


**TRUST THE PEOPLE: THE CASE AGAINST GUN CONTROL**

by David B. Kopel

Men by their constitutions are naturally divided into two parties: 1) Those who fear and distrust the people . . . . 2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe . . . depository of the public interest.

-- Thomas Jefferson

Few public policy debates have been as dominated by emotion and misinformation as the one on gun control. Perhaps this debate is so highly charged because it involves such fundamental issues. The calls for more gun restrictions or for bans on some or all guns are calls for significant change in our social and constitutional systems.

Gun control is based on the faulty notion that ordinary American citizens are too clumsy and ill-tempered to be trusted with weapons. Only through the blatant abrogation of explicit constitutional rights is gun control even possible. It must be enforced with such violations of individual rights as intrusive search and seizure. It most severely victimizes those who most need weapons for self-defense, such as blacks and women.

The various gun control proposals on today's agenda-- including licensing, waiting periods, and bans on so-called Saturday night specials--are of little, if any, value as crime-fighting measures. Banning guns to reduce crime makes as much sense as banning alcohol to reduce drunk driving. Indeed, persuasive evidence shows that civilian gun ownership can be a powerful deterrent to crime.

The gun control debate poses the basic question: Who is more trustworthy, the government or the people?

---

David B. Kopel, formerly an assistant district attorney in Manhattan, is an attorney in Colorado.

## Guns and Crime

### Guns as a Cause of Crime

Gun control advocates--those who favor additional legal restrictions on the availability of guns or who want to outlaw certain types of guns--argue that the more guns there are, the more crime there will be. As a Detroit narcotics officer put it, "Drugs are X; the number of guns in our society is Y; the number of kids in possession of drugs is Z. X plus Y plus Z equals an increase in murders." [1] But there is no simple statistical correlation between gun ownership and homicide or other violent crimes. In the first 30 years of this century, U.S. per capita handgun ownership remained stable, but the homicide rate rose tenfold. [2] Subsequently, between 1937 and 1963, handgun ownership rose by 250 percent, but the homicide rate fell by 35.7 percent. [3]

Switzerland, through its militia system, distributes both pistols and fully automatic assault rifles to all adult males and requires them to store their weapons at home. Further, civilian long-gun purchases are essentially unregulated, and handguns are available to any adult without a criminal record or mental defect. Nevertheless, Switzerland suffers far less crime per capita than the United States and almost no gun crime.

Allowing for important differences between Switzerland and the United States, it seems clear that there is no direct link between the level of citizen gun ownership and the level of gun misuse. Instead of simplistically assuming that the fewer guns there are, the safer society will be, one should analyze the particular costs and benefits of gun ownership and gun control and consider which groups gain and lose from particular policies.

### Guns as a Tool against Crime

Several years ago the National Institute of Justice offered a grant to the former president of the American Sociological Association to survey the field of research on gun control. Peter Rossi began his work convinced of the need for strict national gun control. After looking at the data, however, Rossi and his University of Massachusetts colleagues James Wright and Kathleen Daly concluded that there was no convincing proof that gun control curbs crime. [4] A follow-up study by Wright and Rossi of serious felons in American prisons provided further evidence that gun control would not impede determined criminals. [5] It also indicated that civilian gun ownership does deter some crime. Three-fifths of the prisoners studied said that a criminal would not attack a potential victim who was

known to be armed. Two-fifths of them had decided not to commit a crime because they thought the victim might have a gun. Criminals in states with higher civilian gun ownership rates worried the most about armed victims.

Real-world experiences validate the sociologists' findings. In 1966 the police in Orlando, Florida, responded to a rape epidemic by embarking on a highly publicized program to train 2,500 women in firearm use. The next year rape fell by 88 percent in Orlando (the only major city to experience a decrease that year); burglary fell by 25 percent. Not one of the 2,500 women actually ended up firing her weapon; the deterrent effect of the publicity sufficed. Five years later Orlando's rape rate was still 13 percent below the pre-program level, whereas the surrounding standard metropolitan area had suffered a 308 percent increase.[6] During a 1974 police strike in Albuquerque armed citizens patrolled their neighborhoods and shop owners publicly armed themselves; felonies dropped significantly.[7] In March 1982 Kennesaw, Georgia, enacted a law requiring householders to keep a gun at home; house burglaries fell from 65 per year to 26, and to 11 the following year.[8] Similar publicized training programs for gun-toting merchants sharply reduced robberies in stores in Highland Park, Michigan, and in New Orleans; a grocers organization's gun clinics produced the same result in Detroit.[9]

Gun control advocates note that only 2 burglars in 1,000 are driven off by armed homeowners. However, since a huge preponderance of burglaries take place when no one is home, the statistical citation is misleading. Several criminologists attribute the prevalence of daytime burglary to burglars' fear of confronting an armed occupant.[10] Indeed, a burglar's chance of being sent to jail is about the same as his chance of being shot by a victim if the burglar breaks into an occupied residence (1 to 2 percent in each case).[11]

### Can Gun Laws Be Enforced?

As Stanford law professor John Kaplan has observed, "When guns are outlawed, all those who have guns will be outlaws." [12] Kaplan argued that when a law criminalizes behavior that its practitioners do not believe improper, the new outlaws lose respect for society and the law. Kaplan found the problem especially severe in situations where the numbers of outlaws are very high, as in the case of alcohol, marijuana, or gun prohibition.

Even simple registration laws meet with massive resistance. In Illinois, for example, a 1977 study showed that compliance

with handgun registration was only about 25 percent.[13] A 1979 survey of Illinois gun owners indicated that 73 percent would not comply with a gun prohibition.[14] It is evident that New York City's almost complete prohibition is not voluntarily obeyed; estimates of the number of illegal handguns in the city range from one million to two million.[15]

With more widespread American gun control, the number of new outlaws would certainly be huge. Prohibition would label as criminal the millions of otherwise law-abiding citizens who believe they must possess the means to defend themselves, regardless of what legislation dictates.

In addition, strict enforcement of gun prohibition--like our current marijuana prohibition and our past alcohol prohibition--would divert enormous police and judicial resources to ferreting out and prosecuting the commission of private, consensual possessory offenses. The diversion of resources to the prosecution of such offenses would mean fewer resources available to fight other crime.

Assume half of all current handgun owners would disobey a prohibition and that 10 percent of them would be caught. Since the cost of arresting someone for a serious offense is well over \$2,000, the total cost in arrests alone would amount to \$5 billion a year. Assuming that the defendants plea-bargained at the normal rate (an unlikely assumption, since juries would be more sympathetic to such defendants than to most other criminals), the cost of prosecution and trial would be at least \$4.5 billion a year. Putting each of the convicted defendants in jail for a three-day term would cost over \$660 million in one-time prison construction costs, and over \$200 million in annual maintenance, and would require a 10 percent increase in national prison capacity.[16] Given that the entire American criminal justice system has a total annual budget of only \$45 billion, it is clear that effective enforcement of a handgun prohibition would simply be impossible.

### Do Gun Laws Disarm Criminals?

Although gun control advocates devote much attention to the alleged evils of guns and gun owners, they devote little attention to the particulars of devising a workable, enforceable law. Disarming criminals would be nearly impossible. There are between 100 and 140 million guns in the United States, a third of them handguns.[17] The ratio of people who commit handgun crimes each year to handguns is 1:400, that of handgun homicides to handguns is 1:3,600.[18] Because the ratio of handguns to handgun criminals is so high, the criminal supply would continue

with barely an interruption. Even if 90 percent of American handguns disappeared, there would still be 40 left for every handgun criminal. In no state in the union can people with recent violent felony convictions purchase firearms. Yet the National Institute of Justice survey of prisoners, many of whom were repeat offenders, showed that 90 percent were able to obtain their last firearm within a few days. Most obtained it within a few hours. Three-quarters of the men agreed that they would have "no trouble" or "only a little trouble" obtaining a gun upon release, despite the legal barriers to such a purchase.[19]

Even if the entire American gun stock magically vanished, resupply for criminals would be easy. If small handguns were imported in the same physical volume as marijuana, 20 million would enter the country annually. (Current legal demand for new handguns is about 2.5 million a year). Bootleg gun manufacture requires no more than the tools that most Americans have in their garages. A zip gun can be made from tubing, tape, a pin, a key, whittle wood, and rubber bands. In fact, using wood fires and tools inferior to those in the Sears & Roebuck catalogue, Pakistani and Afghan peasants have been making firearms capable of firing the Russian AK-47 cartridge.[20] Bootleg ammunition is no harder to make than bootleg liquor. Although modern smokeless gunpowder is too complex for backyard production, conventional black powder is simple to manufacture.[21]

Apparently, illegal gun production is already common. A 1986 federal government study found that one-fifth of the guns seized by the police in Washington, D.C., were homemade.[22] Of course, homemade guns cannot win target-shooting contests, but they suffice for robbery purposes. Furthermore, the price of bootleg guns may even be lower than the price of the quality guns available now (just as, in prohibition days, bootleg gin often cost less than legal alcohol had).

Most police officers concur that gun control laws are ineffective. A 1986 questionnaire sent to every major police official in the country produced the following results: 97 percent believed that a firearms ownership ban would not reduce crime or keep criminals from using guns; 89 percent believed that gun control laws such as those in Chicago, Washington, D.C., and New York City had no effect on criminals; and 90 percent believed that if firearms ownership was banned, ordinary citizens would be more likely to be targets of armed violence.[23]

### Guns and the Ordinary Citizen

Some advocates of gun prohibition concede that it will not disarm criminals, but nevertheless they favor it in the belief

that disarming ordinary citizens would in itself be good. Their belief seems to rely heavily on newspaper accounts of suicidal or outlandishly careless gun owners shooting themselves or loved ones. Such advocates can reel off newspaper stories of children or adults killing themselves in foolish gun accidents (one headline: "2 Year-old Boy Shoots Friend, 5") or shooting each other in moments of temporary frenzy.

In using argument by anecdote, the advocates are aided by the media, which sensationalize violence. The sensationalism and selectivity of the press lead readers to false conclusions. One poll showed that people believe homicide takes more lives annually than diabetes, stomach cancer, or stroke; in fact, strokes alone take 10 times as many lives as homicides.[24]

Even in the war of anecdotes, however, it is not at all clear that the gun control advocates have the advantage. Every month the National Rifle Association's magazines feature a section called "The Armed Citizen," which collects newspaper clippings of citizens successfully defending themselves against crime. For example, one story tells of a man in a wheelchair who had been beaten and robbed during five break-ins in two months; when the man heard someone prying at his window with a hatchet, he fired a shotgun, wounding the burglar and driving him away.[25]

Anecdotes rarely settle policy disputes, though. A cool-headed review of the facts debunks the scare tactics of the gun control advocates.

Some people with firsthand experience blame guns for domestic homicides. Said the chief of the homicide section of the Chicago Police Department, "There was a domestic fight. A gun was there. And then somebody was dead. If you have described one, you have described them all." [26] Sociologist R. P. Narlock, though, believes that "the mere availability of weapons lethal enough to produce a human mortality bears no major relationship to the frequency with which this act is completed." [27]

Guns do not turn ordinary citizens into murderers. Significantly, fewer than one gun owner in 3,000 commits homicide; and that one killer is far from a typical gun owner. Studies have found two-thirds to four-fifths of homicide offenders have prior arrest records, frequently for violent felonies.[28] A study by the pro-control Police Foundation of domestic homicides in Kansas City in 1977 revealed that in 85 percent of homicides among family members, the police had been called in before to break up violence.[29] In half the cases, the police had been called in five or more times. Thus, the average person who

kills a family member is not a non-violent solid citizen who reaches for a weapon in a moment of temporary insanity. Instead, he has a past record of illegal violence and trouble with the law. Such people on the fringes of society are unlikely to be affected by gun control laws. Indeed, since many killers already had felony convictions, it was already illegal for them to own a gun, but they found one anyway.

Of all gun homicide victims, 81 percent are relatives or acquaintances of the killer.[30] As one might expect of the wives, companions, and business associates (e.g. drug dealers and loansharks) of violent felons, the victims are no paragons of society. In a study of the victims of near-fatal domestic shootings and stabbings, 78 percent of the victims volunteered a history of hard-drug use, and 16 percent admitted using heroin the day of the incident.[31] Many of the handgun homicide victims might well have been handgun killers, had the conflict turned out a little differently.

Finally, many of the domestic killings with guns involve self-defense. In Detroit, for example, 75 percent of wives who shot and killed their husbands were not prosecuted, because the wives were legally defending themselves or their children against murderous assault.[32] When a gun is fired (or brandished) for legal self-defense in a home, the criminal attacker is much more likely to be a relative or acquaintance committing aggravated assault, rather than a total stranger committing a burglary.

The "domestic homicide" prong of the gun control argument demands that we take guns away from law-abiding citizens to reduce the incidence of felons committing crimes against each other. Not only is such a policy impossible to implement, it is morally flawed. To protect a woman who chooses to share a bed and a rap sheet with a criminal, it is unfair to disarm law-abiding women and men and make them easier targets for the criminal's rapes and robberies.

It is often alleged that guns cause huge numbers of fatal accidents, far outweighing the minimal gain from whatever anti-crime effects they may have. For example, former U.S. Senate candidate Mark Green (D-N.Y.) warned that "people with guns in their homes for protection are six times more likely to die of gunfire due to accidental discharge than those without them." [33] Of course, that makes sense; after all, people who own swimming pools are more likely to die in drowning accidents.

