Gun Control

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assault rifle A technical military term derived from a WWII German innovation dubbed the *Sturmgewehr* ("storming rifle," "assault rifle"), an adaptation to the increasingly mobile, dynamic and close-quarter nature of battle in WWII. The concept was adopted by the Soviets after WWII (the AK-47 and variants), eventually by the U.S. (the M-16 and variants) and by virtually all modern militaries. Three features are essential to the assault rifle: (1) *selective fire* as between semi-automatic and fully automatic modes; (2) chambering for a cartridge *intermediate* in case length (and consequent power) as between traditional military rifle rounds and submachine gun (pistol) rounds (for example, the 7.62x39mm round fired by the AK-47 is the same nominal caliber but intermediate in case length between the 7.62x54mm Russian battle rifle round and the 7.62x25mm submachine gun cartridge); (3) relative compactness compared with traditional rifles, for which reason assault rifles were designated "machine carbines" by the Germans and "automatic carbines" by the Soviets. Hitler dubbed the new machine carbine a *Sturmgewehr* for the same sort of reason that marketing promoters and political detractors alike favor the fearsome image for propaganda today: it is, respectively, attractive to some audiences and repulsive to others. The key innovation was the intermediate cartridge, deliberately downsized in length and consequent power, which Hitler initially rejected as underpowered (assault rifle rounds are less lethal than most hunting rifle ammunition) but which was calculated to gain both logistical and tactical advantages: the round would be (a) more controllable in automatic fire mode (a tactical advantage) as well as (b) more economical to manufacture, supply and carry in

quantity (a logistical advantage). The collateral step down in lethality is both a tactical and logistical advantage insofar as (c) wounded combatants are tactically neutralized while requiring many times the logistical support as dead combatants. A common misconception is that military assault rifles (or their semi-automatic look-alikes) are especially "high powered," whereas in fact their ammunition is lower powered than prior military rifle, or most hunting rifle, ammunition.

assault weapon The use-specific labelling employed by the military for fully automatic assault rifles has been appropriated by political movements to stigmatize and ban a variable assortment of repeating or "military style" pistols, shotguns and rifles as so-called "assault weapons." Unlike "assault rifle" as a military term of art, the label "assault weapon" is neither technical nomenclature nor consistently defined. While the term has been variously applied to "low-capacity' pistols and shotguns as well as "high-capacity" semi-automatic pistols and rifles, the imputation behind the label is nonetheless consistent: that the firearms in question are useful only for military or criminal "assault," mass or wanton violence, and therefore devoid of any legitimate civilian sporting or defensive function. Whatever the stipulated denotation or desired connotation, the use of the term begs rather than illuminates issues of tactical utility and legitimate application. While the military specifications of a true assault rifle are strictly stipulated (1980, U.S. Department of Defense, *Small Arms Identification and Operations Guide,* 105) and while such a weapon is indeed well suited to troop mobility and controllable automatic fire in highly dynamic operations such as assaults, the labelling of even mililtary weapons for the specific tactical purpose of "assault" is itself misleading insofar as combat is inherently both defensive and offensive. Historically, the event that impressed the initially skeptical German High Command with the predecessor of the *Sturmgewehr* ("assault rifle"), then called a machine carbine (*machinenkarabiner)* and disfavored because of its lower-powered cartridge, was its tactical utility as both an offensive and defensive weapon in the dramatic breakout of heavily outnumbered German troops from Soviet encirclement near Cholm, Russia, in 1942. The critical issue begged by semantic dispute over the label "assault weapon" is the fundamental question for any gun ban: What firearms do, or do not, have a legitimate role in the private hands of law-abiding civilians, and why? (See V.A.2.)

automatic firearm The term "automatic" is popular shorthand, but a confusing misnomer, for a *semi*-automatic or self-loading firearm. The term "automatic"

properly applies to a firearm that can automatically *both* reload its chamber after initial manual discharge *and* continue to fire as long as the trigger is pressed. Such firearms are also called "fully automatic" to emphasize the contrast with semi-automatic firearms, whose triggers must be released and again pressed for each successive shot. Many fully automatic firearms are "selective fire": a selector switch enables a choice between fully automatic and semi-automatic modes of fire. Varieties of automatic firearms include crew-served machine guns, automatic rifles, submachine guns, and machine pistols. See also: assault rifle.

BATF The acronym stands for the Bureau of Alcohol, Tobacco and Firearms. Sometimes the shorter acronym ATF is used.

discretionary licensing Regarding gun control policy, a license is required, for example, by federal law to acquire and own an automatic firearm, by some state or local laws to acquire and own a handgun, and by most states to carry a firearm concealed in public. A discretionary licensing system imposes criteria such as "good reason" or "special need" that allow relatively subjective judgment and discretionary latitude, regarding who qualifies for a license, to be exercised by local licensing authorities (usually a chief law enforcement or court officer such as a police chief, sheriff, district attorney, or judge). The discretionary policy of local licensing authorities may vary widely in permissiveness or restrictiveness under the same law or statutory criteria: at the one extreme, discretionary licensing is, in effect, tantamount to "shall issue" licensing; at the other extreme, it is tantamount to an outright ban and can discriminate with impunity on the basis of ~~gender~~ sex, race, political affiliation or other arbitrary predilections. See: shall-issue licensing.

gun ban A law or policy that prohibits the manufacture or import, sale or transfer, acquisition or possession of given firearms for the general population within a jurisdiction (local, state, or national). Bans can target specific firearm-related activities (such as zoning ordinances that ban gun stores and commercial sale in some locale, import bans, or prohibitions on concealed carry), but gun bans typically target some nominal type of firearm and prohibit acquisition and possession for the general population in a jurisdiction (often with exceptions for military, law enforcement, security or specially licensed personnel). Typical ban targets include handguns in general, so-called "Saturday Night Specials," fully automatic firearms, semi-automatic firearms, so-called "military style" rifles or shotguns and so-called

"assault weapons." For example, laws that disqualify some identifiable portion of the general population, such as minors or those with felony records, from possessing firearms are not usually referred to as bans because they disqualify only certain classes of persons rather than the general population. The term "ban" is sometimes applied to highly restrictive policies that target specific types of firearms but that are not strictly prohibitory. For example, it is widely believed that federal law bans private possession of machine guns. The National Firearms Act of 1934 as amended in 1986 (1) requires a transfer tax, FBI background check, federal registration and approval by a local chief law enforcement officer (CLEO) for the issuance of a serial-number specific license to acquire and possess a given automatic firearm but (2) prohibits civilian acquisition and possession only of automatic firearms manufactured after May 19, 1986, except for licensed dealers. Thus, federal law does not strictly prohibit acquisition and possession of all fully automatic firearms. However, some cities and states do totally prohibit both acquisition and possession and, in jurisdictions that do not, a CLEO may refuse to approve any application for the required federal license, a discretionary policy tantamount to a ban on acquisition (but not on possession of previously licensed arms) within that local jurisdiction.

gun control policy "Policy" and "police" as well as "politics" derive from the same root as "polity": *polis* (the Greek term for the political state). So, the prime analogue of policy is expressly promulgated public law, and the primary agency effecting the regulation is some level of coercive government authority. However, private-sector agents (institutions, organizations, corporations, groups and their individual authorities) can also effect liberty-limiting policies of social consequence. Moreover, policy includes tacit goals and guidelines, operative principles or preference patterns as well as expressly promulgated rules or procedures affecting the conduct of public or private affairs. While the law (statutory, adminstrative or case law) is the prime analogue of policy, gun control *policy* is a broader domain of social concern than firearms-related *law* because policy also governs or guides large areas of governmental and private discretion within (or outside) the law. For examples of discretionary administrative policy, see: discretionary licensing, gun ban.

semi-automatic firearm Also called a "self-loading" firearm, "semi-auto" or "auto-loader," a semi-automatic firearm can reload its chamber from a charged magazine after each shot by virtue of the following automatic process: the gas

pressure and/or recoil force from a fired round is used to unlock the breech mechanism, extract and eject the empty cartridge case, and reload its firing chamber by stripping (or releasing) and feeding another cartridge from the magazine into the chamber. Unlike a fully automatic firearm that can both reload its chamber in the above manner and continue to fire automatically as long as its trigger is pressed, a semi-automatic firearm's trigger must be released and again pressed for each successive shot.

"shall issue" licensing Perhaps the most familiar example of "shall issue" licensing, also known as mandatory licensing, is the national norm for issuing state drivers' licenses: if the applicant meets certain statutory criteria (regarding age, residency, passing a written and operator's test), the law mandates that the licensing authority "shall issue" the license in question. Mandatory licensing schemes, in contrast to typical discretionary licensing regimes (see: discretionary licensing), impose tolerably objective criteria that allow far less judgmental discretion on the part of licensing authorities. Regarding gun control policy, typical criteria for shall-issue licensing include being of a certain age, having no record of criminal conviction or involuntary commitment for mental disability, and (for a license to carry firearms concealed) passing a certified course on relevant law, safety standards or marksmanship. Some shall-issue statutes require the applicant to specify self-defense as a reason for a license for concealed carry of a firearm, but this is a *pro forma* requirement for the record: the applicant does not have to demonstrate special "need" and authorities are not allowed to question the validity of the reason. From 1987 through 1996, the number of states with "shall issue" licensing or equivalently permissive provisions for concealed carry increased by over 50% to 31, and proposed legislation was pending in several other states in 1997.

Gun control assumes myriad guises among over 20,000 current laws, the endless array of proposed legislation at all levels of government, evolving case law, administrative policies, consumer-product safety regulations, and novel liability and litigation strategems. The topic embraces a wide variety of arguable means and social ends and, therefore, entails a fair maze of issues. Any instant case of gun control policy serves, in effect, as a rabbit hole leading to an underlying warren of issues: questions of fact, questions of value, and questions of how to try the facts and weigh the values at stake. Consequently, gun control is a matter which few can count

themselves for or against simpliciter, notwithstanding the hard and fast battle lines drawn by partisans on either side of the nominal issue. Indeed, the controversy over gun control has been called a 'culture war,' because it evokes impassioned conflict amongst people's deepest sensibilities and convictions about how best to secure human life and limb, individual liberty, social order, or an appropriate balance. So construed, the very controversy over gun control in the United States has few rivals as a potential threat to that very social order or as a challenge to our collective ability to give both the factual disputes and the competing values at stake a fair hearing and trial.

This article outlines the varieties of gun control and illustrates what must be shown or argued in debating the attendant issues. Because there is a fair variety of policy to consider, Section I provides a taxonomy, with topical examples of attendant controversy. Section II highlights salient perspectives and considerations in the evaluation of gun control policy. Sections III and IV survey specific questions of fact and value endemic to gun control disputes. Section V focuses on two case studies, the two most controversial forms of gun control policy: gun bans, paradigms of restrictive policy, and right-to-carry laws, paradigms of permissive policy. Because the mantle of the presumption of innocence falls upon gun control rather than upon the objects or activities controlled, various arguments are raised against various gun controls as heuristics for delineating what needs to be argued on their behalf.

I. THE VARIETIES OF GUN CONTROL

A. Defining Gun Control

Gun control opponents prefer to define "gun control" as proper grip, stance, presentation, sight picture, and trigger control. This quip calls the question of how to parse the ambiguity of "gun control" as it refers to a complex of social policy. While general criminal and civil law cover criminal acts and tortious misadventure that happen to involve guns but whose actionable nature is not instrument-specific, "gun control" as social policy typically refers to law that regulates such specifically firearm-related activities as the manufacture or assembly, export or import, transfer or sale, acquisition or purchase, possession or ownership, storage or accessibility, transport or carrying of firearms, their ammunition and certain accessories. However, there is more dimension to gun control policy and controversy than statutory law, including: constitutional law, case law, and administrative regulations

as well as discretionary adminstrative, judicial and enforcement policies, civil litigation strategems, and private-sector policies enabled under law. Because generic definitions do not reveal the variegated landscape of either gun control or its attendant controversies, a rough taxonomy is helpful. Different *types* of gun control, as well as their different *strategies,* give rise to different sorts of controversy.

B. Strategies versus Types

"Strategies" and "types" of gun control are commonly treated as loosely synonymous, but it is useful to distinguish the strategy behind any form of firearm regulation from other features by which it can be descriptively categorized. Strategy generally entails some overall plan or design for adjusting means to ends under constraints; in particular, a set of goals (proximate, instrumental, ultimate and, perhaps, ulterior), some empirical rationale or belief about how a given policy mechanism is conducive to achieving any of those goals, and (often tacit and arguable) assumptions about the legitimacy of both the ends and the means in question.

For example, a specific type of gun control, such as gun registration, can be promoted for any of very different goals: as a tool of criminal investigation, as an aid to the enforcement of other gun regulations, as a basis for holding gun owners liable for others' misuse of their guns, or as an aid to prospective gun confiscation and domestic disarmament. The instrumental goal of requiring a waiting period before the purchase of a firearm can be to enable adequate background screening of buyers, whose further goal is ostensibly to prevent sales to *unqualified* persons, or to impose a "cooling off" period before purchase, whose further goal is ostensibly to affect *qualified* buyers. The proximate goal of an instant background check can be to screen firearm purchasers so as to provide *qualified* buyers immediate access or to allow the apprehension of *unqualified* applicants, whereas an ulterior goal might be to build a computer registry of firearm owners and their firearms to facilitate eventual confiscation. Clearly, the *strategy* attributable to any *type* of regulation or its advocates can vary and make a difference to how the feasibility, efficacy, or justifiability of a policy is either perceived or assessed.

Strategy is crucial to explicate when it comes to arguing the *pro's* and *con's* of a gun control policy, whatever its "type." In evaluating a policy (prospectively or retrospectively), we need to specify what it is supposed to be "good" or useful for, its intended effects as well as its actual or likely effects, the empirical rationale for selecting certain means for achieving given objectives, and the philosophic

rationale for promoting those very objectives. For purposes of arguing the merits of a policy, strategy is more telling than type. However, for purposes of making the sheer multiplicity and variety of gun control mechanisms intelligible, it is useful to categorize gun controls along dimensions that do not necessarily illuminate their latent strategies or goals.

C. Categories of Gun Control

The following (adapted from Kleck, 1991, see Bibliography) are dimensions along which gun controls can be categorized and which occasion controversy: the type, level or jurisdictional scope of the *agency* effecting regulation; the *targets* of regulation (the gun-related *activity,* the category of *persons* or the type of *firearm* targeted); and the dimensions and degree of *restrictiveness* of the regulation (from extremely permissive to extremely restrictive or prohibitory).

1. The Agency Effecting Regulation

The type of agency or institution enacting or effecting regulation is typically some level (federal, state, or local) or branch (executive, legislative, or judicial) of government, although private-sector entities (such as businesses, other private institutions or their agents) can lawfully restrict otherwise lawful gun-related activities (a source of controversy endemic to conflicts among enabling laws).

a. Private-Sector Agency

Private-sector gun control, or lack thereof, as allowed within the law is a salient social concern. For example, when within a year and a half there occurred seven suicides and one murder-suicide with rented handguns at shooting ranges in California, there was an outrcry for ranges to stop renting guns, which met with an equally vociferous defense of the policy retorting that car rental companies continue to rent cars despite the many that are used for suicide and crime each year. In the absence of a law prohibiting the rental of firearms at shooting ranges, the controversy concerned what the private-sector policy should be. Airlines have policies regarding how firearms are to be declared for transport on passenger airliners, over and above what is required by the Federal Aviation Administration (see I.C.2.a.iv).

More salient examples of private-sector agencies of gun control policy are enterprises (such as pizza chains, delivery services) that prohibit even duly licensed employees from carrying firearms concealed when delivering goods or services. businesses that prohibit concealed carry by licensed customers as well as employees on their premises, or churches and private schools that have similar policies. Social controversy in such cases arises over whether the law should favor proprietors' rights over those of employees or clientele, whether such discrimination against legally armed citizens is justified, or, conversely, whether citizens should be restrained from going armed on certain premises even when the law generally allows it (as they are in states whose law happens to allow open carry of firearms but where the police and general public effectively discourage the practice). Neither issue is necessarily settled by empirical evidence showing that, according to the National Institute of Occupational Safety and Health (NIOSH), three out of four murdered workers are killed by armed robbers or that permitting concealed carry by armed license holders occasions virtually no wrongful violence, has occasioned myriad successful defenses against criminal offenders and probably deters even more (see III.A.4-5 and V.B). Many proprietors and clientele of businesses, churches and private schools simply object to the very idea of guns kept or carried even for self-defense, regardless of the demonstrable harmlessness or the evident social utility of allowing lawfully armed persons on their premises, or anywhere else (see IV and V.A). Thus, beliefs and cultural attitudes about either guns or gun control run deeper than corrigible beliefs amenable to empirical evidence.

Another type of increasingly popular private-sector initiative is civil litigation by victims of gun violence, their families or political-action groups against legal manufacturers or lawful vendors of the firearms illicitly acquired and misused by criminals. A salient controversy in such litigation concerns appropriate standards of liability, as illustrated by the title of a recent legal symposium volume, *Triggering Liability: Should Manufacturers, Distributors, and Dealers Be Held Accountable for the Harm Caused by Guns?* (1995, Spring, *Seton Hall Legislative Journal*). Whichever way a court or legislative body might resolve the matter in any instant case, the fairness or ethical propriety of the imputed standard of liability can remain controversial. Opponents see such litigation as distending vicarious or strict liability standards and as a strategy for reducing private firearms ownership by bankrupting members of the firearms industry. Some proponents of extending vicarious liability for criminal gun violence to "deep pocket" entities, who are themselves innocent of criminal acts, see it as a fair way to distribute the cost and

responsibility for compensating victims, while others might indeed expressly aim to punish the firearms industry. Regardless of their social goals, litigation strategems ultimately must be argued on the merits of the operative standards of liability and the fairness of their distribution of costs or benefits. Because the economic or political impact of successful civil litigation can be generalized by case law resulting from appeals (an important form of social policy), civil litigation strategems are becoming both increasingly popular and increasingly controversial as tools of gun control.

b. Government Agency: Level, Branch, Jurisdiction

While the category of gun control that enjoys the widest controversy is highly visible federal gun law, the vast majority of firearms laws are at the state and local level, where more restrictive controls and more intense controversy tend to be found. The multi-level distribution of controls can make for an inconsistent patchwork of laws, which run to such extreme variations as the ban on handguns in Morton Grove IL and the mandate that every household possess a firearm in Kennesaw GA. The patchwork problem, the inconsistency of gun laws across jurisdictions, is itself a matter of controversy. Control critics argue that it is unfair to treat citizens with similar qualifications differently simply as a function of their location or residency, while advocates complain that controls legitimately established in one area are undermined by "leakage" from more "lax" jurisdictions. A collateral and more fundamental issue is the proper apportionment of jurisdictional powers among federal, state, and local government.

Complicating the matrix of gun controls is the fact that on the federal, state or local *level* different *branches* of government effect gun control policy and enjoy considerable discretion in policy making. The legislative branch (Congress, a state legislature, a city council), of course, enacts laws; but discretionary legislative administrative policy can influence the fate of proposed legislation in the legislative process (for example, by not releasing a bill from committee). The executive branch issues Executive Orders (one form of discretionary policy making, such as President Bush's 1989 ban on the import of so-called "assault weapons"), promulgates detailed regulations for implementing laws (such as BATF compliance standards for various weapons laws), and administers law enforcement, a crucial dimension of control that also admits of discretionary latitude (for example, neither the Morton Grove ban nor the Kennesaw mandate are proactively enforced). Besides presiding over criminal and civil actions (such as firearms law violations and licensing issues, respectively),

the judicial branch establishes case law at state and federal appellate levels and, at lower local levels, enables enforcement instruments (like arrest and search warrants) according to differing philosophies and policies within the ambit of judicial discretion. Judicial policy and political philosophy are themselves important factors in the appointment or election of judges. The jurisdictional matrix of gun control policy as effected and enforced by government is further complicated by the fact that the three major branches of government (executive, legislative, and judicial) and the three major levels of government (federal, state, and local) in turn include multiple agencies and layers of authority. Examples follow of how the very matrix of government authority for gun control can occasion controversy.

Salient controversies naturally arise from competing philosophies of how jurisdictional powers should be apportioned, checked and balanced both among and within federal, state and local government. The Brady Act, requiring a national five-day waiting period to enable point-of-sale background checks by local law enforcement, has raised issues of states' and local law enforcement rights against compliance with unfunded federal mandates. Brady is accordingly contested on Tenth Amendment grounds (that all powers not specifically granted the federal government by the Constitution remain with the states) and, along with the federal ban on so-called "assault weapons" (part of the Violent Crime Control Act of 1994), has intensified the anti-federal sentiments of state- and local-rights partisans (including members of the populist militia movement). Similarly, state preemption laws, which reserve authority for (all or certain) gun controls to the state legislature, address the pragmatic problem posed by an inconsistent patchwork of laws across localities but run afoul of partisans of local autonomy (such as when, for example, the Pennsylvania General Assembly forced Philadelphia to change from discretionary to "shall issue" licensing for concealed carry).

Inconsistencies among the patchwork of state and local laws thus raise controversies both pragmatic and philosophical. Just as gun control advocates argue that firearms should be uniformly subject to registration, like motor vehicles, for pragmatic reasons (such as to aid criminal investigations), gun rights advocates argue that concealed carry licenses issued by one jurisdiction should be honored uniformly in others, like drivers' licenses, collateral with the right of self-defense, which presumably knows no borders. The latter right itself is, in turn, contested by certain pacifists and other opponents of the private use of deadly force even in self-defense; for example, some American gun control advocates prefer the policy of England, Canada and Australia where self-defense is not regarded at law as a valid

reason for owning a firearm. Again, state or local jurisdictions with more stringent controls complain that the efficacy of their laws is unfairly undermined by more permissive regimes elsewhere (such as when a jurisdiction, like the District of Columbia, which prohibits the sale, ~~and~~ acquisition, and possession, of ~~firearms~~, handguns, suffers "leakage" from one nearby, like Virginia, where sale and purchase are permitted, or when state residents licensed by one locality are allowed by state law to carry concealed in communities that refuse to license the practice for their own citizens). While the "leakage" problem affects only certain forms of gun control, such as restrictions on acquisition and possession, it is cited in support of the preemption of state and local authority by uniform federal law, contrary to the interests of partisans of states' and local rights.

Likewise, rights afforded by federal law can be compromised by state or local policy. For example, federal law allows lawful owners to transport their firearms in their vehicles (unloaded, locked up apart from ammunition, and inaccessible from the passenger compartment) for purposes of interstate travel to destinations where possession of the firearms is legal. However, such travellers are liable to arrest in states and localities that prohibit possession of the firearms in question. Even if compliance with federal law provides immunity from prosecution or a perfect defense against conviction, the risk or cost born by travellers will be a function of local policy governing, for example, whether a state trooper, county deputy or municipal officer arrests, whether a prosecutor brings charges, or how a magistrate disposes of the case - examples of discretionary gun control policy effected by executive and judiciary branches of local government. Case in point: a suit filed by plaintiffs who had standing as regular travellers through New Jersey attempted to enjoin the state's authorities from harrassing interstate travellers transporting lawfully possessed firearms that happened to be banned in that state. The suit prompted an administrative order from the state's Attorney General to that effect, but without provision of penalty for law enforcement agents whose local policy might be to detain such travellers notwithstanding the order.

The patchwork problem is, therefore, compounded by different layers of authority within different branches of federal, state or local government. For example, the federal judiciary encompasses district and appellate courts (which have made contradictory rulings on the constitutionality of the Brady Act and on the merits of challenges to the federal "assault weapon" ban) as well as the Supreme Court (which may, within its discretion, follow a policy of ignoring certain constitutional controversies, as it has regarding the Second Amendment since the

1930's and as it did regarding the First Amendment until the 1920's). Enforcement of firearms laws, a crucial dimension of gun control, is conditioned by discretionary policies on the part of U.S. Attorneys, States' Attorneys General and local District Attorneys (whose dispositions to prosecute any firearms violation may vary) as well as by the policies of lower layers of authority within law enforcement agencies and the judiciary (who, respectively, seek and issue search or arrest warrants). A case in point is the discretionary executive, enforcement and judicial policy that, respectively, determined how lower-echelon BATF officials pursued suspected illegal firearms at the Branch Davidian compound in Waco TX and led a ~~Texas~~ federal magistrate to issue the ATF agents a search warrant on the basis of an arguably dubious affidavit as probable cause. Another example is the policy that led federal agents, severally, to entice Randy Weaver into illegally sawing-off and selling two shotguns in order to enlist him as an informant and later to mount a siege on his Ruby Ridge home, precipitating a chain of events that cost several million tax dollars as well as the lives of Weaver's wife and son and a ~~DEA agent.~~ U.S. Deputy Marshal. The costs of gun-law enforcement initiatives in both the Waco and Ruby Ridge incidents, arguably well out of proportion to the initial violations at issue (as one report on Waco noted, "90 People Dead Over Gun Parts"), illustrate how lower-echelon enforcement and judicial policies can become a salient dimension of gun control and its attendant controversies on the national level.

Another manifestation of the patchwork problem and the problem of discretionary executive authority precluding legislative deliberation are consumer protection initiatives. On their face, consumer protection programs may seem unobjectionable: who is not a consumer, or one so invulnerable as not to want protection? As it happens, a large segment of the firearm consumer population does not want government consumer protection programs. Less surprisingly, firearms manufacturers object to them. To others, outside the firearms community, it is a wonder that firearms are not regulated by consumer protection agencies, admittedly dangerous as they are, like motor vehicles and prescription drugs.

Reasons given for the opposition are: firearms are designed as lethal instruments, such that a completely "safe" firearm would be non-functional, a contradiction in terms; modern firearms offer a plethora of choice among active and passive safety devices; short of making the firearm non-functional, there is no way to eliminate the ultimate safety factor, the human operator, for whom the answer to the safety problem is education (witness the steady century-long decline in the rate of gun accidents even as the private store of firearms and the population of gun

owners has steadily increased); manufacturers have a compelling self-interest in optimizing the trade-offs between the mechanical safety and reliability of their products; firearms makers, and consumers whose lives depend on the products, know better than government bureaucrats how to make the trade-offs; and, a government agency with the power to do so is apt to dictate specifications that compromise the defensive utility of firearms and/or drive manufacturers out of business. Advocates of consumer-product safety regulations for firearms retort: guns, while inherently dangerous implements like vehicles, can certainly be made progressively safer without compromising function, just as cars have been made safer by mandated seat belts, air bags and other emergent technologies; manufacturers cannot be trusted to explore and implement all possible safety measures, left to their own devices; and the government would not burden the firearms industry unduly or threaten its viability any more than government-mandated safety standards have harmed the automobile industry or its consumer clientele.

As it happens, it is within the discretionary ambit of state government officials to impose consumer protection requirements on manufacturers without the need for special legislation (and, therefore, without the need for legislative deliberation and the public scrutiny that legislative debate entails). Case in point: the Massachussetts Public Safety Council held hearings at the end of 1996 on the state Attorney General's proposed consumer protection regulations for commercially available handguns, which arguably need only the Governor's approval to take effect. The Massachussetts initiative is regarded as a model for similar measures in several other states. By the elaborate requirements of the proposed regulations, many of which in fact have no bearing on consumer safety, most current handguns would be disqualified and effectively banned. Law enforcement itself has so far resisted one of the Massachussetts proposals, so-called "smart guns" (which require the operator to wear a solenoid device that communicates with a reciprocating unit in the firearm to enable the firing mechanism), because the technology is expensive, cumbersome and unproven. Consequently, handguns sold to law enforcement in Massachussetts would be exempt from the new standards, calling into question the premises of the proposed regulations: that current handguns are not sufficiently safe and that the new technology is somehow better. If this is so, the critics press, why are police not buying it? The principal manufacturer in the state, Smith & Wesson, objects on the basis of the following dilemma: S&W cannot control the distribution of its product to ensure compliance, the cost of attempted compliance could drive it out of state, but it cannot be sure that any state to which it moved would

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not follow the Bay State's lead. Because manufacturers cannot afford to deal with 50 different sets of state regulations, they would prefer to negotiate the policy issues on the federal level, while gun owners complain that such executive initiatives illegitimately circumvent legislative deliberation and proper public scrutiny.

Again, the level and branch of government appropriate to effect the regulation in question becomes an issue. Like controversy attending other prospective gun controls, the substantive issues call for informed speculation. Would the burden placed on the manufacturers and end-users of the new-spec firearms yield commensurate social benefit, or any added margin of safety? Proponents are confidently affirmative, or indifferent. Opponents suspect the goal of enhancing intrinsic firearm safety is a mantle of virtue disguising an ulterior strategy. For example, the need for the Massachussetts proposal was dramatized at the public hearing by the compelling testimony of parents who lost children to violent crime; but the proposed safety requirements have no bearing whatsoever on preventing criminal violence or those types of tragedy. One of the consumer-product safety proposals is to ban the manufacture of handguns with barrels less than three inches in length, a feature that has no discernible relevance to safety but that is traditionally a target of "Saturday Night Special" bans (see I.C.2.c and V.A.1). Erecting a consumer-product safety apparatus could be overkill relative to the magnitude of the problem. Suppose that in a worst-case year there might be 1500 accidental gun deaths nationwide, up to ~~300~~ 200 - 250 of which might involve "children" through 14 years of age, and up to 500 of which might involve handguns (at which the regulations are aimed). The vast majority are in any case occasioned by chronic adult negligence, the rest by an irreducible factor of chance. The question is whether accidental death and injury by gun is a problem that can be remedied by additional safety technology, or whether the human factor is the crux at the margin or even at the heart of the problem (see III.A.3). Consumer-product safety regulation of firearms is a case where controversy remains muddled so long as the policy harks to either equivocal or ulterior goals that obscure both its empirical and its philosophical rationale.

2. The Targets of Regulation

Gun controls can be categorized according to the firearm-related *activity*, the category of *persons* or the type of *firearm* (or ammunition) targeted for regulation.

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a. Types of Activities

or even as a running header. This sort of reference might be clearer if the complete citation were given each time in the body, e.g.,

Types of firearm-related activity regulated include use, manufacture and importation (also, exportation), transfer (including sale and purchase), transport, and possession (which includes both the "keeping and bearing" of firearms).

i. Use

Actual deployment, including the intentional presentation of a gun as well as deliberately firing a gun for some purpose, is distinguished from the mere possession or carrying of a firearm (see I.C.2.a.v). General criminal or civil law covers crimes, torts, or justifications for the use of force (such as self-defense) that happen to involve the use of guns but whose actionable nature is not instrument-specific. (For example, general laws defining murder or self-defense are indifferent as to whether a gun or some other instrument is used.) "Place and manner" laws specifically regarding where or how firearms may be used (overtly deployed) provide sentence enhancement for crimes committed with a gun, forbid uses such as the reckless display of a gun or discharging a gun within certain areas (such as city limits or national parks), prescribe the type of firearm or ammunition that may be employed in hunting certain game, protect existing shooting ranges from local noise ordinances or nuisance actions, and otherwise regulate shooting ranges (for example, their compliance with noise and pollution regulations, such as ventillation requirements for indoor ranges).

The most salient type of law governing the use of firearms imposes sentence-enhancement for the commission of certain crimes with a firearm. For example, the Gun Control Act (GCA) of 1968 made the overt use (or even covert possession) of a firearm in the commission of a federal crime a discrete offense in its own right subject to an additional minimum penalty over and above any sentence prescribed for the primary offense. The Firearms Owners' Protection Act (FOPA) of 1986 added serious drug offenses to the crimes that entailed an added penalty in case a gun was used. The FOPA doubled the prescribed penalty for any crime if it was committed with a machine gun or a firearm equipped with a sound suppressor. State and local laws likewise often make the use of a firearm in the commission of certain otherwise serious crimes a separate offense entailing an enhanced penalty. The enhancement may be in the form of a mandatory minimum sentence, a discretionary additional sentence, or a prohibition on certain sentencing options such as suspended sentences, probation, parole, concurrent sentences or time off for good behavior.

ii. Manufacture and Importation

The manufacture of firearms is regulated in a number of respects. A federal license is required for virtually all firearms manufacture and, by federal law, all firearms must be made with unique serial numbers and with a minimum metal content identifying them as firearms to detection equipment. The latter requirement, known as the "plastic gun ban," was motivated by the possibility that firearms technology might someday permit the manufacture of non-metallic firearms. It was never the case that firearms made with synthetic ("plastic") frames and parts were not detectable or recognizable as firearms, because no commercially viable substitute for steel barrels, actions and firing chambers has yet been developed.

The Undetectable Firearms Act of 1988 defines "plastic gun" as "any firearm containing less than 3.7 ounces of electromagnetically detectable metal" and bans the manufacture, importation or sale of same. However, the UFA also defines a "plastic gun" as one where "the parts . . . do not permit an accurate x-ray picture of the gun's shape." Consequently, firearms with synthetic, non-metallic components are made with metallic trace elements in their "plastic" parts, even if they happen to contain more than 3.7 ounces of metal. The basic concern is not composition, but the ability of detection technology to recognize a firearm as such. The same bill required toy guns to have a bright orange plug at their muzzle, which requirement failed to pass. However, it was included in the Federal Energy Management Improvement Act of 1988. The concern in this spill-over from the composition and manufacture of firearms to toy guns was the same: the ability to recognize an actual firearm as such, as opposed, for example to a toy gun. The dimensions of the concern about toy guns is reflected in a 1990 report by the Police Executive Research Forum, *Toy Guns: Involvement in Crime & Encounters with Police.*

Local zoning ordinances can prohibit manufacture, as well as commercial sale, and certain states (Hawaii, Illinois, Maryland, Minnesota) and localities (in California) prohibit the manufacture and sale of certain types of firearm such as so-called "Saturday Night Specials" (SNS's). Legislation introduced in 1997, the American Handgun Standards Act, seeks to apply the GCA "sporting purpose" test and the BATF standards developed for *imported* handguns to all *domestically manufactured* handguns as a consumer-product safety measure specifying metallurgic composition and mechanical features that putatively enhance the safety of the firearms as well as minimal barrel length, which does not (see also I.C.1.b and V.A.1).

