Carol Marinovich praised the program, stating: “The gun buyback program is an important step toward making our community safer.”<sup>55</sup>

Such a claim, however, was made without any social science evidence.

Romero, *et al*,<sup>56</sup> declared that “Exposure to a gun—particularly a handgun—has repeatedly been associated with a substantial increase in risk of fatal firearm violence.” They claimed that “Gun exchange programs may reduce risk for firearm violence among some participants...” However, the authors made no attempt to measure whether there was any actual reduction in firearm-related violence attributable to the surrender program. In fact, they measured only characteristics of people turning in their guns.

Three years later, Yurk, *et al*,<sup>57</sup> reported on a firearm surrender program in Portland, Oregon sponsored by Ceasefire Oregon. The program operated on two consecutive Saturdays each

year between 1994 and 2000. The authors described the media campaign which preceded the annual event. In addition, they noted, “The gun turn-in program was linked to an educational program<sup>58</sup> targeting all sectors of the community [especially, physicians and schools] on the many aspects of gun danger” throughout the year. Among the specific messages emphasized was that “a gun in the home is a danger to you and your family.”<sup>59</sup>

No attempt was made to determine changes in outcome measures of firearm mortality or morbidity. Indeed, the authors cited the study by Romero, *et al*, and acknowledged that “Gun Turn-In programs . . . have demonstrated very little impact on other community indicators such as firearm injuries, deaths, and crimes.”

Wintemute later offered a rationale as to why research on gun surrender programs does not show a reduction in violence: “Buybacks remove generally no more than 1 or 2 percent of the guns estimated to be in the community.” It is only because of such insignificant numbers that “there has never been any effect on crime results seen.”<sup>60</sup>

The result of removing a large quantity of firearms from a population has indeed been studied. Meddings and O’Connor<sup>61</sup> measured the incidence of weapon injuries before and after a U.N.-mediated peace agreement in northwestern Cambodia in the early 1990s. Although it was estimated that “around 25-50% of [Cambodia’s combatant factions were]...believed to have been disarmed”<sup>62</sup> during the peacekeeping operation, and although a stable government was left in place at the time of departure of the U.N., no reduction in firearm-related violence was observed. What Meddings and O’Connor found, instead, was that firearm-related injuries rose.

If the weapons effect hypothesis or accessibility thesis were valid, at least some decrease in firearm-related injuries should have been evident.

#### V. REDUCING GUN AVAILABILITY BY CONTROLLING THE TRIGGER

Mandatory “trigger-lock” or “safe storage” laws have been increasingly proposed as reasonable firearm safety measures. Have these lessened firearm-related injuries? In theory, these

laws reduce the number of firearms available for immediate access and also the potential for unauthorized use.

It is an implied underlying fear of firearms, rooted in the weapons effect hypothesis that is the selling point for such regulations. Emotion sometimes substitutes for fact, and the harms of private firearm ownership are emphasized while the benefits ignored.

For example, in 1998, Sen. Richard Durbin (D-IL) called on Congress to enact legislation requiring gun-owners to secure their firearms when not in use or face criminal charges.<sup>63</sup> Violations would result in fines up to \$10,000 and a year in prison. Said Durbin, "I am sorry to tell you that I can give you two reports today from this weekend of children killing children with guns<sup>64</sup> they took from their parents. I am sorry to report to you that by next weekend I'll be able to give you even more."

In 1999, Illinois Gov. George Ryan signed into law a measure that would require gun owners to keep their guns locked away from children under 14 living in the same household.<sup>65</sup> Said Ryan, "This law is designed to prevent innocent children from injuring or killing themselves or others." What Ryan failed to point out was that such incidents are a statistical rarity. He further failed to disclose the costs of complying with his proposal.

Do these laws work as their proponents promise? There is strong evidence to show that just the opposite is the result.

In 1999, McClurg predicted that with the implementation of a Federal child access prevention law (i.e. trigger-lock or "safe"-storage law), there would be a reduction in firearm deaths and injuries of all types.<sup>66</sup> He described the problem of rendering such a secured firearm ready for self-defense, if the need arose, as "nonexistent."

That was not the case in Merced, California, in August 2000, when an insane pitchfork-wielding man attacked Jessica Carpenter's 7-year old brother and 9-year-old sister.<sup>67</sup> Jessica's father had kept a gun in the home, and his children had learned how to fire it. Jessica, age 14, was a very good shot. But by California law,<sup>68</sup> the gun had to be locked up when the parents were not home. When the murderer attacked, Jessica was unable to retrieve the gun to save her siblings. She ran to a neighbor, and begged for help, but the neighbor refused to intervene. By the



time the police showed up, a 7-year-old boy and 9-year-old girl had been gruesomely stabbed to death with the pitchfork.

The children's great-uncle said, "If only Jessica had a gun available to her, she could have stopped the whole thing . . . . Maybe John William and Ashley [Jessica's younger brother and sister] would still be alive." He added that their father "was scared to death of leaving the gun where kids could get it because he's afraid of the law. He's scared to teach his children to defend themselves." In the end, it was compliance with California's "safe"-storage laws—and the fear of being prosecuted for their violation— that resulted in the loss of the two Carpenter children. This tragedy represents the hidden cost of what many refer to as reasonable gun laws, and it's rarely talked about by "safe"-storage advocates.

Compare the Merced outcome to what happened in South Bend, Indiana.<sup>69</sup> On the evening of February 4, 2002, an 11-year-old boy found his grandmother, Sue Gay, with a box cutter held to her neck by 27-year-old Tony Murry. The fifth-grader ran upstairs and retrieved a handgun. Despite Murry using Gay to shield himself, enough of the attacker was exposed, and the youngster fired one shot, hitting Murry in the chest. As a newspaper detailed, "The fifth-grader may not have been just a lucky shot. This is a family that knows guns." St. Joseph County Prosecutor Chris Toth later stated, "The young man reasonably believed his [grand-]mother and himself to be in danger of dying...He did what he had to do."

In discussing child access prevention laws, Wintemute noted: "States have passed laws imposing criminal penalties on adults whose negligence allows children to gain access to firearms with a resulting injury or death...At this time there is no good evidence that the laws are effective."<sup>70</sup>

Lott and Whitley<sup>71</sup> analyzed the effects of safe storage laws from data spanning nearly 20 years. What they found was that not only was there "no support that safe storage laws reduce either juvenile accidental gun deaths or suicides," but such laws cost lives by making it more difficult to have a firearm ready for a sudden emergency. During the first 5 years after the passage of "safe-storage" laws, the group of 15 states that had adopted them experienced significant increases of murder, rape, robbery, and aggravated assault. As Lott and Whitley noted, "these stor-

age requirements appear to impair people's ability to use guns defensively."

If the weapons effect hypothesis were valid, removing more guns from ready availability in those states where safe-storage laws are in force should have been accompanied by decreased levels of firearm-related violence. They were not.

#### VI. BLUNDERBUSS POLICIES

Berkowitz' claim that the trigger pulls the finger is unambiguous and helped set the groundwork for the justification of increasingly restrictive "blunderbuss" firearm laws designed to reduce civilian firearm availability. Those laws, premised on the weapons effect, have failed to work as promised toward reducing firearm-related violence in our society.

Even so, demands for ever harsher restrictions continue. For example, in an article published in *Pediatrics*,<sup>72</sup> Katherine Kaufer Christoffel, a pediatrician and leading firearm prohibitionist, expressed concern about firearm injuries in America's pediatric population. According to Christoffel, "most shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection." Her solution to firearm-related injuries to children included but was not limited to: gun-owner liability, total firearm licensure and registration, ammunition modification to decrease lethality, and "banning [handgun] possession in locations where children live and visit." Christoffel suggested that pediatricians should become involved as "advocates in the political process...[for] reducing the accessibility of guns in the environments of children and adolescents ....Our goal is to reduce the use of guns—and thereby, danger from guns—near and by children and adolescents...Every incremental step in the direction of reducing the availability of firearms in the environments of children and adolescents is a positive step toward reducing their risk of injury and mortality from firearms."

Since children can be found virtually anywhere, even in condominiums whose bylaws restrict permanent residence to adults, Christoffel's recommendations amount to a de facto ban on all guns.

American gun-owners have been subjected to a plethora of "blunderbuss" restrictive gun laws. Firearm licensing and gun-

owner registration, especially with regard to handguns, have been used to effectively prohibit ownership in some urban jurisdictions. In addition, many laws have been enacted to ban entire classes of guns,<sup>73</sup> such as “assault weapons” (self-loading firearms with a military or futuristic appearance)<sup>74</sup> and “junk-guns” (also referred to as “Saturday Night Specials”).<sup>75</sup> Firearm rationing (i.e. “one-gun-a-month”) laws have been enacted in South Carolina, Virginia, and Maryland.

More recently, .50 caliber “sniper” rifles have become the target of a ban by U.S. Rep. Rod Blagojevich (D-Ill).<sup>76</sup> Blagojevich stated, “This is a weapon that should never have been allowed for civilian use in the first place.” Under his proposal, the sale of such rifles would be prohibited to civilians, and those who already own them would be required to undergo a criminal background check and have them registered with the Bureau of Alcohol, Tobacco and Firearms, under the same rules applicable to machine guns.

Suter,<sup>77</sup> identified the tactic of incrementally outlawing guns one group at a time: “Some guns are ‘too big (assault weapons)’; some guns are ‘too small’ (handguns). Some ammunition penetrates ‘too much’ (armor piercing ammo); some ammunition penetrates ‘too little’ (‘hyperdestructive’ hollow point ammo). Some guns are ‘too inaccurate’ (‘Saturday Night Specials’); some guns are ‘too accurate’ (scoped hunting rifles or ‘sniper rifles’). . . . What the anti-self-defense lobby never tells us in their fairy tale is what guns and ammunition are ‘just right’—because, for these extremists, there is no gun or ammunition that is ‘just right.’”

Another means of attempting to reduce firearm availability has been to limit the number of retail and other outlets engaged in the lawful transfer and sale of firearms. Between the time the Brady Act was passed in 1993, and the end of October 1997, the number of Federal firearm licensees<sup>78</sup> dropped 287,000 to 79,224.<sup>79</sup> One factor accounting for this decrease was that, under the Clinton administration, the procedure for applying for a new license, as well renewal of an existing license, became exceedingly complex and burdensome, discouraging both renewals and prospective licensees.<sup>80</sup>

At the same time, many municipalities sharply restricted or banned firearms dealer within their jurisdictions.<sup>81</sup> As a U.S. De-

partment of Justice report noted, “some communities have limited the number of Federal firearms licensees (FFL’s) that are allowed to sell firearms. Zoning and other municipal ordinances that restrict permissible gun sale locations (e.g., in residential and school zones) and impose conditions on gun sales are effective strategies used by many jurisdictions to reduce the degree to which communities are saturated with guns.”<sup>82</sup>

The use of the weapons effect to buttress the philosophical justifications for firearm-prohibition (the ultimate goal) has also been resorted to on a global scale. Such efforts to eliminate the civilian possession of small arms have today become internationally coordinated.

For example, in “Small Arms Survey 2001,” the authors declared: “It is not only the availability of arms—it is the arms themselves that condition violence ....The more accessible the tools of violence, the more likely they are to be used.”<sup>83</sup> Regarding the genocide in Rwanda,<sup>84</sup> the authors focused blame away from the inaction of the international community,<sup>85</sup> and instead implicated the vast number of small arms and other weapons sold to the Rwandan government: “just before the killing began, peacekeepers estimated that 85 tons of weapons...[were] distributed throughout the country.”

A similar claim was asserted in a report by the International Committee of the Red Cross: “Arms transfers into Rwanda as tensions increased...are widely considered to have encouraged and facilitated” the genocide in that country.<sup>86</sup> The implication was that mobs of armed civilians were crazed by their proximity to mortars, rocket-propelled grenades, assault rifles, sub-machine guns, and millions of rounds of ammunition,<sup>87</sup> and commenced killing each other.<sup>88</sup>

The reality in Rwanda was that firearms and other weapons were not evenly available to all segments of the population. The victim segment was defenseless and weaponless, previously disarmed by laws enacted in 1964 and 1979. The firearms were purchased by the government and issued by the government only to the police, the army, and “trusted civilians.”<sup>89</sup> There were relatively few weapons in the hands of the genocide victims. This disequilibrium significantly lowered the cost to the government of Rwanda and its henchmen for the commission of genocide. Had the victims been better armed<sup>90</sup>—had firearm availability

been greater—the genocide might have been prevented, or at least the magnitude of the violence might have been moderated.

## VII. CONCLUSION

Blaming “the gun” absolves one of personal responsibility, and denies the existence of free will—that man, regardless of external forces, can choose his actions. Increasingly, the weapons effect hypothesis has amounted to an excuse for murderers to eschew culpability. It is but one variation of the modern tendency to manufacture excuses for criminals, following the same line of reasoning that we should not hold muggers morally accountable for their actions because they grew up in an environment of poverty.

Blaming “the gun”—as weapons effect proponents would have us do—is easy because of the obvious correlation between the one who was shot, and the weapon that was used. The idea is comforting to many because it promises a quick fix to the complex problems of society. But the underlying causes are swept under the carpet and solutions that truly hold the promise of mitigating the ills of society are ignored or discarded.

The weapons effect hypothesis is the fanciful creation of highly educated researchers, many of whom have an irrational fear or loathing of firearms. It is a perversion of science to declare that experiments using strange circumstances to manufacture findings of aggression are proof that the weapons effect hypothesis is valid.

We suggest a more relevant type of “weapons effect” experiment. Place a subject and a gun, loaded with blanks, in a realistic environment.<sup>91</sup> Insert all possible aggressive cues in that environment. Then measure the percentage of subjects who pick up the gun and point it at the confederate, and note how many of these actually fire the gun. Is this not the real-world outcome Berkowitz and LePage described? Our prediction is that the gun will not be picked up and pointed at the confederate as long as the subject is not made to feel that his personal safety is in jeopardy, or as long as he is provided a pathway for safe retreat.

It is an undeniable fact that aggression exists in humans, but many researchers make the mistake of assuming that the accessibility of aggressive thoughts is inherently bad. The assumption ignores the fact that aggressive behavior is sometimes warranted

and desirable (e.g., self-defense against terrorists or other violent attackers). Berkowitz complained that our society takes “a lenient attitude toward what is sometimes called defensive aggression. It is quite permissible, even admirable, for a man to defend with vigor not only himself but his family, his home and his country, and not only his physical safety but his principles of honor, law and democracy.”<sup>92</sup> What would Berkowitz think about the act of “aggression” performed by Sue Gay’s 11-year-old grandson? What would he wish for were his own grandson about to be killed by a criminal? A “shock key?”

Researchers who say they are “measuring aggression,” and then perform a bait-and-switch to redefine what they measured as a “weapons effect,” are fooling themselves. Having aggressive thoughts does not translate into the lethal kind of “weapons effect” that Berkowitz and LePage hypothesized.