The actual number of people who die in home handgun accidents, though, is quite small. Despite press headlines such as "Pregnant Woman Killed by Own Gun While Making Bed," the actual death toll is somewhat lower than implied by the press. Each

year roughly 7,000 people commit suicide with handguns and 300 or fewer people die in handgun accidents.[34] People who want to commit suicide can find many alternatives, and even pro-control experts agree that gun control has little impact on the suicide rate. Japan, for example, has strict gun control and a suicide rate twice the U.S. level. Americans have a high rate of suicide by shooting for the same reason that Norwegians have a high rate of suicide by drowning; guns are an important symbol in one culture, water in the other.[35]

If a U.S. gun prohibition was actually effective, it could save the 300 or so handgun victims and 1,400 or so long-gun accident victims each year. Even one death is too many, but guns account for only 2 percent of accidental deaths annually.[36]

Guns are dangerous, but hardly as dangerous as gun control advocates contend. Three times as many people are accidentally killed by fire as by firearms.[37] The number of people who die in gun accidents is about one-third the number who die by drowning.[38] Although newspapers leave a contrary impression, bicycle accidents kill many more children than do gun accidents. The average motor vehicle is 12 times more likely to cause a death than the average firearm.[39] Further, people involved in gun accidents are not typical gun owners but self-destructive individuals who are also "disproportionately involved in other accidents, violent crime and heavy drinking." [40]

Moreover, there is little correlation between the number of guns and the accident rate. The per capita death rate from firearms accidents has declined by a third in the last two decades, while the firearms supply has risen over 300 percent. In part this is because handguns have replaced many long guns as home protection weapons, and handgun accidents are considerably less likely to cause death than long-gun accidents.[41] Handguns are also more difficult for a toddler to accidentally discharge than are long guns.[42]

The risks, therefore, of gun ownership by ordinary citizens are quite low. Accidents can be avoided by buying a trigger lock and not cleaning a gun while it is loaded. Unless the gun owner is already a violent thug, he is very unlikely to kill a relative in a moment of passion. If someone in the house is intent on suicide, he will kill himself by whatever means are at hand.

Gun control advocates like to cite a recent article in the New England Journal of Medicine that argues that for every intruder killed by a gun, 43 other people die as a result of gunshot wounds incurred in the home.[43] (Again, most of them are suicides; many of the rest are assaultive family members killed in legitimate self-defense.) However, counting the number



of criminal deaths is a bizarre method of measuring anticrime utility; no one evaluates police efficacy by tallying the number of criminals killed. Defensive use of a gun is far more likely to involve scaring away an attacker by brandishing the gun, or by firing it without causing death. Even if the numbers of criminal deaths were the proper measure of anticrime efficacy, citizens acting with full legal justification kill at least 30 percent more criminals than do the police.[44]

On the whole, citizens are more successful gun users than are the police. When police shoot, they are 5.5 times more likely to hit an innocent person than are civilian shooters.[45] Moreover, civilians use guns effectively against criminals. If a robbery victim does not defend himself, the robbery will succeed 88 percent of the time, and the victim will be injured 25 percent of the time. If the victim resists with a gun, the robbery "success" rate falls to 30 percent, and the victim injury rate falls to 17 percent. No other response to a robbery--from using a knife, to shouting for help, to fleeing--produces such a low rate of victim injury and robbery success.[46] In short, virtually all Americans who use guns do so responsibly and effectively, notwithstanding the anxieties of gun control advocates.

### Enforcing Gun Bans

Apart from the intrinsic merit (or demerit) of banning or restricting gun possession, the mechanics of enforcement must also be considered. Illegal gun ownership is by definition a possessory offense, like possession of marijuana or bootleg alcohol. The impossibility of effective enforcement, plus the civil liberties invasions that necessarily result, are powerful arguments against gun control.

### Search and Seizure

No civil libertarian needs to be told how the criminalization of liquor and drugs has led the police into search-and-seizure violations. Consensual possessory offenses cannot be contained any other way. Search-and-seizure violations are the inevitable result of the criminalization of gun possession. As Judge David Shields of Chicago's special firearms court observed: "Constitutional search and seizure issues are probably more regularly argued in this court than anywhere in America." [47]

The problem has existed for a long time. In 1933, for example, long before the Warren Court expanded the rights of suspects, one quarter of all weapons arrests in Detroit were

dismissed because of illegal searches.[48] According to the American Civil Liberties Union, the St. Louis police have conducted over 25,000 illegal searches under the theory that any black driving a late-model car must have a handgun.[49]

The frequency of illegal searches should not be surprising. The police are ordered to get handguns off the streets, and they attempt to do their job. It is not their fault that they are told to enforce a law whose enforcement is impossible within constitutional limits. Small wonder that the Chicago Police Department gives an officer a favorable notation in his record for confiscating a gun, even as the result of an illegal search.[50] One cannot comply with the Fourth Amendment--which requires that searches be based upon probable cause--and also effectively enforce a gun prohibition. Former D.C. Court of Appeals judge Malcolm Wilkey thus bemoaned the fact that the exclusionary rule, which bars courtroom use of illegally seized evidence, "has made unenforceable the gun control laws we now have and will make ineffective any stricter controls which may be devised." [51] Judge Abner Mikva, usually on the opposite side of the conservative Wilkey, joined him in identifying the abolition of the exclusionary rule as the only way to enforce gun control.[52]

Abolishing the exclusionary rule is not the only proposal designed to facilitate searches for illegal guns. Harvard professor James Q. Wilson, the Police Foundation, and other commentators propose widespread street use of hand-held magnetometers and walk-through metal detectors to find illegal guns.[53] The city attorney of Berkeley, California, has advocated setting up "weapons checkpoints" (similar to sobriety checkpoints), where the police would search for weapons all cars passing through dangerous neighborhoods.[54] School administrators in New Jersey have begun searching student lockers and purses for guns and drugs; Bridgeport, Connecticut, is considering a similar strategy. Detroit temporarily abandoned school searches after a female student who had passed through a metal detector was given a manual pat-down by a male security officer, but the city has resumed the program.[55] New York City is also implementing metal detectors.[56]

Searching a teenager's purse, or making her walk through a metal detector several times a day, is hardly likely to instill much faith in the importance of civil liberties. Indeed, students conditioned to searches without probable cause in high school are unlikely to resist such searches when they become adults. Additionally, it is unjust for the state to compel a student to attend school, fail to provide a safe environment at

school or on the way to school, and then prohibit the student from protecting himself or herself.[57]

Perhaps the most harmful effect of the metal detectors is their debilitating message that a community must rely on paid security guards and their hardware in order to be secure. It does not take much imagination to figure out how to pass a weapon past a security guard, with trickery or bribery. Once past the guard, weapons could simply be stored at school. Instead of relying on technology at the door, the better solution would be to mobilize students inside the school. Volunteer student patrols would change the balance of power in the schoolyard, ending the reign of terror of outside intruders and gangs. Further, concerted student action teaches the best lessons of democracy and community action.

The majority of people possessing illegal weapons during a gun prohibition would never carry them on the streets and would never be caught even by omnipresent metal detectors. Accordingly, a third of the people who favor a ban on private handguns want the ban enforced with house-to-house searches.[58] Eroding the Second Amendment guarantees erosion of the Fourth Amendment.

Those who propose abolishing the exclusionary rule and narrowing the Fourth Amendment apparently trust the street intuition of the police to sort out the true criminals so that ordinary citizens would not be subject to unjustified intrusions. However, one-fourth of the guns seized by the police are not associated with any criminal activity.[59] Our constitutional scheme explicitly rejects the notion that the police may be allowed to search at will.

#### Other Civil Liberties Problems

Although gun control advocates trust the police to know whom to arrest, the experience of gun control leads one to doubt police judgment. A Pennsylvania resident was visiting Brooklyn, New York, to help repair a local church when he spotted a man looting his truck. The Pennsylvania man fired a warning shot into the air with his legally registered Pennsylvania gun, scaring off the thief. The police arrived too late to catch the thief but arrested the Pennsylvania man for not acquiring a special permit to bring his gun into New York City.[60] In California a police chief went to a gun show and read to a machine gun dealer the revocation of his license; the dealer was immediately arrested for possessing unlicensed machine guns.[61]

The Bureau of Alcohol, Tobacco and Firearms has been particularly outrageous in its prosecutions. Sometimes the

BATF's zeal to inflate its seizure count turns its agents into Keystone Kops. One year in Iowa, for example, the BATF hauled away an unregistered cannon from a public war memorial; in California it pried inoperable machine guns out of a museum's display.

In the early 1970s changes in the price of sugar made moonshining unprofitable. To justify its budget, the BATF had to find a new set of defendants. Small-scale gun dealers and collectors served perfectly. Often the bureau's tactics against them are petty and mean. After a defendant's acquittal, for example, agents may refuse to return his seized gun collection, even under court order. Valuable museum-quality antique arms may be damaged when in BATF custody. Part of the explanation for the refusal to return weapons after an acquittal may lie in BATF field offices using gun seizures to build their own arsenals.[62]

The BATF's disregard for fair play harms more than just gun owners. BATF searches of gun dealers need not be based on probable cause, or any cause at all. The 1972 Supreme Court decision allowing these searches, United States v. Biswell, has since become a watershed in the weakening of the Constitution's probable cause requirement.[63]

Lack of criminal intent does not shield a citizen from the BATF. In United States v. Thomas, the defendant found a 16-inch-long gun while horseback riding. Taking it to be an antique pistol, he pawned it. But it turned out to be short-barreled rifle, which should have been registered before selling. Although the prosecutor conceded that Thomas lacked criminal intent, he was convicted of a felony anyway.[64] The Supreme Court's decision in United States v. Freed declared that criminal intent was not necessary for a conviction of violation of the Gun Control Act of 1968.[65]

The strict liability principle has since spread to other areas and contributed to the erosion of the mens rea (guilty mind) requirement of criminal culpability.[66] U.S. law prohibits the possession of unregistered fully automatic weapons (one continuous trigger squeeze causes repeat fire). Semiautomatic weapons (which eject the spent shell and load the next cartridge, but require another trigger squeeze to fire) are legal. If the sear (the catch that holds the hammer at cock) on a semiautomatic rifle wears out, the rifle may malfunction and repeat fire. Accordingly, the BATF recently arrested and prosecuted a small-town Tennessee police chief for possession of an automatic weapon (actually a semiautomatic with a worn-out sear), even though the BATF conceded that the police chief had not deliberately altered the weapon. In March and April of 1988, BATF pressed similar charges for a worn-out sear against a Pennsylvania state police

sergeant. After a 12-day trial, the federal district judge directed a verdict of not guilty and called the prosecution "a severe miscarriage of justice." [67]

The Police Foundation has proposed that law enforcement agencies use informers to ferret out illegal gun sales and model their tactics on methods of drug law enforcement. [68] Taking this advice to heart, the BATF relies heavily on paid informants and on entrapment--techniques originated during alcohol prohibition, developed in modern drug enforcement, and honed to a chilling perfection in gun control. So that BATF agents can fulfill their quotas, they concentrate on harassing collectors and their valuable rifle collections. Undercover agents may entice or pressure a private gun collector into making a few legal sales from his personal collection. Once he has made four sales, over a long period of time, he is arrested and charged with being "engaged in the business" of gun sales without a license. [69]

To the consternation of many local police forces, the BATF is often unwilling to assist in cases involving genuine criminal activity. Police officials around the nation have complained about BATF's refusing to prosecute serious gun law violations. [70]

In 1982 the Senate Subcommittee on the Constitution investigated the BATF and concluded that the agency had habitual engaged in

conduct which borders on the criminal. . . .  
[E]nforcement tactics made possible by current firearms laws are constitutionally, legally and practically reprehensible. . . . [A]pproximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations. [71]

Although public pressure in recent years has made the BATF a somewhat less lawless agency, it would be a mistake to conclude that the organization has been permanently reformed.

One need not like guns to understand that gun control laws pose a threat to civil liberties. Explained Aryeh Neier, former director of the American Civil Liberties Union:

I want the state to take away people's guns. But I don't want the state to use methods against gun owners that I deplore when used against naughty children, sexual minorities,

drug users, and unsightly drinkers. Since such reprehensible police practices are probably needed to make anti-gun laws effective, my proposal to ban all guns should probably be marked a failure before it is even tried.[72]

### Gun Control and Social Control

Gun control cannot coexist with the Fourth Amendment (probable cause for search and seizure) and has a deleterious effect on the Fifth Amendment (due process of law). Gun control is also suspect under the equal protection clause of the Fourteenth Amendment, for it harms most those groups that have traditionally been victimized by society's inequities.