Unlike manufacture, the importation of firearms is regulated exclusively by the federal government and, like manufacture, requires a federal license. The GCA of 1968 introduced the "sporting purpose" requirement for purposes of an import ban on "non-sporting" firearms, in particular military-surplus rifles (such as the Carcano carbine involved in the assassination of President John F. Kennedy) and handguns that failed the test of being "particularly suitable for or readily adaptable to sporting purposes" (typically, small, inexpensive handguns or SNSs). The criterion of "sporting purpose" became a cornerstone of 20th Century gun-control policy following WWI in Europe: the lack of "sporting purpose" provided a convenient rationale for governments to prohibit civilian ownership of military or combat firearms in Great Britain, Weimar and Nazi Germany, and other European regimes. For example, in Great Britain the initial motivation for domestic disarmament was not concern about criminal violence, but rather the fear of spreading Bolshevism and anarchism after WWI and the perceived threat of violent insurrection by Irish insurgents, trade unionists, a growing immigrant population and other potential dissidents. But even in the Soviet Union and Nazi Germany hunting rifles and shotguns were allowed to state-approved civilians (such as non-Jews). The ostensible reason for the exemption of privileged "sporting" arms in even draconian prohibitionist schemes has historically been political and economic expediency: it allows governments to outlaw certain firearms while appeasing large political constituencies and economic sectors, namely hunters and "sport" shooters and the economic enterprises dependent on them. In the present day, while the European Community has debated total bans on cross-border transport and civilian-owned firearms, certain "sporting" arms have so far been spared in the economic interest of multi-billion-dollar commerce. The European experience shows that the criterion of "sporting purpose" can be a useful political tool for a strategy of stepwise civilian disarmament, a lesson not lost on gun ban proponents in the U.S.

The strategy behind the GCA's restrictive import standard was less clear. Whatever its goal, its effect was not to reduce the firearm stock but rather to protect U.S. manufacturers from competition with importers of inexpensive firearms. However, the "sporting purpose" test was invoked in 1989 to ban, by Executive Order, the importation of certain so-called "assault weapons," consonant with the movement to ban "assault weapons" domestically. In 1994, lack of "sporting purpose" was used for the first time to ban firearms of domestic manufacture under the authority of the Secretary of the Treasury or his delegate (in this case, the BATF) to regulate "destructive devices," defined as "any type of weapon (other than a shotgun or a

He only has the ~~same~~ discretion for shotgun shells

shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) . . . which will . . . expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter. . . ." The "destructive device" originally targeted for control was on the order of a rocket or grenade launcher. But the bores of 12- or even 20-gauge shotguns, standardly .729 or .615 caliber, are well over half an inch in diameter; hence, the explicit exemption for shotguns. However, the Secretary or BATF claimed has the discretion to reclassify a shotgun as a "destructive device" for lack of "sporting purpose," which they did with 12-round revolver-action shotguns in February of 1994, several months before those same firearms were banned in September of 1994 when the federal "assault weapon" ban took effect. The "sporting purpose" test for imported firearms has thus been established as a standard for domestic bans (see IV.A.1, Recreational Value and "Sporting Purpose," V.A.2.b.vi, No "Sporting Purpose," as well as I.C.1.b and V.A.1 regarding SNS's or "junk guns").

iii. Transfer, Acquisition, Sale, Purchase

The transfer of firearms typically, but not always, involves either a sale-purchase transaction or the commercial sale of a firearm by a licensed dealer; private transfers between individuals qualified to possess the firearm in question (by sale, barter, trade, gift or bequest) are generally lawful (with the exception of machine guns, which may be transferred only through a licensed dealer). This is a bone of contention for those who believe that all firearms transfers should be subject to the same regulations. For example, the GCA of 1968 prohibited only licensed dealers from knowingly transferring a firearm to an underage person or a member of a disqualified category; however, the FOPA of 1986 made it unlawful for anyone to do so, thereby including private transfers. For prosecution of an alleged violation of this requirement, the FOPA requires proof of "willful" or "knowing" transfer of a firearm to an unqualified individual by either a licensed dealer or a private citizen. The residual problem is that private individuals ordinarily do not have the means to conduct a background check to determine, beyond age and residency, whether a given purchaser is a member of a "high risk" group prohibited from acquiring a firearm. The waiting period and background check established nationally for handgun sales and purchases by the Brady Handgun Violence Prevention Act of 1993 applies to licensed dealer sales, not private transfers. Consequently, some states additionally require private transfers to be mediated by a licensed dealer who, for a

reasonable fee, can initiate a background check; it has been proposed that such a requirement be instituted at the national level (see III.B.2).

Washington DC, Chicago and some other cities ban the sale of handguns, and some states and localities ban the sale of certain small, inexpensive handguns (so-called "Saturday Night Specials"). Where the sale and purchase of firearms is allowed, some regulations affect licensed dealers while others target purchasers. Firearms dealers are required to have a federal firearms license (FFL) and some states and localities require state and local licences as well. The GCA of 1968 prohibited the sale or delivery of any firearm to anyone from or in another state, except for long guns which could be sold to residents of bordering states. The FOPA of 1986 allows long guns to be sold and delivered by licensed dealers directly to qualified individuals in other states in which sale and possession of the firearms are lawful. However, interstate sale and delivery of handguns must be mediated by a licensed dealer in the purchaser's state. While complying with these federal regulations, dealers must also comply with federal and state restrictions on who is qualified to purchase and possess the firearm in question (which means checking the age and residency of the purchaser through reliable photo identification); they must submit the federal form filled out by handgun purchasers for a background check, record all sales on a federal form where the purchaser attests that he is legally qualified, and maintain these records in good order for inspection by the BATF and other law enforcement authorities. Federal law prohibits the keeping of a federal registry on firearms purchases or purchasers, while requiring dealers to maintain these records on their premises. However, state or local law may require dealers to send their purchase or transfer records to a licensing or registration authority, thus establishing state or local registries (which, on the other hand, many states forbid). The Brady Law also requires dealers to report any multiple firearm purchases to local law enforcement. Some states and localities have adopted "gun rationing" laws that prohibit multiple sales and limit how many firearms, or handguns, may be purchased in a given period of time, such as one handgun a month. Advocates argue that this measure obviates multiple purchases by proxy buyers for illegal resale on the black market; opponents argue that notification of multiple purchases is a better law enforcement mechanism, because it allows investigation and apprehension of straw-man buyers. Finally, some jurisdictions require dealers to sell all firearms with trigger locks or other security devices.

Brady increased the three-year license and renewal fees for FFL's (from $30 to $200 and from $30 to $90, respectively), toughened the application requirements

(including fingerprinting and photographs for background checks and interviews with federal inspectors), required proof that licencees actually conduct a retail business and assurance that their businesses are in compliance with state and local law (including zoning ordinances). In addition, dealers became liable to increased, unannounced field inspections. Many legitimate dealers did not do enough business to afford the fees and many operating out of their homes found themselves afoul of local ordinances (which, in some cases, were changed to outlaw the dealers). Undoubtedly, some illegitimate dealers were also deterred from applying for or renewing licenses because of the more rigorous application, renewal, and inspection policies. As a result of these and whatever other factors, between 1993 and 1997 FFL holders decreased by 56%, from 286,531 to 124,286, the lowest number since the BATF began keeping records in 1975. The current or future impact of this decrease on illicit firearms traffic is unknown but bounded by the finding of a 1992 BATF study, "Protecting America," that only 7% of career criminals obtain their illegal firearms from licensed dealers. (First-time convicted offenders, as opposed to recidivists or "career criminals," could have legally qualified for firearm purchases prior to acquiring a criminal conviction.)

Federal restrictions on firearms purchasers include a minimum age requirement (18 for long guns, 21 for handguns), a waiting period (where an instant check system is not available) and background clearance on a number of criteria of legal disability for acquiring or possessing a firearm (see I.C.2.b). To the federal criteria for legal disability, some states add criteria such as alcohol addiction or, more appropriately, abuse. The Brady ~~Law~~ Act, in effect, established a national application-to-purchase system whereby the federal form filled out by the prospective purchaser is actually vetted through a local law enforcement agency for approval; where there is no instant check system, if disapproval is not forthcoming from the agency responsible for the background check within the five-day waiting period, the purchase goes through. Prior to Brady, and since the GCA of 1968, a purchaser was required to fill out a federal form attesting that he belonged to none of the classes of people prohibited from acquiring the firearm in question, but whether this form was actually vetted for approval by a law enforcement agency was a function of state or local law. Absent a system for submitting the federal form for confirmation by a background check, the form was not so much an application to purchase as a signed statement of qualification to do so.

While the Brady ~~Law~~ Act established a national application-to-purchase system, state and local law may impose further restrictions on purchasers. There are two

such mechanisms: purchase permits and licenses to possess a firearm. *Permits to purchase* require a background check and may be valid for some period of years and for multiple purchases, after which they can be renewed and at which time a background check may again be required. Alternatively, a separate purchase permit (and background check) may be required for each purchase. Purchase permits are usually required for acquisitions from private individuals as well as for transfers from licensed dealers, and they may apply only to handguns or to all firearms. *Licenses to possess* a firearm are required for the very possession of firearms, even in one's home or business and however the firearm was acquired, as well as for making new acquisitions. They also require a background check and commonly take the form of a Firearms Owner Identification (FOID) Card. Some propose that a national FOID card should be required to possess or purchase any firearm.

One variation of a license to possess is the federal license required for a National Firearms Act (NFA) firearm such as a machine gun. The form for the NFA license serves as an application to purchase; a separate form is required for each NFA firearm. It must first be approved and signed by a local chief law enforcement officer (CLEO) and then submitted, with fingerprints and photographs of the applicant, for an FBI background check. The license, if approved, pertains only to the single serial-numbered firearm applied for, allows the purchase to go through, and must be kept with that firearm at all times, wherever it is stored, transported or used. (The class of FFL required for dealers in NFA firearms is different from that required for dealing in ordinary firearms and it also serves as an open-ended license to purchase and possess multiple NFA firearms.)

iv. Transport

Transport of a firearm simply for purposes of getting it from one location to another can be distinguished from carrying a firearm on or about one's person for purposes of protection, insofar as legal transport might expressly require that the firearm not be in one's possession, or not easily accessible or under one's control. Transport regulations are another form of "place and manner" restriction insofar as they dictate where and in what condition a firearm may or must be kept for purposes of transporting it off one's own private premises. Transport regulations are of two types: those regulating how a person may privately transport a firearm and those regulating how commercial carriers must dispose of transported firearms. In some cases, where the traveller as well as the firearm are being transported by the same

carrier, these two types are, in effect, two sides of the same coin; but there may be distinct requirements on the traveller and on the carrier.

Typical cases of *private transport* are of two sorts: *intra-jurisdictional*, where a person transports a firearm between his home and a firing range or his business or other lawful destination by private vehicle; and *inter-jurisdictional*, where a person transports a firearm by private vehicle across or into jurisdictions that may have different laws regarding possession of the firearm. The intra-jurisdictional case can be covered by laws that specify how the firearm may or must be transported in a private vehicle (for example, loaded in the passenger compartment or unloaded in a locked container), but within that jurisdiction the law governing possession will be uniform. The problem case is inter-jurisdictional transport. The GCA of 1968 was mute on the matter, but the FOPA of 1986 made it legal to transport a lawfully owned firearm through a jurisdiction where its possession would otherwise be illegal, provided that (1) possession of the firearm is legal at the points of origin and destination and (2) the firearm is unloaded and locked in a container separate from any ammunition (and stored in the trunk of the vehicle in case there is one). There is an ambiguity concerning what constitutes a legal stopover within a jurisdiction where possession of the firearm is not legal. Stopping for fuel, emergency servicing or meals is not problematic where the traveller is clearly passing through to another destination, whereas an overnight stop or visit might be. Legally, one's hotel room is treated as one's domicile, as are mobile homes; but where residents of a state or city are not allowed to possess the firearm in question even in their homes, this may be no defense. Consequently, travellers are advised to avoid stopovers in such jurisdictions. This means that, if a traveller has lawful reason to be transporting a firearm between jurisdictions in which its possession is legal and ~~she~~ he has family or friends ~~she~~ he would like to visit in a jurisdiction in which possession of the firearm is prohibited, ~~she~~ he may be at legal risk staying over with ~~her~~ his family or friends. (This is another manifestation of the patchwork problem discussed in I.I.C.1.b.) By federal law, licensed machine guns cannot be privately transported in one's vehicle or a passenger carrier interstate, but must be transported by a common carrier (such as UPS, not the U.S. mails) and received in the state of destination by a licensed dealer; in addition, a form specifying the transport arrangements must be filed with and approved by the BATF.

Regarding *transport by commercial passenger carrier*, air travel is a case in point. By Federal Aviation Administration (FAA) regulations, the passenger is required to place the firearm, unloaded, in a locked hard case (which may be put

inside a larger piece of soft luggage), to declare the firearm and check the case containing it with the airline; a firearm may not be taken by a passenger onto the airliner (law enforcerment personnel may be excepted in certain instances). Airlines may require a passenger to inform them in advance that she will be checking a firearm with her luggage. Airlines routinely require that the passenger sign a tag attesting that the firearm is unloaded. This is not an FAA regulation, but an industry policy to relieve the airline of liability in case of a discharge. In addition, airline personnel may inspect the firearm and require the passenger to show that it is unloaded. Essentially, the airline may require whatever it wants, because it is not obligated to transport the firearm. In the past, many airlines required the tag identifying the unloaded firearm to be placed on the outside of the firearm container or the luggage in which it was being transported. This tag came to be referred to as the "steal me flag," because it advertised the presence of a firearm and encouraged theft. The Brady Law made this practice illegal such that, if an airline were to transport the firearm (which it could decline to do), the assurance tag must be placed inside the firearm container or luggage. Regarding *transport by non-passenger carriers,* while ammunition may be sent through the mails, firearms (unlike ammunition) may not be transported by the U.S. Postal Service, but must be sent by a common carrier such as UPS or Federal Express.

v. Possession: "Keeping and Bearing" Arms

Possession includes modes such as ownership (legal or illegal), where one can own a gun that is not in one's immediate physical possession or vicinity; having a firearm (which one might not own) in one's vehicle or on one's premises (such as one's home, business, or motel room), where the gun might not be in one's immediate physical possession or immediately accessible (if it's in the trunk or in a closet), but can be construed to be under one's control; having a firearm (which one might not own) on or about one's person, when carrying a gun concealed or openly (such as in a pocket or purse, or in one's grasp). One might carry a firearm openly or concealed, loaded or unloaded, upon one's own private premises or beyond. Laws or policies regarding possession, in effect, regulate the modes of "keeping and bearing" firearms: who may or may not keep or carry them, the places and manners in which they may or may not be kept or carried, the form of permission (such as a license) required to keep or carry them. ("Bearing" arms may also be taken to entail *use* as well as *possession* on one's person, as when bearing arms in battle.)

The categories of persons prohibited from possessing firearms are discussed in section I.C.2.b. Possession, in the sense of ownership, beyond purchase or acquisition (see I.C.2.a.iii), might be regulated in four ways: (1) a license might be required to own any firearm (or a handgun) in some states or locales; (2) some state or local jurisdictions might require registration of any firearms (or handguns) one owns, however or wherever they were acquired; (3) some states and localities have legislation pending to restrict possession of certain firearms to certified clubs and shooting ranges, where said firearms may be used but must be secured at all other times (a "place" restriction); and (4) many states require that all firearms be kept secured from unauthorized hands, in particular from children, in certain specified ways (a "manner" restriction) and/or impose criminal liability for firearms that are not properly secured and that are consequently misused. Legal ownership is required by some jurisdictions for possession, in the sense of having a gun on one's private premises; that is, it can be illegal to loan a handgun or to possess a borrowed handgun. As discussed in I.C.2.a.iv, the manner of transporting a firearm while in one's possession, in the sense of having it somehow accessible or under one's control in a vehicle, is variously regulated depending upon whether one is travelling within one jurisdiction or between jurisdictions. For example, one state may require that all firearms be in a locked case in the trunk during intra-state transport, while another may allow them, even handguns, to be transported unloaded but openly or accessible within the passenger compartment.

Most states have special exemptions, or special carry permits, allowing hunting firearms (even handguns) to be carried openly in vehicles or about one's person in designated hunting areas during hunting season. In general, possession in the sense of carrying a firearm on or about one's person, openly or concealed, is lawful on one's home or business premises, but carrying an uncased firearm, loaded or unloaded, on or about one's person beyond one's private premises is prohibited unless one has a license to do so. Vermont is the one state that allows concealed carry in public without a license, provided that the firearm is lawfully possessed and the bearer has none but lawful intent. Open carry in public is in theory or by default legal in many states (because it is neither expressly prohibited nor licensed), but, in the modern cultural climate and urban or suburban settings, may cause alarm and be construed as disturbing the peace. On the other hand, in certain rural areas, carrying a long gun or handgun openly may be both lawful and unremarkable.

For purposes of licensure to carry a concealed firearm, a concealed weapon is generally construed as one carried on or about a person in such a manner as to

conceal it from the ordinary sight of another person or such that no part of the weapon itself (as opposed, for example, to an imprint of part of the weapon under clothing) is visible. While the printing or bulging of a weapon under clothing may allow another person to infer the presence of a weapon, so long as no part of the weapon itself is visible to ordinary sight, the weapon may be construed as concealed. Thus, a license *(permission)* to carry concealed imposes an *obligation* to keep the gun concealed; unjustified display or inadvertent revealing of the firearm is cause for revocation of the license. For purposes of licensure for the open carrying of weapons only, the law may specify a stringent standard for what portion or proportion of the weapon must be clearly visible to another person; that is, again, *permission* to carry openly imposes an *obligation* to carry openly. (Arizona had such an open carry law, but has since changed to licensed concealed carry.) For purposes of prohibiting the carrying of weapons, whether concealed or not, mere possession on or about a person or readily accessible for immediate use (such as in a handbag or briefcase, on or under the seat or in the glove compartment or console of a vehicle) may be construed as an offense. For example, as defined by section 790.001(15) of the Florida Statutes, it is an offense for an unlicensed carrier if the firearm is "carried on the person or within such close proximity and in such a manner that [the weapon] can be retrieved and used as easily and quickly as if carried on the person." For purposes of such an offense, it is generally irrelevant that the gun is unloaded, just as it is for armed robbery or assault committed with an unloaded gun. There are two types of licensing systems for concealed carry (or, where licensed, open carry), *mandatory* and *discretionary,* discussed in section I.C.3.

Besides restricting the *manner* in which a firearm is carried under a license, federal, state and local law restricts the *places* in which firearms may be carried even by carry-licence holders. Possession of a firearm is prohibited in all federal buildings (including post offices) and airport terminals as well as for inter-jurisdictional travel on commercial passenger carriers; while intra-jurisdictional travel in taxi cabs and public transit might be exempted, commercial trains or bus lines can prohibit carry by passengers and carry by operators is generally prohibited by company policy. Many states prohibit even licensed carriers from carrying in bars (or even eating establishments which serve liquor), in sports stadiums or at sporting events. As discussed in I.C.1.a, private establishments such as stores, restaurants, shopping malls, and amusement parks may prohibit firearms possession by legal carriers on their premises. In Texas, when the new mandatory carry licensing law took effect in January 1996, many establishments and

commercial chains posted signs prohibiting concealed carry. However, many of these rescinded the prohibition either (a) because of threatened boycotts, or (b) because the postings might serve as an advertisement or invitation to armed robbers, or (c) out of concern for liability in the event of an incident like the Killeen massacre (where Luby's Cafeteria patrons had firearms in their vehicles with which they might have defended against the perpetrator had they been allowed to carry them). Most states prohibit possession on school grounds (usually defined as any school building or within 1000 feet of same). Congress passed the Gun Free School Zone Act in 1990 to make this prohibition uniform nationally, but the Supreme Court found the law unconstitutional by reason of being beyond the federal legislative power, which is limited to matters directly affecting interstate commerce. An ammendment to the Omnibus Consolidated Appropriations Act of 1997 reinstituted a national prohibition on the possession of firearms on school grounds and included findings to show the relevance to interstate commerce. The new law exempts licensed carriers as well as lawful possessors (such as hunters with firearms in their vehicles delivering or picking up their children, or home owners who live within the 1000-foot boundary). Federal, state and local regulations may prohibit the possession of firearms in federal, state or local parks. Such an ordinance in Tucson AZ was ruled in violation of Arizona state law, which preempts local authorities from regulating the possession or carrying of firearms within the state.

However, the objection to the Tucson law was on other grounds, which also apply to other of the "place" restrictions on where license holders may carry firearms: the impairment of licensed citizens' exercise of their right of self-protection and the gratuitousness and social disutility of "gun free zones" for the law-abiding. The idea of "gun free zones" (especially when they are hallowed places such as schools for children, churches, or recreational areas for families) may seem unassailable until one examines the logic of such restrictions. Firearm possession by criminals or minors and firearm use for criminal intent is already outlawed and penalized everywhere. Firearm possession by licensed law-abiding citizens, even in hallowed places, is (a) not a problem (see V.B.2.a and b) and (b) useful for deterring and, in the worst case, defending against criminal violence (see III.A.4-5 and V.B.2.c). Minors and criminals who possess and carry guns illegally abroad in society, the whole of which is already a "gun free zone" for them, are not likely to be any more respectful of special, redundant "gun free zone" laws. However, the effect of the special "gun free zone" policies is likely to disarm the law-abiding, depriving them of the means of self-defense and depriving society of the utility of responsible armed

citizens. Because lawfully armed citizens ~~do not~~ misbehave, no social costs are averted. Because armed citizens have social utility, social benefits are lost, while the rights of those citizens are impaired.

Thus, the rationale for many special "gun free zones" appears to be merely symbolic, while both their effects and their symbolism appear to their critics to be perverse. One might as well call for "bullet free zones," because it is not the presence of guns but rather their misuse that is the greater concern. But this we already have: the criminal law declares the whole of society and every person within its borders to be a "bullet free zone," with special exception for the lawful, defensive use of deadly force against aggressors. Passing laws alone prevents no crime. Neither can laws that effectively disarm only law-abiding citizens ensure that any place is effectively "gun free" in the relevant sense. The symbolism of special "gun free zones" is also perverse insofar as it implies that human life is more sacred in some places than in others, or that the right to preserve innocent life varies with place and, worse, shall be suspended in those very places that society considers most hallowed.

This line of objection to many "place" restrictions on possession of firearms by licensed carriers nonetheless allows that there may be places where even lawful, defensive response by armed citizens can be too hazardous to risk. Airliners are a likely candidate, where a stray bullet can compromise the air-worthiness of the aircraft, thereby threatening all aboard; training and marksmanship standards for air marshalls, who routinely carry arms aloft, are consequently higher than for law enforcement generally. Bars may be another "high risk" environment, but, it can be argued, the relevant restriction is not "place" but "manner," insofar as carrying (or using) a firearm while intoxicated is the relevant hazard. Of course, bars pose a higher risk of confrontation and escalation than other places because of the potential misbehavior of patrons other than sober, licensed carriers; so, there remains an argument for this "place" restriction (notwithstanding that criminals will not respect it, for which reason many licensed carriers might not either).

Research would be useful on this issue, to compare the effects of the laws of states with such a restriction and those without, to see whether lawful carriers commit more misadventure than they prevent in or around drinking establishments. Court houses and airport terminals are exceptional because they are so closely policed that the law-abiding who are disarmed are less likely to encounter armed criminals who successfully ignore the law. However, places like schools, workplaces, commercial establishments, sport stadiums and parks are places where some of the worst incidents of mass violence have occurred that might have been belayed by

armed citizens. The Killeen TX massacre at Luby's Cafeteria is a case in point that galvanized the movement to reform Texas' carry law: Dr. Suzanne Gratia watched as her parents were fatally shot at close range before her eyes, knowing that she could have shot the perpetrator with the pistol she had duly left in her vehicle in order to abide by Texas law at the time. At the least, the controversy over "place" restrictions on possession and carry, whether imposed by government or by private enterprise, calls for close scrutiny of both their empirical and their philosophical rationales.

b. Types of Persons: Legal Disabilities

That certain qualifications should be required for acquiring and possessing firearms, as well as for being licensed to carry or deal in them, is, on its face, among the least controversial of all gun control propositions. Presumably, the general criterion for prohibiting certain types or categories of persons from acquiring or possessing firearms, or certain types of firearm (such as handguns), is being at "high risk" for misusing them criminally or for failing to use them responsibly and safely. However, the specific criteria employed for determining legal disability are not all, or necessarily, risk-relevant. For example, convicted felons are generally not permitted firearms regardless of whether the felony conviction was for a non-violent "white collar" crime; minors are not permitted handguns, regardless of the fact that some minors are more responsible than many of their seniors; being dishonorably discharged from the armed services does not necessarily equate to being at "high risk" for violence or firearm misadventure.

Many of the legal disabilities that disqualify people from acquiring or possessing firearms are also disabilities for the enjoyment of other legal rights or privileges, some may seem more punitive than risk-relevant, while others are simply consequences of lack of citizenship. Some, like addiction to controlled substances, mental impairment or a history of chronic violence, are actuarially relevant to being at high risk for misadventure or criminal misuse of firearms. Some legal disabilities may be more relevant to the risk of self-harm, others to the risk of harming others. Thus, depending on the category of disability in question, it might not make sense to consider people in that category as "high risk." This observation raises the question of what the empirical or philosophical rationale for any given category of legal disability actually is.

The federal Gun Control Act (GCA) of 1968, as amended by the Firearms Owners' Protection Act (FOPA) of 1986, provides the following criteria of legal disability for

purposes of acquiring, possessing, selling, transporting or importing firearms: (1) being under indictment or having been convicted of a crime punishable by imprisonment for a term exceeding one year (often considered a felony-class offense, although standards for distinguishing felonies from misdemeanors can vary); (2) being a fugitive from justice; (3) being an unlawful user of, or addicted to, a controlled substance (as defined in the Controlled Substances Act, 21 U.S.C. 802, Section 102); (4) having been adjudicated as a mental defective or committed to a mental institution; (5) being an illegal alien (fireams possession is not proscribed for legal adult alien residents); (6) having been dishonorably discharged from the armed services; and (7) having been a citizen of the United States and having renounced that citizenship. In addition, one must be 18 years of age to acquire a rifle or shotgun and 21 years old to acquire a handgun. Essentially similar criteria, including being under 21 years of age, disqualify a person for being licensed to carry a firearm concealed in the states that provide or require such licenses.

Some states add alcohol abuse as a disability, which raises the question of what *standard* is or should be used to determine the degree to which a person satisfies a given *criterion*. (For example, tallness is a general criterion for promising basketball players, but different standards or thresholds apply to different positions.) Some criteria carry a cut-and-dried standard: for example, one is either a certain age or not. Similarly for criteria (1) - (7), above. While the standard for being addicted to a controlled substance may be arguable, determining whether someone is a user is simpler. But, for example, what is the standard for being addicted to, or an abuser of, alcohol? Some states use the standard of having been convicted of driving while intoxicated a certain number of times. Being a repeat DWI offender may be a good reason for legal disability, but not all DWIs are alcoholics, not all alcoholics are alcohol abusers or DWIs, and not all abusers get caught as DWIs. Extending the standard to include other evidence can run afoul of privacy and confidentiality issues regarding therapeutic records and relationships, fairness issues regarding discriminating against alcoholics who seek help, or evidentiary issues regarding the reliability of "expert" opinion or other diagnostic indicators (which are especially fallible predictors of violence predicated on mental or emotional difficulties). Similar problems have been encountered by proposals to extend the standard for mental or emotional impairment beyond adjudication or commitment for same, which at least are objective matters of public record. Current controversy revolves around just such efforts to extend the scope, criteria or standards of "high risk" categories.

Two novel disability measures are cases in point: the 1994 Violent Crime Control Act disqualified people with outstanding domestic restraining orders against them from possessing firearms; the Lautenberg Amendment (part of the Omnibus Consolidated Appropriations Act of 1997) makes conviction on, or a plea to, a misdemeanor charge of domestic violence a disability for firearm possession. These two innovations are related insofar as the violation of a temporary domestic restraining order (that imposes a temporary disability) can result in a domestic violence misdemeanor (that imposes a permanent disability). The domestic violence misdemeanor disability became especially controversial because it applies retroactively, does not exempt law enforcement and therefore could cost many officers their jobs for misdemeanor pleas or convictions from anytime before the new law took effect in September, 1996. Victor Keppeler, Director of the Criminal Justice Graduate Program at Eastern Kentucky University, estimated that, with accurate reporting and concerted prosecution of police domestic violence, 10% of the nation's law enforcement personnel (about 70,000) would be prohibited from possessing firearms, on duty or off, and therefore subject to losing their jobs. The unconstitutionality of the retroactive provision of the Lautenberg Amendment has been argued on the basis of Article I, Section 9, paragraph 3 of the Constitution, which says "No bill of attainder or ex post facto Law shall be passed." This and the impact on law enforcement were responsible for putting a public spotlight on the new firearm disability law, but it is more subtly problematic for other reasons.

Senator Frank Lautenberg's rationale for his bill appears unassailable: "My amendment stands for the simple proposition that if you beat your wife . . . you should not have a gun." The sense and sensibility behind the measure are presumably no less valid because the domestic violence in question happens to be classified as a misdemeanor. It has often been proposed that violent misdemeanors, or misdemeanors such as driving under the influence, should disqualify such misdemeanants as well as felons from firearm possession. The problem is that standards for assault or battery misdemeanors involving "domestic violence" vary across jurisdictions and incidents, a source of potential unfairness. For example, a mother who spanked her child in a supermarket and pled to a domestic violence (simple battery) charge brought by a witness rather than bear the expense of a trial would be as liable to disability as a husband who chronically and severely beat his wife and was actually convicted of mayhem. Worse for the intent of the law, domestic violence charges are often functions of trivial or false allegations brought by abusive mates against abused women (for example, women who fight back when

beaten), the very people the Lautenberg Amendment intends to serve, resulting in said women's disqualification from acquiring or possessing a firearm for protection.

Restraining orders in some states can be summarily issued *ex parte*, without a hearing, and, in any case, without any finding of physical abuse or merely on the basis of the complainant's word. Judges are prone to grant orders easily lest they be blamed in case an alleged threat proves real. Restraining orders are notorious for being used as weapons in interpersonal disputes. Thus, mates, children or household members can simply lie in order to get a restraining order for personal revenge and without actual cause, whose issuance may require no hearing with the restrained party or the due process and evidentiary safeguards that apply in a trial. Should the restrained party do anything that can be construed as violating that order, such as entering the premises (her home) from which ~~she~~ he has been retrained, this otherwise non-violent and non-threatening action can become the basis of a domestic violence misdemeanor charge. Consider the case of a woman long abused by her estranged husband. The husband obtains a restraining order against her, causing the firearm in her house, kept for defense against the abusive husband, to be confiscated by the police. The husband subsequently attacks the now defenseless woman and kills her. Such abuse of restraining orders is not unheard of, where a chronic but saavy abuser is the one to file the order as a legal tool of harrassment, or worse. Such anomolies in legal determinations of domestic violence misdemeanors and in the issuance of domestic restraining orders motivate the controversy over expanding the criteria for disability for firearm possession. There is no question that serious domestic violence should be grounds for legal disability, but, it is argued, the seriousness of the offense should at least be discerned and substantiated or, better, reflected in its classification as a felony rather than as a misdemeanor. In any case, the fact that such legal disabilities can defeat part of their purpose by being turned against abused women illustrates how an apparently unalloyed virtue can be problematic.

Another issue regarding types of persons prohibited from possessing firearms concerns the criteria and standards appropriate for obtaining relief from legal disability. For example, the GCA of 1968 did not allow relief from federal disability in the event of a state pardon for the felony in question. On the other hand, relief from federal disability for purposes of possessing a firearm could be granted by the Secretary of the Treasury if the disability had not been incurred for a crime involving the use of a firearm or for a violation of federal firearms law and if the Secretary could certify that the possession of a firearm by the convicted felon in

question would not pose a risk to public safety. One type of convicted felon who might be granted such relief from disability would be a person convicted of a non-violent crime such as theft (as opposed to robbery) or a so-called "white collar" crime such as embezzlement; another might be a woman convicted of killing her abuser who, after serving her sentence, is judged to have acted *in extremis* and to pose no risk of future violence. But, if such a woman had shot her abuser, by the GCA standard she would not qualify for relief. Under the FOPA of 1986, state pardons are allowed to remove federal disability if the person exonerated is not specifically forbidden firearm possession (for example, as a condition of the pardon); thus, an exonerated abused woman who shot her abuser could qualify for relief under the FOPA standard. The FOPA also allows convicted felons to appeal their disability, even disability incurred for the commission of a crime involving a firearm or the violation of federal firearms law, but requires judicial review for granting relief. Procedures for granting relief from legal disability are a partial solution to the problem of unfairly or erroneously imposed disability, but are nonetheless controversial.

c. Types of Firearms and Ammunition

Policy that targets certain activities (such as transfer or sale) or certain categories of person (such as minors or convicted felons) often varies as a function of the type of firearm in question. For example, the federal 21-year age requirement applies to the acquisition of handguns, not long guns, and waiting periods typically apply to handguns, not long guns. A federal license is required to acquire a fully automatic firearm, but in most states no license is required to acquire other firearms, be they handguns or long guns. However, where licenses are required to purchase or own more ordinary firearms, handguns rather than long guns are typically the targets of the requirement. While federal law prohibits possession of all firearms by convicted felons, some states prohibit only their possession of handguns. Presumably, it is the utility and popularity of handguns for criminal purposes or their alleged susceptibility to misuse in general that motivates their differential treatment. Other gun types selected for special treatment include so-called "plastic guns," whose manufacturing requirements are intended to ensure their detectability (see I.C.2.a.ii), machine guns (restrictive federal licensing for whose acquisition was motivated by their potential for facilitating indiscriminate or mass violence and by their consequent popularity with gangsters in the '20s and '30s), and short-barreled rifles and shotguns (whose concealability and popularity for criminal purposes was

the rationale for requiring a federal license for their acquisition or possession, like machine guns). In 1986, the Gun Control Act of 1968 was amended by the FOPA to double the prescribed penalty for any federal crime, in particular drug offenses, if a machine gun or a firearm equipped with a sound suppressor was used in commission of the crime. Similar sentence-enhancements are prescribed by some state and local laws for the use of a so-called "assault weapon" in the commission of a crime.

Machine guns, short-barreled rifles and shotguns and what are called "destructive devices" (for example, explosive ordnance) are strictly regulated under the National Firearms Act (NFA) of 1934 as amended in 1968 and 1986, which requires a transfer tax, FBI background check, federal registration and approval by a local chief law enforcement officer for the issuance of a serial-number specific license to acquire and possess a given NFA weapon, but prohibits civilian acquisition and possession of automatic firearms manufactured after May 19, 1986, except for licensed dealers. Since 1934 (in those states that have not banned NFA weapons), only one violent crime has been committed with a licensed machine gun by its legal owner (a police officer, who unjustifiably shot a felon with whom he had a grievance, using his privately owned submachine gun). When it comes to the most restrictive form of gun control, gun bans, selected targets include handguns generally, the so-called "Saturday Night Special" subcategory of handgun whose putatively objectionable features include inexpensiveness and concealability (which features are supposed to make SNS's both unsafe but attractive to criminals), machine guns (in several states), and so-called "assault weapons." Rationales for selective gun bans are discussed in section V.A.