A new generation of weapons effect proponents would have us believe that ordinary American gun-owners are like Pavlov’s dogs learning to salivate upon hearing a bell: put them near a gun, and they will shoot themselves or some other innocent. As Leonard Berkowitz put it, “Gun control may not be too effective in protecting ordinary citizens against criminals or Presidents against assassins, but it may, nevertheless, save some ordinary citizens from other ordinary citizens like themselves.”<sup>93</sup>

Such a profoundly pessimistic view of human nature presumes that most of us are incapable of controlling our actions. If we are to believe that simply seeing a firearm will cause us to think about murdering one another and make us more likely to commit the act, we must also concede that we are gravely lacking of free will—mere slaves to our environment—and that we can easily and completely be dominated by mind-control tactics like subliminal advertising and frenzied propaganda.

Doesn’t mankind deserve more credit?

#### NOTES

1. Lester Adelson, “The Gun and the Sanctity of Human Life; or The Bullet as Pathogen,” *The Pharos* (Summer 1980). The article was reprinted in *Archives of Surgery* 127 (June 1992): 659-64, accompanied by the editorial note: “The penetrating concepts embodied in this seminal contribution are as operative today as they were in 1980.”

2. John Curran, "Officer Snaps, Kills Neighbors, Injures Boss," *The Journal News* (New York), 11 April 2002.
3. Owen Moritz, "Cop's Shooting Spree Leaves 5 and Self Dead," *New York Daily News*, 11 April 2002.
4. Ikimulsia Sockwell-Mason and Todd Venezia, "Time Bomb with a Badge," *New York Post*, 11 April 2002.
5. Leonard Berkowitz and Anthony LePage, "Weapons as Aggression-Eliciting Stimuli," *Journal of Personality and Social Psychology* 7 (1967):202-07.
6. Gary Kleck and David J. Bordua, "The Factual Foundation for Certain Key Assumptions of Gun Control," *Law and Policy Quarterly* 5 (1983):271-98, <[www.saf.org/lawreviews/kleckandbordua.htm](http://www.saf.org/lawreviews/kleckandbordua.htm)>
7. Don B. Kates and Daniel D. Polsby, "Long-Term Nonrelationship of Widespread and Increasing Firearm Availability in the United States," *Homicide Studies* 4 (May 2000):185-201, <[www.donkates.com/don&dan.html](http://www.donkates.com/don&dan.html)> See also John P. May, "Taking Aim at Handgun Violence," *JAMA* 273 (1995): 1739-40: "Any of our patients, like ourselves, can have moments of being impulsive, careless, angry, or filled with despair. If a handgun is readily accessible, those moments are more likely to end in disaster." According to Jasjit Singh, "political dissent rapidly assumes violent shape because of easy availability of lethal small arms." "Illicit Trafficking in Small Arms: Some Issues and Aspects," *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action-Oriented Agenda*, ed. Pericles Gasparini Alves and Daiana Belinda Cipollone (N.Y.: United Nations Institute for Disarmament Research, 1998), 13.
8. Gary Kleck and David J. Bordua, "The Factual Foundation for Certain Key Assumptions of Gun Control," *Law and Policy Quarterly* 5 (1983):271-98.
9. According to Ford, et al, "we would predict that if guns continue to proliferate in our society and thus become more familiar to a greater number of people, completed suicide rates will continue to rise simply because of the lethality of the instrument." Amasa B. Ford, Norman B. Rushforth, Nancy Rushforth, Charles S. Hirsch, and Lester Adelson, "Violent Death in a Metropolitan County: II. Changing Patterns in Suicides (1959-1974)," *American Journal of Public Health* 69 (1979):459-64. Rathjen and Montpetit claimed that "Guns are 15 times more lethal than knives, and much deadlier than fists." Heidi Rathjen & Charles Montpetit, *December 6: From the Montreal Massacre to Gun Control: The Inside Story* (Toronto: McClelland and Stewart, Inc., 1999), 59. Compare with Kleck, who, in discussing the relative lethality of guns vs. knives, stated that the available data supports a 4-to-1 ratio. Gary Kleck, *Point Blank: Guns and Violence in America* (N.Y.: Aldine de Gruyter, 1991), 164.
10. Turner and Leyens credited Berkowitz and LePage (1967) with conducting "the original study that produced findings called the 'weapons effect'." Charles W. Turner and Jacques-Philippe Leyens, "The Weapons Effect Revisited: The Effects of Firearms on Aggressive Behavior," *Psychology and Social Policy*, ed. Peter Suedfeld and Philip E. Tetlock (N.Y: Hemisphere Publishing Corporation, 1992), 201-22.

11. Leonard Berkowitz and Anthony LePage, "Weapons as Aggression-Eliciting Stimuli," *Journal of Personality and Social Psychology* 7 (1967):202-07.
12. Subjects were told that one shock signified a "very good" rating, and ten shocks a "very bad" rating.
13. A brief questionnaire was administered to subjects both before they were administered shocks, and after they had delivered shocks to the confederate, in order to assess "mood changes." The authors concluded, "Analyses of variance of the responses to each of the mood scales following the receipt of the partner's evaluation indicate the prior-shock treatment succeeded in creating differences in anger arousal. The subjects getting seven shocks rated themselves as being significantly angrier than the subjects receiving only one shock."
14. Leonard Berkowitz, "Impulse, Aggression and the Gun," *Psychology Today*, September 1968, 19-21.
15. Arthur L. Kellermann, "Response to Kleck," *Homicide Studies* 5 (2001):276-78.
16. Dolf Zillmann, *Hostility and Aggression* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1979), 145-55.
17. Hans Toch & Alan J. Lizotte, "Research and Policy: The Case of Gun Control," *Psychology and Social Policy*, ed. Peter Suedfeld and Philip E. Tetlock (N.Y.: Hemisphere Publishing Corporation, 1992), 223-49.
18. Michael Carlson, Amy Marcus-Newhall, and Norman Miller, "Effects of Situational Cues: A Quantitative Review," *Journal of Personality and Social Psychology* 58 (April 1990):622-33.
19. Gary Kleck, *Point Blank: Guns and Violence in America* (N.Y.: Aldine de Gruyter, 1991), 158-62.
20. Hans Toch & Alan J. Lizotte, "Advocating Gun Control", *Psychology and Social Policy*, ed. Peter Suedfeld and Philip E. Tetlock (N.Y.: Hemisphere Publishing Corporation, 1992), 223-49.
21. Dolf Zillmann, *Hostility and Aggression* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1979), 145-155.
22. Berkowitz and LePage themselves acknowledged the element of suspicion on the part of subjects as a significant factor in the experiment, and mentioned it several times in the course of their article. For example, the experiment was run on 139 subjects, but 39 subjects were subsequently "discarded" for various reasons; for 21 of these, suspicion expressed by the subject was the basis for their disqualification.
23. Dolf Zillmann, *Hostility and Aggression* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1979), 150.
24. Desmond P. Ellis, Paul Weinir, and Louie Miller III, "Does the Trigger Pull the Finger? An Experimental Test of Weapons as Aggression-Eliciting Stimuli," *Sociometry*, 34 (1971):453-65.



25. It seems to us an easy task to create more realistic scenarios where the presence of a gun would be a reasonable expectation, especially here in the U.S. where firearms are commonplace. For example, one might plan an experiment to be performed on a field trip in a wooded area or at a firearm range, and have "loaded" guns (loaded with blanks, only) easily available to the subject. We would, however, strongly recommend that a qualified firearm instructor be consulted in designing such an experiment in order to ensure both the safety of all participants, and realism of the experimental conditions.
26. Centers for Disease Control and Prevention, "Firearm-Associated Homicides among Family Members, Relatives, or Friends--Ohio," *Epidemiologic Notes and Reports* 38 (April 1989):253-56, <[www.cdc.gov/mmwr/preview/mmwrhtml/00001376.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/00001376.htm)>
27. James D. Wright and Peter Rossi, *Armed and Considered Dangerous: A Survey of Felons and their Firearms* (N.Y.: Aldine de Gruyter, 1986), 92-93.
28. Craig A. Anderson, Arlin J. Benjamin, Jr., and Bruce D. Bartholow, "Does the Gun Pull the Trigger? Automatic Priming Effects of Weapon Pictures and Weapon Names," *Psychological Science* 9 (July 1998), 308-14.
29. The authors noted that "The standard explanation of this weapons effect on aggressive behavior involves priming: identification of a weapon is believed to automatically increase the accessibility of aggression-related thoughts."
30. Charles W. Turner, John F. Layton, and Lynn Stanley Simons, "Naturalistic Studies of Aggressive Behavior: Aggressive Stimuli, Victim Visibility, and Horn Honking," *Journal of Personality and Social Psychology* 31 (1975):1098-1107.
31. Figures given by authors represent mean subject reaction times.
32. There was relatively little ambiguity in the identification of the weapon primes; however, this was not true for the plant primes: one of the "fruit" drawings could easily be interpreted as a slice of meat, or even an embryo; one of the "tree" drawings could be mistaken for the mushroom cloud of a nuclear explosion.
33. In both experiments, subsequent trials commenced following a delay of 0.5 seconds. Sessions lasted approximately 30 minutes for the first experiment, and 45-60 minutes for the second.
34. Both the list of aggressive and nonaggressive words contained words which were ambiguous and had several possible common alternative meanings. Consider the following examples, noting that, in each instance, both aggressive and nonaggressive interpretations can apply to each word. One can "strike" an agreement, or "strike" a person, or go on "strike" at one's place of employment. One can "punch" an antagonist, or drink a glass of "punch." One can "wound" an assailant, or a clock can be "wound"; in a case such as this, subject confusion about how to correctly pronounce the word prior to reciting it aloud could contaminate the response. When the goal of these experiments was to assess timed responses measured in thousandths of a second, and just a few thousandths of a second is considered "statistically significant", the confusion presented by word ambiguities may be important, and there is no indication that the researchers took this factor into account.

35. Supra note 1.

36. Edgar A Suter, William C. Waters, George B. Murray, et al, "Violence in America: Effective Solutions," *Journal of the Medical Association of Georgia* 84 (June 1995):253-63.

37. As Kleck pointed out, there are two methods which can be used to determine the size of the civilian gun stock. One is based on manufacturing figures and adjusted for imported and exported guns. The other is based on gun-owner surveys; one of the major flaws in estimation by this method is respondent denial of firearm ownership, both intentional and unintentional. The figures cited here were obtained using the former method. Gary Kleck, *Point Blank: Guns and Violence in America* (N.Y.: Aldine de Gruyter, 1991), 63-103.

38. Kates and Polsby cite Kleck as noting: "About half of the time gun stock increases have been accompanied by violence decreases, and about half of the time [they have been] accompanied by violence increases, just what one would expect if gun levels had no impact on violence rates." Don B. Kates and Daniel D. Polsby, "Long-Term Nonrelationship of Widespread and Increasing Firearm Availability in the United States," *Homicide Studies* 4 (May 2000):185-201, <[www.donkates.com/don&dan.html](http://www.donkates.com/don&dan.html)>

39. According to the U.S. Department of Justice, in 1998, the violent crime rate had fallen to its lowest point since 1973. Gary Fields, "Study Shows Decline in Violent Crime," *USA Today*, 19 July 1999. See also Alfred Blumstein and Richard Rosenfeld, "Assessing the Recent Ups and Downs in U.S. Homicide Rates," *Crime's Decline—Why?*, National Institute of Justice Journal (October 1998),10. See also Fox Butterfield, "U.S. Crime Figures were Stable in 2000 After 8-Year Drop," *New York Times*, 31 May 2001.

40. M.A.J. McKenna, "Gun Deaths Decline in United States," *Detroit Free Press*, 19 November 1999.

As Kates and Polsby have noted, "Over the past three decades, particularly in the mid-1980s, 30 or more states have enacted laws allowing any trained, law abiding adult to obtain on application a license to carry a concealed firearm [this includes the ten states that eased restrictions on the concealed-carry of handguns between 1987 and 1990, and several others which enacted similar laws afterwards] . . . Since 1990 one to two million residents of these 31 states have been issued licenses to carry concealed handguns." Don B. Kates and Daniel D. Polsby, "Long-Term Nonrelationship of Widespread and Increasing Firearm Availability in the United States," *Homicide Studies* 4 (May 2000):185-201, <[www.donkates.com/don&dan.html](http://www.donkates.com/don&dan.html)> Moreover, between 1973 and 1994, the percentage of the total estimated civilian gun stock comprised of handguns rose from about 29% to about 36%. Gary Kleck, *Point Blank: Guns and Violence in America* (N.Y.: Aldine de Gruyter, 1991), 49-50. These factors would have served to make handguns more readily accessible for immediate use.

41. Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun," *Journal of Criminal Law and Criminology* 86 (1995):150-87, <[www.saf.org/LawReviews/KleckAndGertz1.htm](http://www.saf.org/LawReviews/KleckAndGertz1.htm)>.
42. Gary Kleck, *Targeting Guns: Firearms and their Control*, (N.Y.: Aldine de Gruyter, 1997), 162.
43. Alan J. Lizotte and James Tesoriero, "Gun Ownership and Delinquency", *Urban Delinquency and Substance Abuse: Technical Report*, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (November 1993, revised): Ch. 15. See also "Urban Delinquency and substance Abuse: Initial Findings Report," U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, July 1993.
44. Eighty-four percent of the original study sample was tracked to about 22 years of age, demonstrating a high retention rate. Alan J. Lizotte and Marvin D. Krohn, "Sources of Gun Acquisition among Young Urban Males," delivered at the November 1999 meeting of the American Society of Criminology.
45. The researchers noted that girls rarely own guns and they therefore excluded them from this part of the study's analysis.
46. By the time the study group reached 11th and 12th grade, the number of boys who owned legal guns had risen to about 40, and the number of boys who owned illegal guns had risen to about 60. By this time, therefore, there were approximately 100 gun-owning boys in the study population out of about 660 boys, from a total retained sample of about 900 (males and females, combined). It would be worthwhile to repeat such a study on a larger sample size, especially in an area where restrictions on juvenile possession of firearms are less severe than in New York.
47. According to Westen:

Psychologists have offered two conflicting views of adolescent social and personality development. One approach emphasizes that as adolescents grow less dependent upon their parents and try out new values and roles, they often become rebellious and moody, shifting from compliance one moment to defiance the next. According to this **conflict model**, put forth at the turn of the century, and later elaborated by psychodynamic theorists, *conflict and crisis are normal in adolescence*. Conflict theorists argue that adolescents need to go through a period of crisis to separate themselves psychologically from their parents and carve out their own identity. Beeper studies (which page or 'beep' participants at random intervals over the course of a day to measure what they are thinking or feeling at the moment; Chapter 9) show that adolescents do, in fact, experience a wider range of moods over a shorter period of time than adults. Longitudinal studies find decreases in hostility and negative emotionality and increases in diligence, self-control, and congeniality as teenagers move into early adulthood. Other theorists argue, however, that the stormy, moody, conflict-ridden adolescent is the

exception rather than the rule. According to the **continuity model**, *adolescence is not a turbulent period but is essentially continuous with childhood and adulthood* (all emphases in original).