### Racial Discrimination

Throughout America's history, white supremacists have insisted on the importance of prohibiting arms to blacks. In 1640 Virginia's first recorded legislation about blacks barred them from owning guns. Fear of slave revolts led other Southern colonies to enact similar laws.[73] The laws preventing blacks from bearing arms (as well as drinking liquor or traveling) were enforced by what one historian called a "system of special and general searches and night patrols of the posse comitatus." [74] In the 1857 Dred Scott decision, Chief Justice Roger B. Taney announced that blacks were not citizens; if they were, he warned, there would be no legal way to deny them firearms.[75]

Immediately after the Civil War, President Andrew Johnson permitted several Southern states to return to the Union without guaranteeing equality to blacks. These states enacted "black codes," which were designed to keep the ex-slaves in de facto slavery and submission. For example, in 1865 Mississippi forbade freedmen to rent farmland, requiring instead that they work under unbreakable labor contracts, or be sent to jail. White terrorist organizations attacked freedmen who stepped out of line, and the black codes ensured that the freedmen could not fight back. Blacks were, in the words of The Special Report of the Anti-Slavery Conference of 1867, "forbidden to own or bear firearms and thus . . . rendered defenseless against assaults" by whites.[76] In response to the black codes, the Republican Congress passed the Fourteenth Amendment, guaranteeing to all citizens, freedmen included, their national constitutional rights, especially the right to bear arms. Said Rep. Sidney Clarke of Kansas, during the debate on the Fourteenth Amendment, "I find in the Constitution of the United States an article which declared that 'the right of the people to keep and bear arms

shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws."[77]

White supremacy eventually prevailed, though, and the South became the first region of the United States to institute gun control. During the Jim Crow era around 1900, when racial oppression was at its peak, several states enacted handgun registration and licensing laws. As one Florida judge explained, the laws were "passed for the purpose of disarming the negro laborers . . . [and] never intended to be applied to the white population."[78]

For several years in the 1970s the American Civil Liberties Union lobbied for stricter gun control to forestall white terrorist attacks on minorities. (The ACLU currently does not work for or against gun control.) Concern over racist shooting was certainly justified, for during the civil rights era in the 1960s, white supremacist tactics were just as violent as they had been during Reconstruction. Over 100 civil rights workers were murdered during that era, and the Department of Justice refused to intervene to prosecute the Klan or to protect civil rights workers. Help from the local police was out of the question; Klan dues were sometimes collected at the local station.[79]

Blacks and civil rights workers armed for self-defense. John Salter, a professor at Tougaloo College and NAACP leader during the early 1960s, wrote "No one knows what kind of massive racist retaliation would have been directed against grass-roots black people had the black community not had a healthy measure of firearms within it." Salter personally had to defend his home and family several times against attacks by night riders. When Salter fired back, the night riders, cowards that they were, fled. The unburned Ku Klux Klan cross in the Smithsonian Institution was donated by a civil rights worker whose shotgun blast drove Klansmen away from her driveway.[80]

Civil rights professionals and the black community generally viewed nonviolence as a useful tactic for certain situations, not as a moral injunction to let oneself be murdered on a deserted road in the middle of the night. Based in local churches, the Deacons for Defense and Justice set up armed patrol car systems in cities such as Bogalusa and Jonesboro, Louisiana, and completely succeeded in deterring Klan and other attacks on civil rights workers and black residents. Sixty chapters of the Deacons were formed throughout the South.[81] Of the more than 100 civil rights workers martyred in the 1960s, almost none were armed.[82]

Of course civil rights activists were not the only people who needed to defend themselves against racist violence. Francis Griffin, a clergyman in Farmville, Virginia, related, "Our last trouble came when some Klansmen tried to 'get' a black motorist who had hit a white child. They met blacks with guns, and that put a stop to that." Moreover, the tendency of Southern blacks to arm themselves not only deterred white racist violence, it reduced the incidence of robberies of blacks by drug addicts.[83]

Lest anyone think that blacks' need to defend themselves against racist mobs--whom the police cannot or will not control--is limited to the old South, New York City provides a few counterexamples. In 1966 a mob burned the headquarters of the Marxist W. E. B. Du Bois Club while New York City police looked on. When a club member pulled his pistol to hold off the mob while he fled from the burning building, the police arrested him for illegal gun possession. No one in the mob was arrested for anything.[84]

In 1976 Ormistan Spencer, a black, moved into the white neighborhood of Rosedale, Queens. Crowds dumped garbage on his lawn, his children were abused, and a pipe bomb was thrown through his window. When he responded to a menacing crowd by brandishing a gun, the police confiscated the gun and filed charges against him.[85] The recent mob attack on black pedestrians in Howard Beach, New York, would not have resulted in the death of one of the victims if the black victims had been carrying a gun with which to frighten off or resist the mob.

In some ways, social conditions have not changed much since the days when Michigan enacted its handgun controls after Clarence Darrow's celebrated defense of Ossian Sweet in 1925. Sweet, a black, had moved into an all-white neighborhood; the Detroit police failed to restrain a mob threatening his house. Sweet and his family fired in self-defense, killing one of the mob. He was charged with murder and acquitted after a lengthy trial.[86]

Racially motivated violence is not the only threat to which blacks are more vulnerable than whites. A black in America has at least a 40 percent greater chance of being burgled and a 100 percent greater chance of being robbed than a white.[87] Simply put, blacks need to use deadly force in self-defense far more often than whites. In California, in 1981, blacks committed 48 percent of justifiable homicides, whites only 22 percent.[88]

In addition, although blacks are more exposed to crime, they are given less protection by the police. In Brooklyn, New York, for example, 911 callers have allegedly been asked if they are black or white.[89] Wrote the late senator Frank Church:



In the inner cities, where the police cannot offer adequate protection, the people will provide their own. They will keep handguns at home for self-defense, regardless of the prohibitions that relatively safe and smug inhabitants of the surrounding suburbs would impose upon them.[90]

Judge David Shields of the special firearms court in Chicago came to the court as an advocate of national handgun prohibition. Most of the defendants he saw, however, were people with no criminal record who carried guns because they had been robbed or raped because the police had arrived too late to protect them. Explaining why he never sent those defendants to jail, and indeed ordered their guns returned, the judge wrote that most people

would not go into ghetto areas at all except in broad daylight under the most optimum conditions--surely not at night, alone or on foot. But some people have no choice. To live or work or have some need to be on this "frontier" imposes a fear which is tempered by possession of a gun.[91]

Gun control laws are discriminatorily enforced against blacks, even more so than other laws. In Chicago the black-to-white ratio of weapons arrests one year was 7:1 (prostitution, another favorite for discriminatory enforcement, was the only other crime to have such a high race ratio).[92] Black litigants have gone to federal court in Maryland and won permits after proving that a local police department almost never issues permits to blacks.[93] General searches for guns can be a nightmare-come-true for blacks. In 1968, for example, rifles were stolen from a National Guard armory in New Jersey; the guard ransacked 45 homes of blacks in warrantless searches for weapons, found none, and left the houses in shambles.[94]

### Sexual Discrimination

Many of the same arguments about gun possession that apply to blacks also apply to women. Radical feminist Nikki Craft worked with an antirape group in Dallas. After one horror story too many, she founded WASP--Women Armed for Self Protection. Craft explained that she "was opposed to guns, so this was a huge leap . . . . I was tired of being afraid to open a window at night for fresh air, and sick of feeling safer when there was a man in bed with me." One of her posters read, "Men and Women Were Created Equal . . . And Smith & Wesson Makes Damn Sure It

Stays That Way."[95] Her slogan echoed a gun manufacturer's motto from the 19th century:

Be not afraid of any man,  
No matter what his size;  
When danger threatens, call  
on me  
And I will equalize.[96]

If guns somehow vanished, rapists would suffer little. A gun-armed rapist succeeds 67 percent of the time, a knife-armed rapist 51 percent. Only 7 percent of rapists even use guns.[97] Thus, a fully effective gun ban would disarm only a small fraction of rapists, and even those rapists could use knives almost as effectively. In fact, a complete gun ban would make rape all the easier, with guaranteed unarmed victims. As discussed above, one of the most effective self-defense programs in modern U.S. history trained 2,500 Orlando women in firearms use and produced an 88 percent drop in the rape rate.

One objection to women arming themselves for self-defense is that the rapist will take away the gun and use it against the victim. This argument (like most other arguments about why women should not resist rape) is based on stereotypes, and proponents of the argument seem unable to cite any real world examples. Instead of assuming that all women are incapable of using a weapon effectively, it would be more appropriate to leave the decision up to individual women. Certainly the cases of women, even grandmothers, using firearms to stop rapists are legion.[98] If a woman is going to resist, she is far better off with a gun than with her bare hands, Mace, or a knife. Mace fires a pinpoint stream, not a spray, and the challenge of using it to score a bull's-eye right on a rapist's cornea would daunt even Annie Oakley. And it is more difficult to fight a bigger person with one's hands or with a knife than with a handgun--especially a small, light handgun that can be deployed quickly, and which has a barrel that is too short for the attacker to grab.

### The Second Amendment and the Sources of Political Power

Regardless of the utility or disutility of guns, laws about them are circumscribed by the Constitution. The Second Amendment means what it says: "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." If we are to live by the law, our first step must be to obey the Constitution.

### Attitudes of the Founding Fathers toward Guns

The leaders of the American Revolution and the early republic were enthusiastic proponents of guns and widespread gun ownership. The Founding Fathers were unanimous about the importance of an armed citizenry able to overthrow a despotic government. Virtually all the political philosophers whose ideas were known to the Founders--such as Plato, Aristotle, Cicero, Machiavelli, Montesquieu, Beccaria, Locke, and Sidney--agreed that a republic could not long endure without an armed citizenry.[99] Said Patrick Henry, "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined. . . . The great object is that every man be armed. . . . Everyone who is able may have a gun."[100] Thomas Jefferson's model constitution for Virginia declared, "No freeman shall be debarred the use of arms in his own lands or tenements."[101] Jefferson's colleague John Adams spoke for "arms in the hands of citizens, to be used at individual discretion . . . in private self-defense."[102]

### The Original Meaning of the Second Amendment

The only commentary available to Congress when it ratified the Second Amendment was written by Tench Coxe, one of James Madison's friends. Explained Coxe: "The people are confirmed by the next article of their right to keep and bear their private arms."[103]

Madison's original structure of the Bill of Rights did not place the amendments together at the end of the text of the Constitution (the way they were ultimately organized); rather, he proposed interpolating each amendment into the main text of the Constitution, following the provision to which it pertained. If he had intended the Second Amendment to be mainly a limit on the power of the federal government to interfere with state government militias, he would have put it after Article 1, section 8, which granted Congress the power to call forth the militia to repel invasion, suppress insurrection, and enforce the laws; and to provide for organizing, arming, and disciplining the militia. Instead, Madison put the right to bear arms amendment (along with the freedom of speech amendment) in Article I, section 9--the section that guaranteed individual rights such as habeas corpus.[104] Finally, in ratifying the Bill of Rights, the Senate rejected a change in the Second Amendment that would have limited it to bearing arms "for the common defense." [105]

Gun control advocates argue that the Second Amendment's reference to the militia means that the amendment protects only

official uniformed state militias (the National Guard). It is true that the Framers of the Constitution wanted the state militias to defend the United States against foreign invasion, so that a large standing army would be unnecessary. But those militias were not uniformed state employees. Before independence was even declared, Josiah Quincy had referred to "a well-regulated militia composed of the freeholder, citizen and husbandman, who take up their arms to preserve their property as individuals, and their rights as freemen." [106] "Who are the Militia?" asked George Mason of Virginia, "They consist now of the whole people." [107] The same Congress that passed the Bill of Rights, including the Second Amendment and its militia language, also passed the Militia Act of 1792. That act enrolled all able-bodied white males in the militia and required them to own arms.

Although the requirement to arm no longer exists, the definition of the militia has stayed the same; section 311(a) of volume 10 of the United States Code declares, "The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age." The next section of the code distinguishes the organized militia (the National Guard) from the "unorganized militia." The modern federal National Guard was specifically raised under Congress's power to "raise and support armies," not its power to "Provide for organizing, arming and disciplining the Militia." [108]

Indeed, if words mean what they say, it is impossible to interpret the Second Amendment as embodying only a "collective" right. As one Second Amendment scholar observed, it would be odd for the Congress that enacted the Bill of Rights to use "right of the people" to mean an individual right in the First, Fourth, and Ninth Amendments, but to mean a state's right in the Second Amendment. After all, when Congress meant to protect the states, Congress wrote "the States" in the Tenth Amendment. [109] Moreover, several states included a similar right to bear arms guarantee in their own constitutions. If the Second Amendment protected only the state uniformed militias against federal interference, a comparable article would be ridiculous in a state constitution. [110]

### Modern Interpretations of the Second Amendment

For the Constitution's first century, there was no question that the Second Amendment prohibited federal interference with the individual right to bear arms. During this period the Supreme Court did not view any articles of the Bill of Rights, the Second Amendment included, as applicable to the states. Accordingly, the Second Amendment, like the First Amendment and all the others, was construed by the Supreme Court to place no

limits on state interference with individual rights. (Some state courts, however, treated the Second Amendment as binding on the states.) [111]

In 1906 the Kansas Supreme Court announced in dicta that the Second Amendment did not guarantee an individual right to bear arms but only guarded official state militias against federal interference. Over the following decades, the collectivist state militia theory was accepted by many in the intellectual community but never by the American population as a whole. Today, 89 percent of Americans believe that as citizens they have a right to own a gun, and 87 percent believe the Constitution guarantees them a right to keep and bear arms. [112] Recently, the collectivist theory has begun to lose its standing even in the intellectual community. In the past two decades, scholarship of the individual rights view has dominated the law reviews, especially the major ones. Indeed, only one article published in a top-50 law review argues that individual citizens are not protected by the Second Amendment. [113] The Senate Subcommittee on the Constitution investigated the historical evidence and concluded that the individual rights interpretation was unquestionably the intent of the authors of the Second Amendment, and was intended by the authors of the Fourteenth Amendment to be applied against the states. [114] Stephen Halbrook's That Every Man Be Armed, the first book to deal in depth with the historical background of the Second Amendment, also endorses the individual rights interpretation.