Certain firearm accessories are also targets of control. For example, so-called "silencers" (a misnomer) or sound suppressors are regulated like machine guns by the NFA and detachable magazines holding more than ten rounds and manufactured after September, 1994, were banned for civilian use by the federal "assault weapon" ban, part of the Violent Crime Control Act of 1994. This act also banned firearms that had any two of the following "military style" accoutrements: a pistol-grip shoulder stock, flash suppressor, or bayonet lug. Specific types of ammunition are also targeted for special regulation or prohibition from civilian use.

i. "Bullet Control"

Regulations on ammunition are also sensitive to type. "Bullet control" is an important dimension of gun control, and "bullet bans" have become an alternative

strategy to gun bans. In a comic but pointed twist on the anti gun-control slogan "Guns don't kill people, people do," comedian Pat Paulsen limed the line "Guns don't kill people, bullets do." Senator Daniel Patrick Moynihan, a tireless proponent of handgun bans, appreciated the political cache of this slogan and realized that if one cannot ban the gun, perhaps one could succeed in banning, or restricting, its ammunition, thereby reducing the gun's utility and use. Consequently, he has sponsored a welter of legislative initiatives, typified by the Violent Crime Protection Bill (S-25) of 1987 that proposed banning .25 and .32 caliber handgun ammunition. The rationale for targeting this ammunition was that it purportedly figured in nearly a quarter of shootings of police officers, a convenient stigma despite the fact that .38 and 9mm ammunition accounted for twice as many shootings. This proposed ban became a dead letter because it was obvious even to legislators sympathetic to Moynihan's ambition to reduce the use of private handguns that, even if such a ban effectively deprived criminals as well as law-abiding citizens of the targeted low-caliber ammunition, the inevitable substitution of higher caliber ammunition would simply prove more lethal. (Many selective gun and ammunition restrictions run afoul of the substitution paradox that, if they are effective, their "cure" will perversely prove worse than the targeted "disease.")

Senator Moynihan has persisted in trying to reduce the utility and use of private firearms through strategicaly targeted "bullet control." Bills targeting ammunition introduced in the 105th Congress in 1997 illustrate the range of these efforts. S-112, The Law Enforcement Officers Protection Act of 1997, seeks to strengthen prohibitions on the manufacture, importation and sale of handgun ammunition capable of penetrating soft body armor (ballistic fabric), so-called "cop killer bullets" (see I.C.2.c.iii on the current standards and issues regarding "armor piercing" ammunition). S-132, The Real Cost of Destructive Ammunition Act of 1997, and S-133, The Destructive Ammunition Act of 1997, seek to restrict the availability of certain expanding, hollow-point bullets (see I.C.2.c.ii on the tactical, wound-ballistic, and moral issues regarding expanding versus non-expanding bullets). The apparent rationale of the restriction is to raise the tax on the offending ammunition high enough to discourage its use while providing revenues to help cover the social costs of firearm injuries (regardless of what type of ammunition was involved); the likely ulterior rationale is to take a "first step" toward more comprehensive restrictions, since selective restrictions predictably prove either ineffective or perverse in their effects, thereby creating a pretext for further restrictions (see V.A.2.viii).

When Moyhihan vetted this strategy in 1993, the proposed sales tax on the targeted ammunition was 10,000%. There is a minor paradox in the proposal's rationale: insofar as the tax, clearly meant to be prohibitive, works to discourage purchase and eventually manufacture, it will reduce the consequent revenue, while social harm continues unabated with substituted ammunition. It is likely that the prospective revenue was not the chief goal, but the promise of revenue as well as the punitive nature of the tax may nonetheless make the idea politically attractive. There are two problems with the strategy, one pragmatic and one concerning fairness. Why punitively tax some but not other handgun ammunition? If the tax works to discourage use, other ammunition will be substituted. If the ammunition substituted is fully jacketed rather than hollow-point ammunition, there will be a risk of a net loss in public safety from over-penetration and of a net gain in the morbidity and fatality of handgun wounds (see I.C.2.c.ii). Less than 2% of the defensive uses of firearms by citizens result in injury. The vast majority of gun-shot injuries are inflicted by criminal assailants. The question then is whether it is either fair or even sensible to impose a punitive tax on the general population of ammunition consumers to pay for the vast majority of damage caused by a small criminal minority.

S-134, The Handgun Ammunition Control Act of 1997, calls for ammunition manufacturers and importers to maintain records on the distribution and disposition of their product and submit annual reports on same to the BATF, an expense likely to increase the cost of ammunition, a likely collateral goal of the policy. A problem with the strategy of increasing ammunition costs is that it is not likely to deter criminals whose demand is unresilient, but it is apt to make training, for both law-abiding civilians and police, more expensive, which raises the question "Is providing a disincentive for training with deadly weapons among their lawful users a sound idea?" The bill also calls for the National Academy of Sciences to make a study of ammunition use and to propose recommendations on the effectiveness of reducing crime by restricting civilian access to ammunition. One question is whether even an outright ban on ammunition for civilians would reduce criminal violence any more effectively than a gun ban. For better or worse, ammunition is easier to make than firearms, although gun powder, like drugs, is easier to detect with dogs and aromatic devices than are gun parts. The pragmatic issue is whether criminal offenders would be more than marginally affected, or affected at all. The law-abiding, whose demand is more resiliant, would be more compliant, which could more than marginally reduce the defensive efficacy of firearms and the deterrent effects of armed citizens

on criminal violence (see III.A.4 and 5, V.B.1 and 2.c). Presumably, the NAS would take account of this trade-off. Anything short of a total ban would induce substitution of more accessible for less accessible ammunition; for example, a substitution of higher lethality shotgun or rifle ammunition in handguns devised to fire it. The net benefit of selectively restricting ammunition, rather than banning its commercial availability across the board is, of course, arguable on the same grounds as selective bans on certain types of firearm, because selective restrictions on types of ammunition would presumably reduce the use of the compatible firearms and result in the substitution of others. A national study of the potential impacts of the various possible scenarios might be as informative as it would be expensive, if it took into account the likely adaptations in both the legal and illicit markets and their net effect on criminal violence.

S-135, The Violent Crime Control Act of 1997, S-136, The Violent Crime Reduction Act of 1997, and S-137, The Real Cost of Handgun Ammunition Act of 1997, would heavily increase taxes on ammunition in certain calibers (.25, .32 and 9mm, because of their frequency of use in crime), perhaps anticipating the presumed recommendations of the NAS study called for by S-134. The same question applies: if the tax induces substitution of .22, .380, .38, .357 Magnum, .41, .44 Magnum or .45 ammunition, what benefit is expected? The remarkably irrelevant rationale given for this particular selection is that the targeted calibers are not seen as being "particularly suitable for sporting purposes" but are the calibers of choice for criminals. Be that as it may, their relevant utility is for lawful defensive purposes and criminals either would or wouldn't change their preferences, which in either case would have no effect on their activities. An analogously ironic consequence of successful bans on short-barreled, smaller caliber handguns such as "Saturday Night Specials," or ammunition therefor, would be substitution by criminals of longer barreled, higher caliber handguns or cut-down rifles and shotguns whose ammunition, by virtue of its higher velocity, would be both more lethal and more capable of penetrating soft ballistic armor. S-135 also calls for the establishment of a Bullet Death and Injury Control Program within the Centers for Disease Control and Prevention (CDC) and its National Center for Injury Prevention and Control (NCIPC), which would restore the CDC funding previously devoted to gun control research that was redirected by Congress in 1996 (see II.B.2). Presumably, the hope is to have the CDC-NCIPC generate rationales for ammunition-restricting policies as it previously generated research supporting firearm restrictions, which research was as

remarkable for its "ingenious speciousness" as for its successful publicity (again, see II.B.2).

The foregoing scatter-gun approach to "bullet control" or 'bullet bans" as surrogates for gun control and gun bans will predictably recapitulate the well-worn arguments of the last quarter century concerning the latter. The call for government-funded national studies, despite the evidently foregone conclusions those studies are supposed to reach, will perhaps help to spotlight the old arguments for public scrutiny because tax dollars are expressly at stake. Apart from ammunition restrictions whose goal is to reduce the utility and use of private firearms generally, there are policies whose goals are ostensibly to promote public safety and reduce gratuitous injury without hampering lawful firearm use. For example, policies restricting access to ammunition utilizing "armor piercing" and expanding bullets aim, respectively, to protect police officers from rounds that can penetrate their ballistic vests and to make gun-shot wounds more humane. Restrictions on these types of ammunition are instructive because, along with the well intentioned safeguards they aim to provide, there are important technical misunderstandings that confound public controversy about them.

ii. "Humane" and Expanding Bullets

The idea of making the shooting of another human being (however legally or morally justified the shooting may be in defense of innocent life) "humane" is arguably as oxymoronic as the idea of making firearms "safe." Reflection, of course, allows that the "humaneness" and the "safeness" of deadly weapons is relative: firearms and their employments or effects can be more or less "safe" or "humane." But that relativity is crucially a function of the human operator. Firearms and their ammunition are designed for lawful users and (sporting uses aside) for those worst-case occasions when they are employed justifiably against wrongful aggressors. For all lawful defensive employments, bullets are intended to injure and to injure maximally; there is nothing kind, gentle or humane about deliberate injury with a firearm, even though the proper intent of a justifiable shooting of another human being is neither to kill nor to wound gratuitously, but simply to stop wrongful hostile action. Defensive ammunition is designed for maximal "stopping" effect in justifiable shootings; it is not designed as some sort of felicitous compromise between minimal and maximal injuriousness just in case it should be inadvertantly or wrongfully, rather than justifiably, employed. The idea that ammunition should be devised to

no. It doesn't fragment. The argument was the shapedge.

minimize human hurt and injury in case it is irresponsibly employed or the wrong human gets shot is both seriously ignorant of the technological possibilities and seriously confused about the essential nature of the tool and, more importantly, about the residence of responsibility for its use and effects. The impetus to find more humane ways of forcibly and effectively subduing wrongful and lethal threats to the innocent has arguably reached the point of diminishing returns with current firearms technology; the effort is better directed to investigating the futuristic field of "less lethal" coercive technology (to which research funded by the National Institute of Justice is duly devoted).

Nonetheless, the idea of making gun-shot wounds more humane, on its face, is also difficult to fault. It is important to be specific about the ways proposals for achieving this laudable goal are often misguided. New Jersey, for example, prohibits the use of expanding, hollow-point handgun ammunition by civilians, and such a ban was urged at the national level in 1993 when a particular brand of hollow-point bullet, fearsomely labelled the Black Talon, was alleged to be excessively destructive of human tissue and, therefore, inhumane. Part of the objection to the Black Talon bullet was also the likelihood that its jacket would fragment and endanger surgical personnel clearing the wound channel (an appreciable concern in the era of AIDS), but this is a potential liability of any hollow-point bullet (and there are methods for safely locating and extracting bullets fragments). The alternative to the wide variety of expanding, hollow-point (HP) bullets, and the one mandated for handgun ammunition sold to civilians in New Jersey, is the full-metal jacket (FMJ) or "hardball" bullet of military fame. The HP typically also has at least a metal semi-jacket (SJHP), but the lead core is exposed at the nose and hollow (and, often, pre-fragmented) to some depth in order to facilitate expansion; whereas the lead core of the FMJ, as its name implies, is completely enveloped in a metal jacket except at the base. Consequently, FMJ's tend to penetrate tissue farther than HP's as a function of their not expanding beyond their unfired diameter, such that the penetration of FMJ's can result in the complete perforation of a human body, thereby creating a hazard to someone behind the target. To put the tactical and wound-ballistic issues between expanding and FMJ ammunition in perspective, some history is helpful.

An early brand of expanding bullet was developed and manufactured at the British Dum Dum Arsenal located near Calcutta, India, and used by the British on India's northwest frontier and in the Sudan in 1897 and 1898. The dumdum (as it came to be called) was a jacketed .303 caliber rifle bullet with the jacket nose left open to expose the lead core and enhance bullet expansion. Reportedly, some soldiers would

cut or cross-cut the exposed lead nose with a knife to further enhance expansion. Hence, any lead or lead-nosed bullets so modified by hand are sometimes referred to as dumdum bullets. Also, consequently, "dumdum" is often misapplied as a term for any commercially manufactured soft-nose or hollow-point bullet. The British did not pursue further development and improvement because the Hague Convention of 1899 (not the Geneva Convention of 1925, as commonly thought, which largely dealt with gas warfare) prohibited future use of such bullets in warfare.

Hollow-point bullet technology, one branch of expanding-bullet technology, was not developed until the latter half of the 20th century. It is noteworthy that the modern convention of war that prohibited expanding bullets and mandated full-jacket "hardball" ammunition could afford to be indifferent to the tendency of FMJ bullets to over-penetrate or perforate their targets where the battlefield backdrop of those targets was presumably also hostile. By contrast, for environments inhabited by non-combatants, such as most law enforcement and civilian self-defense settings, over-penetrating FMJ's are a moral and legal liability. For purposes of modern warfare, wounding enemy soldiers proved preferrable to killing them because a wounded soldier requires many times the logistical support of a dead soldier. Wounding with FMJ's may also be more humane by virtue of creating neater wounds (a factor of importance in battlefield conditions where medical attention may be neither immediate nor adequate, as opposed to contemporary civil situations, where medical attention to gun-shot wounds tends to be both timely and intensive). However, FMJ bullets of many varieties over distance eventually yaw or tumble in flight, which greatly enhances the wound channels they create. But, at close quarters, on average, one might need to fire several FMJ rounds to obtain the same stopping effect as from an expanding round. The tactical aim is to produce a cessation in the opponent's hostile action as quickly as possible, which is precisely what the HP is devised to do more expeditiously than the FMJ, while not perforating a human target to become a liability downrange. Multiple FMJ wounds can prove fatal in the long run, whereas an HP is more likely to stop hostilities in the short run and can prove less lethal in the long run. Therefore, it is not clear what the net advantage of FMJ's really is. But, the theory was to minimize the morbidity and, thereby, the fatality of wounds for combatants on the assumption that wounded soldiers would cease fighting and become a logistical liability to their side.

Ammunition standards beyond the military battlefield (for hunting, law enforcement, or civilian defensive purposes) require quicker incapacitation and less penetration than fully jacketed bullets afford. In these applications beyond the

battlefield, expanding bullets are calculated to be more humane, all things considered. For example, hunting rounds must effectively incapacitate game animals to prevent the escape and slower death of wounded animals; consequently, expanding bullets are now mandated by law for hunting in many jurisdictions. For defensive and law enforcement purposes, expanding bullets are likewise morally and legally preferable: quick incapacitation of offenders is desired, while over-penetration and consequent ricochet pose a hazard to innocent bystanders; expanding HPs are more likely to create an incapacitating wound, are less likely to over-penetrate and have a much lower ricochet potential than FMJs. Quick incapacitation of an offender by an expanding bullet is actuarially less likely to prove fatal than the requisite multiple hits by fully jacketed bullets. By contrast, quick incapacitation by non-expanding bullets is highly unlikely, resulting in more rounds having to be fired, creating a higher rate of environmental hazard to innocent bystanders, a higher actuarial rate of fatality, as well as a higher risk of stopping failure to the defender herself.

Thus, while there are different performance standards for military (full-metal jacket) and non-military (expanding) bullets, in its respective context each standard is intended to be more humane than its alternative. The difference in standards for whichever proves more humane is explained by the very different settings, dynamics, and objectives between typical military and civil applications. Contrary to the popular myth that holds expanding bullets to be inherently inhumane based simplistically on their prohibition for warfare by the Hague Convention, expanding-bullet development and the more recent development of hollow-point bullet technology has also been driven by ostensibly humane ends. The notion that humaneness dictates restricting civilian defensive ammunition to military "hardball", when all potential effects are considered, is as dubious as it may be well intentioned.

iii. "Armor Piercing" and "Cop Killer" Bullets

The term "armor piercing" is ambiguous as between hard-armor (metal, glass) piercing and soft-armor (ballistic fabric) piercing. In addition, there are two different types of criteria for defining "armor piercing": bullet *composition* or design and *terminal performance*. The statutory category of "armor piercing" is often limited to bullets for handgun ammunition, because most rifle ammunition, whatever its bullet construction, is capable of penetrating ballistic fabric by virtue of its velocity. Thus, there is further ambiguity in the fact that there are sporting

(hunting and competition) handguns commercially available that are chambered for a variety of rifle ammunition. Regarding composition, an armor-piercing bullet is defined by the Law Enforcement Officers Protection Act (LEOPA) of 1985 as a handgun bullet consisting of a hardened core composed of any of a variety of specified metals that are harder than lead or lead alloys. A bullet's composition and construction are, of course, related to its terminal performance against ballistic barriers, but more so is its velocity, which is a function of the cartridge's propellant charge and the firearm from which it is fired: sufficient velocity can render even a lead bullet soft-armor piercing. A potential ambiguity in defining terminal performance as soft-armor piercing lies in the fact that soft body armor varies in the level of protection afforded, from relatively light undergarments, which are meant to be worn routinely, to very heavy flak-type jackets incorporating ceramic or metallic ballistic panels, which are typically employed by special response teams.

The LEOPA prohibited (for civilians) armor-piercing ammunition defined very specifically, in terms of both projectile composition and terminal performance: ammunition having bullets with a hard metal core or wholly composed of metal harder than lead or lead alloy such as would render the projectile capable of penetrating soft armor even when fired from a handgun at handgun bullet velocities. Later, the federal Violent Crime Control Act of 1994 defined "armor piercing" more broadly regarding composition, as any ammunition having fully jacketed projectiles over .22 caliber whose jacket weight is more than 25% of the total projectile weight. Proposed federal, state or municipal regulations on armor-piercing ammunition may define it more broadly regarding terminal performance, as any ammunition whose projectiles are capable of penetrating ballistic fabric (soft armor), which would thereby include most conventional rifle rounds (for which some handguns are chambered) and high-velocity handgun rounds: again, projectiles with high enough velocity will penetrate soft armor, while projectiles of low enough velocity will not penetrate soft armor, regardless of their design or composition. Revision of the composition and terminal performance criteria of "armor piercing" ammunition in the LEOPA of 1985 was instigated by the controversy over the original so-called "cop killer" bullet, the notorious "teflon-coated" bullet, about which there was and remains significant misunderstanding (both technical and criminological). The forms and extent of the misunderstanding pervading this historic "cop killer bullet" controversy are instructive for assessing current and future "cop killer bullet" proposals. The following are major points of misunderstanding.

(1) *That the "teflon" bullet was armor-piercing by virtue of its teflon coating; that is, that the teflon itself rendered the bullet more penetrating than other bullets.* The official designation of the "teflon" bullet was KTW, an acronym for the last names of its inventors, Dr. Paul Kopsch and two police officers by the name of Turcus and Ward, who contrived their innovation in 1968, nearly two decades before it, like the mythical undetectable "plastic gun," precipitated national controversy. The conical KTW bullet was constructed of bronze or sintered iron for purposes of piercing glass and metal (such as in windshields and car doors). For this intended purpose, KTW ammunition is also of very high velocity. Its hard-armor piercing capability is, thus, a function of both velocity and bullet hardness. However, its effectiveness against hard surfaces in the field is aided by the friction-enhancing property of its teflon coating. The teflon coating of the KTW was devised specifically to allow the bullet to grab more effectively when it encountered a glass or metal surface, especially when striking at oblique angles. Incidentally, the teflon coating also serves to protect the bore of a firearm from excessive wear by the hard KTW bullet. Teflon has paradoxical properties, wherefor it has been used as a slippery stick-resistant coating on cooking utensils but also for the tips of canes and walking sticks to improve their ability to grab and not slip on hard or slick surfaces. Thus, the teflon on the KTW is for *grabbing*, not for *penetrating;* it aids penetration merely insofar as a bullet that glances off its target cannot penetrate the target.

KTW ammunition is and always has been marketed only to the military and law enforcement; it has never been available to the general public. However, in the early 1980's, Congressman Mario Biaggi began to raise a politically opportunistic hue and cry about "teflon bullets," which he touted as "cop killer bullets" designed to penetrate soft body armor. The national media in turn created intense, widespread and persistant publicity about "teflon" and "cop killer" bullets designed to defeat police body armor (which, of course, was not the purpose of the KTW, designed by police officers, but which was nonetheless a capability of KTW's). A movement ensued in Congress to ban all such "armor piercing" ammunition, with the then notorious KTW bullet at the center of the controversy. The media campaign and the initially proposed legislation were misleading and misinformed in the supposition that the KTW bullet was armor-piercing by virtue of its teflon coating. According to Dr. Kopsch, in interviews he gave in the wake of the fracas, the teflon coating actually *retards* the penetrating capability of the bullet on fabric such as soft body armor. It was and is true that many KTW rounds can penetrate most soft body armor, but not because of their teflon coating: high-enough velocity bullets (ordinary

jacketed or even lead bullets) will penetrate soft body armor. A teflon coating, while useful for grabbing glass or metal surfaces, does not improve the penetrating ability of any bullet that would otherwise be stopped by ballistic fabric: if a given round would not penetrate a ballistic vest, its chances of penetrating that vest after being equipped with a teflon-coated bullet would only decrease.

(2) *That the KTW ammunition or bullets were available to the general public.* They never were, by company policy, although they were not outlawed for general consumption until the final revised version of the LEOPA was eventually passed in the wake of the "cop killer bullet" furor. However, until finally revised to win over its opponents, the legislation was so broadly crafted as to ban virtually all rifle and much handgun ammunition.

(3) *That KTW ammunition was being used by criminals to kill police officers.* On the contrary, there has never been a documented case of a police officer killed or shot with a KTW bullet (and the FBI documents all attempts to incidents of police-officer fatality). However, as a possible consequence of the media publicity on "cop killer bullets" and their presumed target, soft body armor, the number of police officers shot in the neck or head (areas not protected by ballistic vests) increased (another kind of untoward "substitution" effect). In the month following major network programs in 1982 renouncing the KTW for its ability to penetrate soft body armor, four officers were killed by neck or head wounds (two in Chicago, one in Detroit, and one in Columbus OH). Richard C. Davis, President of Second Chance, Inc., the first and largest manufacturer of soft body armor, put the KTW flap in perspective in his testimony before Congress in March, 1982: "I am probably in a position to be more sensitive than anyone to reports of KTW or other armor-piercing ammo being used by criminals to penetrate vests. In spite of news stories, it just hasn't happened. . . . My general feeling is that there is approximately a hundred times greater chance of [an officer] being killed by a head shot due to this vest publicity than there is [of] a criminal seeking out exotic armor-piercing ammo and then deliberately shooting a policeman with it."

(4) *That it is possible to ban all ammunition capable of defeating soft body armor without divesting ordinary citizens of most ammunition used for hunting, other sport, and self-defense.* The capability to penetrate soft body armor is primarily a function of velocity and possessed by virtually all rifle and much handgun ammunition. Many sporting handguns fire rifle rounds. It is not possible to ban soft-armor piercing ammunition without banning most ammunition, which is

"armor piercing" if the criterion of "armor piercing" is the ability to penetrate ordinary ballistic vests devised for daily wear.

The mythic proportion and durability of misinformation about KTW ammunition, its avalability and capability, is naturally reflected in the entertainment media. For example, the notorious "teflon bullet" is the plot pinion in the Hollywood movie *Lethal Weapon 3*, where a 9mm pistol version of the KTW is featured not only as the criminals' ammunition of choice (which it has never been) but also as capable of easily piercing several inches of hardened steel on a bulldozer blade (which is absurd, regardless of the cartridge type). Another unfortunate consequence of the misinformed KTW publicity is that some law enforcement personnel have evidently believed it. For example, on one nationally syndicated "reality TV" program, *Cops*, in an episode first broadcast in January 1992 (several years after the "teflon bullet" scare), the officers on the scene confused the Nyclad bullets in a confiscated weapon with the "teflon bullets" of KTW fame, thus further reinforcing the false public impression that criminals were obtaining and using the KTW. (Nyclad is a trademarked synthetic coating used on lead bullets to reduce the hazard of lead vaporization on indoor ranges, which coating also serves to protect the bore from leading.)

The lesson from the political alarm raised over "armor piercing" or "cop killing" bullets is that the criteria proposed for selectively restricting ammunition, and the purported benefits of the proposed restrictions, need to be carefully and competently scrutinized as well as weighed against negative impacts on civilian interests in ammunition that is optimal for defensive as well as sporting purposes.

3. The Restrictiveness of Regulation

The restrictiveness (or permissiveness) of regulation is clearly one of the more controversial features. Bans or prohibitions are, in one sense, as restrictive as gun controls come, but can be more or less selective in their scope, regarding the types and number of firearms banned. Licensing requirements are paradigmatic examples of how restrictiveness (or permissiveness) is relative, a matter of degree, and a function of the relevant dimensions of selectivity and severity. Related dimensions of restrictveness include the subjectivity or objectivity of the selective criteria employed, the degree of difficulty of meeting the screening or licensing criteria, the kind and number of disabilities that bar applicants, the number or types of people targeted or actually affected thereby, the number and kinds of activities restricted or

prohibited, the number and kinds of places where firearm-related activities are proscribed, and the number and kinds of firearms targeted or affected. Total gun bans that prohibit access to all firearms by all civilians are examples of one extreme in restrictive policy, while more permissive licensing is an example from the other end of the spectrum. Systems for licensing concealed carry illustrate how restrictiveness, or permissiveness, can vary in manner, dimension, and degree.

a. Permissive and Mandatory Licensing

A paradigm of permissive licensing is the national rule for states' licensing of legal drivers of motor vehicles: anyone who meets certain, fairly objective criteria (for example, being of certain age, passing a written exam and operator's test, paying a fee) *must* be granted a license. An example of more restrictive licensing is that for pilots of commercial passenger aircraft, bus drivers or even commercial truck drivers who, for obvious reasons, are required to demonstrate knowledge and skills not demanded of automobile drivers. The type of permissive licensing associated with drivers' licenses is known as *mandatory* licensing as contrasted with *discretionary* licensing, which typically is very restrictive in effect (although, by definition, it can be very permissive, at the discretion of the licensing authority). Mandatory licensing can be more or less permissive or restrictive in its selective criteria without allowing discretion in deciding who qualifies on the criteria.

Regarding gun control, non-discretionary or mandatory licensing laws have come to be called "shall issue" laws because the law mandates that the licensing authority "shall issue" the license in question if the applicant meets the stipulated criteria. Characteristically, mandatory licensing schemes, in contrast to discretionary licensing regimes, also employ tolerably objective criteria that allow less judgmental discretion on the part of licensing authorities. Regarding licenses to carry concealed firearms, typical criteria for shall-issue licensing include being of a certain age, having no record of criminal conviction or involuntary psychiatric commitment, paying a reasonable fee, providing finger prints, and passing an accessible and affordable certified course on relevant law, safety standards or marksmanship. Some shall-issue statutes require the applicant to specify self-defense as a reason for a license for concealed carry of a firearm, but this is a *pro forma* requirement for the record: the applicant does not have to demonstrate special "need" and authorities are not allowed to question the validity of the reason. From 1987 through 1996, the number of states with "shall issue" licensing or

equivalently permissive provisions for concealed carry increased by over 50% to 31, and proposed legislation was pending in several other states.

Some advocates argue for adding an enforcement dimension to mandatory licensing laws, insofar as they are supposed to be mandatory upon licensing authorities, such as penalties for those who abuse their authority or provisions to compensate litigants who win appeals against such abuse. For example, Pennsylvania added such a penalty in 1989 for sheriffs who exact fees (previously a matter of local discretion) in excess of what state law requires. Some licensing authorities refuse to approve any applicant who fails to show sufficient need in their view even when state law does not require proof of special need and the applicant otherwise qualifies on the statutory criteria. Such discretionary policy can, of course, be actionable on statutory or state constitutional grounds. For example, an Indiana Court of Appeals found in such a case (*Schubert v. DeBard* 1980) that a carry license could not be withheld merely because an administrative official had subjectively dismissed the applicant's need to defend himself; to uphold such an administrative policy, the court said, "would supplant a [state constitutional] right ['to bear arms for . . . self-defense'] with a mere administrative privilege." However, while the latitude of an official's own discretionary policy can be circumscribed by litigation, the onus and cost is upon the applicant discriminated against to bring and make the case. Where there are no penalties for administrative policy that pushes discretion too far, local licensing policy can be flagrantly arbitrary (such as discrimination based on ~~gender~~ sex or race), precisely the factor that prompts argument for state (or federal) preemption of firearm licensing as well as for "shall issue" laws with qualifying criteria that preclude subjective judgment (see also V.B.1).

b. Restrictive and Discretionary Licensing

The permissiveness or restrictiveness of licensing policy is, of course, a matter of degree. All licensing policy is *per force* restrictive insofar as it restricts permission to engage in some activity to license holders and restricts licensing to those who both apply and meet the criteria for the license in question. The degree of restrictiveness of licensing policy can be a function of the following factors: (a) the selectivity of the criteria, and the consequent cost or difficulty posed for people of average capacity or means in meeting any criterion; (b) the imposition of "subjective" as opposed to "objective" criteria (that is, the degree to which satisfaction of any criterion is a function of an authority's subjective judgment, like

"good character," as compared with criteria susceptible of more objective determination, like whether a person has a criminal record); (c) the degree of restrictive discretion *de jure* exercized by the licensing authority, as expressly allowed by the enabling law; or (d) the degree of restrictive discretion *de facto* exercized by the licensing authority, which can push the envelope on what the law allows; and (e) how the licenses themselves are restricted in the scope of what they permit (a license to acquire, possess or carry a gun can be required for each firearm, be limited to a type of firearm or cover any number or types of firearms) or in the kinds of places where they are valid (licenses to carry concealed handguns are typically valid only in the state where they are issued and carry can be prohibited in some or all ~~federal~~ government buildings, bars and other places).

Examples of (a) would be an expensive required training course, a prohibitive fee, or the requirement of extraordinary marksmanship for a license to carry a concealed firearm. An example of (b) is a criterion of "special need" or "good reason" for a license to own a handgun or to carry it concealed. An example of (c) is a state-granted power of local chief law enforcement officers (CLEOs) to set their own variously discriminatory standards of "special need" or "good reason." An example of (d) is the discretionary interpretation of a subjective criterion like "special need" so as to disqualify applicants regardless of their demonstrable "need." For example, some CLEOs categorically refuse to license women or minority applicants, which discrimination has nothing to do with "need." The city of Los Angeles categorically refused to allow any claimant of "need" to qualify until a civil suit forced the city to be more discerning; while the city's *de facto* policy was ultimately conceded to be unlawful, it nonetheless effectively banned concealed carry for two decades. The difference between (c) and (d), then, is the extent to which the discretion exercised in the latter case is so restrictive as to be actionable under the letter or intent of the enabling legislation (or on constitutional grounds). However, a licensing authority's discretionary ability to effect extremely restrictive licensing, especially on the basis of highly subjective criteria, is limited only by applicants' willingness and ability to assume the burden of litigation. Hence, provisions for compensation of litigation costs to winning appellants can be an important factor influencing the restrictiveness of discretionary licensing policy (see also V.B.1)

II. EVALUATING GUN CONTROL POLICY

A. Dimensions of the Task

One basic challenge for either proponents or opponents of any particular gun control policy is to show, respectively, that the policy is justifiable (desirable and permissible on balance) or that the policy is not justifiable (either undesirable or impermissible on balance). This task entails discerning what counts as good or relevant grounds (evidence, reasons, argument) in the case at hand as well as methods for adjudicating disputes about what counts as good grounds. The task enjoins disputants to seek some consensual notion of how to try claims of fact and value in a fair and rigorous way. Such methodological notions are often themselves contestable but nonetheless presupposed whenever we join a social-value controversy over what is a "good" policy or the "best" policy in any instant case. The task of evaluating and, at bottom, justifying social policy supervenes the interest of proponents and opponents alike in winning a political contest (a debate, popular poll or referendum, legislative vote, judicial or administrative decision), however legitimately, because a political or judicial victory for any given policy does not by itself ensure that it is a good policy let alone the best policy. Current policy can be criticized and policy proposals are certainly arguable, on empirical or philosophical grounds, independent of their political or judicial disposition. What, then, is involved in the evaluation and justification of a social policy, especially one that presumes to restrict or permit access to lethal instruments of both violence and personal defense?

Consider the famous inscription attributed, variously, to a Winchester rifle and to the Colt "peacemaker" revolver (*aka* "the great equalizer"): *Be not afraid of any man, / No matter what his size; / When danger threatens, call on me / And I will equalize.* But what about guns in the wrong hands, which also murder, maim, and terrorize? If we *could* eliminate all recourse to firearms by felons and fellow citizens alike, *should* we not? If gun eradication or domestic disarmament were *feasible*, would it not be *desirable* and *permissible?* Short of complete eradication or disarmament, if more modest measures were both feasible and *efficacious* in reducing death or injury by gun, would such measures not be desirable, even *obligatory?* From a philosophical perspective, the *pro forma* answer is *not necessarily,* because these questions are ambiguous and the standards of "desirable," "permissible," or "obligatory" may be contested, even apart from the factual issues of the feasibility or efficacy of any policy. Further, feasibility and efficacy are often

matters of dispute themselves and, to some gun control advocates, apparently irrelevant. Whatever we opine, hypothesize or find on the *feasibility* or *efficacy* of a social policy, there can remain controversy about policy goals and the *desirability* of those goals, about what it is *justifiable* to do or what, on balance, we *should* or *may* do. Controversies of fact and value collide: *ought* arguably implies *can;* proposals about what *should* be done must make and substantiate empirical assumptions about what *can,* in fact, be done (feasibility) and to what effects or consequences (efficacy). But the putative facts of the matter are arguably not sufficient of themselves to determine what should or may be done (justifiability).

In a convenient if artificial division of labor, our sciences (like criminology) purport to try *the facts* in question, while normative disciplines (like ethics) purport to weigh *the values* at stake. Less conveniently, proponents and opponents of any social policy incur both burdens, the trial of both facts and values. But the considerations or issues taken to be *relevant* or to merit *priority* in evaluating policy, as in evaluating anything else, can vary with perspective.