Drew Westen, *Psychology: Brain, Behavior, and Culture*, (N.Y.: John Wiley & Sons, Inc., 2002), 509-10.

Santrock noted that “Early adolescence is a time when conflict with parents escalates beyond childhood levels,” John W. Santrock, *Life-Span Development*, 6th ed. (Madison, WI: Brown & Benchmark Publishers, 1997), 387-88.

Wright and Rossi noted that, “In the best of circumstances, adolescence can be a much-troubled period in a young man’s life. . .,” James D. Wright and Peter Rossi, *Armed and Considered Dangerous: A Survey of Felons and their Firearms* (N.Y.: Aldine de Gruyter, 1986), 122.

48. Sheley and Wright interviewed male students in 10 inner-city public schools. In asking them how they would go about obtaining a gun if they wanted one, “Most felt there were numerous ways but that family, friends, and street sources were the main sources;” 53 percent of the students would “borrow” a gun from a family member or friend,” and 37 percent of the students would “get one off street.” Joseph F. Sheley and James D. Wright, “Gun Acquisition and Possession in Selected Juvenile Samples,” *Research in Brief*, National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention (December 1993).

49. Alan J. Lizotte and Marvin D. Krohn, “Sources of Gun Acquisition among Young Urban Males,” delivered at the November 1999 meeting of the American Society of Criminology.

50. See “Gun Accidents Down,” news release from the National Shooting Sports Foundation (Newtown, CT), 6 Feb. 2000. “The National Safety Council’s most recent report on accident injuries indicates that in 1998 firearms-related fatalities reached an all-time low of 900—the fewest accidents since record keeping began in 1903.”

51. Lott noted that “nowhere were guns more common than at schools. Until 1969, virtually every public high school in New York City had a shooting club. High-school students carried their guns to school on the subways in the morning, turned them over to their homeroom teacher or the gym coach and retrieved them after school for target practice. The federal government even gave students rifles and paid for their ammunition. Students regularly competed in city-wide shooting contests, with the winners being awarded university scholarships.” John R. Lott, “More Gun Controls? They Haven’t Worked in the Past,” *Wall Street Journal*, 17 June 1999.

Acceleration of this decline was likely facilitated by passage of the 1990 federal legislation banning guns within 1,000 feet of a school, signed into law by then-President George Bush. Although ruled unconstitutional by the Supreme Court on April 25, 1995, the legislation was reworked, resurrected by Congress, and then signed back into law by President Clinton that same year. The legislation had the practical effect of posting signs on school property containing the message, “Only criminals are allowed to carry guns here; all others are potential

victims.” As Lott and Landes noted: “While the recent rash of public school shootings during the 1997-98 school year took place after the period of our study, these incidents raise questions about the unintentional consequences of laws. The five public school shootings took place after a 1995 federal law banned guns (including permitted concealed handguns) within a thousand feet of a school. The possibility exists that attempts to outlaw guns from schools, no matter how well meaning, may have produced perverse effects. It is interesting to note that during the 1977 to 1995 period, 15 shootings took place in schools in states without right-to-carry laws and only one took place in a state with this type of law. There were 19 deaths and 97 injuries in states without the law, while there was one death and two injuries in states with the law.” John R. Lott, Jr. and William M. Landes, *Multiple Victim Public Shootings, Bombings, and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement*, University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 73 (2nd Series, Apr 1999), 5.

52. See Linda F. Burghardt, “Chess, Sure. But Rifles? In Great Neck? Great Neck Skirmish: Scholastic Rifle Team,” *New York Times*, 28 November 1999. Great Neck, New York, is an upscale politically-liberal suburban community just outside New York City on Long Island. It was solely through the efforts of Howard Last (a civil engineer and a certified firearms instructor) and his 14-year-old daughter Lisa that the Great Neck South High School rifle team came into being. However, Last and his daughter faced stiff opposition from people like Susan Posen who headed a campaign to eliminate riflery in the Great Neck schools. According to Posen, “A rifle is an instrument for killing. Shooting is not a sport. When I read that my community was supporting a rifle team, I was incensed. In light of the horrifying gun violence in so many schools, how can we possibly justify helping our children become adept at using guns. . . . It is my goal to totally ban riflery participation in this town.” Last disagreed: “The kids who shoot are nearly always honor students. It’s a very, very safe sport. Every year 50,000 people are killed in car accidents, yet we have driver education in the school. Why not firearms training and a varsity riflery team.” In a private E-Mail communication (27 May 2002), Last stated, “Besides Lisa, my other reason for forming the team was for the kids. The kids are the future. Almost all the kids were honor students and/or AP scholars.” In the end, however, Posen got her wish and the team was disbanded.

53. Gary Kleck, “Policy Lessons from Recent Gun Control Research,” *Law and Contemporary Problems* 49 (1986), <[www.saf.org/lawreviews/lawprobkleck1.htm](http://www.saf.org/lawreviews/lawprobkleck1.htm)> Compare with the position taken by the American College of Physicians: “In the absence of a complete ban on the sale and possession of firearms, steps must be taken to restrict the[ir] availability....” “Firearm Injury Prevention,” Position Paper of the American College of Physicians, *Annals of Internal Medicine* 128 (1998):236-41, <[www.acponline.org/journals/annals/01feb98/ppguns.htm](http://www.acponline.org/journals/annals/01feb98/ppguns.htm)>

54. The program was not really a “buyback” because the government had not originally owned the guns.

55. Buyback America Campaign Launched in 84 Communities. H.U.D. Press Release Apr 18, 2000, <[www.hud.gov/library/bookshelf18/pressrel/pr00-80.html](http://www.hud.gov/library/bookshelf18/pressrel/pr00-80.html)>
56. Michael P. Romero, Garen J. Wintemute, and Jon S. Vernick, "Characteristics of a Gun Exchange Program, and an Assessment of Potential Benefits," *Injury Prevention* 4 (1998):206-10.
57. Robin Yurk, Linda Jaramillo, Linda L. Erwin, and Neal J. Rendleman, "Educating the Community about Violence Through a Gun Turn-In Program," *Journal of Community Health* 26 (October 2001):331-44.
58. The educational aspect could more aptly be described as anti-gun propaganda intended to frighten the public about firearms. The success of such campaigns appears to lie, not in their enhancement of community safety, but in their heightening of community fear of guns. For example, see Matthew Miller, Deborah Azrael, and David Hemenway, "Community Firearms, Community Fear," *Epidemiology* 11 (November 2000):709-14. "Individuals might feel safer as others acquire guns if they believe these guns would deter unlawful behavior or provide neighbors with weapons with which they could aid potential victims. On the other hand, individuals might feel less safe if they believe that these guns would more readily be available to those who have difficulty controlling hostile impulses....our findings suggest most Americans are not impervious to the psychological effects of guns in their community, and that, by a margin of more than 3 to 1, more guns make others in the community feel less safe rather than safer." See also David Hemenway, Sara J. Solznick, and Deborah R. Azrael, "Firearms and Community Feelings of Safety," *Journal of Criminal Law and Criminology* 86 (1995):121-32: "This Article provides suggestive evidence that possession of firearms imposes, at minimum, psychic costs on most other members of the community...Eighty-five percent of non-gun-owners report they would feel less safe if more people in their community acquired guns; only 8% would feel more safe. By a ten-to-one margin, they prefer others not to acquire firearms."
59. New York City Mayor Michael Bloomberg intended to send the same message to residents of his city in the spring of 2002. Facing a 22.3 percent increase in "shooting incidents" between January 1, 2002 and May 5, 2002, compared to same time period the year before, New York City's new administration implemented a "Cash for Guns" program. In a May 7, 2002 press release, Mayor Bloomberg and Police Commissioner Raymond Kelly jointly announced that the NYPD would pay "\$100 for the [anonymous] surrender of every handgun, sawed-off shotgun and assault weapon" as part of the department's "latest initiative to prevent street violence." A similar 1999 program in New York City yielded a total of 1,900 guns in a 30-day period. Bloomberg and Kelly declared that "This program is . . . another step to reducing violence", that anyone who participated would "make your home and your city a safer place", and that "we expect many people would prefer to have cash in their pockets than a deadly weapon in their homes." "*New Anti-gun Initiative Pays Cash for Lethal Weapons*," Press Release, Office of the Mayor, May

- 7, 2002 PR-108-02. See also William K. Rashbaum, "\$100 Offered for Any Gun Turned In. No Questions Asked," *New York Times*, 8 May 2002.
60. See Peter Slavin, "Buying Back Safer Streets?," *Washington Post*, 19 May 2000.
61. David R. Meddings and Stephanie M. O'Connor, "Circumstances Around Weapon Injury in Cambodia after Departure of a Peacekeeping Force: Prospective Cohort Study," *British Medical Journal* 319 (August 14, 1999):412-15, <[bmj.com/cgi/content/full/319/7207/412](http://bmj.com/cgi/content/full/319/7207/412)>
62. See also Jianwei Wang, "Aborted Disarmament," *Managing Arms in Peace Processes: Cambodia*, U.N. Disarmament and Conflict Resolution Project (N.Y. and Geneva: 1996), 32-81.
63. "Durbin Calls for Gun-Storage Law," News Summaries, JoinTogether Online, 28 April 1998, <[www.jointogether.org/gv/news/summaries/reader/0,2061,26101,00.html](http://www.jointogether.org/gv/news/summaries/reader/0,2061,26101,00.html)>
64. While the claim is often made that every day, 15 (or some similar figure) "American children are killed with guns," this statistic is true only if one counts as "children" 19-year-old drug-dealers shot by rivals, and many other criminal older male teenagers. Under this definition of "children", Durbin was technically accurate.
65. "Ill. Residents Must Store Guns Under Lock and Key," News Summaries, JoinTogether Online, 10 June 1999, <[www.jointogether.org/gv/news/summaries/reader/0,2061,259069,00.html](http://www.jointogether.org/gv/news/summaries/reader/0,2061,259069,00.html)>
66. Andrew J. McClurg, "Child Access Prevention Laws: A Common Sense Approach to Gun Control," *St. Louis University Public Law Review* 18 (1999):47-97.
67. Kimi Yoshino, "No Easy Answers: Gun Advocates say Fear of Liability Keeps Parents from Teaching Survival Skills," *Fresno Bee*, 26 August 2000.
68. Violation of California's firearm storage law is punishable by imprisonment in the state prison for up to 3 years, by a fine up to a maximum of \$10,000, or both fine and imprisonment. See Part 4, Title 2, California Penal Code, Sec. 12035(d)(1, 2).
69. Gwen O'Brien, "11-Year-Old Shoots, Kills Assailant Threatening his Grandmother," *South Bend Tribune*, 7 February 2002.
70. Garen Wintemute, "Guns and Gun Violence," *The Crime Drop in America*, ed. Alfred Blumstein and Joel Wallman (Cambridge, Mass.: Cambridge University Press, 2000), 86.
71. John R. Lott and John E. Whitley, "Safe Storage Gun Laws: Accidental Deaths, Suicides, and Crime," *Journal of Law and Economics* (forthcoming).
72. Katherine Kaufer Christoffel, "Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course," *Pediatrics* 88 (1991):294-305.
73. In 1988, a year before enacting the first statewide "assault weapons" ban, the California Attorney General's office had already concluded that a consistent

definition of “assault weapon” was impossible. See Edgar A. Suter, “ ‘Assault Weapons’ Revisited—An Analysis of the AMA Report,” *Journal of the Medical Association of Georgia* 83 (1994): 281-89.

74. This is exemplified by New York State Gov. George Pataki’s “5-Point” gun-control package, signed into law on August 9, 2000. In a press release, Pataki outlined the measures included in the sweeping legislation he lobbied for and shepherded through the state legislature. For example, one of the provisions provided for criminal sanctions for the possession and sale of “assault weapons” and large capacity ammunition feeding devices in New York State. Since 1994, federal law has restricted the possession of assault weapons and large capacity ammunition clips. This measure mirrors the federal provisions and definitions of “assault weapon” and “large capacity ammunition feeding device.” See generally Jeffrey A. Roth and Christopher S. Koper, *Impacts of the 1994 Assault Weapons Ban: 1994-96*, Research in Brief, National Institute of Justice, U.S. Department of Justice (March 1999). As Roth and Koper noted, “The ban has failed to reduce the average number of victims per gun murder incident or multiple gunshot wound victims....The public safety benefits of the 1994 ban have not yet been demonstrated.”

Another provision of the Pataki plan provided for an increase in the age requirement for obtaining a New York State handgun license, from 18 years of age to 21. Pataki justified the increase by noting: “Each year since 1988, more than 80 percent of homicide victims 15 to 19 years of age were killed with a handgun, according to the CDC.” Compare this with Sen. Durbin’s statement, *supra* note 64. The statistic cited by Pataki includes, as “children” in the 15-19 year age group, drug dealers and gang members.

Additionally, the new law also required a firearms retailer to: include a child safety locking device with all purchases, post notices regarding safe storage of guns in their place of business, and include gun safety information with the purchase of any gun.

75. Maryland enacted the first statewide ban on “Saturday Night Specials” in 1988, by establishing a system for review of handguns. A nine-member Handgun Roster Board was charged with listing a roster of “permitted handguns.” According to the Maryland statute, “The Board shall consider the following characteristics of a handgun in determining whether any handgun should be placed on the handgun roster: (i) concealability; (ii) ballistic accuracy; (iii) weight; (iv) quality of materials; (v) quality of manufacture; (vi) reliability as to safety; (vii) caliber; (viii) detectability by the standard security equipment . . . ; and (ix) utility for legitimate sporting activities, self-protection or law enforcement.” Monica Fennell, “Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiating a Model State Gun Control Law,” *Hamline Journal of Public Law and Policy*, 13 (1992):37-71, <[www.saf.org/LawReviews/Fennell1.htm](http://www.saf.org/LawReviews/Fennell1.htm)>

After the West Hollywood, California, city council voted to implement its own “Saturday Night Special” ban in January 1996, San Diego Police Department forensic scientist Eugene Wolberg noted of that city’s ordinance: “Unknown to the authors of the SNS law, the definitions used actually describe a much larger



list than was envisioned by the ordinance's drafters. The guns included are most of today's modern firearms that use plastics, nylon polymers, zinc and aluminum for their construction materials . . . .The real incidence of use [of these guns in crime] is somewhere between 10 and 15 percent depending on the year, and these percentages are steadily declining, mostly due to economic factors." Eugene J. Wohlberg, "'Saturday Night Special' Myth," *San Diego Union-Tribune*, 22 June 1997.

76. Tom McCann, "Sniper Rifle Ban Urged Again: Blagojevich Says They're Terrorists' 'Weapon of Choice,'" *Chicago Tribune*, 22 October 2001. Blagojevich has attempted to enact such a law since 1999. Capitalizing on the political environment created by the September 11 attacks, Blagojevich labeled the guns "the terrorist weapon of choice," and declared: "In response to these terrorist tragedies we have to get them off the market."