Sometimes writers in popular magazines claim that the Supreme Court has endorsed the collective theory. They are wrong. Twice in the 19th century, the Court heard cases involving state or private interference with gun use. Both times the Court took the now-discredited view that the Bill of Rights did not restrict state governments and therefore the Second Amendment offered no protection from state firearms laws. [115] The collective theory was not even invented until the early 20th century; neither of the Court's 19th-century cases endorsed it.

The next (and last) time the Court ruled on the Second Amendment was 1939. In United States v. Miller the Court held that since there was no evidence before that Court that sawed-off shotguns are militia-type, militarily useful weapons, the Court could not conclude that sawed-off shotguns were protected by the Second Amendment. As for the meaning of "a well-regulated Militia," the Court noted that to the authors of the Second Amendment, "The Militia comprised all males physically capable of acting in concert for the common defense. . . . Ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." [116]

Since the 1930s the Court has not had much to say about the Second Amendment. It denied a petition to review the Morton Grove case, in which a suburb's handgun ban was upheld. (The lower court had gotten its result by stating that the intent of the Framers of the Second Amendment was "irrelevant" to the amendment's meaning.)[117] As the Supreme Court has stated, though, a denial of review has no precedential effect.[118] Had the Court wanted the Morton Grove case to apply nationally, the Court could have issued a summary affirmance. More indicative of the modern Court's view of the Second Amendment is Justice Powell's opinion for the Court in Moore v. East Cleveland, where he listed "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" as part of the "full scope of liberty" guaranteed by the Constitution.[119]

### Modern Utility

Some gun control advocates argue that the Second Amendment's goal of an armed citizenry to resist foreign invasion and domestic tyranny is no longer valid in light of advances in military technology. Former attorney general Ramsey Clark contended that "it is no longer realistic to think of an armed citizenry as a meaningful protection." [120]

But during World War II, which was fought with essentially the same types of ground combat weapons that exist today, armed citizens were considered quite important. After Pearl Harbor the unorganized militia was called into action. Nazi submarines were constantly in action off the East Coast. On the West Coast, the Japanese seized several Alaskan islands, and strategists wondered if the Japanese might follow up on their dramatic victories in the Pacific with an invasion of the Alaskan mainland, Hawaii, or California. Hawaii's governor summoned armed citizens to man checkpoints and patrol remote beach areas.[121] Maryland's governor called on "the Maryland Minute Men," consisting mainly of "members of Rod and Gun Clubs, of Trap Shooting Clubs and similar organizations," for "repelling invasion forays, parachute raids, and sabotage uprisings," as well as for patrolling beaches, water supplies, and railroads. Over 15,000 volunteers brought their own weapons to duty.[122] Gun owners in Virginia were also summoned into home service.[123] Americans everywhere armed themselves in case of invasion.[124] After the National Guard was federalized for overseas duty, "the unorganized militia proved a successful substitute for the National Guard," according to a Defense Department study. Militiamen, providing their own guns, were trained in patrolling, roadblock techniques, and guerilla warfare.[125] The War Department distributed a manual recommending that citizens keep "weapons which a guerilla in

civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol."[126] In Europe, lightly armed civilian guerrillas were even more important; the U.S. government supplied anti-Nazi partisans with a \$1.75 analogue to the zip gun (a very low quality handgun).[127]

Of course, ordinary citizens are not going to grab their Saturday night specials and charge into oncoming columns of tanks. Resistance to tyranny or invasion would be a guerrilla war. In the early years of such a war, before guerrillas would be strong enough to attack the occupying army head on, heavy weapons would be a detriment, impeding the guerrillas' mobility. As a war progresses, Mao Zedong explained, the guerrillas would use ordinary firearms to capture better small arms and eventually heavy equipment.[128]

The Afghan mujahedeen have been greatly helped by the new Stinger anti-aircraft missiles, but they had already fought the Soviets to a draw using a locally made version of the outdated Lee-Enfield rifle.[129] One clear lesson of this century is that a determined guerrilla army can wear down an occupying force until the occupiers lose spirit and depart--just what happened in Ireland in 1920 and Palestine in 1948. As one author put it: "Anyone who claims that popular struggles are inevitably doomed to defeat by the military technologies of our century must find it literally incredible that France and the United States suffered defeat in Vietnam . . . that Portugal was expelled from Angola; and France from Algeria." [130]

If guns are truly useless in a revolution, it is hard to explain why dictators as diverse as Ferdinand Marcos, Fidel Castro, Idi Amin, and the Bulgarian communists have ordered firearms confiscations upon taking power.[131]

Certainly the militia could not defend against intercontinental ballistic missiles, but it could keep order at home after a limited attack. In case of conventional war, the militia could guard against foreign invasion after the army and the National Guard were sent into overseas combat. Especially given the absence of widespread military service, individual Americans familiar with using their private weapons provide an important defense resource. Canada already has an Eskimo militia to protect its northern territories.[132]

The United States is virtually immune from foreign invasion, but as the late vice president Hubert Humphrey explained, domestic dictatorship will always be a threat: "The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which

now appears remote in America, but which historically has proved to be always possible." [133]

The most advanced technology in the world could not keep track of guerrilla bands in the Rockies, the Appalachians, the great swamps of the South, or Alaska. The difficulty of fighting a protracted war against a determined popular guerrilla force is enough to make even the most determined potential dictator think twice. [134]

The Second Amendment debate goes to the very heart of the role of citizens and their government. By retaining arms, citizens retain the power claimed in the Declaration of Independence to "alter or abolish" a despotic government. And citizens retain the power to protect themselves from private assault. Ramsey Clark asked the question, "What kind of society depends on private action to defend life and property?" [135] The answer is a society that trusts its citizenry more than the police and the army and knows that ultimate authority must remain in the hands of the people.

### Particular Forms of Gun Control

The foregoing discussion has focused on gun control in general. Many people who are skeptical about a complete ban on all guns nevertheless favor some sort of intermediate controls, which would regulate but not ban guns or ban only certain types of guns. While some of these proposals seem plausible in the abstract, closer examination raises serious doubts about their utility.

#### Registration

Gun registration is essentially useless in crime detection. Tracing the history of a recovered firearm generally leads to the discovery that it was stolen from a legal owner and that its subsequent pattern of ownership is unknown. [136]

Analogies are sometimes drawn between gun registration and automobile registration. Indeed, a majority of the public seems to favor gun registration not because a reduction in crime is expected but because automobiles and guns are both intrinsically dangerous objects that the government should keep track of. [137] The analogy, though, is flawed. Gun owners, unlike drivers, do not need to leave private property and enter a public roadway. No one has ever demanded that prospective drivers prove a unique need for a car and offer compelling reasons why they cannot rely solely on public transportation. No Department of Motor Vehicles



has ever adopted the policy of reducing to a minimum the number of cars in private hands. Automobile registration is not advocated or feared as a first step toward confiscation of all automobiles. However, registration lists did facilitate gun confiscation in Greece, Ireland, Jamaica, and Bermuda.[138] The Washington, D.C., city council considered (but did not enact) a proposal to use registration lists to confiscate all shotguns and handguns in the city. When reminded that the registration plan had been enacted with the explicit promise to gun owners that it would not be used for confiscation, the confiscation's sponsor retorted, "Well, I never promised them anything!"[139] The Evanston, Illinois, police department also attempted to use state registration lists to enforce a gun ban.[140]

Unlike automobiles, guns are specifically protected by the Constitution, and it is improper to require that people possessing constitutionally protected objects register themselves with the government, especially when the benefits of registration are so trivial. The Supreme Court has ruled that the First Amendment prohibits the government from registering purchasers of newspapers and magazines, even of foreign Communist propaganda.[141] The same principle should apply to the Second Amendment: the tools of political dissent should be privately owned and unregistered.

### Gun Licensing

Although opinion polls indicate that most Americans favor some form of gun licensing (for the same reasons they approve of auto licensing), 69 percent of Americans oppose laws giving the police power to decide who may or may not own a firearm.[142] That is exactly what licensing is. Permits tend to be granted not to those who are most at risk but to those with whom the police get along. In St. Louis, for example, permits have routinely been denied to homosexuals, nonvoters, and wives who lack their husbands' permission.[143] Other police departments have denied permits on the basis of race, sex, and political affiliation, or by determining that hunting or target shooting is not an adequate reason for owning a handgun.

Class discrimination pervades the process. New York City taxi drivers, who are more at risk of robbery than anyone else in the city, are denied gun permits, since they carry less than \$2,000 in cash. (Of course, most taxi drivers carry weapons anyway, and only rookie police officers arrest them for doing so.) As the courts have ruled, ordinary citizens and storeowners in the city may not receive so-called carry permits because they have no greater need for protection than anyone else in the city.[144] Carry permits are apparently reserved for New Yorkers

such as the Rockefellers, John Lindsay, the publisher of the New York Times, (all of them gun control advocates), and the husband of Dr. Joyce Brothers.[145] Other licensees include an aide to a city councilman widely regarded as corrupt, several major slumlords, a Teamsters Union boss who is a defendant in a major racketeering suit, and a restaurateur identified with organized crime and alleged to control important segments of the hauling industry--hardly proof that licensing restricts gun ownership to upstanding citizens.[146]

The licensing process can be more than a minor imposition on the purchaser of a gun. In Illinois the automated licensing system takes 60 days to authorize a clearance.[147] Although New Jersey law requires that the authorities act on gun license applications within 30 days, delays of 90 days are routine; some applications are delayed for years, for no valid reason.[148] Licensing fees may be raised so high as to keep guns out of the hands of the poor. Until recently Dade County, Florida, which includes Miami, charged \$500 for a license; nearby Monroe County charged \$2,000.[149] These excessive fees on a means of self-defense are the equivalent of a poll tax. Or licensing may simply turn into prohibition. Mayor Richard Hatcher of Gary, Indiana, ordered his police department never to give anyone license application forms.[150] The police department in New York City has refused to issue legally required licenses, even when commanded by courts to do so. The department has also refused to even hand out blank application forms.[151]

In addition to police abuse of licensing discretion, there is also the problem of the massive data collection that would result from a comprehensive licensing scheme. For example, New York City asks a pistol permit applicant:

Have you ever . . . Been discharged from any employment?

Been subpoenaed to, or attended [!] a hearing or inquiry conducted by any executive, legislative, or judicial body?

Been denied appointment in a civil service system, Federal, State, Local?

Had any license or permit issued to you by any City, State, or Federal Agency?

Applicants for a business premises gun permit in New York City must also supply personal income-tax returns, daily bank deposit slips, and bank statements. Photocopies are not accep-

table. A grocer in the South Bronx may wonder what the size of his bank deposits has to do with his right to protection.

The same arguments that lead one to reject a national identity card apply to federal gun licensing. A national licensing system would require the collection of dossiers on half the households in the United States (or a quarter, for handgun-only record-keeping).

Implementing national gun licensing would make introduction of a national identity card more likely. Assuming that a large proportion of American families would become accustomed to the government collecting extensive data about them, they would probably not oppose making everyone else go through the same procedures for a national identity card.

Finally, licensing is not going to stop determined criminals. The most thorough study of the weapons behavior of felony prisoners (the Wright-Rossi project funded by the National Institute of Justice) found that five-sixths of the felons did not buy their handguns from a retail outlet anyway. (Many of the rest used a legal, surrogate buyer, such as a girlfriend.) [152] As noted above, felons have little trouble buying stolen guns on the streets. In sum, it remains to be proven that gun licensing would significantly reduce crime. Given the very clear civil liberties problems with licensing, it cannot be said that the benefits outweigh the costs.

#### Waiting Periods

In the 1960s and 1970s bills to implement federal gun registration and licensing were soundly defeated in Congress, never to resurface as politically viable proposals. The broadest federal gun legislation currently under consideration is a national waiting period for gun purchases. Senator Howard Metzenbaum (D-Ohio) has introduced legislation to require a national seven-day waiting period for handgun transfers, which would be permitted only after police officials had an opportunity to check an applicant's background. Because the bill applies to all gun transfers, it would even compel a wife to get police permission before receiving a handgun as a gift from her husband. [153]

However, statistical evidence shows no correlation between waiting periods and homicide rates. [154] The image of a murderously enraged person leaving home, driving to a gun store, finding one open after 10 p.m. (when most crimes of passion occur), buying a weapon, and driving home to kill is a little silly. [155] Of course, a licensing system is bound to deny some purchasers an opportunity to buy, but only the most naive

rejected purchaser would fail to eventually find a way to acquire an illegal weapon.

In addition, waiting periods can be subterfuges for more restrictive measures. Former Atlanta mayor Maynard Jackson proposed a six-month waiting period--a long time to wait for a woman who is in immediate danger of attack from her ex-boyfriend. Senator Metzenbaum's bill would give the police de facto licensing powers, even in states that have explicitly considered and rejected a police-run licensing system.

### Mandatory Sentencing

Those who want to make simple gun possession a crime frequently call for a mandatory prison sentence for unlawful possession of a gun. The National Handgun Information Center demands a one-year mandatory minimum sentence for possession of a handgun during "any crime" (apparently including drunk driving or possession of a controlled substance). Detroit recently enacted a 30-day mandatory sentence for carrying an unlicensed gun.[156] None of those proposals is a step toward crime control.