B. Salient Perspectives on Gun Control

The following are four salient perspectives on gun control that emphasize different sorts of consideration or, in the case of strategic (ultimate or ulterior) goals and constraints, different priorities vying for public attention and allegiance. These perspectives are not mutually exclusive, inasmach as they all represent bodies of knowledge or learned disciplines relevant to evaluating gun control policy; indeed, any viable ethic of public policy dispute would enjoin us to consult them all. However, partisan strategies often assume the authoritative mantle of one or another of these perspectives, so it is useful to examine critically how they are employed. (Other perspectives relevant to the evaluation of gun control policy but that have not been saliently employed include risk analysis and management, in whose literature the topics of firearm risks and gun control are virtually absent.)

1. Criminology and Criminal Justice

Criminology studies, among other things, the behavior of criminals and influences thereon, including the feasibility and efficacy of policies aimed at reducing criminal violence. Criminal Justice, among other things, is concerned with the law and other norms governing agencies and policies tasked with reducing criminal violence.

Criminal violence is a natural focus from this perspective, as is gun control policy whose strategic priority is reducing criminal violence, which by some lights (see II.C.2) was the exclusive focus of gun control research and policy into the 1980s. But the other side of the criminology/criminal justice coin is concern with non-criminals as victims and resistors and non-criminal activities (such as legal firearms commerce and ownership) as either enabling or deterrent influences on criminal violence. While criminology and criminal justice as such heed the distinction between justifiable and criminal homicide, their perspectives may be agnostic regarding how non-criminal violence, such as gun accidents and suicides, should be addressed.

However, researchers who are ostensibly criminologists are, fundamentally, social scientists who are not limited by artificial disciplinary boundaries; in fact, they assume a broader social-scientific purview on gun violence and policy that embraces non-criminal violence such as suicide and accidents, and are duly concerned with the reduction of all forms of gun crime and violence. While criminology, broadly construed, is the paradigmatic social-scientific perspective on the *empirical* issues of gun control's feasibility and efficacy and criminal justice is concerned, at bottom, with the *justifiability* of criminalizing law, the public health perspective also figures prominently in current politico-scientific controversy, while constitutional philosophies affect both the justifiability as well as the political feasibility and efficacy of many gun controls.

2. Public Health

Insofar as an exclusive preoccupation with reducing criminal gun violence is a limited strategic perspective for gun control (at least half of all gun deaths are suicides), the public health perspective evolved in the 1980s is an important complement. The public health perspective today is concerned with addressing many contributors to human death and injury, not just disease; hence, the establishment of a division within the National Institues of Health (NIH) and its Centers for Disease Control and Prevention (CDC), the National Center for Injury Prevention and Control (NCIPC). There is little question that expanding society's and government's focus from criminal gun violence to include non-criminal injury is salutory; the surprise would be that it was ever otherwise (which, arguably, it was not). But what has come to be known, by advocates and critics alike, as "the public health approach" (PHA) to gun control policy has evolved from a *research perspective* on non-criminal and unintentional

gun injury into a strategic *political agenda* that, on its face, appears benevolent and benign but that has proven very controversial. It is useful, then, to distinguish between the general public health perspective, which is complementary to the study of human injury (including gun suicide and accidental death), and the PHA as a strategic policy perspective with a specific political agenda.

A general public health strategy aims to reduce all death and injury (by gun or otherwise), specifically avoidable death by suicide and accidental injury. Under the same mantle of medical-scientific authority, the PHA political strategy aims to advance this laudable goal by reducing private gun ownership and use. The problem, then, with PHA as a research strategy is its predisposition to find against non-criminal firearm possession and use. While it may be perfectly possible for scientific research to prove foregone conclusions, otherwise known as working hypotheses, which may well be firmly held, the results are not dispositive for the further step of advocating a particular public policy. The goal of reducing gratuitous death and injury is apparently beyond reproach, but its ostensible virtue and benevolence can obscure other important values along the road to policy goals. By analogy, medical ethics and public health policy have long recognized that the medical imperatives of doing no harm, preventing injury and preserving life are inadequate for sorting out the social and ethical dilemmas of medical practice itself: there are other values at stake (for example, individual autonomy, dignity, equity amidst scarce resources). Similarly, there are other values at stake in the gun control controversy besides the reduction of death and injury (IV) and sides to firearm use besides injury (III.A.4-5).

The general perspective of public health as such is properly agnostic on matters of essential concern to the criminology/criminal justice perspective: the distinction between justifiable death or injury and criminal violence, and such positive role as legally held firearms play in reducing or defending against criminal violence. From a public health perspective as such, injury is injury and something to be prevented, not just treated: the ramifications of preventative medicine can quite naturally include efforts to reduce access to and use of lethal instruments such as firearms. Hence, several health maintenance organizations encourage doctors to advise their patients against keeping household firearms as a health risk, the AMA has officially supported all manner of gun control proposals at the federal level, and the CDC/NCIPC has supported an intensive research program expressly devised to demonstrate that firearms pose a public health risk far greater than any social benefit attributable to their legal ownership or use. While this research program is purportedly social scientific, its prolific publications appear in prestigious medical

journals such as the *New England Journal of Medicine* (NEJM) and the *Journal of the American Medical Association* (JAMA).

It is natural that public health professionals should take a social scientific turn in the interest of understanding the risk factors and mechanisms or "epidemiology" of human injury as well as disease. While the expansion of concern by the public health community is a welcome supplement to criminological and criminal justice concerns, there has been a decade-long controversy surrounding the federally funded studies of the PHA cohort within the public health community. The level of controversy finally caused Congress in November of 1996 to mandate the redirection of all CDC/NCIPC funding devoted to firearms-related research. The charges vetted in Congressional hearings against the CDC-supported research program included the use of federal research moneys for political purposes and the violation of scientific canon and ethics. The most comprehensive scholarly review of the public health research behind this controversy was done by an interdisciplinary team of two Harvard Medical School professors, a criminologist and a bio-statician. "Guns and Public Health: Epidemic of Violence, or Pandemic of Propaganda?" (Spring, 1995, *Tennessee Law Review*).

As a strategic perspective on gun control, the PHA focus on death and injury and the view of firearms themselves as the "vectors" of death and injury are effectively, if not intentionally, biased in important regards. The analogy likening firearms to what epidemiologists call "vectors" of disease, such as bacteria or virus carriers like mosquitoes, is problematic as a premise for research design in two ways: guns are not animate, as are viruses and bacteria; and gun-related injury is also a function of the behavior of animate agents (people) possessing intentionality, unlike viruses and bacteria. The PHA research program, modelled on an epidemiological or disease metaphor, quite naturally focuses on firearms-related pathology, death or injury, but proves arguably myopic in framing its results.

A telling example of such a result is perhaps the most notorious statistic abroad in the gun control debate, the finding of a highly publicized 1986 NEJM article that a gun in the home is 43 times more likely to be used to kill a family member or acquaintance than to kill an intruder. This suggests, and is meant to suggest, frightfully bad odds for people who keep a gun in the home. (Eighty-six percent of the gun fatalities were suicides and 12% accidents, making the ratio of justifiable to criminal homicides 1 to 5, which still looks like a very bad bargain.) The imputation is that the presence of guns in homes, like deadly viruses, are much more apt to bring death to the user or her loved ones than anything good. The statistic itself is

unassailable, the straightforward result of simple arithmetic on the gun fatalities that occurred over five years in King County WA homes. It is the focus on fatalities as the signal measure of the risks/benefits of household firearms that is misleading: less than 1% of defensive uses of firearms are fatal (see III.A.4), so intruders *killed*, as compared to householders or acquaintances killed, is an incomplete measure, just as felons killed by police officers is not the whole, or the most significant, story on the protective value of the police.

In addition, the focus on the gun as the "vector" of the pathology (death) to the exclusion of the criminologic and demographic profile of the killers and their victims ignores critical dispositional and environmental factors: the vast majority of householders and their acquaintances who perpetrate or suffer homicide or fatal accident by gun have certifiable histories of violence, recklessness, substance abuse or drug dealing and are no more representative of risks endemic to the general population of gun owners than the deaths of people who drink and drive are representative of all drivers' risks. Cruder numbers provide some global perspective: in a given year, the ratio of all gun fatalities (at, say, 40,000) to gun owners (at 60 million) is .00066, .066% or 7/100ths of 1% (but see the more specific comparative frequencies in III.A.4). The horrific looking NEJM "odds" for people who keep a gun in their home is an artifact of the PHA study's strategic perspective: an exclusive focus on pathology (fatalities), the consequent comparison with intruders killed rather than the whole story on defensive gun use (III.A.4), a study sample consisting of gun-death homes unrepresentative of gun-owner households generally, and an emphasis on one "disease vector," the gun, to the neglect of other likely risk factors.

The signal 1986 NEJM study exemplifies both the PHA *research* strategy, charitably characterized by Bruce-Briggs as "ingenious speciousness" (Kleck, 1991, 129), and the PHA *political* strategy, whose ostensible goal is to reduce gun death and injury generally by discouraging gun ownership and encouraging restrictions on same. The PHA strategy is so named because it is modelled on public health programs that seek to reduce disease by eradicating or innoculating against disease vectors such as virus carriers. While social science and medical science are properly allied, medical and epidemiological models risk becoming mere metaphors when applied to social scientific matters. There are limits to the analogy between disease control and injury control. Of course, not all firearm-related research by health professionals is specious or predisposed to find against the net utility of privately owned firearms: but the research promoted as the "public health approach" to gun control, reliance on epidemiological metaphors like disease vectors, and an exclusionary focus on

pathology (death and injury) unduly limit perspective on the harms and benefits of firearms.

3. Conflict Resolution

The complementary criminal justice and public health perspectives on gun control may each be defined by the priority they place on a specific social goal, criminal violence reduction and more general violence reduction, respectively. The conflict resolution perspective, like the constitutional and ethical perspectives outlined below (II.B.4 and II.C), is defined not by a specific social goal that it would impute to gun control policy as such, but rather by the procedural side-constraints and perspective that it would urge upon the process of public policy dispute.

a. Politics as "War by Other Means"

The study of conflict and conflict resolution began with a focus on international conflict in the era of the "cold war" under the spectre of the possibility of mutual nuclear annihilation. The conflict resolution movement has devolved in the present day to address a wide array of interpersonal and social conflicts with an approach called Alternative Dispute Resolution (ADR). To what is ADR supposed to be an alternative? One answer is that it provides an alternative to politics as "war by other means," an alternative to intractable partisan perspectives that wage gratuitously costly political battle.

ADR allows that policy disputes and political debate are unavoidable: controversy can be healthy and essential to keeping the "marketplace of ideas" open and honest; it is certainly endemic to democratic process. But a society engulfed in controversy can also be polarized and paralyzed, a society that cannot solve its problems in what Fisher and Ury in their classic text, *Getting to YES* (1991, Penguin Books), characterize as a "wise, efficient, and amicable" fashion. In the winter 1991 newsletter of the American Family Therapist Association, Laura Chasin and colleagues provided a description of intractable conflict that applies to social controversies like gun control as they serve to divide the wider American "family": "Sometimes the polarization is so extreme that people on both sides cannot imagine any solution other than a clear 'win' for their side. They may even feel that there is no sane or rational person on the other side with whom they can talk. Sometimes the value of their own position seems so vital, and that of the other side so dangerous,

that they pay little attention to the costs of the struggle itself - costs to the entire system [society], or costs to their own integrity as they set aside any thoughts, feelings or values they have that don't conform either to their own stated position or to the 'party line.'"

Case in point: on March 17, 1993, Dr. David Gunn, who worked in a Florida abortion clinic, was shot dead by a pro-life activist. The brutal murder was rued by all. But leaders of the pro-life cohort averred that, after all, the doctor killed was himself a "mass murderer." On the pro-choice side, other doctors declared that they had taken to carrying guns as protection against ~~their own~~ death threats. Gun control advocates joined the fray, decrying those who take up the gun in the name of self-protection and the proliferation of guns in private hands, like the hands of Dr. Gunn's murderer (who was a law-abiding citizen a mere day before). Gun control advocates pointed to Dr. Gunn's murder as an example of the tragedies that must inevitably afflict an armed society. Gun-rights advocates pointed to Dr. Gunn's murder as an example of why decent citizens must be granted the right to arm themselves.

Dr. Gunn bore a portentious name for a man whose tragic death would become a symbol in two of the most bitter, intractable and costly life-and-death controversies that divide American society, abortion and gun control. Both controversies pit our deepest concerns about the sanctity of human life and individual liberty against each other. Both divide us indecently over matters of decency. These controversies have perhaps done more to rend than to strengthen the fabric of civic life, in the name of values like intellectual honesty, decency and respect for persons that all partisans piously proclaim but few observe in the heat of political struggle, in alienated polarization.

So it is that politics is aptly called "war by other means." Politics, preoccupied with partisan defeat or victory, is costly. The gun control debate in America harbors controversy that vents in murder, riot and veiled threats of civil war, all in the name of justice. Righteousness duly animates all sides of the controversy. But, while "war by other means" is waged, justice takes the hindmost and solutions to costly social problems are delayed. As Dr. Martin Luther King observed, justice delayed is justice denied (a complaint that haunted the controversy over the Brady Law waiting period assayed in II.B.3.d). The costs of divisive social controversy like that over abortion and gun control oblige us to entertain promising alternatives to politics as "war by other means."

? Brandeis? It preceded King by decades.
Cardozo?

b. Alternative Dispute Resolution (ADR)

ADR proposes an alternative to the arsenal of contentious tactics that dominate many disputes, from family conflicts to political debate. ADR also provides an alternative way to understand social controversy itself, an alternative to simply rehearsing the litany of arguments pro and con. It offers a perspective from which to evaluate policy and view policy disputes that has much in common with the ethic of policy dispute outlined in II.C, but one focused less on the obligatory rigors of argument and more on appreciating the interests underlying argument. Like ethics, ADR is a way of viewing human conflict that looks beyond conflicted positions to underlying interests and that tries to evaluate priorities among interests in the prospect of discovering negotiable common ground. ADR has been used for mediating mutual respect and understanding between partisans on the abortion issue and other social controversies; it has yet to be applied seriously to the gun control controversy.

One hallmark of ADR is its emphasis on collaborative problem solving preceded by exhaustive brainstorming of alternative solutions rather than on debating persistently partisan proposals (the "opening gambits," "ultimatums," "bottom lines," "compromises" and "final offers" of partisan negotiation). Debate as such is properly preoccupied with partisan proposals, policies calculated to serve their partisans' respective positions; these may, of course, be cloaked in the mantle of the commonweal, but the commonweal as perceived from partisan positions. By contrast, ADR works to survey all possible solutions from the beginning of a dispute and to assess the alternatives by the standard of mutual rather than partisan interests. Partisan proposals are crafted to win in the political contest, and sometimes are deliberately calculated to yield to expectably politic compromise with the opposition. By contrast, ADR proposals are crafted to address the interests of all parties forthrightly and respectfully, and aim to do better than mere compromise in the end.

c. Integrative Solutions versus Compromise

Politics is often characterized as "the art of compromise" and "the art of the possible" as well as "war by other means." ADR offers an alternative regulative ideal to compromise, and methods for achieving the ideal, known variously as "win-win" solutions (contrasted with "win-lose" or "zero sum" contests) or "integrative" solutions. The distinction between a compromise and an integrative solution to a

dispute is that the former typically entails some significant loss to the stated interests of the contesting parties, while the latter aims to discover and satisfy all the important underlying interests of both parties. A prosaic example illustrates the difference. Suppose that two parties are arguing over an orange. The stated interest of each is in having the orange. Compromise might call for splitting the orange between them, in which case the parties get only half of what they each want. An ADR approach would counsel them to look beyond their stated positions to underlying interests, the reasons for which they each want the orange. Should it turn out that one wants the peel of the orange to make a cake while the other wants the juice and pulp to make a drink, there is a paradigmatic integrative solution available, one that satisfies (as it happens, equally and maximally) the priority interests of both parties.

The matrix and levels of interests involved in policy disputes, such as over gun control, are more complex and less amenable to compromise, let alone to integrative solutions, than the "orange" dispute. But the apparent intractability of gun control disputes is often a function of the fact that political partisans are not disposed to engage in the appreciable but promising effort of integrative problem solving.

d. Case in Point: Why the Wait for a Waiting Period?

The Brady Bill requiring a national waiting period and background check for the purchase of a handgun was long touted (since before 1988) as a "reasonable and modest" measure of gun control. Why, then, did we have to wait so long for this "reasonable and modest" measure to be passed into law (until 1993)? If it was so "reasonable and modest," why was it so contested? And why is it still being contested, all the way to the Supreme Court, which will hear a case challenging the law in latter 1997 (see II.B.4.d))? Why the controversy over a gun-control measure that Canada's national newspaper, *The Globe & Mail,* called a "baby step" in the history of American gun control? *The Globe & Mail* provided one answer in its March 27, 1993, editorial, "The Roots of the Gun Culture": "Gun control is, like abortion, an issue that excites in Americans the wildest passions, the deepest divisions and the most intractable points of view." The Constructive Confrontation Project (CCP) at the University of Colorado, Boulder, which applies an ADR perspective to seemingly intractable social controversies, in a 1993 CCP conference announcement provided an apt diagnosis of such controversy: issues like abortion and gun control, "involving fundamental moral disagreements and very high stakes [life and liberty], are seen as so important that the parties generally refuse to accept defeat, or even

compromise . . . . Even defeat is seldom considered permanent, but rather, a temporary setback. . . . . The result is often an endless series of costly, time-consuming, and destructive confrontations. While litigation and political maneuvering can bring temporary victory or defeat, the battles over issues - and the costs - often persist for decades."

The Brady Law is a prime example of how the political "solution" of today (the policy that wins the votes in the political contest) becomes the *cause celebre* for renewed and costly conflict in the courts and political arena tommorrow. Politics, even as "the art of compromise," often fails to take sufficient account of the underlying interests of the conflicted parties. The Brady Law that was finally passed in 1993 was a case of compromise where an integrative solution, one that will ultimately have to be thrashed out through costly litigation and reform measures, might have been available from the start. Advocates did indeed compromise mightily with their opponents over the years to get the Brady Law passed; for example, by requiring a background check along with the waiting period (the original bill did not), by reducing the originally proposed waiting period from seven (working days) days to five, by requiring eventual conversion to a nation-wide "instant check" system and sun-setting the waiting period after five years, by immunizing local law enforment authorities from liability for faiing to complete a successful background check, by allowing formal appeal of erroneously denied purchases, by providing for exigent waiver of the waiting period, and by allowing purchases to go through as the default if the local law enforcement authority failed to complete the background check within the presribed time. Such obviously prudent concessions to salient interests might well have expedited earlier passage, but even these significant compromises failed to address all the important interests perpetuating the controversy.

The reduction from seven to five days was counter to the interest of law enforcement agencies who did yet not have the means to perform a proper background check in so short a time. Some agencies needed longer than seven days, some fewer, until such time as adequate computerized record checking might be implemented and practicable for every jurisdiction. Many argued that the length of the waiting period should be at the discretion of the local authorities responsible for the background check. The "compromise" period was, thus, in many cases inconsistent with the law's ostensible goal: providing reliable screening of handgun purchases. Many local authorities did not have the resources to conduct adequate background checks at all; some filed suit in federal court to challenge the right of a

federal law to impose unfunded mandates on state and local law enforcement. One predictable issue, then, was the lack of federal funding commensurate with the requirements or goal of the law. The concessions made actually compromised the effectiveness of the law while not going far enough in providing safe-guards for other salient interests. For example, the law provided for emergency waivers for purchasers, but did not specify a procedure to ensure expedient compliance by local law enforcement. While the law was routinely, if disingenuously, proclaimed to be worthwhile if it saved "only one life," there have been well publicized cases where the required wait in fact cost lives. And the provision for appeal of erroneous denials put undue costs of appeal on the citizens denied. In contrast, the Gun Control Act of 1968, as amended by the Firearms Owners' Protection Act of 1986, required that alleged violators whose firearms were subject to forfeiture be awarded attorney's fees should they win in the forfeiture proceedings. While these policy issues are certainly arguable, the latter is an example of taking the interests of potentially falsely accused (or denied) citizens seriously. Respecting, and attempting to accomodate, important interests at stake is one thing ADR urges but that the politically victorious often ignore, at a cost to society at large.

In many regards, the compromise that won the vote in 1993 was still "hasty pudding" and did not comport with the underlying, common interest of proponents and opponents alike in safe-guarding all citizens against criminal violence. Adequate screening of handgun purchases for this purpose would, predictably, require greater federal appropriations to aid local compliance efforts; a fair system would require more attention to the interests of citizens unduly delayed or erroneously denied protection. These shortfalls of the law seem gratuitous in view of the costs of predictable personal exigencies (such as death) and ensuing litigation. In the meantime, efforts to develop the requisite technology and data base for a nation-wide instant-check system have failed to provide safeguards against the creation of a government registry of gun buyers (see III.B.2), despite its illegality under federal law, another example of gratuitous disregard for salient interests. From an ADR perspective, the interests slighted under the political pressure to hammer out a law for screening firearm purchases, interests that will inevitably be asserted through costly litigation, could have been addressed more forthrightly. Any viable ethic of public policy dispute would contend that a fair hearing and weighing of all such interests is obligatory. From the ADR perspective, the effort to seek integrative solutions rather than hasty compromises to conflicts of interest is, more simply, a matter of civic prudence.

4. Constitutional Law

Constitutional issues regarding gun control can be raised on both the state and federal level. On the federal level, issues regarding the constitutional feasibility and justifiability of gun control policies, or the status of the right of citizens to keep and bear arms, have been raised on Second, Ninth, Tenth, and Fourteenth Amendment grounds.

a. State Constitutional Provisions on the Right to Arms

State constitutions tend to be very explicit about the right to arms being both a right of individuals and for the purpose of self-defense as well as the common defense. For example (references in parentheses are to the respective state constitutions), Alabama holds "[t]hat every citizen has a right to bear arms in defense of himself and the state" (article I, section 26). Many include very explicit qualifications or extentions, such as the following.

> Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men" (article II, section 26).
>
> Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons" (article II, section 13).
>
> Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use" (article I, section 20).
>
> Georgia: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne" (article I, section I, paragraph VIII).

This small sample reflects the effort of a majority of state constitutional provisions to be explicit about a number of issues that are contested by different schools of thought about the Second Amendment: (1) that the right to arms is an individual

right, not merely a collective right of the state to equip and muster a militia; (2) that one function of this right to arms is to ensure effective means for self-defense (some states specify it more broadly to include defense of others and property, as well as the state, and include hunting and recreational uses); but (3) that the exercise of this right is properly subject to certain forms of regulation, in particular that the state may regulate the manner in which arms may be carried.

In addition to Colorado and Georgia, Florida, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, Tennessee, and Texas all specify that the state has the power to regulate the carrying of arms. Utah provides the broader, more ambiguous qualification that "nothing herein shall prevent the legislature from defining the lawful use of arms (article I, section 6). Most of these states now have mandatory carry licensing laws, making clear that the intent of their constitutional provisions was not to prohibit, but rather to regulate, carry. (Colorado has a discretionary carry licensing law, but Colorado Springs is an example where the discretionary policy eschewed the subjective criterion of "good reason" or special "need" so as to be tantamount to a "shall issue" law.)

The most remarkably explicit state constitutional provision on the right to arms is Idaho's:

> The people have the right to keep and bear arms, which shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person, nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony (article I, section 11).

Idaho enumerates specific powers of the state to regulate carrying and to define and punish forms of illegal possession and use; but also, remarkably, Idaho enumerates specific forms of gun control that the state may not impose: (1) licensure for possession of firearms and ammunition, (2) registration of same, (3) special taxes on same, and (4) confiscation of firearms, except particular guns actually used in crime. Idaho's provisions exemplify (a) the type of enforcible assurance that could allay opposition to instant background check systems, which are open to abuse for

purposes of creating surreptitious registries of guns and gun owners (see III.B.2) and (b) due regard for important gun owner interests (declaring those interests enforcible rights) whose routine disregard in the promotion of various gun controls creates gratuitous controversy (see II.B.d). The latter is no surprise, because Idaho is a stronghold of gun-rights supporters; its constitutional provisions would obviate many current gun control proposals, such as special taxes on ammunition (see I.C.2.c.i). However, the parameters of gun control framed in Idaho's constitution comport well with the examples of workable gun control outlined in III.B.2.

Selective gun bans represent one issue that remains ambiguous or arguable even on state constitutional provisions that are more explicit than the Second Amendment. For example, so-called "assault weapon" (AW) bans in California, New Jersey, and Connecticut have deflected or survived constitutional challenges. That fact does not reveal anything about the merits of the cases (the issues remain philosophically and jurisprudentially arguable after any particular disposition), but it leads to an interesting line of constitutional argument in favor of selective gun bans, one actually used by the Connecticut Supreme Court. The issue is whether the government's power to impose certain regulations even as against an individual right to arms includes the power to prohibit the law-abiding from possessing some types of firearm, if not all. The argument on behalf of the Connecticut AW ban was that it left a sufficient remainder of legal firearms unmolested so as to comport with the provision that "[e]very citizen has a right to bear arms in defense of himself and the state" (article I, section 15).

The term "arms" by itself is ambiguous regarding just what kinds of firearm merit protection. For self-defense purposes, could the state not prescribe a narrow assortment of handguns or long guns as sufficient? Would the right to keep and bear arms in self-defense be violated by being limited to a few kinds of state approved guns? Of course, there are important intervening empirical issues about what the criminal potential and defensive utility of AW's actually are (discussed in V.A.2.b), but the issue of principle concerns the conditions on state power to prescribe what constitutes a sufficient selection of arms for defensive purposes. What reasons does the state need in order to constrain the otherwise unfettered choice of arms by citizens? What showing of "need" or lack of social liability is incumbant upon citizens in order to justify their preference in defensive arms? This issue is not obviated by allowing that the right to arms is an individual right for purposes including self-defense. But it implicates another issue: whether another function of the right to arms is to help secure the citizenry against tyranny, the issue of the

political purpose and value of an armed citizenry (IV.C), an issue central to debate about the Second Amendment.

b. The Second Amendment

> *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.*

The philosophical issues underlying debate about the Second Amendment are not obviated by how the constitutional issues might be decided or ignored. General issues about the value of private firearms and an armed citizenry, issues of both utility and residual value, are outlined in section IV. The complex of issues about the meaning and scope of the Second Amendment, and the vast scholarship to which they have given rise, are beyond the capacity of this article to even parse. An outline of the general lay of the land must suffice.

There are basically two schools of thought on the meaning of the Second Amendment (SA): that the SA refers to a right of individuals, the individual right view (IRV), and that it refers to a collective or state right (as in a right of the several states) to maintain a militia as one check against the federal government, whereby the states retain the discretion to determine how citizens shall be armed and regulated for this purpose (the SRV). The "militia clause" is taken by the SRV as evidence of this intent, whereas the IVR observes that the term "the people" is distributively, not collectively, used in other amendments in the Bill of Rights and that "rights" pertain canonically to individual citizens while "powers" pertain to government entities in the constitution. Therewith ensues a formidable hermeneutical controversy.

Supervening the details of this controversy is the presumption that the "original intent" of the Framers is dispositive on the meaning of the Second Amendment. Some opponents of the idea of an individual right to arms break with this presumption in one of two ways, both of which hold that the Second Amendment is an anachronism, but differ as to how to get by it: some aver that the Framers did indeed hold the IRV but argue that, in deciding constitutionality, original intent needs to be balanced against modern exigencies and may be discounted; some accept both the IRV and original intent (as a dispositive trump card) and also hold that the Second Amendment is outdated, but conclude that the SA should be repealed rather than finessed. The former assert that the Framers had no idea what havoc modern

firearms technology would breed, for which they can be excused, such that if they were alive today they would allow that their original intent should be revised and that the IRV may be constrained in whatever ways necessary. Against the first anachronist view, the second view holds that the Framers could not have forseen the havoc modern mass communications media or modern criminal ingenuity would breed, but that is not good enough reason to override the protections of the First or Fourth or Fifth Amendments: the only proper way to correct the constitution, they hold, is by formal repeal or further amendment.

Argument about constitutionality is itself a form of argument from authority, but it is dominated in the public controversy (as opposed to constitutional scholarship) by second-order arguments from authority. Space does not permit explication of the scholarship (to which Cottrol, 1994, is a guide, see Bibliography), but the second-order argument from authority is instructive on the contours of the Second Amendment debate. IRV opponents point out that the U.S. Supreme Court has never proscribed gun control on Second Amendment grounds. Since the Supreme Court has addressed SA issues only once in this century, in a very circumspect decision (*U.S. v. Miller*, 1939), the only thing that can be fairly said about Supreme Court SA jurisprudence is that there is a dearth of it to argue about. Before the 1920's, there was also a dearth of Supreme Court jurisprudence on the First Amendment; from this nothing followed about its meaning and scope except that the Supreme Court had either no inclination or no opportunity to illuminate the matter. As to the IRV/SRV controversy, it is argued that *Miller* supports the IRV, but this is true only in *dicta*, incidental to the decision, which skirts this fundament issue. The basic fact of the matter about Supreme Court jurisprudence on the SA is judiciously put by Nowak, Rotunda, and Young in the Third Edition of *Constitutional Law* (1986): "The Supreme Court has not determined, at least not with any clarity, whether the amendment protects only a right of state governments against federal interference with state militia and police forces . . . or a right of individuals against the federal and states government[s]" (page 316, note 4). That this observation is relegated to a footnote is symbolic of the marginal status of the Second Amendment in the purview of the Supreme Court.

SRV advocates gain more ground in their appeal to the authority of lower court decisions, many of which construct an SRV from their interpretations of *Miller*. Court opinions are the final word on the law of the land and in that sense are authoritative. However, court decisions are not the final word in jurisprudence, only on the positive legal bearing of it to date. The wisdom of court rulings is eminently

arguable on scholarly grounds. While SRV advocates arm themselves with the authority of court rulings, IRV supporters appeal to constitutional scholarship, where the weight of authority breaks down as follows. Scholarship is counted as what is published in law reviews and journals and, in the context of the second-order argument from authority, is ranked by the status of the journals and the credentials of the authors. Counts and rankings have been made, as informative exercises in the sociology of knowledge, to survey the lay of the land of Second Amendment scholarship or, as a partisan matter, to show its steep tilt against the SRV. Of the approximately 60 law review/journal articles that have been published on the Second Amendment since 1980, they run over 6 to 1 in favor of the IRV. Among the minority SRV authorities, it is pointed out, most are not law professors but are employees or partisans of gun control advocacy organizations; and their articles appear in inferior reviews or invitational symposia that are not peer-reviewed. Among the majority IRV authorities, whose articles appear in the most prestigious peer-reviewed journals, are many of the most distinguished constitutional law professors in the land, who happen not to be gun owners and who are personally hostile to firearms and the private use of force. As the second-order argument from authority goes, the latters' scholarship is therefore more credible. Of course, none of this says anything about the merits of the scholarship or its arguments. But it indicates a remarkable growth in Second Amendment research in general, as well as among scholars who are not by disposition or personal philosophy gun-rights advocates. Increased scholarly attention must be salutory by anyone's standards.

A final note on the Second Amendment controversy is in order concerning the broad contours of underlying political philosophies. Cross-cutting the IRV/SRV debate is a more fundamental philosophical distinction, and tension, between the value of individual autonomy and communitarian values and a debate over their comparative priority. The distinction is between what might be called the "libertarian individualism" viewpoint (LIV) and the "civic republicanism" view (CRV). The latter (CRV) tends to subordinate individual to community interests, while the former (LIV) places priority on values relating to individual autonomy and liberty. Regarding interpretation of the Second Amendment, both views can acknowledge that it protects an individual right to arms and that this right has two functions, self-defense and the common defense, but nonetheless differ on the relative priority and implications of these two functions. LIV proponents emphasize "the right to keep and bear arms" (RKBA) clause of the SA for purposes of defending the individual against criminal predation and defending individual liberty against

government predation (where the "militia clause" provides a license for individuals to band together to resist tyranny as well as to serve the common defense). CRV proponents emphasize the "militia clause" and the function of the RKBA for the common defense as a community responsibility. The latter presupposes the moral character and disposition on the part of individuals to subordinate their private liberty interests to the needs of the community.

The CRV can be consistent with deference to government controls on firearms, whereas the LIV tends to resist government constraints on individual liberty, particularly restrictive gun controls. In their extreme versions, the LIV takes an absolutist view of the Second Amendment as proscribing all gun controls that in any adverse way affect law-abiding citizens (advocating crime control to the exclusion of gun control), while the CRV collapses into the SRV (presuming that effective crime control requires restrictive gun control). Whether the endemic tension between the LIV and CRV rises to the level of incompatibility, of course, depends on the degree of extremity in either case. Some CRV proponents argue that, while in the Revolutionary times of the Framers citizens might have possessed the requisite civic virtues and communitarian orientation both to merit being entrusted with arms and to band together to serve a common and just cause, citizens today are no longer worthy of such trust. LIV proponents respond that merit is irrelevant to the matter of why the citizenry should be entrusted with arms, just as it is irrelevant to whether the government should be entrusted with a monopoly on the use of force unchecked by an armed citizenry: LIV proponents are opposed to a government monopoly of force as a matter of non-negotiable principle, whereby the governing value of society under law is individual liberty or autonomy. In theory, these two views are compatible, while at the extremes the LIV can countenance violent opposition to all manner of government control, enlivening the CRV's worst fears, and the CRV, reifying the LIV partisans' worst fears, can provide a rationale for a draconian path to civilian disarmament. The views are interesting because within the space of their compatible intersection, where they differ only in emphasis, they illustrate the possibility of rapprochement on the meaning of the Second Amendment while also illustrating very different ramifications of that meaning, where the libertarian and communitarian functions of the RKBA can diverge.

c. The Ninth Amendment

The enumeration in the Constitution of certain rights shall not be considered to deny or disparage others retained by the people.

The Ninth Amendment was framed to acknowledge that the "rights of the people" could not, in fact, adequately be enumerated and to emphasize that, therefore, the prior eight provisions of the Bill of Rights neither exhaust nor presume to exhaust the "inalienable" rights of interest. This amendment asserts not only the possibility but the necessity of defining unenumerated but nonetheless extant rights in a more explicit fashion. The right of "privacy" is an example of a right (or family of rights) on which the Bill of Rights was specifically mute but which was carved out to protect a fundamental interest (or important family of intrests). The jurisprudential project invited and sanctioned by the Ninth Amendment is analogous to the ethical project of discerning human interests that are so fundamental or so instrumentally crucial as to merit the special status of a moral right.