However, as Kopel and Wheeler noted:

"Gun banners are now rushing to demonize the latest politically incorrect sporting gun—the .50 caliber target rifle. The Washington, D.C.-based Violence Policy Center (VPC) now equates .50-caliber hobbyists with gunrunners for the Taliban....[Blagojevich and] California Sen. Dianne Feinstein . . . have sponsored the 'Military Sniper Weapon Regulation Act' and have denounced .50-caliber target shooters as 'terrorists,' doomsday cultists, and criminals' (in the words of Sen. Feinstein)....Mary Blek, President of the 'Million' Mom March, asserts that the Founding Fathers would have had no use for a .50-caliber rifle (Nov. 28, 2001, McKendree College debate). Actually, the common guns of the early American republic were larger than .50 caliber. The Queen Anne Colonial Musket (manufactured around 1670-1700) was .812. That gun was supplanted by various versions of the English Brown Bess musket, which was .75 caliber. America's French allies supplied the Patriots with the .70 Charleville Musket. The Dutch muskets bought by the Americans were .65 caliber....In other words, a great many of the guns which were most commonly owned and known in early America were at least .50 caliber [emphasis in original]....So the very same guns that Sen. Feinstein lauded in her 'Recreational Firearm Use Protection Act,' in 1994, are now said to be 'clearly distinguishable from rifles intended for sporting and hunting use.' One suspects that firearms stay on her personal list of 'good' guns only so long as there is no political opportunity to urge their prohibition."

Dave Kopel and Timothy Wheeler, "Guns and (Character) Assassination," *National Review Online*, 21 December 2001, <[www.nationalreview.com/kopel/kopel122101.shtml](http://www.nationalreview.com/kopel/kopel122101.shtml)>

77. Edgar A. Suter, "'Goldilocks Gun Control,'" *Gun Week*, 10 January 1997.

78 The Gun Control Act of 1968 eliminated mail-order firearm sales, and required that "No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing

ammunition, until he has filed an application with and received a license [Federal Firearms License, or FFL] to do so. . . ." Title I of the Gun Control Act of 1968, Public Law 99-308, Sec. 923(a).

79 Joseph P. Tartaro, "The 200,000 Missing Gun Salesmen," *Gun Week*, 1 February 1998. Tartaro noted that the 287,000 figure for FFLs represented not just retailers, but included manufacturers, importers, distributors and gunsmiths.

80. Treasury undersecretary for enforcement, Raymond Kelly, stated that the dramatic decrease in FFLs was the result of Clinton Administration directives mandating stricter licensing requirements (including compliance with local zoning regulations) and higher application fees. The fee for a new (3-year) license rose from \$30 to \$200; the fee for renewals rose from \$30 to \$90. "Number of Federally-Licensed Gun Dealers Drops to Record Low," *Gun Week*, 1 March 1997.

81. Restricting the sale of firearms has become increasingly fashionable. In October 1999, Massachusetts Attorney General Thomas F. Reilly ordered local chiefs of police to begin enforcing a provision of the state's new law and suspend the state licenses of home-based firearm dealers. According to the new provision, gun dealers must "maintain a place of business which is not a residence or dwelling." At the time the provision went into force, there were an estimated 1,000 licensed gun dealers in the state; 75% of these were believed to be operating from their homes. Robert M. Hausman, "Massachusetts Shutting Down 75% of State's Gun Retailers," *Gun Week*, 20 December 1999. In accordance with Massachusetts law, a license is required "to sell, rent or lease firearms, rifles, shotguns or machine guns, or to be in business as a gunsmith. Every license shall specify the street and number of the building where the business is to be carried on, and the license shall not protect a licensee who carries on his business in any other place." Mass. Gen. L., Part I, Title XX, Chapter 140, Section 122.

A 1994 Cook County, Illinois, ordinance made it illegal for a gun store to operate within a quarter mile of a park or school. Shore Galleries, a gun store which also sells police equipment, was exempted at the time the ordinance was passed. When the management decided to move to larger quarters just six blocks down the street, the Lincolnwood village zoning board gave its unanimous approval. However, the village council responded to pressure from protesters who included the former head of the Illinois State Police, and rejected the move. Commenting on the situation, Illinois State Rep. Janice D. Schakowski stated "We've got to keep this neighborhood safe for our children." Les Klein, an area resident and father of three children stated: "Having a gun store next to a park where kids play basketball and baseball isn't the message we should send to our children." His wife, a member of Citizens for Safer Lincolnwood, added, "There needs to be a buffer zone here where kids are protected." Reportedly, 85% of the store's customers are police officers. "Suburban Chicago Protesters Prevent Gun Shop's Move," *Gun Week*, 1 August 1997.

82. *Promising Strategies To Reduce Gun Violence*, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, February 1999, 87.
83. *Small Arms Survey 2001: Profiling the Problem*, Graduate Institute of International Studies, Geneva. (United Kingdom, Oxford University Press, 2001), 204-207.
84. The genocide in Rwanda, a country approximately the size of the state of Maryland, began on April 7, 1994, and lasted until July 19, 1994. While it was not the largest genocide perpetrated during the 20th century, it is “perhaps the most concentrated ....Even the Nazis ‘production line’ murder methods could not sustain Rwanda’s average daily rate of about 8,000 murders per day.” Jay Simkin, Aaron Zelman, & Alan M. Rice, *Rwanda’s Genocide 1994: Supplement to Lethal Laws* (Milwaukee: JPFO Press, 1997). As Prunier noted, it has been conservatively estimated that, within a period of 3 months, 800,000 civilians were killed in Rwanda. Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (N.Y.: Columbia University Press, 1995), 265.
85. “Rwanda’s tragedy was the world’s tragedy. All of us who cared about Rwanda, all of us who witnessed its suffering, fervently wish that we could have prevented the genocide....Now we know that what we did was not nearly enough....in their greatest hour of need, the world failed the people of Rwanda.” Secretary-General Kofi Annan’s address to the Parliament of Rwanda, in Kigali, May 7, 1998. U.N. Press Release SG/SM/6552, AFR/56, 06 May 1998, <[www.un.org/News/Press/docs/1998/19980506.SGSM6552.html](http://www.un.org/News/Press/docs/1998/19980506.SGSM6552.html)>
86. *Arms Availability and the Situation of Civilians in Armed Conflicts*, A Study presented by the International Committee of the Red Cross (1 June 1999), <[www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/2C8CDB68E2366CE8C1256B66005D7A56](http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/2C8CDB68E2366CE8C1256B66005D7A56)>
87. *Small Arms Survey 2001: Profiling the Problem*, Graduate Institute of International Studies, Geneva. (United Kingdom, Oxford University Press, 2001), 207.
88. If, indeed, firearms and other weapons engendered genocide, with about one firearm/person in the U.S., and numerous tanks, bazookas, mortars, flamethrowers, rockets, and nuclear devices, one might have reason to conclude that genocide in the U.S. is imminent.
89. Jay Simkin, Aaron Zelman, & Alan M. Rice, *Rwanda’s Genocide 1994: Supplement to Lethal Laws* (Milwaukee: JPFO Press, 1997). The authors further noted: “In pre-genocide Rwanda, every adult was legally required to have a ‘national identity’ card, which stated the bearer’s ethnicity. These ‘national identity’ cards became death warrants for tens of thousands of victims.”
90. The cost to the genocide perpetrators would have been significantly raised if effective resistance were offered by the victims, i.e. through their use of firearms.
91. See supra note 25.

92. Leonard Berkowitz, "Impulse, Aggression and the Gun," *Psychology Today*, September 1968, 20.
93. Leonard Berkowitz, "How Guns Control Us," *Psychology Today* (June 1981):11-12.

# Gun Control Around the World: Lessons to Learn

Dr. Gary A. Mauser

*Gary Mauser is a professor on the faculty of Business Administration at Simon Fraser University in Vancouver, British Columbia. This paper is adapted from the Sixth Annual Civitas Conference in Vancouver, British Columbia held April 26 through 28, 2002.*

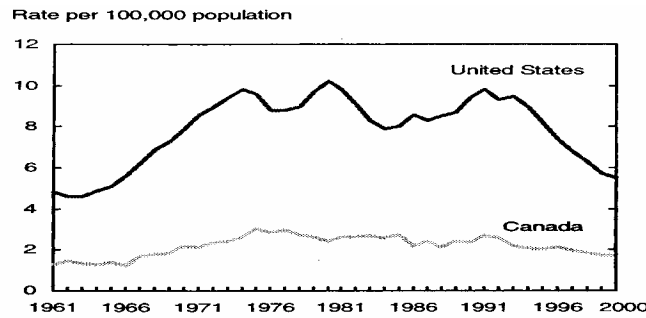
In the past few months, widely televised tragedies in France, Germany, and Switzerland have spurred politicians to introduce changes in their countries' already strict gun laws to make them even more restrictive. Perhaps you remember the headlines? A depressed student in Germany ran amok and killed several people in his school after he'd been expelled. In both France and Switzerland, angry individuals have stormed into local councils and began shooting legislators indiscriminately.

This is not a new story. We've seen this show before. First, there is a horrible event, say a disturbed student shoots people in a school, or a maniac goes on a rampage in a public place. Media coverage is intense for a few weeks. "Experts" on television wring their hands in concern about the danger of "gun violence." Then the government feels it must do something to protect the public, so the police are given sweeping new powers, or new restrictions are introduced on owning firearms. Afterwards, the media rush off on a new story, and the public forgets. Later, there is another tragedy somewhere else, and the process starts all over again.

Does this sound familiar? It should. This has been the pattern followed by virtually every gun law that has been introduced in the twentieth century around the world. In the 1990s, we've seen this drama on television from Australia, Great Britain, the United States, not to mention Canada, as well other countries. It's time to pause and ask a few basic questions. If gun laws work to prevent criminal violence, why do these events keep occurring? And not just in places where the gun laws are comparatively lax, but in countries where it is all but impossible for an average person to own a handgun. Guns are banned in

schools. How could gun attacks happen in “gun free” zones such as schools?

If gun control is supposed to reduce violent crime, then eventually this must be demonstrated to be true, or gun control is no more than a hollow promise. However, most criminologists admit (albeit reluctantly) that there is very little empirical support for the claim that laws designed to reduce general access to firearms reduce criminal violence (eg, Kleck 1997). Frequently, assertions that gun laws work turn out to be bogus. In Canada, the government uses the falling homicide rate as support for their claim that gun control laws are working. Unfortunately for this argument, the homicide rate has been falling even faster in the United States.

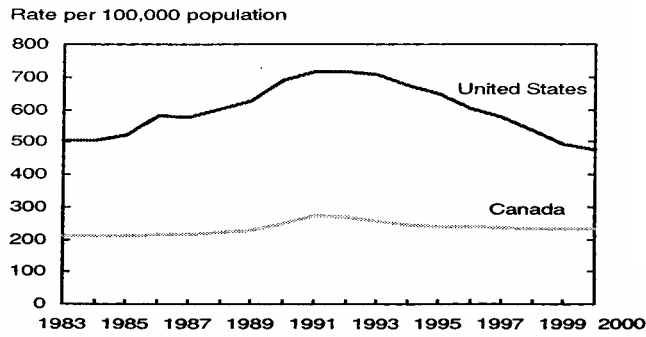


Source: Uniform Crime Reporting program, CCJS: Uniform Crime Reporting program, FBI.

Figure 1 Homicide Rates.

FIGURE 1 – US VS. CANADIAN HOMICIDE RATES

The drop in the criminal violence is much more dramatic in the US than it is in Canada (Gannon 2001). Over the past decade, the Canadian homicide rate has declined about 25%, but the violent crime rate has not changed. In the US during the same time period, both the homicide and the violent crime rates have plummeted by more than 40%. We can't credit gun laws entirely with this success. In both countries, the aging population has helped bring down crime rates, and, in the US, long jail sentences for violent criminals has also been effective.



<sup>1</sup> Violent crime includes homicide, aggravated assault, and robbery. For comparison purposes, the Canadian category of aggravated assault includes attempted murder, assault with a weapon, and aggravated assault. Trend analysis starts in 1983 due to the reclassification of Canadian assault categories in 1983.  
 Source: Uniform Crime Reporting program, CCJS; Uniform Crime Reporting program, FBI.

Figure 2. Rates of Violent Crime

FIGURES 2 – US VS. CANADIAN VIOLENCE RATES

The United States

Nevertheless, gun laws have played an important role in reducing crime rates in the US. Since 1986, more than 25 states have passed new laws encouraging responsible citizens to carry concealed handguns. As a result, the numbers of armed Americans in malls and in their cars has grown to almost 3 million men and women. As surprising as it is to the media, these new laws have caused violent crime rates to drop, including homicide rates. In his scholarly book, *More Guns, Less Crime*, Professor John Lott shows how violent crime has fallen faster in those states that have introduced concealed carry laws than in the rest of the US (Lott 2000). His study is the most comprehensive analysis of American crime data ever completed. He shows that criminals are rational enough to fear being shot by armed civilians.

FIGURES 3 & 4 – CRIME RATES IN CONCEALED-CARRY STATES VS. NON-CARRY

These graphs compare the relative drop in violent crimes in those states that recently introduced concealed-handgun laws with those that did not. Since these laws were introduced in various years, from 1986 to the 1990s, these changes are calculated from the year the law was introduced (“0”). As can be seen,

crime rates were increasing before the legislation was introduced, and the rates declined afterwards. Figure 3 examines the impact upon violent crime in general, and Figure 4 looks at homicide specifically.

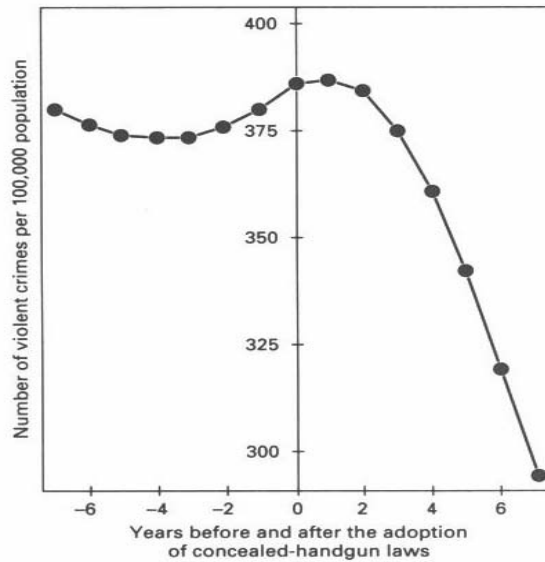


Figure 3. The Effect of Concealed-Handgun Laws on Murders (Lott 1998)

The drop in the US crime rate is even more impressive when compared with the rest of the world. In 18 of 25 countries surveyed by the British Home Office violent crime increased during the 1990s (Barclay et al, 1999). This contrast should provoke Canadians to wonder what happened in those countries where they believed that introducing more and more restrictive firearm laws would protect them from criminal violence.

Before we leap to the conclusion that our personal safety lies in making it ever more difficult for average citizens to own and use firearms, we should look around the world to see what other countries have done and how successful these experiments have been. Canadians are particularly interested in studying “English-style” firearm laws such as followed by other countries in the British Commonwealth.