Massachusetts's Bartley-Fox law, with a mandatory one-year sentence for carrying an unlicensed gun, has apparently reduced the casual carrying of firearms but has not significantly affected the gun use patterns of determined criminals.[157] Of the Massachusetts law, a Department of Justice study concluded that "the effect may be to penalize some less serious offenders, while the punishment for more serious offenses is postponed, reduced, or avoided altogether." [158] New York enacted a similar law and saw handgun homicides rise by 25 percent and handgun robberies 56 percent during the law's first full year.[159]

The effects of laws that impose mandatory sentences are sometimes brutally unfair. In New Mexico, for example, one judge resigned after being forced to send to prison a man with a clean record who had brandished a gun during a traffic dispute.[160] One of the early test cases under the Massachusetts Bartley-Fox law was the successful prosecution of a young man who had inadvertently allowed his gun license to expire. To raise money to buy his high school class ring, he was driving to a pawn shop to sell his gun. Stopping the man for a traffic violation, a policeman noticed the gun. The teenager spent the mandatory year in jail with no parole.[161] Another Massachusetts case involved a man who had started carrying a gun after a co-worker began threatening to murder him.[162] The Civil Liberties Union of Massachusetts had opposed Bartley-Fox precisely because of the risk that innocent people would be sent to jail.[163]

The call for mandatory jail terms for unlicensed carrying is in part an admission by the gun control advocates that judges reject their values and instead base sentences on community norms. A Department of Justice survey of how citizens regard various crimes found that carrying an illegal gun ranked in between indecent exposure and cheating on taxes--hardly the stuff of a mandatory year in jail.[164] The current judicial/community attitude is appropriate. In a world where first-time muggers often receive probation, it is morally outrageous to imprison for one year everyone who carries a firearm for self-defense.

As a general matter of criminal justice, mandatory sentences are inappropriate. One of the most serious problems with any kind of mandatory sentencing program is that its proponents are rarely willing to fund the concomitant increase in prison space. It is very easy for legislators to appear tough on crime by passing draconian sentencing laws. It is much more difficult for them to raise taxes and build the prison space necessary to give those laws effect. Instead of more paper laws, a more effective crime-reduction strategy would be to build enough prisons to keep hard-core violent criminals off the streets for longer periods. If there are to be mandatory sentences for gun crimes, the mandatory term should apply only to use of a firearm in a violent crime.

### Handgun Bans

A total ban on the private possession of handguns is the ultimate goal of a Washington lobby called the National Coalition to Ban Handguns. Unlike some other gun control measures, a ban lacks popular support; only one-sixth to one-third of the citizenry favors such a measure.[165]

Handgun-ban proponents sometimes maintain that handguns have no utility except to kill people. The statement is patently wrong and typical of how little the prohibitionists understand the activities they condemn. Although self-defense is the leading reason for handgun purchases, about one-sixth of handgun owners bought their gun primarily for target shooting, and one-seventh bought the gun primarily as part of a gun collection. In addition, hunters frequently carry handguns as a sidearms to use against snakes or to hunt game.[166]

Cost-benefit analysis hardly offers a persuasive case for a ban. One recent study indicates that handguns are used in roughly 645,000 self-defense actions each year--a rate of once every 48 seconds. (As noted above, most defensive uses simply involving brandishing the gun.) The number of self-defense uses

is at least equal to, and probably more than, the number of times handguns are used in a crime.[167] Most homicides (between 50 and 84 percent) occur in circumstances where a long gun could easily be substituted.[168] Besides, sawing off a shotgun and secreting it under a coat is simple. Many modern submachine guns are only 11 to 13 inches long, and an M-1 carbine can be modified to become completely concealable.[169] Since long guns are so much deadlier than handguns, an effective handgun ban would result in at least some criminals switching to sawed-off shotguns and rifles, perhaps increasing fatalities from gun crimes. In the Wright and Rossi prisoner survey, 75 percent of "handgun predators" said they would switch to sawed-off shoulder weapons if handguns were unavailable.[170]

If families had to give up handguns and replaced them with long guns, fatalities from gun accidents certainly would increase. Since handguns have replaced long guns as a home defense weapon over the last 50 years, the firearm accident fatality rate has declined.[171] The overwhelming majority of accidental gun deaths are from long guns.[172]

Handguns are also much better suited for self-defense, especially in the home, than are long guns, which are more difficult to use in a confined setting. Rifle bullets are apt to penetrate their intended target and keep on going through a wall, injuring someone in an adjacent apartment. Further, the powerful recoil of long guns makes them difficult for women, frail people, or the elderly to shoot accurately. Lastly, a robber or assailant has a much better chance of eventual recovery if he is shot with a handgun rather than a long gun.

#### Banning Saturday Night Specials

If a Saturday night special is defined as any handgun with a barrel length less than 3 inches, a caliber of .32 or less, and a retail cost of under \$100, there are roughly six million such guns in the United States. Each year, between 1 and 6 percent of them are employed in violent gun crimes, a far higher percentage of criminal misuse than for other guns.[173] Although opinion polls find the majority of Americans in favor of banning Saturday night specials, the practical case for banning these weapons is not compelling.[174]

Criminals do prefer easily concealable weapons; roughly 75 percent of all crime handguns seized or held by the police have barrel lengths of 3 inches or less.[175] At least for serious felons, though, low price is a very secondary factor in choice of firearm. Experienced felons prefer powerful guns to cheap ones. The Wright and Rossi survey, which focused on hardened criminals,

found that only 15 percent had used a Saturday night special as their last gun used in a crime.[176] It should not be surprising that serious criminals prefer guns as powerful as those carried by their most important adversaries, the police.

It is often said that a Saturday night special is "the kind of gun that has only one purpose: to kill people." [177] Again, this is untrue. Such guns are commonly used as hunting sidearms, referred to as "trail guns" or "pack guns." One does not need long-range accuracy to kill a snake, and lightness and compactness are important. Nor can all hunters afford \$200 for a quality sidearm.[178] More importantly, inexpensive handguns are used for self-defense by the poor.

There is no question that laws against Saturday night specials are leveled at blacks. The first such law came in 1870 when Tennessee attempted to disarm freedmen by prohibiting the sale of all but "Army and Navy" handguns. Ex-confederate soldiers already had their military handguns, but ex-slaves could not afford high-quality weapons.[179]

The situation today is not very different. As the federal district court in Washington, D.C., has noted, laws aimed at Saturday night specials have the effect of selectively disarming minorities, who, because of their poverty, must live in crime-ridden areas.[180] Little wonder that the Congress on Racial Equality filed an amicus curiae brief in a 1985 suit challenging the Maryland Court of Appeals' virtual ban on low-caliber handguns. As the Wright and Rossi National Institute of Justice study concluded:

The people most likely to be deterred from acquiring a handgun by exceptionally high prices or by the nonavailability of certain kinds of handguns are not felons intent on arming themselves for criminal purposes (who can, if all else fails, steal the handgun they want), but rather poor people who have decided they need a gun to protect themselves against the felons but who find that the cheapest gun in the market costs more than they can afford to pay.[181]

Indeed, one wonders what a ban on these low-caliber guns would accomplish. Criminals who use them could easily take up higher-powered guns. Some criminals might switch to knives, but severe knife wounds are just as deadly (and almost as easy to inflict at close range, where most robberies occur).[182]

If a ban on Saturday night specials failed to reduce crime, is it likely that its proponents would admit defeat and repeal the law? Or would they conclude that a ban on all handguns was what was really needed? Once criminals started substituting sawed-off shotguns, would the new argument be that long guns too must be banned?[183] That is the point that gun control in Great Britain is approaching, after beginning with a seemingly innocuous registration system for handguns.

### Conclusion

In 1911 state senator Timothy Sullivan of New York promised that if New York City outlawed handgun carrying, homicides would decline drastically. The year the Sullivan law took effect, however, homicides increased and the New York Times pronounced criminals "as well armed as ever." [184] Gun control does not reduce crime; gun ownership does. Gun control insists that citizens rely on the authorities. Gun owners know better than to put their lives and liberty in the hands of 911 and the police. Gun control and the Bill of Rights cannot coexist. The advocates of gun control believe that government agents are more trustworthy than ordinary citizens. The authors of the Second Amendment believed just the opposite.

### FOOTNOTES

[1] "Urban Murders on the Rise," Newsweek, February 9, 1987, p. 30. The officer's formula does not consider the possibility that gun ownership might be a response and a deterrent to rising crime rates. For gun ownership as a response to crime rate increases, see B. Benson, "Private Sector Responses to Rising Crime," in Firearms and Violence: Issues of Public Policy, ed. Donald B. Kates (Cambridge, Mass.: Ballinger, 1984), pp. 329-56.

[2] D. Lunde, Murder and Madness (San Francisco: San Francisco Book Co., 1976), p. 1.

[3] Donald B. Kates, Why Handgun Bans Can't Work (Bellevue, Wash.: Second Amendment Foundation, 1982), p. 23. One study of various Illinois counties found no relation between gun ownership and crime, except that female gun ownership appeared to rise in response to a rising crime rate. See David Bordua, "Firearms Ownership and Violent Crime: A Comparison of Illinois Counties," in The Social Ecology of Crime (New York: Springer-Verlag, 1986).

[4] James Wright, Peter Rossi, and Kathleen Daly, Under the Gun: Weapons, Crime and Violence in America (Hawthorne, N.Y.: Aldine, 1983).



[5] James Wright and Peter Rossi, Armed and Considered Dangerous: A Survey of Felons and Their Firearms (New York: Aldine, 1986), pp. 141, 145, 151.

[6] Alan Krug, "The Relationship between Firearms Ownership and Crime: A Statistical Analysis," reprinted in Congressional Record, 99th Cong., 2d sess., January 30, 1968, p. 1496, n. 7; Gary Kleck, "Policy Lessons from Recent Gun Control Research," Journal of Law and Contemporary Problems 49 (Winter 1986): 35-47.

[7] Carol Ruth Silver and Donald B. Kates, "Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society," in Restricting Handguns: The Liberal Skeptics Speak Out, ed. Donald B. Kates (Croton-on-Hudson, N.Y.: North River Press, 1979), p. 152.

[8] "Town to Celebrate Mandatory Arms," New York Times, April 11, 1987, p. 6.

[9] Gary Kleck and David Bordua, "The Factual Foundation for Certain Key Assumptions of Gun Control," Law and Policy Quarterly 5 (1983): 271-98; Krug, p. 1496, n. 7.

[10] George Rengert and John Wasilchick, Suburban Burglary: A Time and a Place for Everything (Springfield, Ill.: Charles C. Thomas, 1985), p. 30; J. Conklin, Robbery and the Criminal Justice System (Philadelphia: Lippincott, 1972), p. 85.

[11] Wright, Rossi, and Daly, pp. 139-40.

[12] John Kaplan, "Controlling Firearms," Cleveland State Law Review 28 (1979), p. 8.

[13] Donald B. Kates, "Handgun Control: Prohibition Revisited," Inquiry, December 5, 1977, p. 20, n. 1.

[14] David Bordua, Alan Lizotte, and Gary Kleck, Patterns of Firearms Ownership, Use, and Registration in Illinois, (Springfield, Ill.: Illinois Law Enforcement Commission, 1979), p. 253.

[15] Kates, Why Handgun Bans Can't Work, p. 43.

[16] David Hardy, "Critiquing the Case for Handgun Prohibition," in Restricting Handguns, pp. 87-88. Hardy's article was published in 1979, so it is fair to assume that the actual costs would be considerably higher than the figures quoted here. See also Raymond Kessler, "Enforcement Problems of Gun Control: A Victimless Crimes Analysis," Criminal Law Bulletin 16 (March/April 1980): 131-44.

[17] Wright, Rossi, and Daly, pp. 25-44.

[18] The armed crime ratio is based on an assumption that there are about 100,000 handgun criminals in the United States. About 300,000 handgun crimes are reported annually to the FBI. Since many robbers and burglars carry out several dozen crimes or more a year, it seems safe to divide the total of 300,000 by at least three, allotting three crimes per criminal.

The homicide ratio is based on an assumption of 10,000 handgun homicides annually (and no gun being used in more than one homicide). In 1984 there were 9,819 gun homicides in the United States, of which 7,277 were committed with a handgun. See Department of Commerce (Bureau of Census), Statistical Abstract of the United States 1986 (Washington: Government Printing Office, 1985), p. 171.

[19] Wright and Rossi, pp. 189, 211.

[20] "Tribesmen in Pakistan Thrive," New York Times, November 2, 1977, p. 2; Wright, Rossi, and Daly, p. 321.

[21] Kaplan, p. 20.

[22] Bureau of Alcohol, Tobacco, and Firearms, Analysis of Operation CUE (Concentrated Urban Enforcement), interim report (Washington D.C.: February 15, 1977), pp. 133-34, cited in Paul Blackman and Richard Gardiner, Flaws in the Current and Proposed Uniform Crime Reporting Programs Regarding Homicide and Weapons Use in Violent Crime, paper presented at 38th Annual Meeting of the American Society of Criminology; Atlanta, October 29-November 1, 1986.

[23] Gerald Arenberg, Do the Police Support Gun Control? (Bellevue, Wash.: Second Amendment Foundation, n.d.), p. 10. Arenberg is executive director of the National Association of Chiefs of Police.

In the past several years, Handgun Control Inc. has attempted to create the impression that the police support gun control. It is true that some police organizations, such as the Police Foundation and the International Association of Chiefs of Police, often favor gun control. It is hardly surprising that some police lobbies support a narrow view of the Second Amendment, since police organizations often take a dim view of all constitutional rights, such as search and seizure protections or suspects' right to legal counsel.