The Ninth Amendment is salient for the gun control controversy in at least four ways: (1) it makes clear that the rights of which the Bill of Rights speaks are not rights *by virtue of* being mentioned or granted by the constitution, but rather are pre-existent to (logically and ontologically independent of) acknowledgement by the artifice of positive law; (2) it makes clear the fact that because a putative individual right (X) is not mentioned or well specified among the Bill of Rights does not mean that X is not a right or that it should not be acknowledged and protected as such; therefore, (3) it provides grounds for arguing for a right to arms as essential to the right of self-defense, regardless of the adjudicated meaning and scope of the Second Amendment; and (4) it has been so exploited, most notably by Nicholas J. Johnson's "Beyond the Second Amendment: An individual right to arms viewed through the Ninth Amendment" in the Fall of 1992, issue of the *Rutgers Law Journal.*

The challenge posed by the Ninth Amendment argument for the right to arms is ethically interesting because it comports with a fundamental task of ethics (or political philosophy) as well as with a basic function of the law: the task of fairly weighing and balancing important interests competing for status as protected rights. Johnson puts the challenge judiciously and succinctly: "The Ninth Amendment has been suggested as support for a right to engage in sodomy, a right to wear long hair, protection against imprisonment in maximum security . . . and affirmative rights to government services. It will be revealing to examine whether we can comfortably

support such rights and at the same time oppose a right to arms for self-defense" (page 80).

d. The Tenth Amendment

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The Tenth Amendment is relevant to gun control in two respects, one general, one particular. Section I.C.1.b illustrated topical controversy about one basic and endemic issue in government gun control: the proper separation and apportionment of powers, with appropriate checks and balances, among the levels of government (federal, state, and local). This issue is fundamental to any system of government, but it is virtually definitive of the American system, born, as it was, amidst disputes between the "federalists" and "anti-federalists." The general issue concerns what kind of laws (including gun control laws) the federal government can pass, or enforce, as against the perogatives (or "powers") of the several states or as against the "rights" of "the people" (defined as those of both citizens and legal aliens). The general issue cuts both ways, as illustrated by the topical examples in I.C.1.b.

The particular issue, or instant case in point, is the constitutionality of the Brady ~~Law,~~ Act which is claimed to impose an undue and unfunded federal mandate on local/state law enforcement to carry out background checks for handgun purchases. Several jurisdictions brought suit against the federal government in different federal district courts on the grounds that the Brady ~~Law~~ Act violated the Tenth Amendment. Different district courts gave different opinions on the merits of their respective cases. The contradictory rulings created the closest thing there is to a mandate for the U.S. Supreme Court to hear the case, which it will in 1997.

e. The Fourteenth Amendment

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The "privileges and immunities clause" (above) is part of the first of four sections of the Fourteenth Amendment, which was established in 1868 in order to make clear that fundamental constitutional protections of citizens against the federal government, as guaranteed in the U.S. constitution, are also protections of citizens' rights as against state governments. The Fourteenth Amendment is relevant to the gun control controversy because of dispute about whether the protection provided by the Second Amendment extends as against putative infringements by the several states. Of course, there is dispute about exactly what protections the Second Amendment affords, even as against the federal government. If SA protections were taken to be merely on behalf of a collective right pertaining to the several states to maintain militias, no interesting Fourteenth Amendment issues arise: why should a state's rights need to be protected from infringement by the self-same state? The ostensible absurdity of this question is taken as evidence of the malappropriate attribution of constitutional "rights" (such as are spoken of by the Second Amendment, pertinent to "the people") to states, which, properly speaking (in the context of the U.S. constitution), have "powers," not "rights." However, the Fourteenth Amendment speaks of "privileges and immunities," not "rights," and the former assuredly pertain to individuals, not to the several states.

Thus, the Fouteenth Amendment dispute relative to gun control recapitulates an issue of the Second Amendment dispute: whether the SA pertains to an individual right, or rather to a collective or state right. If the latter, there is no coherent Fourteenth Amendment issue. Given the dominant scholarly view (absent, to date, Supreme Court rulings to the contrary) that the RKBA of which the Second Amendment speaks is indeed an individual right, there is then an interesting dispute concerning why the Second Amendment has not yet been expressly "incorporated" under the Fourteenth Amendment as a right protected against infringement by the several states as well as against infringement by the federal government. The "incorporation" issue recapitulates another aspect of the Second Amendment controversy: the issue of what an amendment means or is worth in the absence of an expressly telling Supreme Court ruling upon it, given the clear "original intent" on the part of the legislators who framed the amendment. The Supreme Court has so far declined expressly to rule that the Fourteenth Amendment applies to the Second Amendment, whereas it has expressly "incorporated" the First Amendment under the Fourteenth. However, as is the case with the Second Amendment itself, the intent of the authors of the Fourteenth is documentably clear: the Fourteenth was very

specifically intended to apply to the Second because the former was, in part but very specifically, motivated by Reconstruction-era violations of African-Americans' "right to keep and bear arms." Representative John A. Bingham and Senator Jacob Howard, principal authors of the amendment, made it uncontestably clear that the individual rights enumerated in the first eight amendments were within the scope of the "privileges and immunities" clause, without any implication that the Supreme Court needed, independently, to pass judgment on the "incorporation" of those rights, one by one, before they should be respected by the several states.

One curiousity, then, is how, historically, it came to pass that clear legislative intent must wait upon further legislative or judicial action to be implemented. Of course, therein hangs an interesting tale, an unusually interesting version of which is told by Sayoko Blodgett-Ford's "Do battered women have a right to bear arms?" in the 1993 *Yale Law & Policy Review*. Blodgett-Ford argues that the intent of the Fouteenth Amendment by itself provides grounds for the RKBA, however the Second Amendment is construed. In any case, the Fourteenth Amendment "incorporation" controversy demonstrates that the constitutional issues surrounding gun control, or the right to arms, are hardly limited to Second Amendment disputes. An ironic point regarding the issue of the "incorporation" of the Second Amendment is that the majority of state constitutions contain much more specific provisions (as noted in II.B.4.a) than does the Second Amentment: many states have already, in effect, incorporated an explicitly individual RKBA as a limitation upon their own gun control powers.

C. The Ethics of Public Policy Dispute

> *He who decides a case without hearing the other side . . . though he decides justly, cannot be considered just.* (Seneca)

An ethic of public policy dispute would accomodate variant ethical perspectives (for example, utilitarian, deontological or rights-based viewpoints) but would hold all partisans alike to certain procedural and evidentiary standards (analogous to those that govern a legal contest under criminal or civil law): (1) at minimum, standards of accountability in arguing the merits of a policy (at trial, as it were) and (2) standards of procedural justice for adjudicating the policy dispute (deliberating a verdict, as it were). While aspiring to be consensually agreeable, any such ethic may itself be arguable, of course, because it purports to draft the basic rules of the game for

conducting policy disputes and because it may seem question-begging in positing the priority of procedural justice (how we should comport ourselves in policy disputes) over substantive justice (what a just outcome or policy should look like). But the need for consensual procedural standards is an unavoidable tar baby on the road to resolving any social controversy, a pragmatic priority in arguing about anything. And the relation between procedural and substantive justice is not so much one of priority, since any actual policy dispute starts with some notion of both, but dialectical, whereby the fallibility of each is tested and redressed by the other in an effort to reach some tolerable equilibrium (such as we enjoy under our systems of criminal and civil justice, which hark to both procedural and substantive principles).

The adversarial model of procedural justice operative in courts of law is a useful analogue for an ethic of policy dispute. It illustrates the aspirations of such an ethic in the process of arguing a case at trial and the process of deliberating a (bench or jury) verdict. The dual-party trial analogue can be internalized by policy evaluators just as solitary inquirers can become dialecticians who internalize the dynamics of a Socratic dialogue. On the trial analogue, evaluating a policy or arguing the merits of a policy at minimum means weighing considerations both *pro* and *con*. A hypothetical test of the consensual agreeability of this or any injunction of public policy dispute is to ask: Who would publicly eschew it, and why? Who would deny, in public dispute, the mutual utility of reciprocal compliance with the injunction *audi alteram partem* ("hear the other side") or refuse, publicly, to abide by it? Such injunctions are so generic, perhaps, as to seem trivial, like truisms (trivially true on their face, but only interesting, and likely arguable, when unpacked). But in controversies over matters like gun control, aptly dubbed the "Great American Gun War," while all might publicly swear by the injunction, too few indeed comport with it.

There is a need for public policy dispute to comport with some consensual procedural ethic even when disputing substantive ethical matters. Fleshing out this notion is another challenge to which ethicists can apply themselves. The minimum aspiration of such an ethic is to posit standards of *accountability*, what a partisan is obliged to both *take* and *give* account of in arguing the merits of a policy. One way to outline the demands of such an ethic is in terms of generic questions, questions of the sort that must be brooked were the policy dispute to go to trial. The following outline of generic questions is a heuristic for identifying what must be shown or argued in order to afford a fair hearing and trial for policy disputes. Discipline-

specific standards for settling any of these these questions in any trial of contested facts or values, the analogues of instructions for arriving at bench or jury verdicts in the political or policy making process, are another story; but the analogy holds this far: unfair trials or facile lawyering are not conducive to just verdicts. (Sections III and IV outline more specific questions of fact and value to be brooked in gun control disputes specifically). The following generic evaluative questions hark to the generic definition of policy making as *the adjustment of means to ends under constraints.*

1. Feasibility: *Can We Do It? Is it still viable?*

Assessing feasibility entails evaluating means against contraints: "ought" implies "can." Is passage and implementation of the policy feasible, workable, within our means and constraints? What in fact is instrumentally necessary or sufficient to implement the policy?

The feasibility of a policy includes a variety of questions about whether it can be sold politically, afforded economically, implemented technologically, enforced or complied with, or permitted within relevant ethical or constitutional side constraints. Clearly, feasibility questions call in the employment of many disciplines and cannot always be neatly separated from questions of efficacy and justifiability; for example, the practical, constitutional, or ethical infeasibility of the requisite enforcement measures (consider house-to-house searches to confiscate banned weapons or drugs) will naturally affect the effectiveness of a policy. And both feasibility and efficacy are part and parcel of the justifiability of policy. However, we ignore the question *Can we do it?* at our peril. Can we realistically expect to suppress illegal markets or cut off criminal access to firearms, drugs or other contraband? These are obviously important questions to weigh rigorously *before* embarking on costly adventures; they call not for facile faith, but attention to research and informed speculation, and they entail important strategic choices (for example, as between supply-side versus demand-side approaches to controlling the instrumentalities of crime as well as its contraband).

2. Efficacy: *Will It Work? How Well Is It working?*

Assessing the efficacy of a policy entails evaluating means against intended ends as well as actual or likely consequences. Even if implementation of the policy is

feasible, once it is duly implemented, we need to ask how well it will or does work. What are the *stated* goals and intended effects of the policy? What are the *ulterior* goals or collateral effects? Given any goal, what are the relevant success *criteria* of the policy? What is necessary or sufficient (and by what *standard*) to satisfy any success criterion?

Assessing the effectiveness or efficacy of a policy, prospectively or retrospectively, requires express attention its strategy and goals. A problem with much gun control policy is that its proponents or opponents may harbor ulterior goals as well as publicly proclaimed goals. This may be done out of disingenuousness or simply as a political expedient. Whatever the case, the effect is pernicious, because it confounds any attempt to evaluate the efficacy of a policy honestly. Publicly pious deference to the "if it saves only one life" rationale is only the most transparent example. Dishonesty about political goals that are ulterior to any hope of efficacy is hardly uncommon. Charles Krauthammer exemplified uncommon honesty in his April 5, 1996, *Washington Post* column, "Disarm the citizenry, but not yet," in which he gave voice to a view shared by many but admitted by few: "Passing a law like the assault weapon ban is a symbolic - purely symbolic - move . . . . Its only real justification is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation. . . . The real steps, like the banning of handguns, will never occur unless this one is taken first."

Such honesty or candor about strategic designs not only is crucial to knowing how to evaluate the *efficacy* of a policy, knowing what goals or success criteria to measure its effects against, but also will make a difference to the *justifiability* of the policy as well as its political *feasibility* (perceived acceptability) and the evaluation of the policy's goals themselves.

3. **Justifiability:** *Should We Do It? Should We Be Doing It?*

Assessing the justifiability of a policy entails weighing and balancing (prioritizing) interests and evaluating both ends and means. Even if a policy is feasible and promises to be efficacious, we can still ask whether we should (we) adopt it, all things considered. Are the goals or the means otherwise objectionable? Will the policy accomplish all but only its *stated goals?* If so, at what and whose consequent cost? For what and whose consequent benefit? Whom will the policy benefit and whom will it harm? Are the costs, risks, or harms both fair, or fairly distributed, and worth the benefits? In case of conflict, which and whose interests take priority? Why? How?

If the policy will not (or is not even intended) to accomplish all and only its stated goals, what *ulterior goals* or *collateral effects* does the policy have? In these respects, whom will the policy benefit and whom will it harm? Are the costs, risks or harms both fair, or fairly distributed, and worth the benefits? In case of conflict, which and whose interests take priority? Why? How?

And, respecting either a policy's stated goals or its ulterior goals or collateral effects, there is the obvious question: Are there equally feasible and efficacious but more desirable alternatives? For example, is there an alternative that would more equably or equitably serve all stakeholder interests? Regarding this last crucial question, politics and public policy dispute have much to learn from the field of conflict resolution, what's called Alternative Dispute Resolution and its methodology for achieving *integrative solutions,* as distinct from compromises, among conflicted interests (II.B.3).

4. Epistemics: ***How Do We Know, Judge, Decide?***

Epistemic questions (What do we know, and how? What is reasonable to believe, and why? Have we examined all the available evidence? weighed all the reasons *pro* and *con?* employed the best available methods, argumentative and evidentiary standards?) apply to all the forgoing issues (Can we do it? Will it work? Should we do it?). The variety of scientific disciplines and normative methodologies that may be relevant in any instant case are not amenable to summary treatment here. However, any viable ethic of public policy dispute obliges us to take and give rigorous account of these questions as we seek to "lay down the law" regarding how human life should be secured and society ordered, as we try the facts and weigh the values at stake.

III. TRYING THE FACTS

The great enemy of the truth is very often not the lie - deliberate, contrived, and dishonest - but the myth - persistent, persuasive, and unrealistic. (John F. Kennedy)

It isn't what folks don't know that's the problem. It's what they know that ain't so. (Will Rogers)

Former President Kennedy's and Will Rogers' caveats apply to much of what is taken as conventional wisdom about firearms and violence. *Pace* Will Rogers, in addition, what people don't know or care to know is also a problem for public policy dispute. Despite a very large body of analytic and empirical research to draw upon, policy partisans, politicians, and the media (as well as the public dependent upon them) seem to ignore it. It is quite natural that people should not like the facts to interfere with their faiths, a general tendency hardly unique to the gun control controversy. Of course, the controversy over guns engages many of the strongest and least attractive of human passions: the fears evoked by the apparent ubiquity or randomness of human violence (fears exacerbated for some, assuaged for others, by the availability of guns); contempt for others with alien, seemingly threatening values (be they "gun nuts" who are seen as "wild west" vigilantes, or "do-gooder" "gun grabbers" who would throw the citizenry, disarmed, to the wolves); and cultural beliefs akin to apocolyptic religious faith (visions of bloody anarchy, or cold-blooded totalitarianism, either of which might bring an end to the world as we wish to know it). Phobia, paranoia, and bigotry reign at both extremes. Extreme control advocates see the gun culture as paranoid and blood thirsty, but are viewed in turn as paranoid enemies of liberty by their opposite numbers: by exploiting and remaining true to stereotype, "control freaks" and libertarian "fanatics" naturally reciprocate phobia, paranoia, and bigotry.

However, as in the abortion controversy, partisans at the extremes do not typify the vaster population in between. Another reason for widespread and even wanton ignorance of available analysis and research is people's quite unremarkable tendency not to seek information or analysis where they experience no doubt or ambivalence. Conventional wisdom would not be so named if it were not taken so widely or thoroughly for granted. The desire to believe that things are as they appear is evidently stronger than the suspicion that appearances can be deceiving.

And where the conventional wisdom comports with hope for solutions to complex or fearsome problems, people are all the more loathe to let facts interfere with their opinions.

Perhaps more than the abortion controversy, which tends to turn on metaphysical and moral issues more than upon empirical matters, the gun control controversy is rife with factual disputes. On the factual front, there is bad news and good news. The good news is that there are many well-researched findings of fact available, as well as informed and reasoned analysis on irreducibly speculative matters (on one of the more daunting, see "Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment," *Tennessee Law Review*, Spring 1995). The bad news is that a lot of the comforting faith and conventional wisdom about guns and gun control do not fare well at trial. Even well established facts are often not sufficient to resolve controversy: bare facts do not always wear their bearings on their sleeves, and many questions of fact and value are interimplicated. For example: value judgments about the merits of any policy can be either defeasible or supportable as a function of surprising factual findings; judgments of feasibility and efficacy can entail arguable, but obscure, value trade-offs; classifying observable effects under easy rubrics like "harm," "benefit" or "utility" can entail problematic value judgments. Judgments of risk, which abound on the topic of gun control, involve two interesting dimensions: the probability and the magnitude of harm, each of which can call for arguable estimation and valuation. Even where a risk is determinate quantitatively (say, one has twice the chance of avoiding injury by using a gun to resist assault than by using other methods or not resisting) and the hazard is qualitatively well defined (death or grave bodily injury), it can be reasonable to ask "So what?" People will argue about the collateral risks of keeping or carrying guns, or how to play the known odds of suffering well defined harms.

The trial of the facts and the weighing of values, therefore, often go hand in hand. But none of the bad news makes a virtue of ignorance: we need to know what there is to know and to identify what we think we know that "ain't so." The following catalogue of factual issues provides only a summary of a sample of the pertinent research, but the resources in the Bibliography are readily available for broader study. Greater detail is here provided on those matters that are less likely to be within the common knowledge or that are contrary to conventional wisdom. Greater detail on any matter, including important methodological issues, can be found in the most

updated in Nov. '97 as Targeting Guns.

comprehensive review of gun control research to date, (1991) Kleck, *Point Blank: Guns and Violence in America* (see Bibliography).

A. Effects Associated with Firearms

Presumably, we are interested in factual matters of the following kind for purposes of informing some cost/benefit assessment of private firearm ownership and use (as well as controls thereon), whatever role cost/benefit analyses play within our respective ethical orientations. Such assessments would require a more elaborate inventory than can be afforded here, one that took into account not only deaths, injuries, and crimes perpetrated and prevented by the use of firearms but also other associated costs and non-fungible values (some of which are discussed in IV). For purposes of illustrating the empirical contours of the task of policy evaluation, the following discussion will focus on well-defined indicators of social cost and benefit: the chief categories of firearm fatality, violent crime, and the defensive and deterrent effects of firearms.

1. Criminal Gun Violence

From the indisputable facts that America has a high level of violent crime, a high level of gun ownership, and a high level of crime committed with guns, and the fact that America's levels of both gun ownership and violent crime are higher than other nations' (see III.A.1.c), the inference is often drawn that the level of gun ownership "causes" or occasions the higher violent crime rate in America. There are two, decidedly less popular, alternative hypotheses: *the substitution hypothesis*, that the violent crime rate is accountable to other factors and would occur by other means without the guns, and *the reverse causation hypothesis*, that the crime rate motivates gun ownership rather than vice versa. (Variations on the substitution hypothesis also arise in argument about the other two categories, gun suicide and gun accidents.)

There are two possible connections between gun possession and violent crime that need to be distinguished: (a) the effects of illegal gun possession by criminal aggressors on the patterns and lethality of violent crime on the level of individual incidents and (b) the effects of legal gun ownership in the general population on aggregate violent crime rates. Kleck has systematically assessed the research on these two relationships as well as the viability of (c) international comparisons

between the United States and other countries, which points to the importance of (d) demographic and cultural factors in violent crime rates. (The effects of citizens' possession and defensive use of firearms on the outcomes of violent crimes are summarized in III.A.4. The effects on violent crime of citizens' carrying concealed firearms are addressed in V.B.2.)

a. Effects of Illegal Gun Possession on Criminal Aggression

On the level of individual incidents of violent crime, one question of interest is how the type of weapon possessed by a criminal aggressor influences the disposition to aggress via *threat,* whether threats escalate to *attacks,* whether in the event of attack *injury* results, and whether in the event of injurious attack *death* results. These are questions about what are called *intrumentality effects.* What are the instrumentality effects of firearms when used by criminal aggressors? Does the use of guns in violent crime tend to increase the likelihood of attack, or serious injury and death from attack? Guns or weapons generally can be effective coercive instruments as mere threats, and threats may be preferred over attack to gain certain criminal ends (where, for example, the criminal's goal is to rob rather than to injure or kill).

Criminal aggression can progress up the steps of a ladder, as it were, from threat to attack to injury to death, or stop at any step. Threat of physical harm can be accomplished by virtue of superior bodily force, such as greater stature, strength, skill, or numbers on the part of the aggressor(s), or by wielding an impact weapon, an edged weapon, or a gun in a coercive fashion. Attack can consist in attempting to grapple, throwing a punch, swinging a club, thrusting or slashing with a knife, or firing a gun. Such attacks can connect and produce injury, or they might not connect or produce injury. In turn, resultant injury might or might not be serious or prove fatal. In common law, the mere threat of harm counts as assault, regardless of whether an attack ensues or harm results. The National Crime Survey data from 1979-85 show that half of assaults were mere threats; of the 50% that escalated to attack, half of the attacks resulted in injury. The NCS data combined with the FBI Supplementary Homicide data for 1983 indicate that 1% of the injurious attacks proved fatal. When the weapon is a gun, what effect does this have on criminal aggression, escalation to attack, the injuriousness of attacks, and the fatality of injurious attacks?

(i) Effects on Criminal Threat

It has been found that guns are used in homicides more often in the following types of cases (as compared with the reverse situations): where the victim is male, where the attacker is female, where the attacker is under 16 or older than 39, where the victim is 16 to 39 and the attacker is outside this "prime" age span, where there is a single attacker, and where a single aggressor attacks multiple victims. Such homicide data suggest that guns, compared with other weapons, can facilitate criminal aggression where attack is contemplated or where victim resistance is a contemplated risk. But these data do not prove that guns induce aggression or attack where they would not otherwise have been attempted for lack of a gun. It is possible that criminal aggressors would be sufficiently motivated to threaten or even attack victims, absent a gun. However, the advantage of a gun as a threat and remote-control weapon might well embolden criminals to aggress where they would not do so without a gun. This might be true particularly where the aggressors perceive themselves to be at risk or at a disadvantage as compared with anticipated victims, for example by virtue of some disparity of bodily force in stature or strength, or because of age or ~~gender~~ sex. A gun can certainly facilitate aggression by equalizing disparities in force, real or perceived.

(ii) Effects on Criminal Threat Escalating to Attack

Similarly, it seems reasonable to hypothesize that a gun would facilitate weaker or smaller criminals' escalating their aggression from mere threat to attack, even where attack was not originally contemplated, but particularly where victim resistance is seen as a risk. Guns may also enable physically strong and able criminals to commit attacks where they would be loathe to do so with weapons requiring physical contact. *The facilitation hypothesis* holds that guns enable some criminals to aggress and attack where they would not do so with bare hands or contact weapons because guns equalize disparities of force for aggressors (just as they do for victims) or because guns allow attack without requiring contact with the victim (which may be undesirable for a variety of reasons).

In addition, *the triggering hypothesis* holds that guns can increase the likelihood of criminal aggression or attack because their very presence or possession can incite aggression. This has also been called "the weapons effect," presumably because it could apply to other weapons, although the term "triggering effect"

perhaps more aptly distinguishes it from other instrumentality effects attributed to firearms. Experimental studies on this effect are about evenly divided between those that support a triggering effect and those that do not. Other factors in the experimental situations, such as prior anger stimulated in the subjects or cues to aggression besides the mere presence of a firearm, played a confounding role in studies that found some stimulus effect. In particular, the attributes of the experimental subjects themselves are found to be important: subjects who lack direct personal experience with firearms are more likely than firearms-experienced subjects to attribute aggressive meaning to them. In any case, no study provides evidence that mere possession of a gun by itself stimulates aggression, or, as the triggering hypothesis is aptly summarized to hold, that "the trigger pulls the finger." It is also noteworthy that the forms of "aggression" that laboratory experiments attempt to elicit does not rise to the level of attack with deadly force, actually firing a gun at a person, the prospect of whose consequences (and penalties therefor) might as well inhibit attack. Indeed, some of the "weapons effect" experiments showed that the mere sight of a weapon could inhibit "aggression," but various expressions of aggression are one thing, while lethal attack is quite another (and certainly not an option for experimental subjects).

The inhibition hypothesis holds that, probably because a gun creates such a disparity of force and is effective at a distance (the very features delineated by the facilitation hypothesis), when a gun is presented by the aggressor, both the aggressor and the victim tend to refrain from attack or resistance, respectively. The victim is, predictably, more apt to comply with the aggressor's mere threat and, because this is likely, the aggressor is inhibited from gratuitously raising the ante (say, the risk of greater penalty for injuring or killing the victim) by escalating from threat to attack. Evidence for the inhibition hypothesis comes from victim survey data. Complementary evidence for the inhibition hypothesis is found in the fact that victims who resist aggressors with a gun fare better, for all categories of criminal threat, than victims who do not resist or those who resist by other means (see III.A.4.b). The inhibition hypothesis predicts only that the use of a gun is likely not to escalate a threat to an attack, on the assumption that the aggressor is not antecedently interested in attacking the victim and likely has reason to prefer to *avoid* attack. If the aggressor's antecedent aim is to injure or kill as well as rob or rape or otherwise dominate, then presumably he will do so whether or not he has a gun. Although a gun can certainly facilitate injuring or killing a victim, and might be chosen for that very reason, it also facilitates compliance by its effectiveness as a

threat, thereby obviating the need for attack. The bottomline is: for those aggressors disposed to attack, injure, or kill, a gun is an effective choice; for those not so disposed, a gun will help them to avoid doing so.

(iii) Effects on the Injuriousness of Completed Attacks

Once an attack ensues, for whatever reason, what effect does the use of a gun by an aggressor have on the liklihood of the attack being completed and resulting in injury? Conversely, how likely is it that an attack involving the firing of a gun (as opposed to using the gun as an impact weapon) will miss and not injure the target victim, as compared with an edged or impact weapon attack? Despite the utility of firearms for longer range attacks, most gun attacks occur at close range. Despite this, according to National Crime Survey data for 1979-87, only 19% of gun attacks resulted in hits on victims. By contrast, NCS data on knife attacks show that they connect 55% of the time. However counter-intuitive it might seem for those unfamiliar with the impact of stress in lethal encounters and the difficulty of shooting accurately even at close range, the net effect of the use of firearms in criminal attacks is to reduce the frequency of completed attacks and resultant injury. More generally, it is found that the more lethal the weapon used in an attack, the less likely it will be used to inflict injury. (See also III.A.4.b.i regarding analogous findings for gun-armed robbery victims.)

(iv) Effects on the Fatality of Injurious Attack

It is natural to expect that the surprising infrequency with which gun attacks are completed and prove injurious would be counter-balanced by the greater lethality of the gun-shot wounds that do occur. This intuition turns out to be correct: given an injury, the injury is more likely to prove fatal if it is a gun-shot wounding than if it is some other kind. More generally, the less lethal the weapon, the less likely an injury sustained by the weapon will prove fatal. Of course, this is almost tautologous, "almost" because there are many other factors involved than the lethality of a weapon as associated with the rate of fatality from injury with that weapon. "Deadly force" is defined as that force capable or likely to produce death *or grave bodily harm*. "Grave bodily harm" is variously defined as permanent or crippling injury. The severity of injuries that are not fatal from a gun can be greater than those from a knife or other weapon, depending on many variables (for

example, the number and placement of blows or cuts or shots, which will be a function of the aggressor's skill and disposition as well as other circumstantial factors). Lethality of injury from any weapon is also a function of available medical treatment, its timeliness and its adequacy. Nonetheless, actuarially, the rule holds: there is a hierarchy of fatality running from, at the top, gun-shot wounds to knife wounds to blunt-instrument injuries to damage produced by hands and feet.

How does the greater frequency of fatality from injury interact with the lower frequency of injury from firearms as compared with other modalities of both threat and attack? What is the net effect of the use of guns by aggressors as compared with other modes of threat and attack? The matter is too complex for summary analysis here, but the net actuarial impact of aggressor use of firearms (considering their differential impacts at all the above stages of aggression: threat, attack, injury, fatality) turns out to be very slight but positive on the overall chance of victim fatality: the use of a gun by an aggressor, all things considered, increases the probability of a victim's death by 1.4%. Thus, the countervailing "good news/"bad news" effects of firearm use at different stages of aggression almost cancel one another out. This actuarial result does not reflect the net effect of general firearms possession, by aggressors and victims alike. Besides the aggressor's choice of weapon and other circumstantial factors, one important variable is whether and how (for example, with what sort of weapon) the victim resists (where resistance with a gun is more successful than other forms or non-resistance). Aggressor gun effects are counter-balanced by the effects of defensive firearm use and by the deterrent effects of victim firearm use and ownership (see III.A.4-5 and V.B.2). Gun possession by prospective victims and gun use by actual victims (or other defenders) also confound the question of what effect general firearm possession has on aggregate criminal violence.

b. Effects of Legal Gun Ownership on Aggregate Criminal Violence

While the vast majority of violent crime is not committed by law-abiding gun owners who turn rogue, but by small, high-risk or recidivist subsets of the population disposed to criminal violence, the institution of private gun ownership is suspected of increasing violent crime by increasing general gun availability (for example, for theft), thereby enabling illegal possession and use, and by enabling, or even inducing, legal gun owners to commit violent acts. Firearm "availability" is ambiguous as among the following: (a) the level of legal gun ownership (for

example, the size of the pool of legally owned guns available for theft and redirection to criminal misuse or the black market), (b) the relative ease or difficulty with which firearms can be purchased from licensed dealers by either qualified or unqualified purchasers, and (c) the ease with which a firearm can be obtained on the black market. The factor of contention regarding the effect of lawful gun ownership on criminal violence is (a); factor (b) is a function of controls on transfer, sale and purchase, including the accessibility of retail outlets; and factor (c) is a function of the level of illegal possession and the accessibility of illicit markets. (Once a firearm is possessed by a person, legally or illegally, the question of its effects on criminal aggression on the level of individual incidents were discussed in III.A.1.a.)

The question about gun "availability" as affected by legal gun ownership is whether, or to what extent, the level of lawful ownership of firearms legally acquired is positively correlated with either criminal gun violence or criminal violence in general. For example, do areas with higher rates of legal gun ownership have more crime? Do crime rates increase over time when gun ownership rates increase? These questions are ambiguous insofar as a positive correlation between levels of gun ownership and levels of crime could have at least four explanations:

(1) Guns ownership enables illegal possession and crime; higher levels of gun ownership promote higher levels of crime.

(2) Reverse causation: crime motivates gun ownership.

(3) Reciprocal causation: each has a positive effect on the other.

(4) Confounding factors: many other variables, demographic and cultural, are determinants of crime rates.

In addition, a distinction must be made between higher gun ownership levels (a) correlating positively with higher *gun* crime rates, (b) correlating positively with higher *overall* crime rates, and (c) correlating *negatively* with either (i) gun crime rates or (ii) overall crime rates (where, for example, legal gun ownership has a deterrent effect on crime overall or other factors are at work, see III.A.1.c-d, III.A.4-5, III.B3). It is possible that the relationship between gun ownership levels and crime rates is both two-way and otherwise complex, such that, for example, positive relationships and negative relationships tend to cancel each other out, either completely or partially (as with the inhibitive and facilitative effects of aggressors' firearm use on the lethality of criminal aggression, per III.A.1.a).

Again, space cannot be afforded here to summarize the amount and variety of the research on this matter or the intricacies of Kleck's analysis of that research. But

the bottomline is instructive: the net impact on violent crime of the various combined effects of gun possession by criminals and by prospective victims (the general public) is a virtual nullity ("not significantly different from zero" according to Kleck). "Consequently, the assumption that general gun availability positively affects the frequency or average seriousness of violent crimes is not supported. The policy implication is that there appears to be nothing to be gained from reducing the general gun ownership level. Nevertheless, one still cannot reject the possibility that gun ownership among high-risk subsets of the population may increase violent crime rates" (1991, Kleck, 203).

Thus, as a policy matter, while trying to reduce levels of legal gun ownership is not helpful and might even be counter-indicated for reducing the rate and severity of violent crime, it might nonetheless be effective to target illegal gun possession and to screen against high-risk persons' acquiring firearms, consonant with the policy recommendations in III.B.2 and the efficacy conditions outlined in III.B.3. The qualification that it "might" be effective is not meant to diminish the rectitude or desirability of trying to reduce possession by high-risk individuals, but merely acknowledges the apparent paradox of the findings reported in III.A.1.a, that criminals' use of guns inhibit as well as enhance the lethal effects of gun crime. The net effects observed in this and the previous section simply illustrate the need for caution in speculating about the connection between firearms and crime rates: speculation is no substitute for comprehensive study of the available research. The need for similar caution in speculating about the utility of gun controls is illustrated in III.B.3. The following two sections illustrate a few of the factors that complicate or confound the relationships between either guns or gun controls and violent crime.

c. International Comparisons

Besides citing raw death tolls and misstated factoids such as "A gun in the home is 43 times more likely to be used to kill a family member or a friend than to kill an intruder" (discussed in II.B.2), perhaps the most popular diversion in the gun control debate, enjoyed by both sides, is bandying comparisons between the United States and other countries. Japan and Great Britain, it is observed, have far lower rates of homicide but far stricter gun controls; hence, America's being awash in guns must be the reason it is awash in violence. Switzerland, comes the rejoinder, is not only awash in guns but also requires its citizens to keep fully automatic assault rifles in their homes (the estimation is about a third versus upwards of half U.S. households

for firearms generally), yet Switzerland has one of the lowest violent crime rates in the world; hence, the availability of guns in a given population is not uniformly associated with violent crime. The bottomline regarding the net effect of general gun ownership on violent crime was summarized in the previous section, but the matter of international comparisons is instructive to explore briefly, if only because it is as popular as it is unproductive to speculate about.