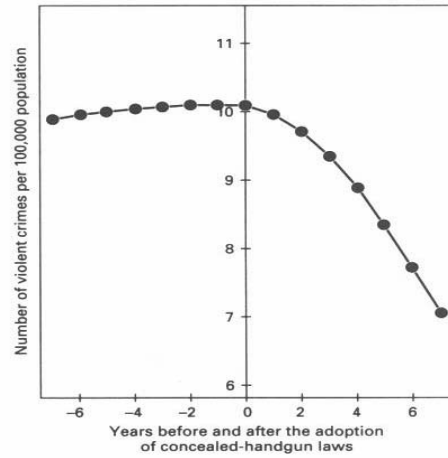


Figure 4. The Effects of Concealed Carry-Handguns on Violent Crimes (Lott 1998)

Canada

Despite the drop in rates of criminal violence in Canada, the gun law has little to do with it. In a study Professor Dennis Maki and I did recently, that will be published later this year by *Applied Economics*, we found that this legislation may even have caused an increase in armed robbery. In our study we evaluated 9 other factors in our model as “co-variates.” Once we factored out the effects of these other variables, the Canadian gun law still had a significant effect. Unfortunately, this effect was positive, that is to say, the gun law actually acted to increase criminal violence.

FIGURE 5 – M&M T-TEST TABLE

Great Britain

The first country to consider is Britain, where they have endured a serious crime wave. In contrast to North America, where the homicide rate has been falling for over twenty years, the homicide rate in England and Wales has doubled over the past thirty years. In the 1990s alone, the homicide rate jumped 50%, going from 10 per million in 1990 to 15 per million in 2000 (British Home Office 2001).

Figure 5. Pooled Regression Models for Robbery and Robbery with a Firearm.

Dependent Variables	Robberies		Total Robberies With a Firearm	
	Coeff.	T- ratio	Coeff.	T-ratio
1977 Gun Law	1.578	1.81*	4.518	2.11*
Registered Indians	-2.417	-1.36	-2.253	-0.47
Male youth	-0.805	-0.72	-2.146	-0.85
Unemployment rate	0.085	0.46	0.144	0.34
International immigration	522.13	6.14*	958.79	4.14*
Clearance Rate <sup>1</sup>	-0.003	-0.44	-0.074	-1.91*
Police Effectives	-0.008	-0.98	-0.032	-1.74*
UI benefits	9.993	0.90	37.701	1.55
Internal migration	31.731	1.11	-45.737	-0.63
Transients	-435.59	-2.37*	-592.33	-1.27
Constant	11.386	0.85	109.89	3.36*
Buse R square		0.521		0.576

Note 1: CR differs for each dependent variable.

\*Indicates t-values significant at .05

Source: Mauser and Maki, *Applied Economics* (forthcoming).

In response to rising crime, British politicians, both Conservative and Labour, have brought in laws that increasingly restricted firearms ownership by the general public. Important changes to the firearm laws were made in 1988, and then again in 1992, before banning all handguns in 1997 (Greenwood 2001; Munday and Stevenson 1996). The Home Office has also tightened up on enforcement of regulations to such an extent that the firearm community has been virtually destroyed. Shotgun permits have fallen almost 30% since 1988 (Greenwood 2001). And the result of this Draconian gun control law in Great Britain? It's not pretty. No end appears in sight for the continuing crime wave.

## FIGURES 6 AND 7 – INCREASE IN CRIME RATES VS. DECLINE IN REGISTERED GUNS

Year	Shotgun Certificates	Total Robbery
1980	781900	15006
1981	785200	20282
1982	780699	22837
1983	783400	22119
1984	798400	24890
1985	819300	27463
1986	841000	30020
1987	861300	32633
1988	882000	31437
1989	865100	33163
1990	802300	36195
1991	724600	45323
1992	589200	52894
1993	681100	57845
1994	670000	60007
1995	653800	68074
1996	638000	74035
1997	623100	63072
1998	627600	66172
1999	625692	84277
2000	600733	95154

Figure 6. Total number of shotgun certificates in England and Wales and total number of robberies with, or without, a firearm.

## ENGLAND

Clearly, the firearm laws have not caused violent crime to fall, and the gun laws have probably increased criminal violence by disarming the general public. Despite banning and confiscating all handguns, violent crime, and firearm crime, continues to grow. The number of violent crimes involving handguns has increased from 2,600 in 1997/98 to 3,600 in 1999/00. And firearm crime has increased 200% in the past decade. The British Home Office admits that only one firearm in 10 used in homi-

cide was legally held (British Home Office, 2001). But, the politicians continue their policy of disarming responsible citizens.

Year	Homicide per M pop
1967	7.3
1968	7.4
1969	6.8
1970	7.0
1971	8.3
1972	8.3
1973	8.0
1974	10.7
1975	9.0
1976	9.9
1977	8.5
1978	9.6
1979	11.1
1980	11.1
1981	10.1
1982	11.2
1983	9.7
1984	10.8
1985	10.7
1986	11.2
1987	11.9
1988	10.9
1989	10.3
1990	10.9
1991	12.2
1992	11.4
1993	11.0
1994	12.3
1995	12.8
1996	11.2
1997	11.7
1998	12.5
1999	13.2
2000	15.5

Figure 7. Homicide rate in England and Wales with, or without, a firearm.

Australia

English-style gun laws have failed in Australia too. In 1997, the Australian federal government panicked, following the horrific murders by a deranged man in 1996, and banned and confiscated 600,000 semi-automatic “military style” firearms from their licenced owners (Lawson 1999). The result? Violent crime continues to increase.

FIGURES 8 AND 9 – INCREASE IN CRIME RATES IN AUSTRALIA

Year	HG Percentage
92-93	16.9
93-94	21.7
94-95	17.7
95-96	13.1
96-97	36.2
97-98	45.6
98-99	42.2
99-00	47.5

Table 8. Percentage of homicides committed with a handgun in Australia.

Year	Armed Robbery	B&E
1993	30	25000
1994	29	28000
1995	30	32000
1996	38	33000
1997	50	35000
1998	58	37000
1999	50	36000

Table 9. Armed Robbery and break in rates in Australia with or without a firearm

The destruction of the confiscated firearms cost Australian taxpayers an estimated \$Au500 million, and there has been no visible impact on violent crime. Robbery and armed robbery rates continue to escalate. Armed robbery has increased 166% nationwide -- jumping from 30 per 100,000 in 1996 to 50 per 100,000 in 1999 (AIC, 2001). The homicide rate has not declined, and the share of firearm homicide involving handguns has doubled in the past five years (Mouzos 2001). As in Great Britain and Canada, few firearms used in homicide are legally

held; in 99/00 only 12 out of 65 (18%) were identified as being misused by their legal owner (Mouzos 2001).

#### CONCLUSION

Gun laws may not reduce violent crime, but crime causes gun laws. The loser in this drama is individual freedom. The winner is bureaucracy. Since it is a truism that only law-abiding citizens obey gun laws, or any other kind of law for that matter, it is an illusion that further tinkering with the law will protect the public. No law, no matter how restrictive it is, can protect us from people who decide to commit violent crimes. There have always been criminals, and there have always been deranged people. Murder has been illegal for hundreds if not thousands of years. The truth is we live in a dangerous world, and the government can't completely protect us.

This brief review of gun laws in the British Commonwealth suggests that English-style gun laws have failed to reduce violent crime. However, more research needs to be done before we can draw this conclusion with much confidence. All I've been able to do so far is to examine simple two-way analyses. Before we can have any confidence in our conclusions, we need to conduct econometric studies in order to disentangle the complex events that occurred at the same time that new firearm laws were introduced.

Nevertheless, we can say that disarming the public has not reduced criminal violence in any country we've examined here: not Great Britain, not Canada, and not Australia. Only the United States has witnessed a dramatic drop in criminal violence. One of the important reasons is that many states in the past two decades have encouraged responsible citizens to carry concealed handguns. Perhaps it is time criminologists encouraged more individual self-reliance.

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# Lock, Stock and Barrel: Civil Liability for Allowing Unauthorized Access to Firearms

Andrew J. McClurg<sup>1</sup>

*Abstract: Professor McClurg is co-editor (with David B. Kopel and Brannon P. Denning) of Gun Control and Gun Rights, a new firearms policy textbook published by the New York University Press. McClurg has written a trilogy of law review articles advocating the safe storage of firearms. Below, he offers a substantially modified, enhanced, and updated version of a presentation he made at the University of Connecticut School of Law's "Guns and Liability In America" symposium in March 2000. He argues that unsafe firearm storage constitutes negligence under tort law. McClurg advocates civil liability for gun deaths and injuries caused by unsafe storage as a way to deter unreasonably dangerous conduct.*

Tens of millions of negligently stored guns sit in homes throughout America, where they are easily accessible to unauthorized and dangerous users. More than half of our nation's 77 million handguns are stored unlocked.<sup>2</sup> Ammunition is stored unlocked in more than 30 percent of gun-owning households.<sup>3</sup> Millions of children live in homes containing guns that are both loaded and unlocked.<sup>4</sup>

Negligently stored firearms create three distinct risks of foreseeable harm: (1) accidental shootings by children; (2) suicides by adolescents; and (3) intentional harm by criminals who steal unsecured guns.

This week (March 2000), we saw another example of what can happen when guns are not kept secure when a six-year-old boy shot and killed Kayla Rolland, his first-grade classmate in Michigan, with a gun he brought from home. The case is generating massive national attention. But what happened in Michigan isn't the problem. It's just one more tragic footnote to the problem. Day in and day out, around the clock, negligently stored firearms are being used to kill and injure other innocent people. While the nineteen-year-old African-American drug user whose

gun was used to kill Kayla Rolland may make an attractive media villain, it's hypocritical to focus all our ire on him while ignoring the irresponsible gun safety practices being carried on by millions of "legitimate" gun owners.

My goal here this morning is to *prove* to you that the failure to securely store firearms is negligent conduct under American tort law. I'm going to prove it using documented facts and figures and fundamental principles of negligence law. Because unsafe gun storage is negligent, gun owners and sellers who fail to safely store their guns should be civilly liable for the foreseeable harms that naturally flow from that conduct.

#### I. NON-CONTROVERSIAL GUN CONTROL?

I've been involved in the firearms policy debate for a long time. Frankly, it can get depressing. Opinions on both sides are so firmly and emotionally held that there is little room for middle ground. I learned this during my very first presentation on the issue 10 years ago. I addressed a group of high school students at the Arkansas State Capitol. I was young and naive in those days. I thought I could mold their young minds. I believed that if I argued with enough passion and logic, I could convince them that gun control was a necessary solution to gun violence.

And it seemed to be working. Their attention was rapt. You could hear a pin drop. They're with me, I thought. I'm winning them over. When I finished, the first person to raise her hand was a demure-looking 15-year-old girl. She said, "Professor, what's the most important thing in the world to you?" I said, "My daughter, why?" She said, "Mine's a pearl-handled revolver that my grandmother gave me, and if you ever tried to take it away, I'd shoot you right between the eyes."

Gun control and gun rights people can't seem to agree about anything. Nothing. Not one single thing, *except...* There is *one* principal regarding guns on which there is universal agreement: firearms must be safely stored to keep them out of the hands of unauthorized users.

Even the National Rifle Association agrees that guns owners have a duty to store guns so they are inaccessible to unauthorized users. On its Web site, the NRA admonishes gun owners to "[s]tore guns so that they are inaccessible to children and other unauthorized users,"<sup>5</sup> acknowledging that "[g]un shops sell a

wide variety of safes, cases, and other security devices” for accomplishing this goal.<sup>6</sup> A popular gun magazine states without equivocation that “[a]ll gun owners have the responsibility of keeping their firearms out of unauthorized hands.”<sup>7</sup> A writer for the *1999 Colt Firearms Buyer’s Guide* “recommends storing...firearms in a locked cabinet or approved gun safe.”<sup>8</sup>

## II. WHAT IS SAFE STORAGE?

What constitutes “safe storage”? Here again, there is widespread agreement. Groups as diverse as ammunition manufacturers and pediatric physicians recommend storing guns both *locked and unloaded*.<sup>9</sup> Not simply locked *or* unloaded. Many guns owners apparently think they’re acting safely when they store an unlocked handgun in the closet and ammunition in the bureau across the room. Such naive thinking is akin to reasoning, “Hmm, I have this stick of dynamite, which I know can be extremely dangerous if it gets in the wrong hands. And I have this pack of matches. No doubt about it, dynamite and matches can be a dangerous combination. I know! I’ll put the dynamite over here and the matches over there.” Guns need to be stored unloaded *and* locked. There is no in-between solution with respect to reasonably safe storage.

### A. Firearm Storage Patterns in the United States

Despite unanimous agreement that guns must be safely stored and a widespread consensus that safe storage requires guns be stored unloaded and locked, shockingly high percentages of American gun owners store their guns unsafely. This bleak fact is established by no fewer than ten public health studies.<sup>10</sup> We don’t have time to review them all today, but I do want to show you the highlights of a couple of the studies [on overhead transparencies], just so you don’t think I’m making this stuff up.

### B. Senturia Study

Yvonne Senturia and colleagues have conducted a couple of different studies of firearm storage practices. In 1996, they published the results of a pediatric practice-based study designed to ascertain gun storage patterns in families with children using data from questionnaires completed by 5,233 parents of children at-

tending pediatric practices (focusing on the 1,682 families who reported owning at least one gun).<sup>11</sup> Among other topics, the questionnaires asked about gun ownership, types of guns owned, gun storage, and ammunition storage.<sup>12</sup> For the purposes of this study, safe firearm storage was defined as storing all guns unloaded and locked in an area separate from ammunition.<sup>13</sup> Key findings included:

- 61 percent of gun-owning families with children reported keeping at least one unlocked gun in the house.<sup>14</sup>
- 15 percent reported having at least one loaded gun in the house.<sup>15</sup>
- 7 percent reported keeping at least one gun unlocked and loaded in the house.<sup>16</sup>
- Handguns were twelve times more likely to be stored unlocked and loaded than rifles.<sup>17</sup>
- Only 30 percent of households reported storing all guns locked and unloaded.<sup>18</sup>
- Ammunition was stored locked by only 42 percent of families, while 32 percent of families stored ammunition unlocked.<sup>19</sup>

An important thing to note about the gun storage studies is that—as alarming as the findings are—the reality is probably much worse. All of the gun storage studies are based on surveys in which gun owners must, in effect, admit to strangers that they store their guns in ways that negligently endanger their families and communities. I’m surprised *anyone* would admit that. Think about it. A stranger calls you up and you agree to participate in a survey. You’re asked, “Do you have any kids?” “Oh yeah, got a slew of little rugrats running around here.” “Do you have any guns?” “Hell, yeah, got a bunch guns.” “Do you always keep your guns locked and unloaded?” “Uh...well...yeah, course I do.” While it is almost impossible to imagine a reason why gun owners who follow safe storage practices would falsely report unsafe storage practices, it is quite easy to imagine gun owners who follow unsafe storage practices being untruthful to anonymous telephone surveyors.