The antigun police lobbies, however, can hardly claim the unanimous support of rank-and-file police. The International

Association of Police Unions (AFL/CIO), for example, has testified before Congress against gun control legislation. The president of the American Federation of Police, Dennis Ray Martin, appears in print advertisements as a Second Amendment Foundation spokesman (e.g. Gun Week, April 22, 1988, p. 7). After Handgun Control Inc. placed an advertisement in Police magazine, the magazine received mail "unrivaled by any subject in the last two years," most of the writers "saying they didn't like the contents of the ad one bit." Police's editor composed an editorial condemning Handgun Control Inc., defending the NRA, and warning that "HCI is trying to erode" the Second Amendment. F. McKeen Thompson, "Readers Respond to HCI . . . And We Agree," Police (The Law Officer's Magazine), December 1987, p. 4.

[24] W. Allman, "Staying Alive in the 20th Century," Science 85 vol. 6, no. 8 (October 1985) 34, cited in Lance Stell, "Guns, Politics and Reason," Journal of American Culture 9 (Summer 1986): 71-85.

[25] "The Armed Citizen," American Hunter, February 1987, p. 6, citing Miami Herald, December 16, 1986.

[26] Quoted in Wright, Rossi, and Daly, pp. 129-30.

[27] R. P. Narlock, Criminal Homicide in California (Sacramento: California Department of Justice, Bureau of Criminal Statistics, 1967), p. 55, cited in Congressional Record, 90th Cong., 2d sess., January 30, 1968, p. 1497. Even the University of Pennsylvania's Marvin Wolfgang, who favors gun control, agrees (Marvin Wolfgang, Patterns in Criminal Homicide [Philadelphia: University of Pennsylvania Press, 1958], p. 83). The conclusion is strongly disputed by some pro-control scholars, such as Stanford University's Franklin Zimring.

[28] Kates, Why Handgun Bans Can't Work, pp. 25-26. See also Kleck, "Policy Lessons," pp. 40-41, stating that 70-75 percent of domestic homicide offenders have a previous arrest, and about half have a previous conviction.

[29] M. Wilt, G. Marie, J. Bannon, R. K. Breedlove, J. W. Kennish, D. M. Snadker, and R. K. Satwell, Domestic Violence and the Police: Studies in Detroit and Kansas City (Washington: Government Printing Office, 1977), quoted in Wright, Rossi, and Daly, p. 193, n. 3.

[30] Robert Sherrill, The Saturday Night Special (New York: Charterhouse, 1975), p. 29, citing "Gun Murder Profile," written by Senate Judiciary Committee's Juvenile Delinquency Subcommittee (Washington: Government Printing Office, n.d.).

[31] Kirkpatrick and Walt, "The High Cost of Gunshot and Stab Wounds," Journal of Surgical Research 14 (1973): 261-62.

[32] M. Daly and M. Wilson, Homicide (New York: Aldine, 1988), pp. 15, 200 (table p.1).

[33] Mark Green, Winning Back America (New York: Bantam, 1982), p. 222.

[34] David Hardy, "Product Liability and Weapons Manufacture," Wake Forest Law Review 20 (Fall 1984), p. 551; Federal Bureau of Investigation, Uniform Crime Report 1982, (Washington: Government Printing Office), p. 10; National Safety Council, Accident Facts 1986 Edition (Washington: Government Printing Office), p. 12. Total deaths from all firearms suicides are about 17,000 annually (Statistical Abstract of the United States 1985, p. 79).

[35] George Newton and Franklin Zimring, Firearms and Violence in American Life, report to the National Commission on the Causes and Prevention of Violence (Washington: Government Printing Office, 1970), ch. 6. See also Bruce Danto, "Firearms and Their Role in Suicide," Life-Threatening Behavior 1 (1971), p. 14 (Study of foreign and American suicide; "[D]ata shows that people will find a way to commit suicide regardless of the availability of firearms."); Herbert Hendin, Suicide in America (New York: W. W. Norton, 1982), pp. 144-46, citing Maurice Taylor and Jerry Wicks, "The Choice of Weapons: A Study in Suicide by Sex, Race, and Region," Suicide and Life-Threatening Behavior 10 (1980): 142-49; Paul Friedman, "Suicide Among the Police," in Essays in Self-Destruction, ed. E. Shneidman (New York: Science House, 1967), pp. 414-49.

[36] National Safety Council, Accident Facts 1986 Edition (Washington: Government Printing Office), p. 12. According to the Council, in 1983 there were 92,488 accidental deaths, and 1,695 accidental firearms deaths.

[37] National Safety Council, p. 12, reporting 1,695 deaths from firearms accidents, and 5,028 deaths from flame or fire accidents.

[38] National Safety Council, p. 12, reporting 1,695 deaths from firearms accidents, and 5,254 deaths from drowning or submersion accidents (not including drowning deaths relating to water transport).

[39] Mark Benenson, "A Controlled Look at Gun Controls," New York Law Forum 14 (Winter 1968): 741.

[40] Philip Cook, "The Role of Firearms in Violent Crime: An Interpretative Review of the Literature," in M. Wolfgang and N. Weiler, eds. Criminal Violence (Beverly Hills, Ca.: Sage, 1982), pp. 236, 269.

[41] Colin Greenwood, "Comparative Statistics," in Restricting Handguns, pp. 58-59.

[42] The trigger on a rifle or shotgun is much easier to pull than is the trigger on a revolver or the slide on an automatic pistol. Rifles or shotguns are also more prone to fire if accidentally dropped. Finally, handguns can be hidden from inquisitive children more easily than long guns can.

[43] Arthur T. Kellerman and Donald T. Reay, "Protection or Peril? An Analysis of Firearm-Related Deaths in the Home," New England Journal of Medicine 24 (June 1986): 1557-60; discussed, for example, in "Sons of Guns," The New Republic, March 2, 1987, p. 12.

[44] Donald B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," Michigan Law Review 82 (1984), p. 269, n. 278, citing 1981 Federal Bureau of Investigation statistics. Sources other than the FBI put justifiable civilian killing of criminals at much higher levels. Although the Bureau estimates that civilians kill 300 criminals annually, Lawrence Sherman of the pro-control Police Foundation puts the figure at 600. Gary Kleck of Florida State University's School of Criminology estimates that 1,500-2,800 criminals are shot to death annually by citizens acting lawfully. The different statistical results may be due to the FBI's reliance exclusively on incidents reported to the police, and the fact that if a homicide is initially labelled a criminal homicide, but later determined to be self-defense, the homicide is still reported to the FBI as a criminal homicide. Gary Kleck, "Crime Control Through the Private Use of Armed Force," Social Problems 35 (February 1988) 4-7.

[45] Silver and Kates, pp. 154-55. The problems police encounter do not necessarily imply that the police are poorer shooters, or that they possess worse judgment. Official guidelines may force the police to intervene in situations that ordinary citizens could avoid, and may prevent an officer from drawing his weapon at the most opportune time.

[46] Kleck, "Crime Control," pp. 7-9.

[47] David J. Shields, "Two Judges Look at Gun Control," Chicago Bar Record (January/February 1976): 182. (The second judge referred to in the title was Marvin E. Aspen, who wrote a pro-

control article.)

[48] J. B. Waite, "Public Policy and the Arrest of Felons," Michigan Law Review 31 (April 1933): 764-66.

[49] A.C.L.U. estimate cited in Kates, "Handgun Control: Prohibition Revisited," p. 23.

[50] Steven Brill, Firearms Abuse: A Research and Policy Report (Washington: Police Foundation, 1977), p. 34.

[51] Malcolm Wilkey, "Why Suppress Valid Evidence?," Wall Street Journal, October 10, 1977. See also Mike Royko, "Magnum Force," San Francisco Examiner, May 14, 1982.

[52] Blackman, "Civil Liberties and Gun-Law Enforcement," p. 27.

[53] James Q. Wilson, "Again, The Gun Question," Washington Post, April 1, 1986; Police Foundation quoted in "Whether It Sharply Reduces Crime or Not, Is a Federal Ban Worth Trying?" New York Times, April 5, 1981, p. IV 3. See also, J. Fyfe, "Enforcement Workshop: Detective McFadden Goes Electronic," Criminal Law Bulletin 19 (March/April 1983): 162-67; N. Morris and G. Hawkins, The Honest Politician's Guide to Crime Control (Chicago: University of Chicago Press, 1970).

[54] "Berkeley City Attorney Mulls Car Searches for Weapons," Associated Press, December 19, 1987 (available in NEXIS in Wires library).

[55] For New Jersey, see Jonathan Friendly, "Schools Ease Curbs on Drug and Weapons Checks," New York Times, June 17, 1986, p. B2. For Bridgeport, see Richard L. Madden, "Bridgeport Acts to Keep Guns Out of Schools," New York Times, March 20, 1987, p. B2 (locker searches for guns); for Detroit, see "In Detroit, Kids Kill Kids," Newsweek, May 11, 1987, p. 24. The Police Foundation proposal for general "perimeter control" metal detectors in schools is discussed in the National Rifle Association's letter of March 13, 1985, to Alfred Regnery, director of the Justice Department's Office of Juvenile Justice and Delinquency Prevention. The Baltimore city government considered a perimeter-control proposal in 1985.

[56] "5 Schools to Use Detectors for Guns," New York Times, May 5, 1988, B3; Mark Mooney, "Green Wants Weapon Searches in Schools," New York Post, March 25, 1988, p. 7.

[57] A. Mackay-Smith, "Should Schools Permit Searching Students for Weapons, Drugs?" Wall Street Journal, May 30, 1984. Mackay-Smith discussed policy in Detroit, where police searches looked

for knives and Mace carried by girls to protect themselves from rapists.

[58] Blackman, "Civil Liberties and Gun Law Enforcement," p. 2.

[59] Wright, Rossi, and Daly, pp. 177-78.

[60] "Deadly Weapons," The Park Slope Paper, October 23, 1986.

[61] Kates, "Civil Liberties Obstacles," pp. 1-2.

[62] BATF abuses are chronicled in detail in David Hardy, The B.A.T.F.'s War on Civil Liberties (Bellevue, Wash.: Second Amendment Foundation, 1979).

[63] United States v. Biswell, 406 U.S. 311 (1972), discussed in Robert Batey, "Strict Construction of Firearms Offenses," Journal of Law and Contemporary Problems 49 (Winter 1986): 184-85.

[64] Batey, p. 163. In Florida, as everywhere else, it is illegal for a felon to possess a gun. One Florida felon discovered this when he wrested a pistol away from someone who was attacking him--and was convicted of illegal possession of a weapon (Thorpe v. State, 377 So.2d 221 [Fla. App., 1979]).

[65] United States v. Freed, 401 U.S. 601 (1974).

[66] Batey, p. 187.

[67] For Tennessee, see J. J. Baker, "Assault on semi-Avtos," American Rifleman, April 1987; 42. For Pennsylvania, United States v. Corcoran, Crim. no. 88-11 (W.D. Pa, April 6, 1988) (Ziegler, J.).

[68] Brill, pp. 134 ff. See also Lawrence Sherman, "Equity Against Truth: Value Choices in Deceptive Investigations," in Police Ethics, ed. Heffernand and Stroup (New York: John Jay Press, 1985), pp. 117-32 (Police Foundation head arguing that random selection of undercover investigation targets is fairer than probable cause selection).

[69]. Hardy, The B.A.T.F.'s War on Civil Liberties, pp. 11-41, 75-86.

[70] *Ibid.*, pp. 53-55.

[71] Senate Committee on the Judiciary, Subcommittee on the Constitution, The Right to Keep and Bear Arms, 97th Congress, 2d sess., Senate Doc. 2807 (February 1982): 20-23.

[72] Aryeh Neier, Crime and Punishment: A Radical Solution (New York: Stein & Day, 1976), p. 76.

The Fourth and Fifth Amendments are not the only parts of the Bill of Rights threatened by antigun sentiment. In derogation of the Sixth Amendment's right to jury trial, a Pennsylvania federal district court judge recently tried to categorically bar National Rifle Association members from serving on a jury in a gun law prosecution. The Third Circuit Court of Appeals reversed the lower court (United States v. Salamone, 800 F.2d 1216 [3d Cir. 1986]). If not reversed, the lower court's ruling would have provided precedent for excluding all Sierra Club members from environmental cases, or NAACP members from discrimination suits.

The First Amendment is not safe either. Attempts to censor allegedly violent entertainment are legion. For example, the National Coalition on Television Violence wants the government to ban "Photon Warrior" because the program shows "adolescents fighting 'the forces of evil' with infra-red Photon guns." The coalition insists that "the toy industry's greed for money must not be allowed to trample the moral development of our next generation." Previous generations, which include veterans of foreign wars, might find shooting guns at evil forces like the Wehrmacht to be quite moral.

[73] Lee Kennett and James L. Anderson, The Gun in America: The Origins of a National Dilemma (New York: Westport Press, 1975), p. 50.

[74] Donald B. Kates, "Attitudes Toward Slavery in the New Republic," Journal of Negro History 53 (1968): 37.

[75] 60 U.S. (19 How.) 393, 417 (1857).

[76] Quoted in H. Hyman, The Radical Republicans and Reconstruction (New York: Bobbs-Merrill, 1967), p. 217. For the black codes, see Howard Zinn, A People's History of the United States (New York: Harper, 1980), p. 194.

[77] Quoted in David Hardy, "The Constitution as a Restraint on State and Federal Firearm Restrictions," in Restricting Handguns, p. 181.

[78] Watson v. Stone, 148 Fla. 516, 450 So.2d 700, 703 (1941) (Buford, J., concurring specially).