The obvious difficulty with many international comparisons regarding gun ownership/control and violence such as homicide derives from important differences on dimensions canonically associated with differential homicide rates, per Kleck (1991, 189): social solidarity, cultural and ethnic homogeneity, history of racial conflict, hierarchical rigidity, obedience to authority, subjective sense of unjust deprivation, and so on. In many cases, reliable and uniform data are not available on either these variables or gun ownership levels. Consequently, systematic study of a large comparison set is impaired. Absent systematic comparison on all relevant dimensions, pair-wise comparisons are embarrassed by isolated or anecdotal indicators of cultural differences. For example, both Japan and Switzerland have much higher suicide rates (17.2 and 35.6 per 100,000, respectively, in 1989) than the U.S. (12.4 in 1988). Switzerland not only keeps and bears its private firearms with noteworthy civil discipline, but is also noteworthy for citizens who pay public transit fees on the honor system. Paragons with relatively low violent crime rates are nonetheless distressed to see those rates rise along with the growing ethnic diversity of their populations from immigration and itinerant labor. And so on.

However, despite the obstacles in the way of telling comparisons, creative approaches have proven instructive. For example, to partially control for cultural differences between the U.S. and Japan, Kleck examined homicide rates among Japanese-Americans (J-As) in the U.S., where gun availability is notorious, with homicide rates in virtually firearm-free Japan, finding rates of 1.04 per 100,000 for the former and 2.45 for the latter. Given the possibility that Japanese-American homicide perpetrators were under-identified by arresting officers, the J-A rate could be underestimated. However, even if it were in error by a factor of two, the Japanese rate would still be higher. Of course, there could be many cultural differences between J-As and Japanese citizens that might defeat this comparison; but that is just the point: international comparisons are readily vitiated by confounding factors. The lesson that Kleck draws from his exercise is that even a simple attempt at controlling for cultural variables can obviate an apparently enormous difference in violence rates. An example of an obviously fallacious but popular comparison is that between

the U.S. and Great Britain: not only is the U.S. overall homicide rate higher, but its *gun* homicide rate is also higher, which is then taken to imply that the greater rate of gun ownership in the U.S. must account for its higher rate of homicide. But GB also has lower rates of homicide from hands and feet, yet no one could suppose that this fact is accountable to Britains' having fewer hands and feet.

Another illustrative study surveyed gun ownership levels in 14 countries and noted, for pair-wise comparisons, that higher gun ownership levels generally correlated both with higher total homicide rates and with higher gun homicide rates. What the study did not notice or mention was that greater gun availability correlated equally strongly with higher *non-gun* homicides, which suggests an alternative to the hypothesis that more guns cause more homicide, namely, the reverse causation hypothesis that higher homicide rates motivate higher levels of gun ownership. *A priori*, there seems more reason to expect non-gun homicide to motivate gun ownership than to expect gun ownership to motivate non-gun homicide. Another alternative explanation is that both the higher levels of gun ownership and the higher homicide levels are correlated with other cultural variables, such as attitudes on the use of lethal weapons against others (from cause or malice). In any case, international comparisons are not yet dispositive on the nature of the relationship between gun ownership levels and violence rates and shed no light beyond the intra-national findings on U.S. gun ownership and violence (per III.A.1.b). A canonical reference for further study is Kopel (1992) *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (see Bibliography), the most intensive analysis of international comparisons.

d. Demographics

The tendency to isolate firearms as a major factor accounting for American violence is understandable: America has distinctively high levels of gun ownership, violent crime and gun crime. However, solutions to the problem of American violence are not apt to become apparent if the problem itself is oversimplified and other factors in the patterns of American violence are ignored.

For example, it is axiomatic that violence (for example, violent crime, including gun crime, suicide, and fatal accidents) tracks demographics. Perhaps the most distressing recent manifestation of the operation of demographic factors in the U.S. is the sharp rise in violent crime, and gun crime in particular, among juveniles and young adults. It is not surprising, from the criminological perspective, that as

the youth cohort of the general population increases the overall crime rate can increase, because the highest rate of crime in any population in every age and society occurs in the subset of those aged 15 to 24 (or thereabouts). In turn, the highest crime rate in the youth cohort is in the subset of males and the highest crime rate in the male youth cohort is in the subset of the socio-economically deprived. Despite the steep increase in gun crime among the youth cohort and the increase in the relative size of that cohort in the 1980's in the United States, the overall violent crime rate did not so markedly increase, indicating that in other age groups violent crime actually decreased. Aside from the increase of drug marketeering and associated incentives for American youths to resort to firearms in the 1980's, the general factors of youth, ~~gender~~ sex and socio-economics play an impressive role in the national crime rate.

For example, data from the 1992 FBI Uniform Crime Reports and the *Economist* (on European crime rates) reported by Jarod Taylor in ~~the~~ a May, 1994, *National Review* show the following: European murder rates in 1990 were Great Britain 7.4 (per 100,000), France 4.6, Germany 4.2, Italy 6.0, with an average of 5.5, compared to the 1992 U.S. rate of 9.3. If the socio-economically deprived cohort is removed from the U.S. tally, the U.S. murder rate falls below Great Britain's and rivals the European average. Removing the youth cohort aged 15-24 has a similar, dramatically deflationary effect. This in no way diminishes the more severe violent crime problem in the United States (the same artifice would analogously deflate the murder rates in the European countries). It simply illustrates the magnitude of the association of violence with general demographic factors. The point is not that the problem of violent crime is not significant, but that the problem is not uniform across U.S. society. An analogous lesson is drawn from the sample fact that about half of all violent crime in the state of Pennsylvania occurs, unsurprisingly, in the greater Philadelphia area.

Beyond the role of general demographic, socio-economic, or geographic factors, more specific influences on the patterns of violence in American society can be discerned. Analogous to the question "Why is America more violent than its neighbor to the north?" is the question "Why was the American western frontier more violent than Canada's?" Instructively, the American west was no more uniformly violent than American society is today. For example, David T. Courtwright's article on "Violence in America" explores the question of "what human nature and the California gold rush tell us about crime in the inner city" in the September, 1996, *American Heritage*. Courtwright identifies many regional peculiarities and

differences in American violence through history that cannot be explained simply by the demographics of age and ~~gender~~ sex, whereby young men, as in all societies and times, are at highest risk for violent crime and misadventure. More specifically, it is young men who lack parental supervision or marital partners, family, or other communitarian identities, who are at greatest risk. For a variety of reasons and for most of its history, "America has had a higher proportion of itinerant, single men in its population than the nations from which its immigrants, voluntarily or otherwise, came." American immigration patterns were such that there was a surplus of men every year until 1946, producing what Courtwright calls "the abnormal structure of the population" that accounts in significant part for America's abnormal history of violence "played out with a bad hand of cards dealt from a stacked demographic deck." The surplus of men, many of whom would necessarily remain single, combined with "the ubiquity of bachelor vices" (such as liquor, gambling, and prostitution purveyed in places of commercialized vice) created ample opportunity for violent conflict, which in turn created ample reason for this volatile population to resort to arms (as young drug traffickers do today). Unlike the Canadian frontier, which attracted families and women in greater numbers and was characterized by a more balanced and rooted population, single men disproportionately populated the notoriously violent zones of the American frontier (not all parts of which were especially violent).

Courtwright's case in point is California during the gold rush, where the population was 95% men in 1849, 20% of whom were dead within six months of their arrival from disease, suicide, and violent competition over scarce prostitutes and gambling affrays, all of which were exacerbated by alcohol abuse. For a complex of reasons, the excesses and ravages of life in communities dominated by single men abated with the influx of women and, in established communities, with more balanced populations, violent conflict was localized to the establishments and mining camps where men exclusively caroused. Mining communities were several times more violent than urban crime centers even today. For example, where the latter post homicide rates of 20 to 30 per 100,000, the former produced rates of 60 to over 110. However, a telling exception was the gold rush in the Gold Hill area of North Carolina, which was settled by immigrant Cornish miners who brought with them or created (from neighboring female populations) families and suffered nothing like the premature death and homicide rates of the female- and family-scarce California environs.

By Courtwright's analysis (whose detail and documentation can be found in his 1996 book, *Violent Land: Single Men and Social Disorder From the Frontier to the Inner City,* Harvard University Press), the key factor differentiating the more violent from the more pacific communities across "frontier" regions as well as across time (as havens of violence became increasingly domesticated and peaceful, or vice versa) was the difference in ~~gender~~ sex balance: the more balanced the population, the greater the social order. The complexion of this relationship, of course, reflects far more than the mere head count of male and female co-inhabitants, but the dynamics of the relationship and the salient role played historically by undomesticated men in America's violent "hot spots" illustrate a level of demographic detail worthy of attention today.

2. Suicide by Gun

There are two different kinds of issue regarding guns and suicide: empirical and philosophical. The empirical questions concern the instrumentality effects of firearm possession on the frequency of attempted suicide (facilitative or inhibitive) and the effect of the use of a firearm on the success of suicide attempts (lethality). While there may be little philosophical question about the propriety of the law being used to try to reduce criminal violence (to protect citizens from unjust harm by others, to prevent citizens from unjustly harming others), there is a philosophical question, albeit a delicate one, about the law being used to prevent suicide (to prevent citizens from harming themselves). If objection can be raised against medical paternalism, it can be raised against paternalism (limitation on, or interference with, a person's liberty for the presumed good of that person but regardless of, or against, that person's express or apparent wishes) exercised by coercive state authority.

There is a question about what government should be able to do to prevent suicide in general, because suicide (self harm) is a social problem of a different order from violent crime (harm to others), but the complexion of the problem is different for different categories of people. For example, one rationale for making minority age and mental/emotional impairment legal disabilities for firearm possession is the presumed susceptibility of both categories to impulsive or (if such a distinction makes sense) errant suicide (as contrasted, for example, with calculated suicide by mature, competent but hopelessly ill people). The very contentiousness of any attempt to discern better or worse reasons for suicide reflect the profundity of the

philosophical question about what we are permitted, or obliged, to do to prevent it. Suicide prevention, at least gun-suicide prevention, is also part of the rationale for imposing special criminal liability for negligence in securing firearms from unauthorized hands. And suicide reduction is one rationale for gun bans or gun-scarcity programs, on the assumption that eliminating or reducing gun suicides will reduce total suicides. Prohibiting minors and the mentally/emotionally impaired from possessing guns, imposing liability for the insecure keeping of guns, and banning guns are three different types of gun control aimed at suicide reduction.

A brief summary of the facts and findings about guns and suicide is helpful for determining how suicide-targeted gun controls might be argued. Gun suicides regularly outnumber gun homicides and account for about half of all gun deaths: if in a given year gun fatalities were 40,000, 20,000 would typically be suicides, 1500 accidents, 18,500 homicides (10% to 15% of which could be in justifiable self-defense, see III.A.4.a). Guns were used in 57% of U.S. suicides in 1985, compared with hanging, the second most popular method, at 14%. The frequency of both gun suicides and the preference for firearms for suicide in general suggest to some that the immediate availability of a gun can induce suicide (analogous to the "triggering" hypothesis regarding guns and criminal aggression, that "the trigger pulls the finger") or that the general availability of guns is conducive to suicide. Alternative notions are that the suicide who chooses a gun is typically a determined, not an impulsive, suicide attempter; that the gun is preferred because the suicide attempter wants to ensure success (fatality) as well as the ease of success and the immediacy of success; and that ambivalent or call-for-help suicide attempters, for this reason, do not prefer guns. Proponents of this line of hypothesizing have generated a mass of research, as have its opponents, but it culminates in *the substitution hypothesis,* which holds that virtually all gun suicides would have been committed by some other means had a gun not been available, on the assumption that suicidal intent is generally very robust. The substitution hypothesis is one empirical challenge to proposals to reduce firearm ownership in order to reduce suicide overall. How does one test such a counter-factual? Therein hangs an interesting tale, one that will reward study. It must suffice here to provoke that investigation and to summarize bottomlines.

Overall, by Kleck's analysis (1991, 255) and as is the case in other areas, the research fails to make a case for the effectiveness of gun controls for reducing the *overall* suicide rate (as opposed to the *gun* suicide rate). As is the case in other contested areas of research on the efficacy of gun controls, the research is about evenly divided regarding whether any given gun control measure appeared to

reduce overall suicide rates or failed to do so. There are two studies paradigmatic of what can be said for the partisans and opponents of the substitution hypothesis, respectively. A 1990 study of average suicide rates in Toronto five years before and after Canada imposed stricter gun controls found a decrease in the gun suicide rate but no significant drop in the overall suicide rate, consonant with the substitution hypothesis. However, a study of the effects of the Washington DC Firearms Control Act of 1975 (which went into effect in February, 1977) from 1976 to 1977 found that the gun suicide rate decreased by 38% while the total suicide rate decreased by 22%, even as the national suicide rate was increasing. The DC law prohibited handgun sales as well as handgun possession by previous handgun owners who failed to register their handguns prior to passage of the law; it is the latter provision that could have had an impact in the study's short time frame. Factors that detract from the impressive drop in overall suicides include the facts that (a) the study did not control for any other variables besides the handgun ban and (b) that the results represent only a one year period. (Let suspense about the DC suicide trend and whether the suicide-deflation effect remained robust over the twenty years since the first year of the handgun ban be a goad to research.) Factors that enhance the impressiveness of the DC study's results include the facts that (c) the substitution of more lethal long guns for handguns, if it occurred, left an impressive decrease nonetheless, contrary to one version of the substitution hypothesis, and (d) any "leakage" effect from other jurisdictions that helped make DC the "murder capitol of the world" despite its gun ban evidently did not erase the effect of the handgun ban on the suicide rate in the first year; "leakage" might have more of an effect over time, but suicide attempters are more law-abiding and less apt to seek illegal guns than criminals.

By contrast with the dramatic suicide rate drop and contrary to the study's authors' claim, the DC handgun ban, according to Kleck's analysis, did not result in decreases in overall violent crime. This is consistent with two general facts: (1) few crimes, but most suicides, are committed by people without certifiable criminal identities; (2) broadly targeted gun controls, such as gun bans, reduce gun possession only among the law-abiding if they reduce gun possession at all. While the reliability or generalizability of the DC study's result, limited to one year of the last two decades, might be questioned, the study poses an instructive question. The Canadian toughening of gun controls that effected no reduction in total suicides, according to the aforementioned ten-year Toronto study, was not tantamount to a handgun *ban*. The discrepancy might be taken to suggest that only sufficiently draconian controls.

such as outright bans, are rewarded with the intended effect, a net reduction in some category of violence. The challenge, then, is to decide how to weigh the benefits against countervailing costs. Washington DC is a case in point: on the assumption that overall suicide reduction has remained a robust result of the 1975 handgun ban, the question is whether the suicides saved counter-balance innocent lives lost to criminal violence for lack of a defensive firearm. In view of the data on the utility of private firearms for defense against and deterrence of criminal violence (III.A.4-5 and V.B.2.c) and in view of the residual values violated by gun bans (IV), two questions remain: whether the prospect of suicide reduction can itself justify gun bans and, if not, what other forms of gun control can hope to reduce suicide.

There are two important firearm-specific instrumentality effects to consider, whatever one's position on suicide-preventative gun control. (1) Firearms are among the most lethal suicide instruments. For example, they are more likely to ensure success (fatality) than driving a vehicle into a barrier, more likely to produce immediate success than a drug overdose, but, in the case of failure, they are more likely to gravely damage the suicide survivor, like failed vehicular suicide, than is a drug overdose. Also, delayed-success methods like drug overdoses provide more opportunity to interdict suicide, should that be justifiable. The lethality of guns as suicide instruments suggests that even if gun suicide attempters would have seriously attempted suicide absent the availability of a gun, more attempters might survive (and survive with less damage) absent a gun. (2) A secondary effect of a handgun ban, were it actually to be effective in reducing handgun possession, could be to induce firearms users to substitute long guns (rifles and shotguns) for handguns; in the case of gun suicide attempters, this substitution would prove yet more lethal (more attempted gun suicides would succeed and those that failed would be liable to graver injury). Similar untoward effects would obtain from effective bans on smaller-caliber handguns (or their ammunition). While the Washington DC handgun ban, at least in the first year, resulted in a significant net decrease in suicides whether or not long guns were substituted as an instrumentality, handgun bans or handgun ammunition bans can still have the perverse effect of inducing some suicide attempters to resort to more lethal firearms. Would the substitutability of long guns for handguns argue for banning both? Again, the defensive and deterrent value of private firearms would need to be weighed against any net reduction in suicide.

3. Accidental Death by Gun

As in the case of suicide, there is more philosophical argument about how the law should be used to prevent accidents (which can involve self harm as well as harm to others) than about how the law should be used to prevent crime (harm to others). As with suicide, accident-prevention measures that target minors or children are less contestable than those that constrain adults for their own (as opposed to others') safety. With respect to coercive accident-prevention measures aimed at adults for their own safety, some might be welcomed by their supposed beneficiaries, while others might objectionably interfere with the liberty or other interests of prospective beneficiaries. (An example of a controversial gun-safety measure is the consumer-protection policy discussed in I.C.1.b).

Unlike the case of gun suicides, which typically outnumber gun homicides, fatal gun accidents are relatively small in *proportion* to all gun deaths (typically, less than 5%) and in *number* (1400 to 1500 in the 1990's) and their *rate* has been steadily decreasing since early in the century. For example, accidental firearm fatalities among children and juveniles age 14 and younger dropped 63% between 1979 and 1993; and the National Center for Health Statistics puts accidental firearm death at the bottom of their list, below drownings, falls and choking. While 1500 deaths are hardly a negligible problem, the magnitude of the problem they represent is hardly on the order of the "thousands of deaths a year, most of them children" routinely advertised by uninformed, or mendacious, gun control proponents. For example, the January 10, 1997, issue of the *Weekly Reader*, self-described as the "largest newspaper for kids in the world," reported that almost 2,000 "kids" died in gun accidents in 1992, whereas the total number of fatal gun accidents for all age groups in 1992 was 1400. Control advocates routinely inflate the harms done with guns to "children" by defining people up to ages such as 14, 16, 19 or 21 as "children," rather than distinguishing children under age 10 from pre-adolescents age 10 to 12, or juveniles age 13 to 17, or young adults age 18 to 21, each of which categories can have very different risk factors. Be that as it may, like the topic of gun suicide and its reduction, the topic of gun accidents is far richer than can be allowed here, where a synopsis of provocative highlights must suffice.

Despite the low number of fatal gun accidents (FGA's) at, say, 1500 a year, some control advocates argue that FGA's outnumber justifiable gun homicides in the home and that, therefore, the accident risks of a gun kept in the home for defense outweigh its defensive value. Allowing that not all but most FGA's occur in the home,

the problem with this popular line of propaganda is the *non sequitur:* justifiable homicides represent less than 1% of defensive firearms use and are in no way an adequate measure of their defensive value (see III.A.4 on the defensive *utility* of firearms and IV.A on their *residual* protective value). As advice that people should disarm themselves, it is a bad argument; as a paternalistic argument for disarming defensive-gun owners, it is worse. (See II.B.2 for a similarly fallacious "public health" argument based on all home gun fatalities, not just FGAs).

One reason to expect that the rate of fatal gun accidents would be below drownings, falls and choking, among other modalities, is that ~~people's~~ persons' exposure rates are also lower: even most gun owners have cause to handle loaded guns less frequently than they encounter heights and food, for example. We could expect, then, that an increase in the exposure rate would increase the fatal accident rate. Lott and Mustard did a recent study (see V.B.2.c.iii) of all counties in the United States on the effects of right-to-carry laws. Where more ~~people~~ persons are newly licensed to carry concealed handguns, we might expect that more will carry and that fatal gun accidents would increase with this increased exposure (handling a loaded firearm on a daily basis). Lott and Mustard estimated that the increase in right-to-carry laws might increase fatal handgun accidents by 9 or 4.5% over the 200 annual handgun accidental deaths they found, which would be an overall increase of 0.6%, 6/10ths of a percent, if total accidental gun deaths were 1500 per year. This increment as a cost would, then, need to be balanced against the benefits of concealed carry found by Lott and Mustard.

FGAs can be distinguished as between two kinds: harm to self and harm to others, which, in theory, present problems of different orders and suggest different rationales for proposed controls. Imposing an unwanted constraint to keep a person or his gun from harming others, even inadvertantly, is more easily justified than imposing an unwanted constraint to keep a person from inadvertantly harming himself. But this distinction is significant only if constraints can be differentially targeted. An example is the imposition of special criminal liability, as opposed to relying on extant tort law covering negligence and recklessness, for failing to keep firearms secure from unqualified hands. Such measures address criminal and suicidal misadventure as well as FGAs, but among FGAs their concern is accidental harm to others, which can include self-inflicted FGAs by people, especially children, who misappropriate an unsecured gun. It is not clear in this case what significance the distinction between self harm and harm to others bears. The question is whether there are cases of unwanted (arguably paternalistic) controls

exclusively aimed at preventing harm or accidental self-harm to qualified gun owners.

In any case, FGA's fall into two categories: FGA's that involve a person accidentally shooting himself with a gun he is holding, and FGA's that involve another person getting shot by the person handling the gun. About half of FGA's are self-inflicted. It is estimated that 5.5% to 14% of self-inflicted deaths classified as FGA's are actually suicides. This substantially reduces the already relatively small magnitude of the problem of self-inflicted FGA's. For example, if there are 1500 apparent FGA's in a given year, 750 of which are self-inflicted, and if 100 (13%) of these are actually suicides, then there are actually 650 self-inflicted FGA's. What type and magnitude of legal apparatus is appropriate for reducing this number? What proportion of the self-inflicted FGA's involve children shooting themselves with another's gun as opposed to qualified adult gun owners shooting themselves with their own gun? It might be that cases of purely paternalistic controls are too difficult to distinguish from harm-to-others controls to raise concern, but it is an issue to be alert to as new consumer-product safety measures are proposed.

Of course, the relatively small number of *fatalities* does not capture the whole problem of concern, accidental gun injury (fatal or not). The Consumer Product Safety Commission (CPSC) estimated from a national sample of emergency room data (which were inflated by including intentional injuries among youths 15 and younger) that guns accounted for 60,000 injuries. Guns then ranked 36th among 183 products or groups of products. The CPSC had previously weighted injuries by seriousness. On the CPSC injury index that took into account both frequency and ~~seriousness~~ severity, guns ranked 46th among 159 products, just behind prescription drugs and three ranks ahead of pens and pencils. Bicycles ranked first with a rating 15 times as high as firearms. For the prudent, these figures counsel due care. For some policy makers, the implication taken is that there is always room for more concerted government controls. The potential for reducing accidental gun death or injury by government action will be a function of how gun accidents occur, where accidents, like intentional criminal violence, tends, unsurprisingly, to track similar demographics. Some conceptual analysis regarding what constitutes a gun "accident" will be helpful for putting this problem in perspective.

Webster's Seventh New Collegiate Dictionary provides several definitions of "accident," but the one that, according to Kleck, is most appropriate to the typical gun accident is "an unfortunate event resulting from carelessness, unawareness, ignorance, or avoidable causes." For example, only a small fraction of FGA's involve

firearm design defects, such as the lack of a passive hammer or striker block, which omission will allow a loaded gun to discharge if dropped. Virtually no handguns are so made anymore, although many long guns lack a drop safety. By various studies, the rates of guns discharging from being dropped are found to range from 3.3% to 4.7% of home FGA's, while reports of discharge due to some defect in hunting accidents (which represent 16% of FGA's) find them to be 7% of FGA's and 8% of non-fatal accidents. Thus, the vast majority of FGA's involve someone pulling a trigger, intentionally or otherwise. The trigger may be pulled intentionally, while the result (a discharge or the striking of a given target) may not be intended. The "otherwise" category, while unintentional, rarely includes "pure" accidents, but the continuum and factors that an "accidental" discharge might entail (beyond *Webster's* generic definition) merits some discussion.

In the broadest or least strict sense, an *accidental* discharge is any *unintentional* discharge of a firearm. Either this concept of "accident" reflects no ethical or legal distinction between accidents and negligence, or else it implies, reasonably enough, that there are such things as negligent accidents as opposed to "pure" accidents. More strictly speaking, an accidental discharge is a subset of unintentional discharge, namely a *non-negligent unintentional* discharge, rather than a merely unintentional one. The intuitive appeal of this distinction is reflected in the hollow ring of the notorious excuse, "It was just an accident! I didn't know the gun was loaded!" A *purely accidental* discharge is, paradigmatically, one occasioned by an unexpected mechanical failure of a firearm or round of ammunition, or a physical event (such as a fall, or the dropping of a loaded weapon, or an involuntary muscle contraction) that *could not have been forseen or prevented* by the shooter. As with President Nixon and the Watergate affair, the crucial question is culpability for what the shooter *could and should* have known or done to prevent the unwanted discharge.

Involuntary discharge is a also subset of unintentional discharges: the act of discharging a firearm without deliberate or conscious intent, resulting from a bio-mechanical response or event (such as an involuntary muscle contraction in the shooting hand) which is beyond the shooter's *instant control.* An action beyond one's instant control can be forseeable and arguably negligent. For example, a vehicular accident can be beyond the instant control of a drunk driver, but, while sober (or even intoxicated), the driver arguably could and should have forseen and avoided the risk of driving drunk (by either not drinking in the first place, or by not driving thereafter). "Horsing around" with a loaded gun with one's finger on

the trigger, or just having one's finger on the trigger when moving about (or even sitting still), is an invitation to a decidedly forseeable, albeit involuntary, discharge from an involuntary muscle contraction incited by events which are beyond one's instant control: being startled, losing one's balance, or experiencing what's called "interlimb response" or "sympathetic grip." An example of the latter phenomenon is when the non-gun hand grips an object, such as another person or a door handle, with full force, in which case the gun hand can involuntarily contract with up to 20% of full force. If an average full-force grip is 100 pounds, the gun hand can contract with a force of 20 pounds, enough to defeat even the heaviest trigger pull-weight. If the gun hand's finger is on the trigger, an involuntary discharge will result. Whether an involuntary discharge is considered purely accidental or negligent will be a function of what the shooter could and should have forseen and done to preclude the precipitating event. Adherence to the cardinal safety rule of trigger discipline, "Keep your trigger finger securely registered outside of the trigger guard until both (a) you are on target and (b) you have decided to fire," would preclude an involuntary muscle contraction from causing an involuntary discharge. The question of negligence may then devolve to the question of whether the shooter should have known (or intuited) and observed such a rule.

A *negligent* discharge is an apparently unintentional or allegedly "accidental" discharge caused by an action or event which the shooter could and should have forseen or prevented. Many negligent discharges are claimed to be "accidental," but apparently "accidental" or even involuntary discharges may be accounted negligent. A paradigmatically negligent discharge is one resulting from a gross violation of a cardinal safety rule which the shooter could have been expected to know and observe. Negligence, in general, can take either of two differentially blameworthy or culpable forms: (1) *inadvertent negligence*, (a) where an agent unwittingly and unintentionally performs a wrongful or risky act, but (b) where he should have forseen the risk and refrained from so acting; (2) *advertent negligence* or *recklessness*, (a) where the agent does not intend to do anything wrongful or harmful, but (b) where he knowingly and intentionally runs an unjustified risk of wrongdoing or causing harm. For example: a man who fired a handgun in the air one New Year's Eve whose bullet lodged in the head of a girl a mile away was acquitted of reckless endangerment because it was not proved that he knew the risk of hitting someone with a bullet fired into the air; he was, rather, convicted of discharging a weapon within city limits. Answering to these *criteria*, there are two general types of *standard* of due care by which to judge the degree of negligence or

its culpability: (i) an *objective* (reasonable and prudent person) standard of care: what we would expect of a reasonable and prudent person with normal capacities in the agent's circumstances; (ii) a *subjective* (agent-relative) standard: what we would expect of a person in the agent's circumstances who knows only what the agent knew at the time and who possesses only the agent's particular capacities.

Within this conceptual framework, at least using the "reasonable and prudent person" standard of negligence, the vast majority of gun "accidents" are morally if not actionably negligent. The implication is that gun accidents are occasioned by some manner and discernible degree of carelessness. Even purely mechanical discharges resulting from dropping a gun can be foreseeable and avoidable. The keeping of an unsecured and loaded firearm in one's bedroom for a child or other unauthorized person to find while one is away and unable to monitor the situation is needless and careless, irresponsible or forseeably risky (whether or not it rises in any given case to actionable negligence or recklessness).

This general characterization of the problem of gun "accidents" comports with specific findings about those who cause or occasion them. In 1987, children under age 10 accounted for 122 of the 1400 FGA's, or 13%. It is estimated that 64% of child FGA's might be caused by children under 10. Even if all these FGA's were either self-inflicted or involved children shooters, children, of course, cannot be accounted "negligent" or responsible therefor. The relevant responsibility, or negligence, lies with the adults who allowed them access to the firearms. Adults who allow children access to guns match the high-risk/reckless profile of adults and juveniles who are typically the shooters (and also victims) in gun accidents, who in turn match the profile of high-risk/aggressive offenders who perpetrate violent crime. The most accident-prone as well as the most violence-prone categories are these: male, single, 15 to 24 years of age, minorities, socio-economically deprived, abusive of drugs or alcohol, with histories of accidents or violence (such as vehicular accidents and offenses, prior arrests for assault), or characterized by combinations of the forgoing. By contrast, for example, average gun owners are at virtually no risk for gun accidents; indeed, the vast majority of the general population, as well as the population of lawful gun owners, are likewise at negligible risk for gun misadventure of any description. This fact raises a general philosophical question regarding not just gun accidents but also criminal gun violence and gun suicides: How should the vast majority of any population, or their liberty, be trammelled in the hopes of restricting the untoward or heinous behavior of a fractional and marginal element (notwithstanding that the effects of this element's behavior are

significantly harmful, but granting that would-be controls to date have been largely feckless)? At bottom, and in the main, the problem of gun accidents is an adult/juvenile behavioral problem, not a mechanical safety problem, and this perspective needs to govern the deliberation of gun controls contemplated or crafted to reduce gun accidents. Candidate measures follow.

Firearms Safety Training addresses ignorance of (a) the cardinal safety rules (which, if followed rigorously, could prevent all but the most inadvertant mishaps), (b) mechanical operations (such as the operation of active safeties, how to safely inspect or unload a gun) and (c) practical and tactical wisdom about handling firearms in various settings and deployments (such as awareness of the bio-mechanical phenomena of involuntary muscle contraction cited above). Training can remediate safety or technical ignorance or unfamiliarity in gun handling, but cannot remediate the willful recklessness or habitual carelessness associated with the gun-accident prone (who are, generally, accident-prone). Most drivers have taken both driver education courses and driver certification tests, but some drive recklessly regardless, while others habitually or episodically suffer lapses of judgment or become distracted (for example, car phone owners are at the same risk for vehicular accident as intoxicated drivers). Nonetheless, training can address the dimension of gun accidents concerning what, in retrospect, a person "should have known" as entailed by what he should and could have foreseen or prevented. Kleck notes that training is least likely to be available to, or to be taken by, or to affect those most likely to need it (such as low-income urbanites). One solution to the access or compliance problem would be to provide firearms safety training routinely in the schools, just as driver's education, health education and other life-skills training are provided. It could be as economical as driver's education or, unlike driver's education, could be purveyed and cumulatively reinforced in age-appropriate forms and measure throughout the primary and secondary grades. One obstacle to such a systematic approach is political opposition to anything resembling acceptance or promotion of firearms. This poses a paradox for those professing interest in public safety but who are also opposed to firearms, which, like drugs (legal and illegal) and other hazards, are fixtures of the world: educating generations of children and juveniles about guns might reduce their hazards while also reducing popular support for attempts to eliminate them. Firearms training in the schools addresses the access problem but not the question of whether training can have any effect on persons prone to reckless or aggressive behavior, a potential shortfall that also relates to the following proposal.

Screening for Proficiency in firearm safety and handling before allowing a person to purchase or possess a gun would entail or prove tantamount to a licensing system. It would be expensive, as against the small proportion of accidents attributable to deficiencies in such knowledge (as opposed to reckless or careless dispositions, regardless of such knowledge). If such a measure is accounted beneficial on balance, there would be economy of scale in integrating safety training in the schools rather than establishing a separate government apparatus. Mandating safety training from certified trainers in the private sector, as is done with some states' right-to-carry systems, is also an alternative to government-run certification programs, which would be perceived by many as an occasion for the government to create a bottleneck by failing to provide sufficient opportunity for citizens to qualify (which has in fact happened under the pretext of lack of funds). The main problem with a proficiency or training *requirement*, or *opportunity*, is that it would not address or might not overcome the dispositional factors operative in the vast preponderance of gun accidents.

Firearm Safety Technology can be improved to some extent. For example, all firearms could be equipped with passive hammer or striker safeties that would allow them to pass standardized drop tests and not discharge without the trigger being pulled. Such a measure would address the 4% (in the home) to 8% (in hunting) of gun accidents that result from such alleged defects, although it would affect only firearms of new manufacture. Most contemporary handguns are already so equipped. As discussed in I.C.1.b, consumer-product safety requirements for firearms themselves beyond passive or active safeties are arguably gratuitous and already controversial. However, safety *accessories* such as trigger locks or lock boxes that permit quick access to a loaded gun kept for protection are inexpensive and convenient. They do not compromise the functionality of the firearms themselves and are a virtual fail-safe (there are no reports of children defeating locks or lock boxes) against children gaining access to the secured firearms (which remain readily accessible to authorized adults). The prevalence, reliability, and relatively low cost of such devices make keeping a loaded firearm for defense in a fashion accessible to children both needless and irresponsible, if not actionable.

According to Kleck, no credible evidence to date shows that general gun control laws, such as already prohibit gun possession by certain high-risk individuals, have reduced gun accidents (such as those involving juveniles, whose FGA's occur with illegally possessed guns). Screening on the basis of a broader set of legal disabilities (such as alcohol abuse, mere arrest rather than conviction for

My gun control friends will appreciate it, of course.

felonies, violent misdemeanors, or other indicators of propensity to misadventure) run afoul of the controversies discussed in I.C.2.b (not to say civil-libertarian objections to prior restraint, and the like). Since violent offenders already defeat such screens in order to possess firearms illegally, other high-risk individuals, by virtue of their reckless dispositions, are apt to escape any yet wider net of prohibitions. But the question remains open whether gun laws simply fail to keep guns from enough high-risk people or whether there are measures yet untried that could tighten the net without courting civil-libertarian controversy.