### C. Stennies Study

Here are the results of a recently published study of gun storage practices in all 50 states. Gail Stennies and colleagues conducted a random telephone survey of English and Spanish-speaking households from the fifty states and Washington, D.C.<sup>20</sup> The data gathered were weighted to better represent the national population.<sup>21</sup> Although 9,342 individuals were contacted, 3,630 refused to participate.<sup>22</sup> The researchers completed a total of 5,238 interviews concerning gun ownership and storage practices.<sup>23</sup> Firearm storage practices were grouped in one of three categories: (a) all guns kept unloaded and locked; (b) at least one gun kept loaded and unlocked; or (c) any intermediate answer falling between categories (a) and (b).<sup>24</sup> If storage practices fell in category (c), further questions were administered to determine ammunition storage.<sup>25</sup> If storage practices were in category (a) or (b), no questions regarding ammunition storage were administered.<sup>26</sup> Key findings:

- 33.2 percent of households (1,635) kept a gun in the home.<sup>27</sup>
- Among the 1,598 households whose storage practices could be classified, 30 percent reported storing guns locked and unloaded, 48.5 percent reported intermediate storage practices, and 21.5 percent reported storing at least one gun loaded and unlocked.<sup>28</sup>
- An estimated 6.8 million American households contain at least one loaded, unlocked firearm.<sup>29</sup>
- Households with children reported better gun storage practices (41.5 percent stored guns unloaded and locked) than households with no children (20.9 percent stored guns unloaded and locked).<sup>30</sup>
- 41.5 percent of households with children reported storing all guns unloaded and locked.<sup>31</sup>
- 11.1 percent of households with children reported storing at least one gun loaded and unlocked.<sup>32</sup>
- An estimated 1.6 million U.S. households with children store at least one firearm loaded and unlocked.<sup>33</sup>

Take careful note of the second bulleted statistic: when we add the percentage of households that store guns both loaded and unlocked to the percentage that engage in “intermediate storage practices” (which presumably means unloaded but unlocked or locked but loaded), we see that *fully 70 percent of U.S. gun owners store their guns unsafely*. Only 30 percent reported storing guns both locked and unloaded. There are at least eight other gun storage studies.<sup>34</sup> Although they vary in their specifics, every one of them shows that unsafe firearm storage is pervasive. There is no evidence to refute these studies.

### III. RISK-UTILITY ANALYSIS: A FAMOUS JUDGE’S FAMOUS FORMULA FOR NEGLIGENCE

Now to my case—my attempt to prove that unsafe gun storage is negligent conduct under tort law. The test for determining negligence is not in dispute. Negligence is conduct that creates an “unreasonable risk” of harm. The most dominant torts treatise ever compiled, the American Law Institute’s *Restatement (Second) of Torts*, defines negligence as “conduct which falls below the standard established by law for the protection of others from unreasonable risk of harm.”<sup>35</sup> The legendary Prosser & Keeton hornbook on tort law states similarly that “the essence of negligence” is “behavior which should be recognized as involving unreasonable danger to others.”<sup>36</sup>

The test for evaluating what constitutes an *unreasonable risk* also is undisputed. Section 291 of the *Restatement* explains that “the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”<sup>37</sup> The Prosser & Keeton hornbook offers an almost identical risk-utility definition of unreasonable risk, explaining that it “is fundamental that the standard of conduct which is the basis of the law of negligence is usually determined upon a risk-benefit form of analysis.”<sup>38</sup>

The reason we use a risk-utility test to determine negligence is simple. Virtually all conduct presents some risk. However, we obviously do not want to brand all conduct as negligent. So negligence law distinguishes between reasonable risks and unreasonable risks, imposing liability only for the latter. How do we decide whether a risk is an “unreasonable” one? About the only

way to do so is by balancing the degree of the risk against the usefulness or utility of the conduct to society.<sup>39</sup>

In his famous opinion in *United States v. Carroll Towing Co.*,<sup>40</sup> the great Judge Learned Hand cast risk-utility analysis into an algebraic formula for negligence.<sup>41</sup> Hand posited that an act or omission is negligent if the burden of avoiding a risk of injury presented by the act or omission (B) *is less than* the probability of the risk manifesting itself in injury (P) *times* the gravity of the injury if it does occur (L).<sup>42</sup> In algebraic terms, if  $B < P \times L$ , an actor is negligent.<sup>43</sup> Hand's formula is purely a risk-utility analysis, but looked at from a slightly different angle. Rather than balance the risk of the conduct against the utility of the conduct that creates the risk (in this case, it would be the utility of *unsafe* gun storage), Hand's formula balances the risk against the burden (both to individuals and to society) of altering the conduct to eliminate the risk.

Unsafe gun storage fails the risk-utility test for negligence, which can be proved by applying Judge Hand's formula. We begin with the risk side of the equation. What is the *probability* that an unsafely stored gun will be used to cause harm and what is the *severity or gravity of that harm* when it occurs? If the multiple of these risk factors exceeds the *burden* of safe firearm storage, unsafe storage creates an unreasonable risk and is negligent conduct. The basic risk of unsafe firearm storage is that an unauthorized user will gain access to it and use it to cause harm. Unauthorized users, in turn, pose three distinct risks of harm: the risk of accidental shootings, the risk of adolescent suicides, and the risk that guns will be stolen by criminals and used for criminal purposes.

#### IV. THE RISK OF ACCIDENTAL SHOOTINGS

Risk number one: accidental shootings. Accidental shootings kill hundreds of children and teenagers each year. In 1995, 440 children and teens were killed in accidental shootings.<sup>44</sup> In 1994, firearms accidents were the fifth leading cause of accidental death for children under fourteen.<sup>45</sup> Ninety percent of all accidental shootings are tied to easy access to household firearms.<sup>46</sup>

Moreover, there is evidence suggesting that safe storage does, in fact, work to reduce accidental shootings. In 1989, Florida became the first state to pass a Child Access Prevention or

“CAP” law.<sup>47</sup> CAP laws impose criminal penalties for negligent firearm storage when a child gains access to the gun and uses it to cause harm.<sup>48</sup> The year after the Florida law was passed, accidental shootings plummeted 50 percent.<sup>49</sup> Such a dramatic decline suggests that the CAP law motivated more gun owners to follow safe storage practices and that these practices led to a reduction in unintentional shootings. A study published in the *Journal of the American Medical Association*<sup>50</sup> supports this proposition. Two physicians studied the effects of CAP laws in twelve states and found that accidental firearm deaths of children in those states were 23% lower than expected.<sup>51</sup>

Imposing tort liability for accidental shootings resulting from negligent storage is the least controversial portion of my proposal. Numerous courts have held gun owners civilly liable when their negligently stored guns have been obtained by children and used to cause accidental injury or death.<sup>52</sup>

#### V. THE RISK OF ADOLESCENT SUICIDES

The second risk of unsecured guns is adolescent suicides. Suicide is the forgotten statistic in the gun control debate even though firearm suicides regularly exceed firearm homicides.<sup>53</sup> Every twenty-four hours in this country, forty-six people use guns to kill themselves.<sup>54</sup>

Easy access to firearms presents an unusually high suicide risk to adolescents. Adolescents often attempt suicide impulsively, to escape from temporary pain. Relatively minor tribulations of every day life—such as breaking up with a boyfriend or girlfriend or an argument with parents—can be the triggering event for an adolescent suicide attempt.

Studies show that most adolescents who attempt suicide don't really want to die.<sup>55</sup> However, firearms offer few second chances. Guns are by far the most lethal form of suicide, succeeding in 85-90 percent of attempts.<sup>56</sup> Comparatively, drug overdose, the most common method, succeeds less than 1 percent of the time.<sup>57</sup> The firearm suicide rate in the United States for children under age 15 is eleven times higher than that of any industrialized nation in the world.<sup>58</sup> Ninety percent of all suicide attempts by adolescents occur in the home<sup>59</sup> where, as we have seen, millions of guns are within easy reach.



Lastly, no fewer than eleven public health studies, all of which I review in an article I published in the *Hastings Law Journal*,<sup>60</sup> link easy access to guns in the home to higher suicide rates overall and particularly to higher adolescent suicide rates. No evidence exists to refute these studies.

#### VI. THE RISK OF CRIMINAL MISUSE OF STOLEN GUNS

The third risk from unsafe gun storage is the risk of criminal misuse of stolen guns. Undoubtedly, the most controversial part of my proposal is that gun owners and gun sellers should be held civilly liable when their negligently stored guns are stolen by criminals who then use them to inflict harm. But this proposal really shouldn't be that controversial because the criminal misuse of stolen guns is the largest risk presented by unsecured guns. Substantial evidence shows that gun thefts are highly foreseeable events, as is the probability that stolen guns will be used for criminal purposes. From 1985 to 1994, an annual average of 274,000 firearms were reported stolen to the FBI.<sup>61</sup> As of March 1995, the FBI's National Crime Information Center contained more than two million reports of stolen guns.<sup>62</sup>

It is estimated that 80 percent of stolen guns are taken from private residences.<sup>63</sup> Burglaries occur in the U.S. at the rate of at least 2.5 million per year.<sup>64</sup> All gun owners know or should know that guns in their homes are prime targets for thieves.

Guns are also stolen in large numbers from automobiles. At least 7,000 guns are stolen from automobiles each year.<sup>65</sup> This figure most likely will increase now that thirty-three states have passed Right to Carry laws allowing citizens to carry concealed weapons. Larcenies from automobiles occur at the rate of approximately two million per year.<sup>66</sup> All gun owners know or should know that guns in their automobiles are prime targets for thieves.

Guns also are frequently stolen from gun dealers and interstate carriers, sometimes in large numbers. Data collected by the Bureau of Alcohol, Tobacco & Firearms (ATF) shows that during fiscal years 1996 and 1997, federal firearms licensees filed 5,041 gun theft reports involving 24,697 guns.<sup>67</sup> During the same two-year period, interstate carriers filed 1,871 theft reports with ATF involving 4,842 guns.<sup>68</sup> Gun dealers and interstate carriers

know or should know that guns in their possession are prime targets for thieves.

By definition, all stolen guns go directly into the wrong hands. Thus, not only is it foreseeable that guns will be stolen, it is readily foreseeable that stolen guns will be used for criminal purposes. The fact is that gun thefts are one of the primary means by which criminals acquire guns. The most comprehensive gun-tracing study ever undertaken provides strong support for this conclusion. In 1995, President Clinton initiated the Youth Crime Gun Interdiction Initiative (YOGI).<sup>69</sup> YOGI set up a national database to trace guns confiscated at crime scenes for the purpose of determining the original sources of guns used in crime.<sup>70</sup> The program began in 1995 with seventeen cities and was subsequently expanded to twenty-seven cities.<sup>71</sup> Under the program, ATF attempted to trace all confiscated guns back to the original buyer.<sup>72</sup> In February 1999, the ATF released a tracing analysis of 76,260 guns used in crimes in the twenty-seven cities by persons ages 18-24 during the past three years. The study found that 35 percent of the guns—*one out of every three guns used in crime*—had been stolen from private residences or gun dealers.<sup>73</sup>

Gun owners should owe a duty under tort law to safeguard their firearms from theft because gun thefts and crimes committed with stolen guns are readily foreseeable events.

#### VII. THE BURDEN OF AVOIDING THE RISKS OF UNSAFE STORAGE

On the risk side of Judge Hand's formula for negligence, we've seen that unsecured firearms create highly foreseeable risks of grave bodily harm to human beings in three forms: accidental shootings, adolescent suicides and criminal misuse of stolen guns. So what of the other side of Judge Hand's formula? What is the burden of eliminating (or at least substantially reducing) the risks of unsafe firearms storage? More specifically, what is the burden of *safe* firearms storage?

The burden consists of three components: (1) the financial investment required to achieve safe storage; (2) the inconvenience burden from having to unlock a gun when one desires to use it and to lock it up again when not in use; and (3) the inter-

ference, if any, with the utility of a safely stored gun for self-defense purposes. Let's examine each component.

#### A. The Financial Burden of Safe Storage

The safe storage of a firearm will require a monetary expenditure by the owner. The price of commercially available safe storage devices can range from as low as three dollars for a cheap trigger lock<sup>74</sup> to more than a thousand dollars for a large capacity gun safe capable of holding several guns. I'll be candid. Three-dollar trigger locks are not the answer. They might prevent some accidental shootings by children and adolescent suicides, but a trigger lock is not an effective preventative measure against theft.

Effective storage requires either: (1) a non-portable gun safe or lock box; (2) an external gun lock that cannot be removed by an unauthorized user without rendering the gun inoperable; (3) an internal, non-removable gun lock; (4) or the incorporation of personalized gun technology that would disable the gun to all but the authorized user.

*Option 1.* A wide variety of gun safes and lock boxes are available to consumers. They range in price from about \$150 for an anchorable lock box designed to hold one pistol<sup>75</sup> up to several hundred dollars for large capacity, heavy safes designed to hold multiple guns.<sup>76</sup> *Option 2.* A less desirable option to gun storage safes would be an individual gun-locking device, similar to a trigger lock that could not be removed without disabling the firearm. Such a device is most likely technologically feasible. Already, Saf 'T Lok sells a locking device that fits on the grip or magazine of a gun which, according to the manufacturer, "cannot be removed without special tools or damage to the gun, even if the grips are removed."<sup>77</sup> It sells for sixty dollars.<sup>78</sup>

*Options 3 and 4.* The future of safe storage lies in the incorporation by gun manufacturers of internal locking devices or, even better, "personalized technology" within individual guns that would prevent them from being discharged by anyone other than the authorized users. Both internal locks and personalized technology are technologically feasible. In December 2000, Smith & Wesson (S&W), the nation's largest firearms manufacturer by market share, entered into a settlement agreement with the City of Boston, one of the government entities that has sued

the gun industry, in which S&W agreed that within two years, all handguns will incorporate an internal locking device that can be unlocked only by key or combination unique to the particular gun.<sup>79</sup> The company further agreed that it would use its best efforts to incorporate personalized technology into all new models of handguns within three years.<sup>80</sup> Although Boston subsequently withdrew from the settlement agreement to avoid litigation and enforcement costs,<sup>81</sup> S&W's commitment to implement internal gun locks and personalized technology suggests that the technology to render guns inoperable to unauthorized users either exists or is close at hand.

While personalized technology will add to the cost of guns, as with other new technological developments, this cost can be expected to decline, particularly if government regulation or the tort system provides an incentive for the competitive development of such gun technology.<sup>82</sup> Some pro-gun advocates advance an economic discrimination argument with respect to the costs of gun safety, the gist of which is that gun safety requirements that increase the cost of gun ownership discriminate against poor people.<sup>83</sup> While the argument has emotional rhetorical appeal, it is substantively unsound. Many products cost more because of safety engineering. As with all other expenditures of life, these costs fall disproportionately on the less affluent. Automobiles, for example, cost more because of required investments in quality control and safety covering everything from crashworthy designs to airbags. However, no one is arguing that auto manufacturers should dispense with either of these safety measures because poor people cannot afford them. This is true even though transportation has much more vital daily utility than firearms.