[79] John Salter, Social Justice Community Organizing and the Necessity for Protective Firearms, paper presented at the 18th annual meeting of the Popular Culture Association, New Orleans,



March 26, 1988, p. 2.

[80] Salter, p. 3.

[81] Richard Maxwell Brown, "The American Vigilante Tradition," in The History of Violence in America, ed. Hugh Davis Graham and Ted Robert Gurr (New York: Praeger, 1969), pp. 203, 217 n. 150.

[82] Donald B. Kates, "Why a Civil Libertarian Opposes Gun Control," The Great Gun Control Debate (Bellevue, Wash.: Second Amendment Foundation, 1976), p. 4. For more, see J. Weiss, "A Reply to Advocates of Gun Control Laws," Journal of Urban Law 53 (1974): 577. At the time, Weiss was director of the Office of Economic Opportunity's national legal services office for the elderly poor.

[83] "Decade of Change in South Gives Negroes High Hopes," New York Times, August 16, 1970, pp. 1, 54. See also "Panel Told Mississippi Negroes Are Prepared for Self-Defense," New York Times, August 13, 1970, p. 20.

[84] John Salter and Donald B. Kates, "The Necessity of Access to Firearms by Dissenters and Minorities Whom the Government Is Unwilling or Unable to Protect," in Restricting Handguns, p. 187.

[85] Eleanor Blau, "Black Couple in Home Bombing Shot in Accident," New York Times, August 29, 1975, p. 31 (the "accident" was due to Spencer's resisting the officer's attempt to wrest the gun away); Nathaniel Shephard, "Policeman Attacked at Bombed Home," New York Times, January 5, 1975, p. 46; Jill Gerston, "Home of Blacks Struck by Bomb," New York Times, January 1, 1975, p. 21. Half a year later, the charges against Spencer were dropped. Murray Illson, "Harassed Rosedale Black Cleared of Gun Charges," New York Times, April 17, 1976, p. 25.

[86] Donald B. Kates, "A History of Handgun Prohibition," in Restricting Handguns, p. 19; Walter White, "The Sweet Trial," Crisis, 31 (January 1926): 125-29. See generally Irving Stone, Clarence Darrow for the Defense (New York: Doubleday, 1941), pp. 529-547.

[87] James Q. Wilson and Richard J. Herrnstein, Crime and Human Nature (New York: Simon and Schuster, 1976), p. 463. Other statistics indicate a black is almost three times as likely to be robbed as a white. See Department of Justice (Bureau of Justice Statistics), Report to the Nation on Crime and Justice: The Data (Washington: Government Printing Office, October, 1983), p. 20.

[88] Benson, p. 342.

[89] "We're Mad as Hell and We're Not Going to Take It Anymore," Brooklyn Free Press, November 24, 1986, p. 35.

In one case, citizens called to report that a man outside their apartment building was screaming for help (robbers were stabbing him to death). The 911 operators, however, relayed only a message that the man was unconscious, and the police, thinking that the man was merely a drunk, took their time arriving on the scene. (They stopped to issue a reckless driving ticket.) One of the callers to 911 told a reporter, "They kept asking me stupid questions--what race the victim was, what race I was--can you imagine that? A man's outside hurt and they're asking me things like that." The patrol car took 20 minutes to arrive on the scene, and the ambulance took even longer. The man died. Dennis Turner, "Did 911 Foul-up Kill Gardens Man?" Park Slope Paper, April 2, 1988, p. 1.

[90] Frank Church, foreword to Restricting Handguns, p. xiii. Consider also an item in the (New York) Daily News, June 17, 1977, "Where Survival is a Crime." A crippled black middle-aged cab driver was preparing dinner in his Harlem tenement when a junkie broke in, began beating the cab driver on the head with a lead pipe, and demanded money. The cab driver having none, the junkie continued the assault until the cabbie reached for his Saturday night special and killed his attacker. The police arrested him for criminal possession of a weapon. Commented the writer, "Willie [the cab driver], of course had no gun permit. To get one in New York City you need to know somebody. Willie doesn't know anybody. All he knows is he had to defend himself. Our politicians don't give a damn about Willie, anymore than they give a damn about you. They ride in limos and carry guns."

[91] David Shields, p. 184.

[92] David Hardy and Kenneth Chotiner, "The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition," in Restricting Handguns, p. 211.

[93] Clark v. Gabriel, civil action no. M-75-581 (D. Md., Dec. 13 1976), cited in Paul Blackman, "Carrying Handguns for Personal Protection," paper presented at the 37th annual meeting of the American Society of Criminology, San Diego, November 13-16, 1985, p. 6.

[94] Sherrill, p. 274.

[95] Quoted in Tricia Lootens and Alice Henry, "Interview: Nikki Craft, Activist and Outlaw," Off Our Backs: A Women's News-journal, vol. 15, no. 7 (July 1985): 3.

[96] Inscription on a Winchester rifle, quoted in Kennett and Anderson, p. 108.

[97] Philip J. Cook, "Gun Availability and Violent Crime," Crime & Justice 4 (1982), p. 61, n. 8, analyzing data in Joan McDermott, Rape Victimization in Twenty-Six American Cities (Washington: Government Printing Office, 1979), pp. 20-21. Rate of firearms use in rape is from Department of Justice, Report to the Nation on Crime and Justice, p. 14.

[98] A feature in the National Rifle Association magazine every month, called "The Armed Citizen," collects such stories from newspapers around the nation. Only incidents that have been verified as legitimate self-defense by the police, grand jury, or other official body are included. See also Silver and Kates, "Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society," p. 139, citing numerous instances of women defending themselves from criminal attack.

[99] Stephen Halbrook, "The Second Amendment as a Phenomenon of Liberal Political Philosophy," in Firearms and Violence, pp. 363-83.

[100] Quoted in ed. Morton Borden, The Antifederalist Papers, vol. 3 (East Lansing: Michigan State University Press), p. 386.

[101] Thomas Jefferson, "The Virginia Constitution, Third Draft," in The Papers of Thomas Jefferson, Vol. I 1760-1776 (Princeton: Princeton University Press, 1950), p. 363. The limitation regarding private property was added in Jefferson's second draft.

[102] Stephen Halbrook, "What the Framers Intended," Journal of Law and Contemporary Problems 49 (Winter 1986): 155; John Adams, A Defence of the Constitutions of the Government of the United States of America against the Attack of M. Turgot (Philadelphia: 1788), p. 471.

[103] A Pennsylvanian (Coxe's pen name), "Remarks on the First Part of the Amendments to the Federal Constitution," The Federal Gazette and Pennsylvania Evening Post, June 18, 1789, p. 2, quoted in Stephen Halbrook, That Every Man Be Armed (Albuquerque: University of New Mexico Press, 1984), p. 76.

[104] Donald B. Kates, "Second Amendment," in Encyclopedia of the American Constitution, ed. Leonard Levy (New York: MacMillan, 1986), p. 1639. See also Robert Shalhope, "The Ideological Origins of the Second Amendment," Journal of American History 69 (December 1982): 599-614; Joyce Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," Hastings Constitutional Law Quarterly 10 (Winter 1983): 285-314.

[105] Senate Committee on the Judiciary, The Right to Keep and Bear Arms, p. 6. The senators in part may have wished to avoid the implication that a large standing army was acceptable for nondefensive, overseas war.

[106] Quoted in Clinton Rossiter, The Political Thought of the American Revolution (New York: Harcourt, Brace and World, 1953), pp. 126-27.

[107] Quoted in Borden, p. 425.

[108] House Report No. 141, 73d Cong., 1st sess. (1933), pp. 2-5. Congress did so in order that the National Guard could be sent into overseas combat. The National Guard's weapons plainly cannot be the arms protected by the Second Amendment, since Guard weapons are owned by the federal government. (32 United States Code sect. 105[a] [1].)

The most thorough discussion on the political status of the National Guard is John G. Kester, "State Governors and the Federal National Guard," Harvard Journal of Law and Public Policy, 11 (Winter 1988): 177-212. As Kester explains, there are technically two distinct National Guards. State National Guards are created by state governments under their power to raise an organized militia.

[109] Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," p. 218.

[110] Today, 42 state constitutions guarantee a right to firearms ownership.

[111] Halbrook, That Every Man Be Armed. See, e.g., Nunn v. State, 1 Ga. 243 (1846).

[112] Wright, Rossi, and Daly, p. 229, quoting survey conducted by Decision-Making Information Inc. Decision-Making Information is headed by conservative pollster Richard Wirthlin, and the particular survey was funded by the National Rifle Association. Despite the potential for bias, the survey is probably reliable, Wright and his coauthors concluded. Wright compared the Wirthlin data with data in a contemporaneous poll by Cambridge Research, Patrick Caddell's polling organization. The Caddell poll was sponsored by the Center for the Study and Prevention of Handgun Violence, whose then-director Pete Shields was also the head of Handgun Control Inc. Although the Wirthlin and Caddell polls both could have suffered from their sponsors' biases, "the actual empirical findings from the two surveys are remarkably similar. Results from comparable (even roughly comparable) items rarely differ between the two surveys by more than 10 percentage points.

. . . [O]n virtually all points where a direct comparison is possible, the evidence for each survey says essentially the same thing." Wright, Rossi, and Daly, p. 240.

[113] Peter Feller and Karl Gotting, "The Second Amendment: A Second Look," Northwestern University Law Review 61 (March/April 1967): 46-69. The authors did not address any of the evidence against the collective view discussed in the previous section. Surprisingly, the collective interpretation, lacking support in Supreme Court precedent, academic scholarship, or popular opinion, still abounds in many lower federal courts--generally in an offhand sentence or two in cases where arms smugglers invoke frivolous Second Amendment defenses.

[114] Senate Committee on the Judiciary, The Right to Keep and Bear Arms, pp. 11-12.

[115] Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1875).

[116] 307 U.S. 174, 179.

[117] Quilici v. Village of Morton Grove, 532 F. Supp. 1169 (N.D. Ill.), affd. 695 F.2d 261 (7th Cir., 1982), cert. denied 464 U.S. 863 (1983).

[118] Hopfman v. Connolly, 471 U.S. 459 (1985).

[119] 431 U.S. 494, 502 (1976). Justice Powell was quoting Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). The "liberty" that Justice Powell was referring to was the liberty protected by the Fourteenth Amendment's clause "nor shall any State deprive any person of life, liberty, or property without due process of law." That clause has been construed, in the last century, to mean that states must not violate the individual freedoms guaranteed in the Bill of Rights. (The Bill of Rights had originally been held only to limit federal power.)

If the Second Amendment were only a limit on federal power over official state militias, it would have been preposterous for Justice Powell to list the right to bear arms as one of the rights protected by the Fourteenth Amendment's liberty clause; for that clause is explicitly a limit on state powers over individuals.

[120] Ramsey Clark, Crime in America (New York: Simon & Schuster, 1970), p. 88.

[121] Alan Gottlieb, "Gun Ownership: A Constitutional Right," Northern Kentucky Law Review 10 (1982): 138.

[122] Governor O'Connor of Maryland delivered a radio address on March 10, 1942, at which he called for volunteers to defend the state: "[T]he volunteers, for the most part, will be expected to furnish their own weapons. For this reason, gunners (of whom there are sixty thousand licensed in Maryland), members of Rod and Gun Clubs, of Trap Shooting and similar organizations will be expected to constitute a part of this new military organization." State Papers and Addresses of Governor O'Connor, vol III, p. 618, quoted in Bob Dowlut, "The Right to Bear Arms: Does the Constitution or the Predilection of Judges Reign?" Oklahoma Law Review 36 (1985): 76-77, n. 52. See also Kates, Why Handgun Bans Can't Work, p. 74, citing Baker, "I Remember 'The Army' with Men from 16 to 79," Baltimore Sun Magazine, November 16, 1975, p. 46.

[123] M. Schlegel, Virginia On Guard--Civilian Defense and the State Militia in the Second World War (Richmond: Virginia State Library, 1949), pp. 45, 129, 131. According to Schlegel, the Virginia militia "leaned heavily on sportsmen," because they could provide their own weapons. Ibid., p. 129; quoted in Bob Dowlut, "State Constitutions and the Right to Keep and Bear Arms," Oklahoma City University Law Review 2 (1982): 198.

[124] "To Arms," Time, March 30, 1942, p. 1.

[125] Office of the Assistant Secretary of Defense, U.S. Home Defense Forces Study (March 1981), pp. 32, 34, 58-63, quoted in Dowlut, "State Constitutions," p. 197.

[126] Originally printed as Bert Levy, Guerilla Warfare (New York: Penguin Books, 1942), p. 55; reprinted as B. Levy, Guerilla Warfare (Panther Publications: 1964), p. 56; quoted in Dowlut, "State Constitutions," p. 198, n. 91.

[127] Julian Hatcher, Frank Jury, and Joe Weller, Firearms Investigation Identification and Evidence (Harrisburg, Pa.: Stackpole, 1957), p. 59.

[128] Mao Zedong, Mao-Tse Tung on Guerilla Warfare, translated by S. Griffith (New York: Praeger, 1961), cited in Raymond Kessler, "Gun Control and Political Power," Law and Policy Quarterly 5 (1983): 395.

[129] "One Year Later, Analysts Groping for Answers to Afghanistan," Kansas City Times, December 26, 1980, p. B-3, cited in Kessler, p. 395.