4. The Defensive Utility of Firearms

The defensive *utility* of firearms against personal criminal threat (of murder, assault or rape, robbery, or the burglary of ~~inhabited~~ occupied premises) is a quantifiable or actuarial component of their personal protective value (IV.A) as well as of their social value (IV.B) and a function of two factors: the *frequency* and the *efficacy* of defensive use. The efficacy of defensive use in the instant circumstances (which may contribute to, but which is distinct from, their deterrent value), in turn, has two dimensions: the effect of defense with a firearm on the *completion* of an attempted crime and on the *injuriousness* of an attempted crime (including attempted homicide).

Doubt about the defensive utility of firearms is often based on one or more of the following common beliefs: people who own guns hardly ever use them defensively, because they're not likely to be available when needed (see III.A.4.a); even when they are, people who try to defend against crime with guns will not prevail and usually have their guns taken away and used against them (see III.A.4.b.i and iv); would-be gun-armed defenders just escalate conflict and the liklihood of attack and injury from attack, whereas the best advice is to comply with criminals' terms or run away (see III.A.4.b.iii); civilians lack the ability to use guns effectively and probably shoot more innocent people than criminals (see III.A.4.a and b.v); people can and should rely on the police for protection (see IV.A.2.c) rather than "taking the law into their own hands" (see III.A.4.c).

a. The Frequency of Defensive Firearm Use

Kleck has conducted a comprehensive critical analysis of all past research on the frequency of the defensive use of firearms as well as the most recent and

systematic survey research (with Marc Gertz, "Armed resistance to crime: The prevalence and nature of self-defense with a gun," *Journal of Criminal Law and Criminology,* Fall 1995). Because the Kleck and Gertz results are astounding and space does not allow an account of the study's meticulous design as to how it addressed the details of controversy generated by prior surveys, some indication of its scientific standing is wanted. An argument from authority on the integrity of the study comes from Marvin Wolfgang, a preeminent criminologist and one who did not like Kleck and Gertz's results. In "A tribute to a view I have opposed" (in the same journal issue that published the study), Wolfgang averred: "[Kleck and Gertz] have provided an almost clear-cut case of methodologically sound research in support of something I have theoretically opposed for years, namely, the use of a gun in defense against a criminal perpetrator. I have to admit my admiration for the care and caution expressed in . . . this research. . . . It is hard to believe. Yet, it is hard to challenge the data collected. We do not have contrary evidence." A natural response to the results and implications reported below would be: "People interviewed in such a survey about their defensive use of firearms are apt (a) to exaggerate the facts about whether they ever actually used a gun defensively and (b) to suffer from the 'halo effect' in construing whether their use of a firearm was actually 'defensive' as opposed to felonious." Given the magnitude of the Kleck and Gertz findings, it is understandable that people who might not like the implications of these findings would be motivated to speculate about the methodological deficiencies of the survey research and analysis that produced them. Critics so inclined need to consider whether it is plausible that Marvin Wolfgang would not have noted such failings, given his self-confessed hostility to them, and, in any case, to scrutinize the study for themselves.

The major finding of the Kleck and Gertz study is that guns are used by civilians in defense against criminal threat two million to 2.5 million times a year. In keeping with the judiciousness the study, we will take the lower figure to illustrate some ramifications. (The two million count was based on that portion of the sample for which a direct personal confrontation with a criminal could confidently be posited, as opposed to a belief inferred by the defender from circumstantial evidence.) The finding enables a more direct rebuttal to the "ingenious speciousness" of the long line of "public health approach" studies (II.B.3) purporting to show that the harms of private firearms vastly outweigh their benefits. The deceptiveness of findings like "a gun in the home is 43 times more likely to be used to kill a household member or acquaintance than to kill an intruder" becomes clear without labored

analysis of its attendant fallacies. Assuming, for purposes of illustration, round "ballpark" numbers for gun deaths at 40,000 a year, with 18,500 homicides, 1,500 accidents, and 20,000 suicides (variations in actual numbers in any year will make a negligible difference to the comparisons below), we can derive the following comparative frequency figures based on the Kleck and Gertz study.

• *Guns are used defensively to save lives nearly 20 times more often than they are used criminally to take life.* Reportedly (see III.A.5.b.ii), 314,000 lives are "almost certainly" saved by the defensive use of firearms; this divided by 16,280 criminal homicides (as derived below) yields 19.28.

• *Guns are used 50 times more often to defend against criminal threat than to kill anybody - defensively, criminally, suicidally or by accident.* We need to first subtract justifiable fatalities from the lower Kleck and Gertz estimate of defensive gun use, two million. Kleck and Gertz estimate justifiable gun homicides at fewer than 3,000 (or less than 1% of the lives reportedly saved by defensive gun use). Against the ballpark baseline of 18,500 gun homicides used here (not a Kleck figure), 3,000 fatal defenses would give a justifiable homicide rate of 16%, probably high, but we want to err on the high side. A generous estimate of the percentage of defensive gun uses that prove fatal is then 3,000 divided by 2,000,000, which yields .0015 or .15% (15/100ths of 1%), leaving 99.85% or 1,997,000 non-fatal defensive uses. 1,997,000 non-fatal defenses divided by 40,000 gun deaths is 49.9.

• *Guns are used over 100 times more often to defend against criminal threat than to kill another person intentionally.* 1,997,000 non-fatal gun defenses divided by 18,500 gun homicides, including self-defense, is 107.95.

• *Guns are used 100 times more often to defend against criminal threat than to commit suicide.* Two million gun defenses divided by 20,000 gun suicides is 100.

• *Guns are used over 1300 times more often to defend against criminal threat than to occasion an accidental death.* Two million gun defenses divided by 1500 fatal gun accidents is 1333.

• *Guns are used 480 times more often by law-abiding citizens to defend against criminal threat than to commit criminal homicide.* Assume the finding of Chicago Police Department studies of 20,264

homicides from the period 1965-91 that approximately 75% of criminal homicides are committed by criminals with prior records. Assume 18,500 annual gun homicides and a low rate of justifiable gun homicide at 10% or 1,850, leaving 16,650 criminal homicides. 25% of 16,650 criminal homicides yields 4,163 criminal firearm homicides by people with no prior criminal record. Two million defensive uses divided by 4,163 is 480. spell out

The last comparative frequency estimate addresses the question of how often previously law-abiding gun owners turn rogue and commit criminal homicide as compared to how often they use guns defensively. It provides perspective for those who presume the worst of gun owners (as one gun ban advocate put it, "The homicide fantasy is the engine that drives America's fascination with guns") and it gainsays widely believed and authoritatively propogated allegations, such as: "The overwhelming majority of people who shoot to kill are not convicted felons; in fact, most would be considered law-abiding citizens prior to their pulling the trigger."

b. The Efficacy of Defensive Firearm Use

By the foregoing findings, the defensive use of firearms is far more frequent than misuse resulting in criminal homicide, suicide, or accidental death. But just how effective is it? There are at least five interesting indicators of the efficacy of gun defense, or lack thereof: (i) How effective is defensive gun use in foiling crime, in the sense of preventing its completion? (ii) How many lives are saved? (iii) How well do the gun defenders fare compared to those who do not resist or to non-gun resistors? (iv) Aren't their guns usually taken away from them and used against them? (v) And how often do would-be defenders "go off half-cocked" or mistakenly shoot innocent people?

i. Efficacy in Preventing the Completion of Crimes

"Completion" will have different definitions for different crimes. For example, for assaults completion involves resultant injury, so completion and injury rates are the same (see III.A.4.b.iii). Completed attempted murder is difficult to separate from criminal aggressions that escalate from threat to injurious attack that proves lethal (section III.A.4.b.ii concerns lives saved in potentially lethal encounters and section III.A.4.b.iii concerns avoiding attack and injury in general).

For robberies, completion means the robber absconded with the victim's property. Victims who resisted robbery with a gun or with a weapon other than a gun or knife were less likely to lose property than those who resisted in any other way or those who did not resist. Kleck's analysis of National Crime Survey (NCS) data for 1979 to 1985 found the following completion rates: guns 30.9%, knives 35.2%, other weapon 28.9%, physical force 50.1%, threatening or reasoning with the robber 53.7%, no self-protection 88.5%. Regarding attack and injury rates in robbery, see III.A.4.b.iii. For rape, NCS data provided too small a sample to analyze, since less than 1% of rape victims report resisting with a gun. Kleck and Sayles grouped resistance with guns, knives and other weapons together (1991, Kleck, 126) and found that armed resistors to rape were less likely to have the rape completed against them than victims using other methods of resistance (such as reasoning with their assailant) and armed resistors did not suffer greater injury beyond the rape itself. From the finer breakdown of data on completion and injury rates for robbery and assaults, it seems reasonable to infer that the same results would hold for rape. In general, the more lethal the weapon used to resist (with exception for weapons other than knives for robbery completion rates), the less likely is the chance of completion or injury, where gun resistance is the most effective method for avoiding injury (III.A.4.b.iii).

ii. Estimation of Lives Saved

Defensive gun use is not limited to self-defense but often involves or includes the defense of some person(s) other than or in addition to the gun wielder. The Kleck and Gertz study asked the following question: "If you had *not* used a gun for protection in this incident, how likely do you think it is that you or someone else would have been *killed?*" Reportedly, 15.7% of respondents "almost certainly would have been killed," 14.2% "probably would have," and 16.2% "might have," which, given the lower estimate of two million defensive gun uses, would translate, cumulatively, to 314,000, 598,000 (314,000 plus 284,000) and 922,000 (598,000 plus 324,000) or between 300,000 and 1,000,000 lives saved. At the lower end, the lives reportedly saved by defensive gun use are a good seven times the total gun deaths in any year. If only 15% of the most confident respondent reports were correct, lives saved with guns would still outweigh all gun deaths. If the balance of total firearm benefits over harms (including injuries and associated costs prevented or sustained) follow suit with the pattern of lives likely saved to lives lost, the utilitarian case in

favor of civilian ownership and defensive use of firearms would be fairly straightforward.

iii. Efficacy in Preventing Attack and Injury

Dr. Arthur Kellerman, the co-author of the study that produced the notorious finding that a gun in the home is 43 times more likely to be used to kill a family member or acquaintance than to kill an intruder (see II.B.2), in an interview for the March/April, 1994, *Health* magazine averred with admirable candor: "If you've got to resist, your chances of being hurt are less the more lethal your weapon. If that were my wife, would I want her to have a thirty-eight special in her hand? Yeah." It is no puzzlement that Kellerman can accept this fact about the defensive efficacy of guns, as an honest man, and yet be dedicated to casting serious doubt on the proposition that the defensive benefits of firearms are worth the general social or personal hazards: it is quite consistent to hold that firearms are more hazardous than useful overall, or that it is not worth keeping one all things considered, but also hold that people are much more likely to escape injury if they happen to use a gun defensively when attacked.

Thus, there is a plain fact of the matter here which even dedicated skeptics about the prudential wisdom of keeping firearms acknowledge. The fact is that people who defend against criminal insult or threat with a gun are the best off of all the categories of victim-responder regarding the liklihood of suffering injury, better off than those who do not resist, better off than those who try to reason with the criminal, better off than those who try to flee, and better off than those who resist with bare physical force or with any other type of weapon. For robbery, the rates of attack (A) and injury (I) for various categories of victim response are: gun A 25.2%, I 17.4%; knife A 55.6%, I 40.3%; other weapon A 41.5%, I 22%; physical force A 75.6%, I 50.8%; threatening or reasoning A 48.1%, I 30.7%; no self-protection A 41.5%, I 24.7%. For assault, the rates of attack and injury are: gun A 23.2%, I 12.1%; knife A 46.4%, I 29.5%; other weapon A 41.4%, I 25.1%; physical force A 82.8%, I 52.1%; threatening or reasoning A 40%, I 24.7%; no self-protection A 39.9%, I 27.3%.

Thus, gun defenders are significantly better off than those employing any of the alternative methods of responding to robbery or assault as a matter of actuarial fact. This fact contradicts the myths created and propogated by many (not all) police chiefs and other authoritative paternalists to the effect that people are better off (in terms of liklihood of avoiding injury or death) by not resisting, or by carrying and

using a police whistle or Mace or pepper gas or a "stun gun," whatever. Perhaps the only alternative response that was not determined to be less effective than defense with a gun was prayer, for which data are not available. This basic result expressly applies, in varied comparative measure, to violent or contact crimes (see also III.A.4.a and b.ii). Regarding speculation that attemped gun defense is apt to precipitate or escalate a criminal attack, Kleck found to the contrary that the defensive use of firearms appeared to inhibit attack on defenders in threatening confrontations with criminals as well as, in the event of an attack, to reduce the probability of injury. This comports with the inhibitive effects of guns in criminal aggression (see III.A.1.a).

Kleck carried out this classic research on the basis of the Bureau of Justice Statistics National Crime Survey data for 1979-1985 and the Uniform Crime Reports Supplementary Homicide Reports. In his book *Point Blank* (Chapter 4), he makes many interesting analytic observations about these data and their implications that repay reading. Let it suffice to report the general facts here, as an important dimension of the efficacy of defensive firearm use. It should go without saying that these facts do not imply that a given gun defender will not be injured or killed, any more than highway death actuarials predict one's own fate on any given drive. Nor is it equivalent to the magical view that wielding a gun by itself will act as a talisman to ward off attack. Nor are these facts sufficient grounds, or claimed to be, for one to decide, as a matter of personal policy, the wisdom of taking up the gun.

iv. Defenders Shot With Their Own Gun

One form of ineptitude attributed to gun defenders by skeptics of the defensive efficacy of private firearms is their liability to having their guns taken away by an assailant and used against them. Because of the prevalence of this allegation, it merits special attention. In fact, this sort of misadventure is extremely rare. By Kleck's analysis, 1% of defensive gun use is the *outside* estimate for such untoward reversals. These incidents include situations such as where a burglar did not actually take the gun from the defender's hands but rather confronted an armed defender with another of the defender's guns obtained in the course of the burglary.

v. Defenders' Rate of Mistaken Shootings

Another prevalent myth is that gun defenders are trigger happy, because, say, they are naturally bloodthirsty, skittish, eager to shoot their way into the "Armed Citizen" column of the *American Rifleman*, or the lot. Again by Kleck's analysis, fewer than 2% of fatal gun accidents involve a would-be defender shooting an innocent person mistaken for an intruder or assailant. Assuming as many as 1,500 untintentional gun fatalities a year, this means 30 fatal mistaken shootings annually. Fatal mistaken shootings then represent .0015% or 15/10,000ths of 1% of gun defenses, not an egregious rate or error.

c. Defensive Firearm Use versus Vigilantism

Vigilantism is historically associated with times and places where no official law enforcement or judicial authority was available to either apprehend or meet out statutorily apportioned punishment to offenders. Whatever its arguable quasi-legal rationale in such times and circumstances, vigilantism in the modern American setting is defined as the use of force by anyone (whether a civilian, police officer, or government official) to impose *summary punishment without due process of law*. As such, it is decidedly a criminal offense. By contrast, the use of deadly force is perfectly lawful in defense of innocent human life against the imminent threat of death or grave bodily harm (and, in some jurisdictions, in defense of property or against trespass, where the law grants the householder the presumption that an unannounced intruder poses actionable risk). The threat of the use of deadly force (such as the presentation of a gun without firing it), especially upon one's own premises, is arguably lawful when the defender has articulable suspicion of the hostile intent of the offender (akin to the standard for investigative detention by a police officer). Such use of force, whose intent is defensive and not punitive, is, by definition, not vigilantism.

Relatedly, the defensive use of force is often dubiously described as "taking the law into one's own hands." It is, indeed, precisely that, notwithstanding the ambiguity of the metaphor: when the law is "broken" by an offender who poses a threat allowing defensive force (or the threat of defensive force), the defender is allowed to take the broken law into his own hands, as it were, and forcibly make it right. This is not vigilantism, the unlawful taking of the law into one's own hands for purposes of meeting out punishment absent due process of law, but a lawful mending

of broken law. Where society might be without such an allowance needs to be considered in light of the putative deterrent effect of the defensive use of private firearms as compared with that of the criminal justice system (III.A.5.a).

5. The Deterrent Value of Firearms

Crime prevention by interdicting or interrupting an attempted crime (as in the effective use of defensive force) is different from deterring a person from even attempting a crime in the first place. Crime deterrence means the prevention of the very attempt to commit a crime by people who are or might be otherwise disposed to break the law, presumably by engendering fear of negative consequences or raising the awareness of risk on the part of the risk-averse would-be criminal. A deterrent effect attributable to private firearms possession would be another component of their protective value and their social value (IV.B) in addition to their defensive utility. While, unlike the defensive utility of firearms, their deterrent value is difficult to determine let alone quantify, there exist reasonable grounds as well as direct evidence for positing a deterrent effect. There are at least two questions of interest: (a) whether there is reason to posit a deterrent effect and, if so, (b) how to assess its significance or magnitude.

a. A Plausibility Argument for a Deterrent Effect

Apart from direct empirical evidence, there is a plausibility argument to the effect that there probably is a deterrent effect and, whatever its exact magnitude might be, that it is probably greater than, or at least similar to, any deterrent effect attributable to the criminal justice system (CJS), whose presumed deterrent effect is itself notoriously hard to prove. Thus, the plausibility argument is conditional: if the CJS has a deterrent effect, then the deterrent effect of private firearms and the private use of force is probably greater, or at least similar.

Deterrence theory holds that deterrence, in part, is a function of three factors: (1) the certainty of penalty, (2) the severity of penalty, and (3) the promptness of penalty. Kleck observes that the risk a criminal faces from armed civilians is at least more prompt (the armed victim is, by definition, at the crime scene) and potentially more severe (death or grave injury from being shot) than the risk of penalty from the CJS (where the likely legal penalty for robbery, burglary, rape, assault or even murder is a few to several years in prison). While less than 1% of defensive gun uses

by civilians are fatal, civilians fatally shoot thousands of criminals a year, more than do the police and vastly more than are executed for capital crimes (only 20 persons were executed for murder from mid-1967 to mid-1984). The frequency of defensive gun uses that involve actual confrontations (at 2,000,000 per year) is twice the 1980 arrest rate for violent crime and burglary (at 988,000), so the risk of confronting an armed citizen is at least as likely as arrest but far more likely than conviction. Of the 600,000 police officers in 1982, less than 25%, or 150,000, were on duty at any given time; whereas there are tens of millions of civilians with access to firearms and high motivation to use them for protection of themselves or their families. By definition, the armed victim of an attempted crime is "on duty" on the spot. For example, if 1% of the adult population carries a concealed firearm (in states that have licensed concealed carry, 3% to 5% of the population are license holders, which need not mean that all of them carry all or most of the time), then there could be more armed civilians abroad (nevermind in homes or businesses) than armed police on most shifts. In sum, if there is reason to attribute any deterrent effect to the CJS, there seems to be reason to attribute a deterrent effect of at least similar or, better, a greater magnitude to armed civilians.

However, it might be objected that everyone, including the would-be criminal, is well aware of the law enforcement presence and the CJS threat, such as it is, but might not be cognizant of the armed-citizen cohort in society. The deterrent effect of the factors of the certainty, severity and promptness of penalty is, of course, ultimately a function of how these factors constitute any risk of penalty or are *perceived*. For example, penalty will not be (or perceived to be) prompt if a victim is not armed (or is not believed to be armed); penalty will not be more severe (or perceived as likely to be more severe) than arrest if the armed defender does not shoot (or is not believed to be likely to shoot). While the *risk* of penalty forthcoming from armed civilians (the probability and magnitude of penalty) may in fact be as formidable as the risk of penalty from the CJS, neither may be perceived, or taken seriously, by many criminals. The next section sheds some light on how criminals in fact perceive the risks of encounters with armed civilians.

b. Evidence of a Deterrent Effect

Until recently, the direct evidence for a deterrent effect has been of two kinds: self-reports obtained from surveys of incarcerated criminals, which are extremely persuasive but not conclusive, and quasi-experimental or observational studies of the before- and after-effects of well publicized firearms training programs. In addition, there is recent evidence from other studies, for example one by Lott and Mustard of all counties in the United States, on the effects of right-to-carry laws (see V.B.2.c). Insofar as concealed carry by civilians has a deterrent effect, it could effect violent crime abroad or in general, not just violent crime or burglary in the home or business establishments in which guns are apt to be kept. Robbery, rape, and assault outside of homes and businesses could be deterred in areas where concealed carry is allowed by virtue of criminals' *uncertainty* regarding who is or might be carrying a firearm, allowing unarmed citizens to "free ride" on the effect produced by the perception that licensed carriers might be abroad. The perception can be induced merely by the publicized fact of the law, absent any information about how many people are licensed to carry or do in fact carry. A deterrent effect, unlike the defensive utility of firearms, can likewise be enjoyed by households or establishments that do not keep firearms, insofar as would-be criminal intruders do not know whether given premises contain an armed defender or not. But, what direct evidence is there that armed civilians are *perceived* as a sufficient risk to serve as a deterrent to crime?

i. Criminal Survey Evidence

Kleck (1991, 133-134) reports as follows on the classic Wright and Rossi study (1986, see Bibliography) that interviewed 1874 imprisoned felons in 10 states about their encounters with, and their perception of the risks of confrontations with, gun armed civilians. Interviews of those who admitted having committed a violent crime or burglary in their criminal histories indicated the following: 42% encountered armed victims; 38% were scared off, shot at, wounded, captured, or a combination; 43% on some occasion refrained from a crime because they believed the victim was carrying a gun; 56% agreed with the statement that "most criminals are more worried about meeting an armed victim that they are about running into the police" (subjects' responses of agreement with survey statements such as this are not necessarily self-reports but judgments about criminals in general); 58% agreed that

"a store owner who is known to keep a gun on the premises is not going to get robbed very often"; 52% agreed that "a criminal is not going to mess around with a victim he knows is armed with a gun"; 45% of those who had encountered an armed victim thought frequently about the risk of getting shot by a victim, while only 28% of those who had not had such an encounter said the same; and only 27% saw committing a crime against an armed victim as an exciting challenge. These data suggest that a substantial number of criminals are frequently deterred by the perceived risk of encountering armed victims.

Kleck allows that prisoners are a biased sample because their very imprisonment shows that at least in one instance they were not deterred. It has also been argued that felons who elude capture might be different in attitude and disposition from those who are foiled (for example, more aggressive and elusive). However the latter point suggests only that not all criminals are risk-averse to the same extent, in either attidude or behavior, regarding encountering armed victims, which the survey already allows. Moreover, Kleck argues that the bias of the sample renders the survey results more impressive. The prisoners' admissions recounted above are not complimentary; if anything, prisoners' incentive is not to admit such vulnerabilities and concerns, such that the results are likely to under-report the extent of aversion to the risks of encountering armed victims. Because the prisoner sample excludes the criminally disposed who are in fact deterred, the survey results under-represent the deterrent impact of armed civilians in this respect.

ii. Observational Evidence

A number of well publicized episodes highlighting armed citizens have allowed the observation of significant decreases in some period after the episodes as compared with before the episodes, as compared with comparable environs, and as compared with larger state, regional, and national trends. Of course, publicity (or criminal awareness) and consequent heightened risk perception are key factors in such episodes. But because the publicized episodes and similar phenomena concerning armed citizens are fairly ubiquitous, a crime-control and deterrence strategy readily suggests itself: publicity of the training, licensing, growing numbers and defensive successes of armed citizens. As more states pass mandatory right-to-carry laws and as more citizens are licensed and trained, there is continuing opportunity for such "psy-op" programs. One example of the effect of heightened risk perception is the fact that, in the survey of prisoners reported above, 45% of

those who had actually encountered an armed victim thought frequently about the risk of getting shot by a victim, whereas only 28% of those who lacked such an experience said the same. Publicity, like education generally, works in part by transmitting vicarious rather than actual experience; it could be a benefit to all parties if greater vicarious awareness of the risks of encountering armed victims could save more would-be offenders, and potential defenders alike, from having to learn about the defensive benefit of firearms from actual experience. The experiences, or "quasi-experiments," of several communities follow.

Orlando FL. The Orlando Police Department trained over 2500 women in the use of firearms from October 1966 to March 1967, in response to concerns about the rape rate. The program was well publicized by the *Orlando Sentinel*, one of its co-sponsors. The rape rate decreased by 88% in 1967 from what it was in 1966, a much greater decrease than in any prior year, while the rates for both Florida and the nation generally did not change. Burglary, a crime most likely to occur where victims have guns, also decreased sharply. These decreases by themselves do not demonstrate a deterrent effect, whereby would-be rapists and burglars refrain from offending in their respective crime categories, because their offenses might have been displaced to other areas. However, the decreases were substantial enough to comport with a mixed-impact hypothesis positing both deterrence and displacement effects. Programs that reduce crime, or crime of some category, in one location are not thereby necessarily deterrent. But the magnitude of some effects may be taken to indicate crime reduction by deterrence as well as by displacement. One control for such "experiments" would be to compare the rates of the target crime in neighboring areas within the same time series.

Kansas City MO. The Kansas City police ran a training program for 138 citizens from September through November in 1967 in response to retail businesses' concerns about a steep 5-year upward trend in robbery. Between 1967 and 1968, the robbery rate increased by 35% in the state of Missouri generally and by 20% in the nation, but robbery leveled off in Kansas City (interrupting the pronounced upward trend) and declined by 13% in the surrounding areas, comporting with the counter-factual hypothesis that the KC program caused robbery levels to be lower than they otherwise likely would have been. If displacement was a factor, it was not to neighboring areas, suggesting at least a mixture of deterrent and displacement effects. Robbery was the only violent crime to level off, but there was also a dramatic cessation and levelling of a steep upward trend in the burglary rate. The Orlando and

Kansas City experiences suggest that some impact on burglary rates piggy-backs on the publicized target crime (rape and robbery, respectively)..

Detroit and *Highland Park MI.* While the Orlando and Kansas City experiences suggest that burglary tends to enjoy a collateral deterrent or reductive effect with whatever the target crime, a possible explanation of the crime-specific impact on robbery in KC's case and rape in Orlando (but no other violent crime) could be that publicity about the programs highlighted their motivating concerns: the robbery and rape rates, respectively. The crime-specific publicity-effect hypothesis comports with the experiences of Detroit MI, where grocery robberies declined after a grocers' organization started running firearms training courses, and Highland Park MI. where a drop in retail store robberies followed publicity about "gun-toting merchants."

Kennesaw GA. To protest the handgun ban passed in Morton Grove IL. Kennesaw passed an ordinance in March of 1982 requiring heads of households to keep a firearm in the home. It was estimated that 85% of Kennesaw homes already kept firearms; citizens could be exempted from the requirement by reason of conscientious objection, and there was no attempt to enforce the ordinance proactively. Hence, unlike the cases above, where there was an actual as well as a publicized increase in the possession of fireams or readiness to use them among certain victim populations, there was no real change in Kennesaw other than the publicity. In the 7 months following the passage of the ordinance, there were 5 residential burglaries compared to 45 in the same period the previous year, an 89% decrease, which was in significant excess of the 10.4% decrease in Georgia overall, the 6.8% decrease for the South Atlantic region, the 7.1% decrease for other cities with a population of under 10,000, and the 9.6% for the nation.

Critics of the longer term Kennesaw effect found no statistically significant reduction in total burglaries, but they employed raw numbers rather than rates (failing to take account of a 70% increase in population from 1980 to 1987). More importantly, by lumping residential and non-residential burglaries together, they obscured the target-crime effect. Kleck had argued that the effect of (publicized) guns kept in the home should be deterrence of *home* burglaries along with a displacement of burglary to safer, unoccupied targets such as *non-residential* premises that would generally be empty at night. This displacement hypothesis is consistent with a lack of decrease in the total burglary rate, where an increase in non-residential burglary could offset a decrease in residential ones. The fact that home burglaries were displaced to another sub-category of crime (category discplacement)

rather than displacing home burglaries to another area (area displacement within the same crime category), does not gainsay the deterrence hypothesis: burglars in Kennesaw in fact refrained from burglarizing homes. Also, the fact that the deterrent effect might diminish over the longer term is not surprising, because the critical factor in deterrence is risk *perception* and it is to be expected that, as time passed, memory of the passage of the Kennesaw ordinance and its publicity would fade, and the perceived risk along with it. Temporary deterrence is still deterrence. Even episodes of temporary deterrence demonstrate that deterrence of significant magnitude is possible. The crime control challenge is how to renew or prolong such an effect by increasing risk awareness on the part of would-be offenders in any area or in any category of crime. The experiences of Orlando, Kansas City, Detroit, Highland Park, and Kennesaw provide a clue to the mechanism.

Right-to-Carry States. There have been incidents where non-risk averse criminals have responded to the known risk of armed victims with a preemptive attack. For example, ABC's *Turning Point* broadcast such an incident in the case of Lance Thomas, a Los Angeles watch dealer, in an October 5, 1994, episode. However, such cases are isolated, extremely rare events and, happily, often survivable by gun-armed defenders (like Lance Thomas) when they occur. They have not been a noteworthy response to highly publicized programs such as the aforementioned. Nor has there been such a response, as predicted by many, since the highly publicized mandatory right-to-carry law was passed in Florida in 1987. Right-to-carry states like Florida represent larger-scale, longer-term "quasi-experiments" on the deterrent effect of armed citizens than do the community-based experiences cited above (see V.B.2).

B. The Feasibility and Efficacy of Gun Control

Nothing is so firmly believed as that which we least know. (Montaigne)

Montaigne's remark applies to general faith that gun controls actually work as intended or hoped. The selective slant of this article advisedly favors factual matters about "that which we least know" that are apt to prove surprising to the conventional wisdom. Examples of virtues and vices attributed to various sorts of gun control were given in the course of the catalog in section I. Two controversial species of gun control, one a paradigm of very restrictive policy (gun bans) and the other a paradigm of permissive policy (right-to-carry laws), are discussed in some illustrative detail in section V. It is not possible to do similar justice, if justice it be, to the *pros* and *cons* of all species of gun control, although the analysis of the virtues and vices of the research on same is very interesting. Rather, for purposes of both parsimony and surveying the general lay of the land, a view from good authority will have to do. What actually is known about the workability and intended impacts of gun controls, and, absent a showing of impact, what remains to be said for them? It varies, of course, with the case. Kleck's summative view is as closely informed a reality check as any. For finer texture, or to support a more hopeful or a more critical outlook, the mine of research is there for the digging.

Kleck posits the central question to be the efficacy of gun control for crime and violence control or reduction (control may be regarded as more modest than reduction, keeping a problem from getting worse rather than diminishing it). In insisting on this kind of efficacy, he will lose those who see gun control as a way to impose or express moral values beyond the ambit of the social harm principle (see V.A.2.b). That does not mean one must be a narrow utilitarian who counts only fungible utility; it simply means that whatever values or putative rights one wants to weigh in the balance scales, the justifiablility of a policy must ultimately also answer to some standard of efficacy for crime and violence reduction. A lesson from Kleck's "book," as it were, as someone, unlike most, who has been through a rigorous trial of the facts, is not, for example, that gun controls cannot disarm criminals in some manner or degree, but that such an ostensibly desirable effect may not in turn produce any net decrease in the target commodity, crime or violence (their frequency or severity). For example, background checks may prevent many felons from purchasing handguns over a legal counter, but perhaps to no discernible effect on violent crime. Background checks may nonetheless be on the order of those

controls, of little burden to the lawful, that we should impose regardless of demonstrable efficacy, in order to do what we can to obviate criminal access to the legal market. But we need not deceive ourselves about the insufficiency of illicit markets to meet illicit demand or about the utility of add-ons to screening regimens, such as creating a registry of legal gun owners, which may go beyond a merely ineffective but agreeable policy to an ineffective and gratuitously controversial one. If the public brouhaha is any reflection, it is difficult to keep one's eyes on the prize, crime and violence reduction, rather than ulterior designs or wishful fantasies. So much for protreptics. Cautious bottom lines follow.

1. Feasibility and Efficacy Factors

Kleck posits feasibility and efficacy factors gleaned from research on what seems to work, what not, and suggests gun control measures he believes can be effective crime and violence controls. His suggestions are outlined, with some gloss, below. (Factors thought to contribute to the efficacy of a policy are distinct from the conditions necessary to *demonstrate* efficacy, which are outlined in III.B.3.a.i.)

(1) Sufficient popular support to be politically viable and to be susceptible of wide compliance (rather than a provocation to disobedience and loss of respect for law) as well as susceptible of enforcement. Acceptability to criminal justice personnel (including street cops as well as command officers and politically appointed chiefs, prosecutors, and the judiciary) is as crucial to the enforcement dimension of efficacy as compliance on the citizenry side of the equation. See item (8) below.

(2) Susceptibility or likelihood of compliance by a non-negligible portion of the criminally disposed population: laws which command no deference on the part of the seriously violence-prone as well as petty criminals and general citizenry court fecklessness.

(3) Lack of reliance on wishful aims not susceptible of realistic achievement: the ambition of producing significant gun scarcity in a nation of over 200 million durable firearms and other supply-side gun controls are examples. Apart from the durability of the firearm stock, the unlikelihood of sufficient compliance, per (2), and the infeasibility of enforcement by confiscation, there is the resilience and creativity of the illicit market, inveterately resistent to and undaunted by draconian enforcement efforts (witness alcohol prohibition and "the war on drugs").

This conflicts with (1) and (2). When it exists, it is all but universally ignored.

(4) Uniformity of regulations across firearm types; for example, uniformity of policy for long guns as well as handguns. Inconsistency across firearm types can undermine the efficacy of handgun controls and provide incentive for the substitution of more lethal long arms. Discriminatory policies such as those regarding "assault weapons" and automatic firearms are "largely beside the point" for purposes of violence reduction (see V.A.2.b).

(5) Uniformity across jurisdictions in the types of controls whose inconsistency otherwise breeds "leakage" problems. Of course, said controls need to pass muster on the above criteria. For example, trammeling a policy that violates criteria (1) - (4) with trans-jurisdictional ambitions compounds its infeasibility.

(6) Uniformity across commercial sales and private transfers: lack of uniformity creates another kind of intra-systemic "leakage" that undermines the desired effects of the regulation of commercial sales.

(7) Commensurability of costs to benefits. This presumably applies to estimable non-fungible costs and benefits, and raises interesting epistemic issues: How do we know, judge, or decide when the balance is struck?

(8) To Kleck's criteria, above, should be added two supervenient ones, which happen to apply to the evaluation of the workability of all public policy: compliance with an express ethic of public policy dispute and passing muster with Alternative Dispute Resolution standards for *integrative solutions* (see II.B.3 and II.C). This is especially crucial to the realization of criterion (1).