#### B. The Inconvenience Burden of Safe Storage

The second burden factor to consider is the inconvenience to gun owners of engaging in safe storage. The physical and mental effort required to keep a gun secure is small. At worst, it is an annoying, minor inconvenience. The time required to lock and unlock a firearm is less than that required to stop at a red light, a similarly common sense safety restriction the law requires us to abide by numerous times each day. The average gun owner

retrieves his or her firearm only on rare occasions. This burden should be entitled to little or no weight in the risk-utility calculus.

### C. The Self-Defense Burden of Safe Storage

Years of participating in the gun control debate have convinced me that the largest obstacle to a meeting of the minds on most issues involving firearms regulation is differing perspectives on the utility of firearms for self-defense.<sup>84</sup> Gun owners are convinced their firearms may one day save their lives.<sup>85</sup> Gun control proponents believe it is much more likely the same firearms will be used to kill family members or acquaintances,<sup>86</sup> or otherwise fall into the hands of dangerous, unauthorized users.

The self-defense argument creeps into the safe storage debate. Some gun owners fear that laws requiring guns to be safely stored will decrease their usefulness for self-defense because they will not be as readily accessible when needed. For example, in a *Wall Street Journal* op-ed piece, John Lott argued against requiring locks on guns: “Locked, unloaded guns offer far less protection from intruders,” he asserted, “and so requiring locks would likely greatly increase deaths resulting from crimes.”<sup>87</sup>

There are at least four reasons why the “interference with self-defense” argument in the context of safe storage lacks merit. First, most gun owners lack the ability to effectively use even their negligently stored guns in self-defense. As gun experts know, simply “having” a gun does not make it useful for self-defense.<sup>88</sup> Effective self-defense using a firearm requires, like every other skill in life, an organized plan and practice to implement it. In an article on the use of firearms for home defense, a leading expert summed up his advice as follows: “Train yourself or, better yet, get yourself trained.”<sup>89</sup> However, too many gun owners simply buy a gun, load it and store it, with no thought about what to do with it if they need it.<sup>90</sup> “Somewhere in the closet,” one friend said, when asked where the handgun she keeps for self-defense is stored. Rehearsing self-defense drills with a safely stored gun would result in much quicker response times than most gun owners could presently muster with their unsecured guns.<sup>91</sup>

Second, manufacturers are developing a variety of safe storage devices made with quick access in mind. These devices are

designed to be opened or released in a matter of seconds, even in total darkness.<sup>92</sup> Third, gun experts, including those writing for pro-gun audiences in pro-gun magazines, instruct unequivocally that guns must be stored in a manner to prevent them from being accessed by unauthorized users.<sup>93</sup> These experts presumably know of what they speak.

Fourth, and perhaps most telling, despite John Lott's dramatic claim of a "greatly increase[d]"<sup>94</sup> death rate from crime resulting from safely stored guns, there is not a single recorded incident of a person suffering injury from a criminal due to an inability to gain access to a secured firearm. This is true even though fourteen states<sup>95</sup> (including three of the nation's four most populous states in California, Florida and Texas<sup>96</sup>) have Child Access Prevention laws imposing criminal penalties for negligent storage if a child gains access to a gun and uses it to cause harm. As dismal as the overall results may be, the firearm storage studies show that approximately half of all handguns are stored locked.<sup>97</sup> If safe gun storage really interfered with self-defense, is it not reasonable to expect there would be at least *some* evidence to support this claim? This is not to say that it is impossible for such an event to occur, but the apparent rarity of the event would not outweigh the societal gains that would result from safe storage.

The bottom line is that gun owners who believe guns offer them protection in the form of self-defense have nothing to fear from safe storage. They have much more to fear from their own lack of training and planning in self-defense tactics. The argument that safe storage would interfere with the utility of a firearm for self-defense is a hollow bogeyman.

## VII. CONCLUSION

Judge Hand's risk-utility formula for negligence—the undisputed test for negligence—holds that if the burden of avoiding a risk of harm is *less than* the probability of the harm *times* the severity of the harm, an actor has created an unreasonable risk which it is negligent to fail to protect against.

On the risk side of the equation, I have shown you strong evidence that unsecured guns present highly probable risks of death and grievous bodily harm. In comparison, the burden of avoiding the risk is minimal: a one-time safety investment in a

safe storage device and the time and effort required to actually use the device. I submit that by any rational appraisal of the evidence, the risk of an unsecured gun outweighs the burden necessary to reduce the risk. As such, when gun owners and gun sellers fail to safely store their firearms, tort liability is an appropriate response when unauthorized users gain access to those guns and use them to cause harm. This includes liability for accidental shootings, suicides and criminal misuse of stolen guns.

Courts recognize that firearms present extraordinary risks and that those who possess them must exercise an extremely high degree of care.<sup>98</sup> The *Restatement (Second) of Torts* states that “those who deal with firearms...are required to exercise the closest attention and the most careful precautions, not only in preparing them for their use but in using them.”<sup>99</sup> In the specific context of negligent storage, the New Jersey Supreme Court stated that “firearms are so inherently dangerous ... that a person of ordinary prudence in the exercise of reasonable care will take cautious preventative measures commensurate with the great harm that may ensue from the use of the gun by someone unfit to be entrusted with it.”<sup>100</sup> A California appellate court, in a negligent storage case involving a Mauser rifle, stated that “a person dealing with a weapon of this kind is held to the highest standard of due care ... even a slight deviation from which may constitute negligence in the safeguarding of such a dangerous instrument.”<sup>101</sup>

The reason courts demand a higher than normal degree of care in using and handling firearms is because of the magnitude of the risk. As in all negligence cases, the required standard of conduct with regard to firearms is reasonable care under the circumstances.<sup>102</sup> Although the standard of care remains the same, the amount of necessary care is variable according to the circumstances.<sup>103</sup> As the risk goes up, so does the amount of care that is demanded. In the context of dangerous instrumentalities, the Prosser & Keeton hornbook explains:

The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it. Those who deal with instrumentalities that are known to be

dangerous . . . must exercise a great amount of care because the risk is great. They may be required to take every reasonable precaution suggested by experience or prudence.<sup>104</sup>

With respect to the storage of firearms, this should translate to a duty on gun owners to take reasonable steps to prevent unauthorized users from acquiring their guns.<sup>105</sup> Tort law routinely imposes liability for conduct far less risky than leaving an inherently dangerous product accessible to unauthorized users. Asking gun owners to keep their guns secure from unauthorized users is not asking too much. To the contrary, it is only asking them to behave reasonably.

1. Professor of Law, Florida International University College of Law. This piece was originally presented as a symposium speech at the University of Connecticut School of Law in March 2000. I have modified it in places, fleshed out some of the discussion, and added sources for the data and propositions included. To say that the issue of unsafe firearm storage is of interest to me would be an understatement. Some might call it an “obsession.” See Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More “Smoking Gun”*, 51 HASTINGS L.J. 955 (2000); Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189 (2000); Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach To Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47 (2000). This essay borrows heavily from these three prior articles.

The issue of safe gun storage appeals to me primarily because I believe safe storage is the single most effective means for substantially reducing almost all types of firearm deaths and injuries *without* unreasonably interfering with a person’s right to possess firearms. Some of the citations herein are to Web links that may have changed or are no longer active. I can be contacted through my legal humor Web site: [www.lawhaha.com](http://www.lawhaha.com) and am always interested in hearing reader feedback.

2. Yvonne Senturia et al., “Children’s Household Exposure to Guns: A Pediatric Practice-Based Survey,” 93 *Pediatrics* 469, 471 (1994).
3. Yvonne Senturia et al., “Gun Storage Patterns in US Homes with Children: A Pediatric Practice-Based Survey,” 150 *Archives of Pediatrics & Adolescent Med.* 265, 267 (1996).
4. Gail Stennies et al., “Firearm Storage Practices and Children in the Home, United States, 1994,” 153 *Archives of Pediatrics & Adolescent Med.* 587, 588 (1999).
5. *A Parent’s Guide to Gun Safety*, <<http://www.nrahq.org/safety/education/guide.shtml>>



6. *Id.*

7. Bill O'Brien, "Securing Your Handgun" *Guns & Ammo: Handguns for Home Defense*, 1994, at 41.

8. Frank James, *All About Gun Safety*, in 1999 Colt Firearms Buyer's Guide 72, 72 (1999).

9. See Mark D. Polston & Douglas S. Weil, "Unsafe by Design: Using Tort Actions to Reduce Firearm-Related Injuries," 8 *Stan. L. & Pol'y Rev.* 13, 14 (1997) (citing recommendations by Sporting Arms and Ammunition Manufacturers' Institute and American Academy of Pediatrics that guns be stored unloaded and locked).

10. See Barbara Chatterjee & Pamela Imm, "Firearms Prevalence and Storage Practices in Wisconsin Households," 95 *Wis. Med. J.* 286 (1996); Samuel Forjuoh et al., "Firearm Ownership and Storage Practices in Pennsylvania Homes," 2 *Inj. Prevention* 278 (1996); Bruce Goldberg et al., "Firearm Ownership and Health Care Workers," 111 *Pub. Health Rep.* 257 (1996); David Nelson et al., "Population Estimates of Household Firearm Storage Practices and Firearm Carrying in Oregon," 275 *J.A.M.A.* 1744 (1996); Kenneth Powell et al., "State Estimates of Household Exposure to Firearms, Loaded Firearms, and Handguns, 1991 through 1995", 88 *Am. J. Pub. Health* 969 (1998); Yvonne Senturia et al., "Gun Storage Patterns in US Homes with Children: A Pediatric Practice-Based Survey," 150 *Archives of Pediatrics & Adolescent Med.* 265 (1996); Yvonne Senturia et al., "Children's Household Exposure to Guns: A Pediatric Practice-Based Survey," 93 *Pediatrics* 469 (1994); Gail Stennies et al., "Firearm Storage Practices and Children in the Home, United States, 1994" 153 *Archives of Pediatrics & Adolescent Med.* 587, 588 (1999); Douglas Weil & David Hemenway, "Loaded Guns in the Home: Analysis of a National Random Survey of Gun Owners," 267 *JAMA* 3034 (1992); Stefan Wiktor et al., "Firearms in New Mexico," 161 *West. J. Med.* 137 (1994). For a review of each of these studies, see McClurg, "Armed and Dangerous," *supra* note 1, at 1190-1200.

11. See Yvonne Senturia et al., "Gun Storage Patterns in US Homes with Children: A Pediatric Practice-Based Survey," 150 *Archives of Pediatrics & Adolescent Med.* 265 (1996).

12. *Id.*

13. *Id.* at 267.

14. *Id.* at 266.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 267. Nineteen percent of the families reported keeping no ammunition. *Id.* The study does not account for the missing seven percent necessary to make the percentages add up to 100 percent.
20. *See* Gail Stennies et al., “Firearm Storage Practices and Children in the Home, United States, 1994,” 153 *Archives of Pediatrics & Adolescent Med.* 587 (1999).
21. *Id.*
22. *Id.* at 588.
23. *Id.*
24. *Id.* at 587.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* Southern households were more likely to store at least one firearm loaded and unlocked (17.6 percent) compared to the rest of the country (7 percent). *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See supra* note 10.
35. Restatement (Second) of Torts § 282 (1965).
36. W. Page Keeton et al., *Prosser & Keeton On Torts* § 31, 169 (5<sup>th</sup> ed. 1984).
37. Restatement (Second) of Torts, *supra* note 35, § 291.
38. *Prosser & Keeton On Torts*, *supra* note 36, § 31, at 173. A WESTLAW search offers some indication of the extent to which risk-utility analysis pervades negligence law. Nearly 8,000 judicial opinions contain the words “negligence,” “risk” and “utility.” Search of WESTLAW, ALLCASES Library (Feb. 11, 2000) (search terms: “negligence & risk & utility”).
39. In economic terms, risk-utility analysis under negligence law reflects the general deterrence model of tort law, which is grounded on the notion that tort law should be constructed to promote the efficient allocation of resources. Under this view, the policy of tort law is not to eliminate accidents, but to optimize the number of accidents. To accomplish this, the deterrent model holds that tort liability rules are (or should be) designed to induce actors to expend resources on safer behavior up to the point where the marginal cost of increased safety exceeds the marginal reduction in accident costs. *See* William M. Landes & Richard A. Posner, “The Positive Economic Theory of Tort

Law,” 15 *Ga. L. Rev.* 851, 865-72 (1981). If liability rules are fashioned in this way, people will invest in safety at the optimal level because they know it will cost them more if they fail to do so. See William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 16-17 (1987). Put more simply, economically efficient tort rules deter risky behavior that is not cost-justified.

40. 159 F.2d 169 (2d Cir. 1947).

41. See Prosser & Keeton *On Torts*, *supra* note 36, § 31, at 173 n.46 (equating Judge Hand’s formula for negligence with risk-utility analysis).

42. See 159 F.2d at 173. To my knowledge, no one has ever explained why Judge Hand used an “L” rather than an “P” to represent what he called “the injury.” *Id.* Perhaps he was thinking in terms of “loss.”

43. *Id.*

44. Dianne R. Stepp, “School Watch; Students signing “no-guns” pledge; Safety issue: Parents of many middle school pupils will get copies of the promise about gun safety during their next teacher conference,” *Atlanta Const.*, Oct. 15, 1998, at 4JG.

45. Courtney McClelland et al., *Assessing Firearm Safety in Inner-City Homes*, 17 *N & HC: Perspectives on Community*, Official Publication Nat’l League for Nursing 174, 175 (1996).

46. Adrienne T. Washington, “Unlocked guns are an open door to tragedy,” *Wash. Times*, Dec. 1, 1998, at C2.

47. See Fla. Stat. Ann. § 784.05 (West 1992 & Supp. 1998).

48. Fourteen states have passed CAP laws. See Cal. Penal Code § 12035 (West 1992 & Supp. 1998); Conn. Gen. Stat. §29-37i (1990 & Supp. 1998); Del. Code Ann. tit. 11, § 1456 (1995); Fla. Stat. Ann. § 784.05 (West 1992 & Supp. 1998); Haw. Rev. Stat. § 134-10.5 (1993); Iowa Code § 724.22 (1993); Md. Code Ann. § 36K (1996); Minn. Stat. § 609.666 (1987 & Supp. 1998); N.J. Stat. Ann. § 2C:58-15 (West 1995); N.C. Gen. Stat. § 14-315.1 (1993 & Supp. 1997); R.I. Gen. Laws § 11-47-60.1 (1994 & Supp. 1997); Tex. Penal Code Ann. § 46.13 (West 1994 & Supp. 1997); Va. Code Ann. § 18.2-56.2 (Michie 1996); Wis. Stat. § 948.55 (1996). Although Nevada is frequently included on lists of states with CAP laws, the Nevada statute is not a criminal safe storage statute, but a civil liability statute concerned with the negligent entrustment of firearms to minors. See Nev. Rev. Stat. § 41.472 (1996). For a detailed analysis of the different state CAP laws, see McClurg, *Child Access Prevention Laws*, *supra* note 1, at 61-69.

49. Bill Duryea, “Fully Responsible, Nearly Destroyed,” *St. Petersburg Times*, June 28, 1998, at 1F.

50. Peter Cummings & Frederick P. Rivara, “State Gun Safe Storage Laws and Child Mortality Due to Firearms,” 278 *JAMA* 1084 (1997).