[130] Gottlieb, p. 139. Even the pro-control New York Times editorial board sometimes understands the efficacy of lightly armed guerrillas; see, for example, "Who Will Hold the Guns in Rhodesia?" New York Times, August 31, 1977, p. 18. Nor do the guerrillas have to drive the occupier out single-handedly. At the least, guerrillas can tie down the enemy army, weakening the enemy so that he is defeated elsewhere. Although the Nazis faced critical manpower shortages on the Eastern Front against the Soviet Union, a sixth of their forces were deployed fighting Tito and his Yugoslavian partisans.

[131]. For the Philippines, see Sherrill, p. 272. For Uganda, "Uganda Curbs Firearms," New York Times, December 22, 1969, p. 36. For Cuba, see Kessler, p. 382; Crum, "Gun Control Paved Castro's Way," Conservative Digest, April 1976, p. 33 (use of Batista's registration lists to facilitate confiscation); Williams, "The Rise of Castro: 'If only we hadn't given up our guns!'", Medina County Gazette, October 15, 1978, p. 5. For Bulgaria, see "Gun Control Laws in Foreign Countries," rev. ed. (Washington: Library of Congress, 1976), p. 33. (Upon coming to power Bulgarian communists immediately confiscated all firearms.)

[132] "Far North Has Militia of Eskimos," New York Times, April 1, 1986, p. A14.

[133] Quoted in David Hardy, "The Second Amendment as a Restraint on State and Federal Firearm Restrictions," in Restricting Handguns, pp. 184-85.

[134] From Aaron Burr to Huey Long, Joseph McCarthy, Douglas MacArthur, and Richard Nixon, American history has seen its share of potential dictators. So far, our other safeguards have succeeded. But in a Constitution and political structure designed to last several hundred years, one cannot always count on the press or Congress to save things at the last minute.

[135] Clark, p. 89.

[136] J. Howard Mathews, Firearms Identification (Springfield, Ill.: Charles C. Thomas, 1962), pp. 77, 80; Hatcher, Jury, and Weller, pp. 177, 180, 184.

[137] Wright, Rossi, and Daly, pp. 236, 241.

[138] B. Bruce-Briggs, "The Great American Gun War," The Public Interest, (Fall 1976): 59. Historians disagree about whether the Nazis used registration lists to carry out confiscations in Denmark and Norway. Gun confiscation in Jamaica was part of a severe government anticrime program, which drastically curtailed

civil liberties; the program did little to stop crime in the long run but did imprison many innocent people, particularly from outcast groups such as the Rastafarians. Edward Diener and Rick Crandall, "An Evaluation of the Jamaican Anticrime Program," Journal of Applied Social Psychology (March 1979): 137-48; Dudley Allen, in Crime and Punishment in the Caribbean, eds. R. and G. Brana-Shute [Gainesville, Fl.: Center for Latin American Studies, 1980]: 29-57 [Allen was formerly the Jamaican Commissioner of Corrections]; Kates, Why Handguns Bans Can't Work, p. 16.

[139] "Wilson's Gun Proposal," Washington Star-News, February 15, 1975, p. A 12; Lawrence Francis, "Washington Report," Guns & Ammo, December 1976, p. 86.

[140] Blackman, "Civil Liberties and Gun-Law Enforcement," p. 14.

[141] Lamont, DBA Basic Pamphlets v. Postmaster General, 381 U.S. 301 (1965). The U.S. Post Office intercepted "foreign Communist propaganda" before delivery, and required addressees to sign a form before receiving the items. The Court's narrow holding was based on the principle that addressees should not have to go to the trouble of filling out a form to receive particular items of politically oriented mail. Since the Post Office had stopped maintaining lists of propaganda recipients before the case was heard, the Court did not specifically rule on the list-keeping practices. One may infer that the Post Office threw away its lists because it expected the Court would find them unconstitutional.

[142] Wright, Rossi, and Daly, pp. 223-35.

[143] Donald B. Kates, "On Reducing Violence or Liberty," Civil Liberties Review (August/September, 1976): 56.

[144] Slatky v. Murphy, New York Law Journal, October 14, 1971, p. 10.

[145] "Permit 29,000 to Pack Guns," (New York) Daily News, June 22, 1981; Susan Hall, "Nice People Who Carry Guns," New York, December 12, 1977; Kates and Silver, p. 153.

[146] William Bastone, "Born to Gun: 65 Big Shots With Licenses to Carry," Village Voice, September 29, 1987, p. 11.

[147] Pete Shields, Guns Don't Die--People Do (New York: Arbor House, 1981), p. 83.

[148] Statement of Robert F. Mackinnon, on behalf of the Coalition of New Jersey Sportsmen, before the House Committee on the Judiciary, on Legislation to Modify the 1968 Gun Control Act, part 2, serial no. 131, 99th Congress, 1st and 2d sess., Feb. 27,



1986 (Washington: Government Printing Office, 1987), p. 1418.

[149] Blackman, "Carrying Handguns," p. 8. The Florida state legislature recently enacted a statewide gun law, effective November 1987, which supplanted all local fees with a \$125 state fee.

[150] Motley v. Kellogg, 409 N.E.2d 1207 (Ind. App. 1980).

[151] For some examples of the New York City Police Department's flagrant abuse of the statutory licensing procedure, see Shapiro v. Cawley, 46 A.D.2d 633, 634, 360 N.Y.S.2d 7, 8 (1st Dept. 1974) (ordering N.Y.C. Police Department to abandon illegal policy of requiring applicants for on-premises pistol license to demonstrate unique "need"); Turner v. Codd, 85 Misc. 2d 483, 484, 378 N.Y.S.2d 888, 889 (Special Term Part 1, N.Y. County, 1975) (ordering N.Y.C. Police Department to obey Shapiro decision); Echtman v. Codd, no. 4062-76 (N.Y. County) (class action lawsuit that finally forced Police Department to obey Shapiro decision).

Also: Bomer v. Murphy, no. 14606-71 (N.Y. County) (to compel Department to issue blank application forms for target shooting licenses); Klapper v. Codd, 78 Misc.2d 377, 356 N.Y.S.2d 431 (Sup. Ct., Spec. Term, N.Y. Cty.) (overturning refusal to issue license because applicant had changed jobs several times); Castelli v. Cawley, New York Law Journal, March 19, 1974, p.2, col. 2 (Applicant suffered from post-nasal drip, and repeatedly cleared his throat during interview. His interviewer "diagnosed" a "nervous condition" and rejected the application. An appeals court overturned the decision, noting that the applicant's employment as a diamond cutter indicated "steady nerves.")

[152] Wright and Rossi, p. 185.

[153] The Attorney General's 1981 Task Force on Violent Crime also offered a waiting period proposal. Recommendation 18 of Report of the Attorney General's Task Force on Violent Crime (Washington: Government Printing Office, August 17, 1981).

[154] Report on the Federal Firearms Owners Protection Act, S. Rep. no. 3476, 97th Cong., 2d sess. (1982), pp. 51-52; Murray, "Handguns, Gun Control Laws and Firearm Violence," Social Problems 23 (October 1975): 81-93. Statistical studies notwithstanding, the Palm Beach, Florida, police credit a 1984 waiting period law with causing a drop in homicides the next year (Congressional Record, February 4, 1987 [Sen. Howard Metzenbaum]).

[155] David Hardy, "Legal Restrictions on Firearms Ownership as an Answer to Violent Crime: What Was the Question?" Hamline Law Review 6 (July 1983): 404.

[156] Isabel Wilkerson, "Urban Homicide Rates in U.S. Up Sharply in 1986," New York Times, January 15, 1987, p. A14.

[157] Wright, Rossi, and Daly, pp. 290-94, 298, 308.

[158] Kenneth Carlson, "Mandatory Sentencing: The Experience of Two States," Department of Justice, National Institute of Justice policy brief (Washington: Abt Associates, May 1982), p. 15. The document analyzes of the Massachusetts gun law and New York drug laws.

[159] "State's Gun Law: Impact and Intent Uncertain," New York Times, April 11, 1982, p. 1.

[160] "Judge Hears Conscience, Not 'Gun Law' Sentence," American Bar Association Journal 67 (November 1981): 1433.

[161] Hardy, "Legal Restrictions on Firearms Ownership as an Answer to Violent Crime," p. 407.

[162] Commonwealth v. Lindsey, (Mass. Supreme Judicial Court, March 5, 1986) (available in LEXIS library, Massachusetts file). Wrote the court, "The threat of physical harm was founded on an earlier assault by Michel with a knife and became a real and direct matter once again when Michel attacked the defendant with a knife at the MBTA station. . . . [D]efendant is a hardworking, family man, without a criminal record, who was respected by his fellow employees (Michel excepted). Michel, on the other hand, appears to have lacked the same redeeming qualities. He was a convicted felon with serious charges pending against him. . . . It is possible that defendant is alive today only because he carried the gun that day for protection. Before the days of a one-year mandatory sentence, the special circumstances involving the accused could be reflected reasonably in the sentencing or dispositional aspects of the proceeding. That option is no longer available in judicial branch of government in a case of this sort." Eventually, the defendant was pardoned by the Governor.

[163] Brief for Civil Liberties Union of Massachusetts as amicus curiae, Commonwealth v. Jackson, pp. 22-26, cited in James Beha, "And Nobody Can Get You Out," Boston University Law Review 57 (1977): 110, n. 55. The Massachusetts legislature's black caucus had also opposed the bill, because of concern about discriminatory licensing and arrests. Beha, p. 108, n. 45.

[164] Department of Justice, "The Severity of Crime," Bureau of Justice Statistics Bulletin (January 1984): 4.

[165] Wright, Rossi, and Daly, pp. 234-35. Public opinion on this issue has changed rather strongly since the late 1950s, when the Gallup Poll found a majority in favor of a handgun ban.

[166] Wright, Rossi, and Daly, pp. 57-58, citing survey conducted by Decision-Making Information Inc.; Finn Aagard, "Handgun Hunting Today," American Hunter, February 1987, p. 32 ("I doubt if any branch of the shooting sports has grown more phenomenally over the last decade than hunting with a handgun.")

[167] Kleck, "Crime Control," pp. 2-4.

[168] Gary Kleck, "Handgun-Only Control," in Firearms and Violence, p. 193.

[169] David Hardy and Donald B. Kates, "Handgun Availability and the Social Harm of Robbery" in Restricting Handguns, p. 127. M-1 information is from the California attorney general's 1965 appearance before the Senate Judiciary Committee's Subcommittee on Juvenile Delinquency, hearings On Amendments of Federal Firearms Act 1965, quoted in Sherrill, p. 63.

[170] Wright and Rossi, p. 220.

[171] Benenson, "A Controlled Look at Gun Controls," p. 720; John Kaplan, "The Wisdom of Gun Prohibition," Annals of the American Academy of Political and Social Sciences 455 (1981): 17.

[172] Pete Shields, the chairman of Handgun Control, writes, "Of the accidental deaths, again it is safe to assume that over 50% were by handguns." (Pete Shields, p. 28.) As noted above, handgun accidents comprise 300 of the 1,700 accidental gun fatalities yearly.

[173] Affidavit of professor of criminology Gary Kleck in amicus curiae memorandum of law by Congress on Racial Equality and Second Amendment Foundation in Kelly v. R.G. Industries, at 20-23 (Md.Ct.App. 1983).

[174] Wright, Rossi, and Daly, pp. 234-35.

[175] Wright, Rossi, and Daly, p. 17.

[176] Wright and Rossi, pp. 167, 233. (As noted above, the survey was part of a National Institute of Justice project.)

[177] Pete Shields, p. 46.

[178] Wright, Rossi, and Daly, p. 58.

[179] Kates, "Toward a History of Handgun Prohibition in the United States," p. 14.

[180] Delahanty v. Hinckley (D.D.C. July 1986) (Penn, J.). Recently, the federal appeals court in Washington certified this case to the District of Columbia Court of Appeals, to have the case decided under Washington, D.C.'s common law. Slip op. no. 87-7055 (April 29, 1988) (Mikva, J.).

[181] Wright and Rossi, p. 238.

[182] The son of the chairman of Handgun Control was slain by San Francisco's "Zebra killer," an insane black man who murdered whites for no reason at all (Pete Shields, p. 12). Had the man been armed with a sawed-off shotgun, he still could have concealed it inside his jacket. Any psychopath capable of carrying out so many slayings and evading detection for so long would probably know where to buy a stolen shotgun. Even an effective prohibition on all guns would not stop such maniacs; the man committed his first homicide with a machete (*ibid.*, p. 37).

The founder of Handgun Control was moved to action after he was robbed with what he was told was a gun underneath a robber's jacket. *Ibid.*, p. 22. Again, banning handguns would not eliminate the type of problem that led him into antigun lobbying; would robberies be any less terrifying at the point of a sawed-off shotgun or a knife?

[183] Clyde Barrow, of Bonnie and Clyde fame, could "quick draw" his shotgun from a special holster in his pants. Kennett and Anderson, p. 203.

[184] New York Times, May 23, 1913, p. 9; Kennett and Anderson, p. 185.

---

Published by the Cato Institute, *Policy Analysis* is a regular series evaluating government policies and offering proposals for reform. Nothing in *Policy Analysis* should be construed as necessarily reflecting the views of the Cato Institute or as an attempt to aid or hinder the passage of any bill before Congress.

Contact the Cato Institute for reprint permission.

Additional copies of *Policy Analysis* are \$2.00 each (\$1.00 in bulk). To order, or for a complete listing of available studies, write to: *Policy Analysis*, Cato Institute, 224 Second St. S.E., Washington, D.C. 20003.