51. *Id.* at 1085. The authors studied states in which a CAP law had been in effect for at least one year from 1990 to 1994. While one must be careful of *post hoc* reasoning, the authors offered several reasons for concluding that the reduced death rates were tied to the CAP laws, as opposed to being caused by

other factors: (1) the effect was strongest among those specifically covered by the laws—children; (2) the effect was strongest for the outcome the laws were designed to prevent—unintentional shootings; (3) the states with CAP laws are from all regions of the country and do not appear to share a set of common features other than that they all have safe storage laws; and (4) the estimated change in mortality was based on a comparison within each state before and after the law took effect, meaning that differences between the CAP law states and other states cannot account for the results.

Subsequently, two other researchers conducted a statistical study reaching opposite conclusions. They found “no consistent evidence that safe storage laws reduce accidental deaths.” John R. Lott, Jr. & John E. Whitley, “Safe Storage Gun Laws: Accidental Deaths, Suicides, and Crime,” *Yale Law School, Program for Studies in Law, Economics, and Public Policy*, Working Paper no. 237 (2000).

52. See, e.g., *Williams v. Davidson*, 409 S.W.2d 311 (Ark. 1966) (brother and sister obtained air rifle and ammunition from unlocked closet); *Jacobs v. Tyson*, 407 S.E.2d 62 (Ga. Ct. App. 1991) (twelve-year-old retrieved loaded pistol from unlocked dresser drawer); *Glean v. Smith*, 156 S.E.2d 507 (Ga. Ct. App. 1967) (three-year-old obtained loaded pistol from drawer); *Valence v. State*, 282 So.2d 517 (La. 1973) (four-year-old accessed loaded pistol in glove compartment); *Sojka v. Dlugosz*, 200 N.E. 554 (Mass. 1936) (nine-year-old obtained father’s squirrel rifle); *Stoelting v. Hauck*, 159 A.2d 385 (N.J. 1960) (fifteen-year-old obtained access to .45 caliber pistol from unlocked desk in bedroom; court found sufficient evidence to support claim of negligent storage, but reversed jury verdict for plaintiff on ground that evidence of plaintiff’s contributory negligence and assumption of risk was improperly excluded); *Hart v. Lewis*, 103 P.2d 65 (Okla. 1940) (minor picked up gun defendant had laid on counter of business while cleaning); *Kubns v. Brugger*, 135 A.2d 395 (Pa. 1957) (twelve-year-old obtained loaded pistol from drawer in grandfather’s cottage); *Mendola v. Sambol*, 71 A.2d 827 (Pa. 1950) (eleven-year-old retrieved .22 caliber rifle from behind door in living room); *Stanley v. Joslin*, 757 S.W.2d 328 (Tenn. Ct. App. 1987) (fourteen-year-old obtained rifle and cartridges from gun rack); *Giguere v. Rosselot*, 3 A.2d 538 (Vt. 1939) (child used father’s rifle to shoot plaintiff); *Stewart v. Wulf*, 271 N.W.2d 79 (Wis. 1978) (twenty-year-old houseguest accidentally shot himself with loaded gun left in bedroom).

53. Firearm suicides exceeded firearms homicides in forty of the sixty years between 1933 and 1992. Garen J. Wintemute et al., “The Choice of Weapons in Firearms Suicides,” 78 *Am. J. Pub. Health* 824 (1998).

54. At least 17,000 people in the United States commit suicide by firearm each year. *The Unspoken Tragedy: Firearm Suicide in the United States, A Report by The Educational Fund to End Handgun Violence and The Coalition to Stop Gun Violence* 1 (May 31, 1995). The figure quoted in text was arrived at by dividing 17,000 by the 365 days in a year.

55. David K. Curran, *Adolescent Suicidal Behavior* 39 (1987) (stating that “a good deal of research and clinical experience” supports the proposition that most

adolescent suicide attempters do not have a strong wish to die). In one study, only 12 percent of a group of 1,103 adolescent suicide attempters stated in emergency room interviews that they wished to die as a result of their acts. *Id.*

56. Geo Stone, *Suicide and Attempted Suicide: Methods and Consequences* 148; see also Jukka Hintikka et al., "Hunting guns in homes and suicides in 15-24-year-old males in Eastern Finland," *Australian & New Zealand J. Psychiatry* 858 (stating firearm suicide attempts result in death in over 90 percent of cases); Ed Magnuson, "Suicides: The Gun Factor," *Time*, July 17, 1989, at 61 (citing 92 percent death rate from suicide attempts with guns and quoting sociologist James Wright: "Everyone knows that if you put a loaded .38 in your ear and pull the trigger, you won't survive").

57. An Oregon study of youth suicide rates found that firearms were successful in 78.2 percent of attempts, although they accounted for only 0.6 percent of total attempts. See "Fatal and Nonfatal Suicide Attempts Among Adolescents—Oregon, 1988-93," 44 *Morbidity & Mortality Weekly Rep.* 312, 315 (Apr. 28, 1995). In stark comparison, drug overdose was the chosen suicide method in 75.5 percent of attempts, but was successful only 0.4 percent of the time. *Id.* Perhaps most significantly, the study found that while firearms were used in only 0.6 percent of all attempts, they were responsible for 63.7 percent of all fatal attempts. *Id.*

58. Etienne G. Krug, "Childhood homicide, suicide, and firearm deaths: an international comparison," 49 *World Health Statistics Qtrly.* 230, 232 (1996) (study of twenty-seven countries and areas).

59. Stone, *supra* note 56, at 42.

60. See McClurg, "The Public Health Case for the Safe Storage of Firearms," *supra* note 1, at 965-77 (reviewing eleven studies).

61. Marianne W. Zawitz, Bureau Just. Stat., Dep't Just., *Guns Used in Crime*, NCJ-148201, at 3 (1995).

62. *Id.*

63. Gordon Witkin, "Handgun stealing made real easy; Thousands of guns are stolen straight from firearms makers, stores—even military bases," *U.S. News & World Rep.*, June 9, 1997, at 34.

64. U.S. Bureau of the Census, *Statistical Abstract of the U.S.: 1998* 214 tbl. 343 (118<sup>th</sup> ed. 1998) (reporting 2,595,000 burglaries in 1995 and 2,502,000 burglaries in 1996).

65. Witkin, *supra* note 63, at 34.

66. *Statistical Abstract of the U.S.*, *supra* note 64, at 214 tbl. 343 (reporting 1,940,000 larcenies from motor vehicles in 1995 and 1,997,000 such larcenies in 1996).

67. U.S. Dep't of Treasury, 1997 ATF Annual Rep. 19 (1997), <[www.atf.treas.gov/pub/report97/report97.htm](http://www.atf.treas.gov/pub/report97/report97.htm)> During the 1992 Los Angeles rioting that followed in the wake of the Rodney King verdict, nineteen gun stores were looted, resulting in the theft of more than 4,000 guns. Witkin,

*supra* note 63, at 34. One pawnshop had 970 guns stolen; another lost 1,150 guns. *Id.*

68. 1997 ATF Annual Rep., *supra* note 67, at 19. In October 1995, a United Parcel Service worker was convicted of stealing 250 Smith & Wesson firearms en route to gun stores. Witkin, *supra* note 63, at 36. At least 60 of the guns were involved in subsequent crimes. *Id.*

69. Mark Johnson, "In Memphis, armed youths see "the gun people": Police start cracking down, tracking down firearm sales," *Sunday Gazette Mail*, Sept. 27, 1998, at 8A.

70. *Id.*

71. *Id.*

72. *Id.* The number of tracing requests received by the ATF jumped from 80,042 in 1995 to 194,235 in 1997. *Id.*

73. Debbi Wilgoren, "Report Traces Guns Used in Crimes; D.C. Offenders Increasingly Getting Weapons from Beyond Area," *Wash. Post*, Feb. 22, 1999, at B01. The study determined that half of the traced guns were purchased from licensed dealers in "straw" transactions in which persons acting as intermediaries purchased the guns and gave them to others. *Id.*

74. *See* Gun Safety and Other Safety Items, <[linktotheweb.com/gunlock.htm](http://linktotheweb.com/gunlock.htm)> (advertising package of three gun trigger locks for nine dollars).

75. *See* Security Locks.Com, <[www.securitylocks.com/safes5.htm](http://www.securitylocks.com/safes5.htm)> (advertising 14-gauge steel pistol box with quick release entry feature and pre-drilled holes for anchoring at a cost of \$153).

76. *See* A-1 Lock & Safe, Inc., <[www.a-1locksafes.com/gunsafe.htm](http://www.a-1locksafes.com/gunsafe.htm)> (advertising several large gun safes ranging in price from \$504 to \$1085).

77. *See* Saf T Lok Gun Locks, <[www.saf-t-lok.com](http://www.saf-t-lok.com)>

78. *Id.*

79. Andrew J. McClurg, David B. Kopel & Brannon P. Denning, *Gun Control and Gun Rights* 313, 347-49 (2002)

80. *Id.*

81. Robert Hanley, "Citing Recent Crime Statistics, Jersey City Sues Gun Makers," *N.Y. Times*, Mar. 29, 2002, at B2 (stating City of Boston dropped suit because of litigation costs).

82. For example, prototype airbags in automobiles cost \$20,000. Scott Shane, "Taking Aim at the Gun as Threat to Public Health," *Baltimore Sun*, May 29, 1994, at 1A. Now they cost about \$200. *Id.*

83. John R. Lott, Jr., "Childproof Gun Locks: Bound to Misfire," *Wall St. J.*, July 16, 1997, at A22 (asserting that "Safety rules that raise the costs of gun purchases will . . . reduce gun ownership and hit these [poor] people hardest").

84. For thorough examination of the utility of guns for self-defense, *see* McClurg, Kopel & Denning, *supra* note 79, at 3-33.

85. See John R. Lott, Jr., "Concealed guns reduce crime; If people are packing, crooks think twice," *Star Tribune* (Minneapolis, Minn.), Aug. 16, 1998, at 25A (arguing that Americans use guns for defensive purposes more than two million times each year).
86. See "Concealed-gun idea full of risks to women (letter)," *Chi. Sun-Times*, Sept. 14, 1998, at 34 (citing study by Dr. Arthur Kellermann that gun kept in home for self-protection is 43 times more likely to be used to kill a family member than an intruder).
87. See Lott, "Childproof Gun Locks," *supra* note 83, at A22.
88. See Massad Ayoob, "Strategies and Tactics for Home Defense," *Guns & Ammo: Handguns for Home Defense*, 1994, at 37 ("Understand that the gun won't keep you safe by itself. Far too many citizens have fallen into the trap of thinking, 'I have a gun, so I'm automatically safe.'"). Ayoob's article begins with the observation: "Home-defense tactics cannot be adequately covered in 2,500 words, and some have failed to do so in 25,000." *Id.* at 35.
89. *Id.*
90. Walt Rauch, "Training and Instruction," *Guns & Ammo: Handguns for Home Defense*, 1994, at 79 ("In some cases, the sorry truth of the matter is that a gun is bought, loaded and stored away—with no more thought given to it until it's needed. When you make the decision to get a handgun for home defense, your first step should be to get some training in the defensive use of a firearm.").
91. See "Masked man kicks in door, yells for money," *Ark. Democrat-Gazette*, Dec. 3, 1998, at 4B (describing incident in which assailant broke into house, spotted handgun on victim's bedside table and grabbed it before the waking victim could respond; assailant stole gun and left).
92. The Saf T Lok trigger lock replaces the grip of a handgun and uses a "quick click" combination designed to release the lock within three seconds, even in total darkness. See Carl Stewart, "Keep 'Em Safe: It's Smart Business," *Shooting Industry*, Nov. 1, 1997. The Speed Release Gun Lock is an electronic trigger locking device powered by a 9-volt battery featuring a programmable four-digit illuminated key pad. *Id.* The manufacturer of the Sesamee line of combination gun locks boasts that its locks "can be opened quickly, even in low-light conditions." *Id.* (quoting Maura Griffin, representative of CCL Security Products). See also A-1 Lock & Safe, Inc., <[www.a-1locksafes.com/gunsafe.html](http://www.a-1locksafes.com/gunsafe.html)> (advertising guns safes with electronic combination and electronic push-button locks).
93. See *supra* notes 7-8 and accompanying text.
94. See *supra* text accompanying note 87.
95. See *supra* note 48 for citations to the fourteen state Child Access Prevention Laws.
96. In 1997, California's population was 32,268,000 and ranked first out of the fifty states; Florida's population was 14,654,000 and ranked fourth; Texas'

population was 19,439,000, and ranked second. Statistical Abstract of the U.S., *supra* note 64, at 28-29.

97. See *supra* note 2 and accompanying text.

98. See, e.g., *Bridges v. Dahl*, 108 F.2d 228, 229 (6<sup>th</sup> Cir. 1939) (utmost caution must be exercised by those in possession and control of dangerous instrumentalities such as firearms and explosives); *Jacoves v. United Merchandising Corp.*, 11 Cal.Rptr.2d 468, 486 (Cal. Ct. App. 1992) (civil law holds firearm use or possession to highest standard of care, even slight deviation from which may constitute actionable negligence); *Jacobs v. Tyson*, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991) (classifying firearms as an “inherently dangerous instrumentality” which imposes on users a duty to employ “exceptional precautions to prevent injury”; distinguishing firearms from other products that are capable of being used to inflict harm, such as knives and golf clubs, because of the unusual dangers presented by firearms); *Long v. Turk*, 962 P.2d 1093, 1096 (Kan. 1998) (court had “no difficulty concluding that a .357 Magnum handgun is a dangerous instrumentality” which requires the highest degree of care in safeguarding); *Luttrell v. Carolina Mineral Co.*, 18 S.E.2d 412, 417 (N.C. 1942) (those having possession and control of dangerous instrumentalities such as firearms and explosives owe highest degree of care; utmost caution must be exercised in their care and custody); *Strever v. Cline*, 924 P.2d 666, 671 (Mont. 1995) (stating firearm is dangerous instrumentality that requires a higher degree of care in use and handling).

99. Restatement (Second) of Torts, *supra* note 35, § 298 cmt. b.

100. *Stoelting v. Hauck*, 159 A.2d 385, 389 (N.J. 1960) (reviewing jury verdict against parents of fifteen-year-old girl for negligent storage of .45 caliber pistol used by girl to shoot plaintiff; verdict reversed on other grounds).

101. *Reida v. Lund*, 18 Cal. App. 3d 698, 704 (Cal. Ct. App. 1971) (reversing summary judgment for parents of child who gained access to rifle and used it shoot motorists).

102. *Prosser & Keeton On Torts*, *supra* note 36, § 32, at 175.

103. See *id.*

104. See *id.* § 34, at 208.

105. Detailed case law analysis of “negligent storage” claims arising from accidental shootings, suicides, and the criminal misuse of stolen guns can be found in McClurg, “Armed and Dangerous,” *supra* note 1, at 1214-44.



## Notes



## Notes



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