2. Examples of Workable Gun Control

The following will appear to be a paucity of options for dealing with what seems a massive problem: crime and violence involving guns. But there is no need for dismay over such a modest (if effective) arsenal, because "gun control" as such is not the only or most likely alternative solution to the problem of gun violence (criminal, suicidal, or accidental). Rather than amassing a huge armory of laws that are not workable or effective but are expensive and socially divisive for the sake of feeling well armored when, in point of fact, we may be deluding ourselves, we can expand the modest arsenal of firearms policy that actually works with more promising alternatives than "gun control" as such. One example of the educational alternatives is conflict resolution programs in schools and communities that specifically address the youth cohort, which is the locus of the most violence and its greatest increase. The idea that social problems that happen to involve guns therfore demand "gun

control" as the solution is seriously myopic. The following examples of gun control policies that have a serious claim to feasibility, efficacy, and justifiability include five adapted from Kleck and caveats about potential controversy.

(1) Background screening at points-of-sale by means of a national "instant" records check. The need for uniform screening and centralized, reliable data argues for a federally mandated, and subsidized, policy. Background screening to obviate the possibility of purchase by disqualified applicants, a corollary of the need to disqualify certain categories of people, is presumably as agreeable as gun controls come. Another law enforcement advantage of an instant check system is the capability it provides to apprehend disqualified applicants who may be dangerous or wanted. However, a computerized and nationally networked instant check system arouses opposition from those who fear, and have reason to fear, the creation of a national (or state or city) registry of legal gun owners: lack of utility of such a registry as a crime control tool suggests an ulterior strategy, its expediency for the confiscation of firearms. Government's lack of response to this fear is causing gratuitous controversy over a gun control measure that should not be problematic. Case in point: the creation by the federal government, or by private enterprise with government funding, of software programs for instant checks whose default mode automatically files the information obtained from screened purchasers with the Department of Justice. The software system is known as FIST, an impolitic acronym for Firearm Inquiry Statistical Tracking. The developers deny that the system will be used to create a national registry, which is against federal law, but opponents of the computerized instant check system observe that there are no verifiable safeguards or checks on what law enforcement might, surreptitiously or eventually, do. One solution to this impasse, akin to the obstacle that a lack of mutual verifiability would pose to a mutual disarmament treaty, is to negotiate such safeguards for verifiable compliance by government. Opponents argue that if government has no intention to create a registry, now or eventually, the screening system should be verifiably disabled accordingly. This is an example of an arguably gratuitous impasse, reflecting government insensitivity to citizen interests and a shortfall on criterion (1), above (III.B.1).

(2) Required background screening for private transfers. The lack of uniformity enables "leakage" of legally disqualified buyers to private sellers, who lack the means to perform a proper background check. The proposal is for a national policy (some states already have such laws) that require private transfers to be processed through a licensed dealer. Of course, this would impose some

inconvenience and cost (a presumably modest servicing fee on private transfers that are not presently borne by citizens) on the transfer. Presumably, the benefit of tightening the potential loophole of private transfers to disqualified buyers would outweigh the costs, which need be no greater than those involved in the private transfer of an automobile. This benefit may be arguable in its impact on the illicit firearms market; but it is also arguably obligatory to do what we can to prevent illegal firearm acquisitions, regardless of net impact, when the burden to law-abiding gun owners of "doing the right thing" is modest. Private automobile transfers are handled by a similar process, requiring a modest fee.

(3) A necessary condition for the efficacy of both proposals (1) and (2) is a uniformly reliable central database that obviates false positives and negatives. This is essentially a system implementation or optimization problem, as opposed to a contestable policy issue: the National ~~Criminal~~ Crime Information Center (NCIC) is already utilized for running criminal background checks and the system for accessing criminal records, unlike FIST, is not a facility for retaining and storing information on the transaction (purchase and purchaser) for which the check is done.

(4) Legal disability policy. Laws that prohibit certain categories of ~~people~~ persons from possessing or using firearms may be the least problematic form of gun control. However, two controversial issues are (a) exactly what categories of ~~people~~ persons (beyond the "usual suspects" such minors and those with felony records or certifiable mental disabilities) ought to be disqualified from firearm acquisition, possession or licensing for concealed carry and (b) standards for granting relief from legal disability, such as for recovered mental patients or convicted non-violent felons after some period of time has passed since their imprisonment. If new categories of disability are added, these issues need to be carefully addressed. Examples of novel disability criteria are prohibiting minors from possessing long arms for hunting and target shooting, expanding standards for mental disability beyond involuntary commitment (which would require access to otherwise confidential medical records), and the inclusion of disability for those under domestic restraining orders or convicted of domestic violence misdemeanors. There is no question that certain categories of "high risk" ~~people~~ persons should be prohibited from possessing firearms, but the expansion of the traditional criteria of disability has proven controversial (see I.C.2.b).

(5) Improved, concerted, proactive enforcement of carry and possession laws. Illegal carry of firearms occurs in public and is ~~an easily~~ established offense in that setting; laws prohibiting unlicensed carry are more susceptible of enforcement than laws against general possession whose enforcement requires access to the felon's

Dealers and background checks aren't involved in such transfers. It would be illegal — it should be illegal.

Yes. Kleck has endorsed this without evaluating such existing laws.

Untrue as documented by Kleck.

persons

Of course there's question; I question it.

Kleck favors a police state. Do you, too?

hide-out or home. Law enforcement programs that have intensified, for whatever purposes, street searches (based, of course, on the articulable suspicion standard for investigative stops per *Terry v. Ohio,* where a stop for cause may lead to grounds to search an individual or vehicle) have been found effective for interdicting casual weapon carrying. Sentence enhancement for certain firearms-related offenses can prove an effective tool of enhanced enforcement, although discretionary policies are found more effective than the popular mandatory enhancement laws. This is an interesting case where many gun control opponents, on the one hand, argue against gun control nostrums on grounds of their lack of proven efficacy and, on the other hand, persist in pushing "tough on criminal" laws such as mandatory sentencing for gun crimes only to be hoist upon their own petard: discretionary systems work better than mandatory ones.

(6) Replacement of the hodge-podge of discriminatory and corruption-prone discretionary licensing systems by means of a federal law mandating (a) uniform "shall issue" concealed carry licensing systems for all states and (b) uniform reciprocal recognition of every state's carry permits by every other state, consistent with the treatment of other uniformly important rights, privileges and immunities such as drivers' licenses. Given the results described in III.A and V.B, it would seem unconscionable not to mandate "shall issue" systems as an evidently effective criminal violence control measure as well as a matter of justice for the citizens whose lives are on the line and quite clearly are able to comport themselves responsibly. Both utilitarian and rights-based arguments support such a policy. Along with conflict resolution programs among the youth cohort (attacking the disposition to violence where it is greatest) and proactive enforcement of carry laws (attacking the problem of gun crime where it occurs and where criminals are most vulnerable, on the street), exploiting the excellent track record of lawful behavior and crime reduction under "shall issue" laws is probably the most efficacious strategy available; and, it is an extremely inexpensive one.

(7) Given the evidence on the deterrent effect that armed citizens have on violent crime and burglary (reported in III.A.5 and V.B.2.c), publicity of the training, licensing, growing numbers and successes of armed citizens could heighten criminals' perception of the risks of encountering armed victims or defenders. Given the frequency (2,000,000 gun defenses a year) and the efficacy of defensive gun use and carry (reported in III.A.4 and V.B.2.c.iii), there is no lack of material to publicize. Speculation that raising awareness about the possibility of victims being armed would induce more criminals to arm themselves and attack their

victims preemptively does not comport with the evidence (see V.B.2). Publicizing the demonstrable benefits of permissive gun control (such as allows the law-abiding to possess, carry and defend themselves with firearms) as a strategy for crime control in general, not just gun crime, seems worthy at least of serious consideration. There should be a responsible way to exploit the lessons of the local "experiments" that have already shown its promise (III.A.5.b.ii). Of course, there is and would be staunch political opposition to publicizing "good news" about guns, which is why it is no surprise that stories about successful gun defenses, unlike criminal activity, are virtually non-existent in the general media. It is ironic that it is the downside of America's so-called "love affair" with guns that draws the lion's share of attention, when well-crafted programs on the upside could both enhance deterrence and educate the public on firearm safety as well as the legal and ethical responsibilities of the defensive use of deadly force. However, such initiatives are more the province of the private sector than of the government..

3. Efficacy versus Justifiability

To assess the efficacy of any gun control policy one needs to know its goal, what it is supposed to be good for. One commonly agreeable goal is the reduction of violence (criminal violence, suicide, and inadvertant death and injury), its frequency or severity. Of course, this is not the only goal espoused by gun control proponents. Gun scarcity at large and civilian disarmament, apart from or regardless of their impact on overall violence, are other goals. However, whatever may be the collateral or ulterior goals of gun control across the spectrum of its proponents, a question of common and salient interest is whether any form of gun control reduces any form of violence, in frequency or severity.

a. Efficacy as Necessary for Justifiability

Efficacy in the sense of reducing violence, its frequency or severity, is arguably a necessary condition for the justifiability of liberty-limiting and otherwise costly gun controls. Section V.A discusses variations on this contention with respect to gun bans. While a showing of efficacy is necessary to a showing of justifiability, certain conditions are also necessary to a showing of efficacy.

This is actually irrelevant. The issue is violence reduction, not substitute violence.

i. Necessary Conditions for Showing Efficacy

Kleck describes three conditions as necessary for showing the effectiveness of gun controls. Taking the rate of violence as the feature of interest, the basic structure of the evidence for the efficacy of a gun control policy (GC) for reducing the overall violence rate (at least in some category) would be as follows.

(1) GC has a significant negative correlation with the gun violence rate (GVR) in some category, such as gun homicide or robbery: the GVR decreases.

(2) GC has a significant negative correlation with the overall violence rate (OVR) in some category, such as all homicide or robbery: the OVR decreases.

(3) GC has a weaker correlation with the non-gun violence (NGVR) rate than with the GVR in some category, such as gun homicide versus non-gun homicide: the GVR decreases more than the NGVR decreases.

These criteria simply show that a correlation between GC and a reduction in the rate of *gun* violence of whatever category is not necessarily tantamount to efficacy in reducing overall violence (in that category or otherwise). However, it is possible that a reduction in the rate of gun violence, or in the rate of gun violence with a specific type of gun, while not reducing the incidence of overall violence (because, perhaps, of the substitution of other instruments), might nonetheless reduce the rate or severity of resulting injury (including death), a possibility discussed with regard to "assault weapon" bans in V.A.2.b. The criteria of efficacy as formulated here simply illustrate the structure of the required evidence, using the rate rather than the severity of the violence in question.

For example, if (1) but not (2) holds (the GVR decreases but the OVR does not), then there is evidence for the hypothesis that other instruments are substituted for guns: reduction in the GVR seems to be offset by an increase in NGVR with no net change in the OVR. If (2) but not (1) holds (the OVR decreases but the GVR does not), then there is evidence that some variable(s) other than GC might account for the reduction in the OVR. If (1) and (2) but not (3) hold (the GVR and OVR decrease, but the NGVR decreases more than the GVR), or (1) but neither (2) nor (3) holds (the GVR decreases but neither the OVR nor the NGVR decrease), then it is ambiguous as to whether the GC has any net beneficial effect.

ii. Some General Findings

The following brief summary of Kleck's analysis of the evidence regarding the efficacy of gun control laws (a large sample of those in effect before 1991) does not begin to do justice to the mass and details of the research or to the subtleties of the analysis. It simply illustrates that the appearance of plausibility for many gun control policies can be deceiving. If a showing of efficacy is necessary to the justifiability of gun control, the lesson of Kleck's analysis is that the task is non-trivial.

One strategy for reducing overall violence is indirect, trying to do so (the ultimate goal) by reducing overall gun ownership (the proximate goal); another is to target gun violence directly and thereby reduce the OVR. In general, GCs do not reduce general gun ownership, either legal ownership among the general public or illegal keeping of guns among "high risk" groups. While this suggests that the indirect strategy or its proximate goal of reducing gun ownership is not a promising approach to reducing the OVR, it also suggests that in general GCs (gun bans excepted) do not impair legal ownership. However, certain forms of the direct strategy, which targets gun violence specifically rather than gun ownership generally, have demonstrable benefits. Kleck reports that 92% of the results of 121 tests of the effect of 19 major types of gun control on 7 categories of crime and violence show no effect on violence rates. But 6 tests provided ambiguous evidence of efficacy, while 4 tests provided unequivocal support. For example, consonant with the recommended policies in III.B.2, mandatory penalties for illegally carrying a firearm and discretionary (rather than mandatory) additional penalties for felonies committed with a gun evidently reduce robbery rates. One possible explanation is that such laws, by whatever mechanism, reduce casual carrying and thereby reduce casual or opportunistic robbery.

Of course, the fact that the preponderance of gun controls have no demonstrable efficacy in reducing violence does not show that gun control in general can have no such effect, because it might be the case, as advocates insist, that a different combination of controls, more controls, or stricter controls would prove effective. The point, rather, is to illustrate that common assumptions about the efficacy of gun control are, more often than not, too facile, to outline what must be shown to make a case for efficacy, and to underscore the burden of proof in substantiating the efficacy of gun controls as a crucial step towards showing their

justifiability. Kleck's analysis exemplifies what it means to take that obligation seriously and repays detailed study.

b. Efficacy as Insufficient for Justifiability

While efficacy is necessary, it is arguably not sufficient for the justifiability of liberty-limiting and otherwise costly policy, because there are countervailing values to be weighed against the benefits of its efficacy (per section IV). Of course, if it costs money, time, and liberty, and does not, or can not, accomplish what it promises, presumably the policy is unjustifiable. Interesting cases are purely symbolic, expressive, or so-called "feel good" policies, whose goals and success criteria are modest and easy to satisy because their mere passage "sends a message" or allows their advocates to feel good about taking a stand or discomoding their opponents. Such cases illustrate why efficacy, working as intended, is not tantamount to justifiability. We may be forced to accept lax standards of what is necessary or sufficient for the justification of policy in the *reale politique* of policy making, but the ethics of public policy *dispute* certainly demand stricter standards of efficacy and justifiability.

As discussed in II.A, Dimensions of the Task, and III.C, The Ethics of Public Policy Dispute, a showing of efficacy or a compelling probability of efficacy, is not by itself sufficient for justifiability. Even where the demonstrable effect of a policy is a greater balance of social utility over social harm, the justifiability of the policy is not settled. There is the prior question of why social utility should trump other considerations, such as countervailing interests or putative moral rights or non-utilitarian moral values, as well as the question of what is supposed to constitute the social utility in question (which, of course, might incorporate these moral considerations). And there is always the question of whether there is a comparably feasible and efficacious alternative that is less right-conflictual or a more integrative solution for resolving conflicts of interest.

Section IV illustrates salient individual, social and political values regarding firearms that need to be taken into account in assessing the justifiability of gun control policy. Under each of these categories of value, a disinction is made between demonstrable or expectable *utiilty* and other, *residual* values (things in which value resides, or values that are held, irrespective of any consideration of expectable utility). Section V.A on gun bans illustrates gun control strategies and arguments differentially predicated on utility and residual values.

IV. WEIGHING THE VALUES

Regarding the balance of harms as against benefits associated with private firearms, a question often asked is: At what point does the good of the many outweigh the freedom of the individual? The way such questions are framed often presumes that there exists a net balance of harm or risk to the detriment of the many, putting individuals' entitlement to firearms on trial under a presumption of guilt. Such questions also imply a utilitarian presumption about what is required for proof of innocence, that a showing of net benefit would vindicate the putative right to private arms. A *Consumer Reports* article on public risk management, "Facing our fears" (December, 1996), provides an apt caveat: "[risk management] is more than a numbers game; it's a social process that balances costs, scientific data, conflicting social values, and citizens' interests." This section surveys some of the values and citizen interests at stake, over and above the social utility or disutility of private firearms. Section V.A.1, Gun Bans: The Fundamental Moral Objection Strategy, illustrates residual moral values opposed to private firearms.

A. The Value of Firearms to Individuals

The potential value of firearms to individuals is two-fold: their *recreational* value and their *protective* value. Individuals may also take an abiding interest in the *residual* social and political values of private firearms (see IV.B and C).

1. Recreational Value and "Sporting Purpose"

There is an odd puzzlement in the gun control controversy, at least the controversy over policies such as "assault weapon" bans, which are predicated on what might be called the "sporting purpose hypothesis" (SPH). The notion of "sporting purpose" in gun-control policy is one of the tools for discriminating between "good" guns and "bad" guns. The mantle of "sporting purpose" protects "good" guns, while the denial of "sporting purpose" helps stigmatize "bad" guns: "bad" guns are the presumptive targets of bans; guns endowed with "sporting purpose" are presumptively exempted from being banned. The SPH holds: if a firearm (such as firearms particularly suitable for combat purposes) serve no "legitimate" sporting purpose (that is, to use the recent statutory language, if any firearm is not "particularly suitable for

legitimate sporting purposes"), then it may (justifiably) be banned. That is, the lack of "legitimate" sporting purpose is *sufficient* to justify banning a firearm and *necessary* for immunity from being banned. Significantly, the SPH does not hold that possessing "legitimate" sporting purpose is also *sufficient* for immunity from being banned.

Putting aside wonderment about the norm or authority for discerning "legitimate" from illegitimate sporting uses (the latter are lawful but denigrated activities), the puzzlement is that sporting purpose should come into the question of what guns to ban or not ban at all: if private firearms are to be banned either because they are fundamentally morally objectionable or because they occasion greater social harm than benefit, their recreational value and "sporting purpose" is certainly not going to be sufficient to stay a ban when their protective value is imputed to be insufficient to do so. But the puzzlement is resolved with the realization that the SPH was devised as a very stealthy wolf in sheep's clothing. It appears to allow the perverse proposition that recreational value carries privileged weight in the balance scales of social harms and benefits of firearms. The imputation of immunity from gun bans based ultimately on the harm which firearms are capable of inflicting gives false hope to owners of "sporting purpose" firearms: in the targeting of deadly weapons as vectors of social harm, how long can the deadly tools of the recreational hunter hope to escape a ban?

Hunting firearms are far more deadly than the firearms targeted as "assault weapons." For example, the Colt Sporter banned by the federal AW ban fires a relatively small .223 caliber cartridge, while the Remington 7400 rifle comes chambered in the vaunted .30-06 round, the U.S. military rifle cartridge from before WWI to Korea, a favorite of big game hunters, and a far more devastating round than the .223. There are 20- and 30-round aftermarket magazines for the 7400 and it's no trick to equip it with "military-style" accessories like a folding pistol-grip stock and a handguard. Why is the lightweight .223 an "assault weapon" ban target and the heavy-duty .30-06 a sanctified "sporting" arm? What hunter can seriously believe that this inconsistency in the elastic standards of proposed bans can long escape notice or correction? At bottom, the "sporting purpose" standard is a temporary expedient for allaying opposition to gun bans that, like "criminals' weapons of choice" (see V.A.2.b.i), is irrelevant to the efficacy or justifiability of any ban. It provides only temporary immunity for the guns of sport shooters and hunters on the perverse pretext that the recreational value of deadly weapons carries special weight in the balancing of the overall harms and benefits of firearms. (See V.A.2.b.vi for

more specific objections to the "sporting purpose" hypothesis as it figures in "assault weapon" bans.)

Whatever weight it carries in the social balance scales, the value of the recreational *use* of firearms is two-fold: the *residual value* of the enjoyment of firearms by recreational shooters, hunters, or collectors regardless of their expectable utility, a value to individuals, and the *social utility* of their use in lawful hunting, insofar as this recreation serves, and raises significant money for, wildlife conservationist policy and local economies. (For example, the Vermont Fish and Wildlife Department estimated that the fall, 1996, hunting season brought $68 million into the state's economy, which, extrapolated across several hunting seasons and the several states, suggests that hunting is a multi-billion dollar economy booster). In addition, social utility is imputed to recreational training and competitions with combat firearms (see V.A.2.b.vi). But neither dimension of recreational value is likely to weigh heavily enough against the costs of criminal misuse to stay gun bans even against "sporting purpose" firearms. The protective value of firearms, however, is something people are more apt to "go to war" over (figuratively, we can hope).

2. Protective Value

The *protective* value of firearms to individuals also has two dimensions: (a) *defensive utility*, one metric for which is the actuarial rate at which armed civilians successfully defend against criminal threats (as discussed in III.A.4) and (b) the *residual value* of the putative moral right to firearms as an option in self-defense, the interest people have or take in guns as an option for protection, irrespective of their defensive utility.

a. Defensive Utility

As has been documented (III.A.4.b), actuarially, a firearm happens to be one's best option in the gravest extreme when, by the universal standard of justifiable deadly force, an innocent person is in imminent and otherwise unavoidable danger of death or grave bodily harm. The conventional wisdom notwithstanding, gun owners and carriers know this and are jealous of the option.

b. Residual Value

The other dimension of the protective value of firearms is the incommensurable *residual value* of this option in self-defense (which may for some include but goes beyond the value of psychological states, such as feelings of security), the *interest* held, taken, residing, or remaining in having this option in self-defense regardless of either the actuarial *utility* of using a gun defensively or the *likelihood* of ever having to use it (which, while non-negligible, may be very low for many people). A person may value this option in self-defense, and many do, regardless of what the statistics say about the defensive efficacy of firearms or the probability of their ever having to ward off predatory criminals.

This residual value includes the value residing in the legal claim-right and putative moral right to effective means of self-defense (namely, firearms), derivative of the putatively paramount right to self-preservation. The value of the moral right to effective means of self-defense is as inestimable as the value invested in the right to self-preservation, the value of life itself or the imputed value of such commodities as dignity and self-respect, all of which are implicated in the residual value invested in the maximum option of self-defense (such as firearms). It is a value that cannot be second-guessed for purposes of utilitarian calculation or easily quantified among the estimable or fungible trade-offs of cost/risk-benefit calculations. It is, in any case, a value that cannot simply be dismissed by those who might dismiss the estimable distributive or aggregative utility of private firearms possession, because it is a value, like the value of dignity, independent of fungible calculations. Because the residual protective value of firearms comports so closely, in those who hold it, with their notion of dignity (as opposed to contingent ephemera such as feelings of security), threats to this value are taken as insults to dignity. It is this value, and the residual social and political value of firearms (discussed below), that makes the gun control controversy a dangerously volatile matter.

c. The Question of Police Protection

The protective value of firearms to individuals can take on a different complexion and priority depending on one's view of the efficacy or liklihood of police protection, whose essential functions are general deterrence and reactive apprehension after the fact. As a matter of law, the police are not strictly *responsible* for protecting individuals because they are not *liable* for failing to do so, in all but a

few, extremely rare, cases where they have expressly assumed a special obligation to do so. As a matter of fact, the police are unable to afford reliable or proactive protection directly to individuals, which is why they are not held responsible for doing so: again, *ought* implies *can*, power and responsibility must be commensurate. The legal fact that police have no general duty to protect is well established by statutory law and case law going back into the 19th century. Typically, statutory law denies public liability for failing to provide even general police protection. For example, according to section 845, California Tort Claims Act, a state appellate court held in *Hartzler v. City of San Jose* (1975) as follows: "Neither a public entitity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection"

Perhaps the most notorious case illustrating lack of liability for failure to prevent even a reported and consumately heinous crime in progress is that of Carolyn Warren of Washington, D.C. Warren called police on March 16, 1975, to report that two intruders had smashed through the back door of her house and were attacking a female housemate. When the police arrived and knocked on the door, Warren and another female housemate had taken refuge on a roof, afraid to betray their location by answering the police. The responding police officers left without checking the back door (which might seem to be actionable dereliction of duty, since they were already on the scene and knew the nature of the call). Warren again called the police and was told they would respond. Assuming they had returned, Warren called to her victimized housemate, thereby revealing her own presence and location. The two instruders then rounded up all three women and for the next 14 hours robbed, raped, beat, and forced them to perform sexual acts on one another. In *Warren v. District of Columbia* (1981), the Superior Court held: "'[T]he fundamental principle [is] that a government and its agents are under no duty to provide public services, such as police protection, to any particular individual citizen.' . . . The duty to provide public services is owed to the public at large, and, absent a special relationship between the police and an individual, no specific legal duty exists." The Court further explained that such a "special relationship" did not mean an oral promise to respond to a call for help, as in the Warren case.

In light of the fact that the police have neither the duty nor the ability to afford individuals protection and given the non-negligible actuarial risks of victimization (the National Crime Survey estimates indicate that 83% of Americans, sometime in their lifetime, will be a victim of violent crime), the residual value of

private firearms possession for protection is predicated on citizens' ultimate responsibility for their own protection in the gravest extreme. People who value the sheer option of armed defense argue that, if they must bear responsibility for their own protection, the options afforded them should be commensurate.

B. The Social Value of Firearms

1. Security, Tranquility, Civility

On the one hand, the prevalence of private firearms may seem to threaten the social values of security, domestic tranquility, and civility. For example, people who advocate domestic disarmament (a state monopoly on force), and oppose self-help against crime for the sake of domestic tranquility and civility, also uphold the value of the security of life and limb for the sake of enjoying the rest; but they do not hold with private firearms as a means of securing any of these values. Moreover, their ideal of civility appears to be higher flown than mere politeness (as in "an armed society is a polite society") and a respect for law. Again, Charles Krauthammer, in his April 5, 1996, *Washington Post* column, "Disarm the citizenry, but not yet," proposes that an American citizenry hunkered down under arms does not comport with some higher teleological ideal of "civilization": "Ultimately, a civilized society must disarm its citizenry if it is to have a modicum of hope of domestic tranquility of the kind enjoyed in sister democracies like Canada and Britain . . . ."

The ethos of Krauthammer's civilization is evidently quite contrary to Jeffrey Snyder's in his influential article in *The Public Interest* (Fall, 1993), "A Nation of Cowards," which proposes that self-help as well as defense of community against criminal predation is not only a fundamental right, but also a moral duty of citizens: "Although difficult for modern man to fathom, it was once widely believed that life was a gift from God, that not to defend that life when offered violence was to hold God's gift in contempt, to be a coward and to breach one's duty to one's community." Snyder does not subscribe to the empirical and positive legal assumption of the Krauthammer view of civilization that the state, with a monopoly on force, both can and will provide adequately for individuals' security (see IV.A.2.c).

Thus, on the other hand, proponents of the private use of force in the provision of individual and collective security and the right to arms therefor, who thereby oppose a state monopoly on deadly force, also uphold the social values of domestic tranquility and civility; but they cleave to very different ideas about the

Incidentally, a 1928 dictionary describes this word as "archaic."

means for securing these values and, crucially, on the apportionment of responsibility therefor. They point out the legal and practical fact that the police are neither legally responsible nor practically able to provide for the protection of individual citizens, and that statutory and case law universally confirm this. And they find hypocritical those who assume that citizens have a right to police help when they refuse to take responsibility for helping themselves. As Snyder pointedly puts the moral challenge, "How can you rightfully ask another human being to risk his life to protect yours, when you will assume no responsibility yourself?" And he adds, elsewhere, "[W]hile we wait for laws to restrain men, we will be condemned to wonder why criminals have no respect for our lives, when we ourselves do not value our lives enough to assume the responsibility to defend them."

2. The Social Utility and Residual Value of Private Firearms

By the Snyder ethic, the social value of private firearms is not limited to their utility in defensive deployment, nor to their role in the reduction of criminal violence or social disorder by either deterrence or defensive interdiction. Rather, their social value, like their protective value to individuals, is two-fold: one part *social utility* and one part *residual value* (their value regardless of their expectable utility) held by those who take an abiding interest in lawful citizen participation in the maintenance of civil order (see III.A.4.c Defensive Firearms Use versus Vigilantism). That is, there are two kinds of question of value. There are the empirical, actuarial questions of utility: Does an armed citizenry collectively deter or reduce crime against the person and thereby provide, on balance, an effective measure of aggregate security from harm (see III.A.4 and 5)? Or, rather, does the keeping or bearing of arms by law-abiding citizens undermine public safety, aggregate security from harm, and social tranquility by misadventure or inadvertance (see III.A.1-3)? Besides these empirical questions of social utilty, there are also residual moral questions: Are citizens not morally obligated to contribute to the public safety, as well as to their own defense, not by vigilantism (III.A.4.c), but by vigilance and, in the gravest extreme, by responsible armed response? Can citizens be fairly expected to fulfill this civil right and civic duty without being afforded effective means? Or, rather, should the state be afforded a monopoly of armed force and sole responsibility for maintaining public safety and civil order?

In any case, conscientious commitment to the defensive and deterrent social function of the institution of the armed citizen is another part of the residual value

of private firearms. In his essay "Utopia and Violence" (1965, *Conjectures and Refutations*, Harper & Row, New York), Karl Popper framed the moral distinction between aggressive and defensive violence: "[W]e must not allow the distinction between attack and defence to become blurred. We must insist upon this distinction, and support and develop social institutions . . . whose function it is to discriminate between aggression and resistance to aggression." To opponents of a state monopoly on force, the notion of a violence-free society is utopian and an armed citizenry is an institution founded on the need to oppose wrongful aggression by all lawful means.

C. The Political Value of Firearms

An important controversy beyond that of the social value of private firearms and armed citizens concerns the value of an armed citizenry and a fundamental issue for moral-political philosophy, the question of the monopoly of force as a political matter: whether the distribution of checks and balances -- as exemplified by the apportionment of power, ultimately coercive, among several levels of government (federal, state, and local) as well as among the several branches of government (executive, legislative, and judicial) -- should not properly allot to the people, the ultimate sovereigns, a fair share in the distribution of force. There is a collateral issue: Who should enjoy the greater presumption of trust, the people, or their government, irrespective of actual trustworthiness. This question is analogous to the question of which presumption should rule the institution of criminal law: the presumption of innocence, or the presumption of guilt. Should the government presumptively mistrust the people in the apportionment of liberty? Or should the people presumptively mistrust their government in the apportionment of power? The philosophic issues here tend to be dismissed by conventional wisdom heavily reliant on empirical presuppositions. One prevalent view is that it is absurd to suppose that an armed citizenry would ever have either cause or the ability to prevail against a government run amuck in modern times. But the controversial alternative, as a matter of principle, can not be dismissed out of hand. It is clear what can be said against it. What can be said for it?

1. Political Utility and Residual Value

The political value of an armed citizenry is perhaps the most controversial, insofar as its empirical dimension is largely speculative. This putative value presumably

consists in the role of an armed citizenry as a defense and deterrent against government violation of the social compact as well as its utility for the common defense. But this political value is only one part expected utility (the deterrent or defensive *efficacy* of an armed citizenry against government transgressions and the *likelihood* of the need therefor) and one part the residual value of citizens' being entrusted with a share of armed force (as against a paternalistic or arrogated monopoly of force by the state).

Again, there are two kinds of question of value. There are the obvious empirical albeit speculative utility questions: Whether an armed citizenry is any longer necessary or likely useful for the protection of the state against disorder from within or invasion from without; or, whether an armed citizenry is either a necessary or even viable impediment to governmental abuse of power in the gravest breech of the social compact. Be that as it may, there remain fundamental philosophic questions: the propriety in principle of entrusting the state with a paternalistic monopoly of armed force as versus the value of methodical mistrust of government (irrespective of its actual trustworthiness); the value of sharing all manner of power (including the right to arms) with the people as part and parcel of the system of checks and balances; hence, the value of investing a measure of coercive (not just procedural) power in the people themselves, individually as well as collectively. The residual moral value of so entrusting and empowering the people is not a function of expected utility (whether it is likely that it would ever be necessary or feasible in fact for the people to pose a threat of armed resistance against their government); it is rather a matter of the principles upon which the governance of a free people should arguably be founded, a question of residual moral value rather than expected utility alone.

2. Speculative Issues

The question of the need for an armed citizenry as a check on the abuse of governmental power is simply dismissed by many as both anachronistic and anathema in our modern and high-mindedly optimistic times. But the question is relative, as the need or capacity or efficacy of armed resistance pertains to any level of government: federal, state, or local. In fact, armed American citizens have, as in Athens, Tennessee, following WWII, as well as in many African-American communities terrorized by local white supremicist authorities (see "The Second Amendment: An Afro-Americanist reconsideration," in Cottrol, 1994), mustered in

order, successfully, to resist corrupt governmental authority on the local level. That an armed citizenry is a factor to be reckoned with even by a central government superior in arms is, by some lights, shown by many insurgency actions around the world, not the least by our own forbearers' historic war of independence and our dismal experience in Viet Nam.

But today the very idea of a people having to take up arms against their own government invites images of anarchy as well as futility and is, in any case, a discomfiting thought. While granting this, Sanford Levinson, in his judicious treatment of the Second Amendment controversy ("The embarrassing Second Amendment," in Cottrol, 1994), provides a temporizing perspective on this sensitive and irreducibly speculative issue: "One would, of course, like to believe that the state, whether at the local or national level, presents no threat to important political values, including liberty. . . . But it seems foolhardy to assume that the armed state will necessarily be benevolent. The American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state . . . . In any event, it is hard for me to see how one can argue that circumstances have so changed as to make mass disarmament constitutionally unproblematic."

In the end, the empirical fact of the matter, the likelihood of whether the people could, or would need to, resist their government in the gravest breech, is not dispositive on the moral and political-philosophic question, whether a free people should nonetheless be so empowered. In addition, political-philosophic commitment to such empowerment is part of the residual value of firearms for many individuals, who value it regardless of its speculative utility. The individual, social, and political value of privately owned firearms are all arguable, on both empirical and philosophic grounds. But that is to say that they must be fairly accounted and weighed in the balance scales on their merits, not summarily ignored as counter to the conventional wisdom.

V. Paradigms of Restrictive and Permissive Policy

Gun bans and permits to carry firearms concealed in public are probably the two most controversial types of gun control measure among political proponents and opponents of gun control, by virtue of the fact that they are viewed, respectively, as extremely (excessively) restrictive and extremely (excessively) permissive policies. Both restrictive control advocates and a large part of the public (as reflected in polls) have favored selective bans on certain types of firearm; in the case of "assault weapons," 70% of Americans apparently favored a ban (whatever they may have construed such firearms to be). Prohibitionist control advocates tend to oppose concealed carry permits, at least the more permissive "shall issue" variety. (While support for discretionary permits cannot be inferred from their exploitation, many prohibitionist gun control advocates have held such permits: Senator Diane Feinstein, while she was mayor of San Francisco, held one of only four carry licenses issued under the city's discretionary licensing system and many others enjoy the non-egalitarian privilege under New York City's highly restrictive discretionary system.) While a 1996 poll found 60% of Americans in favor of permissive licensing for concealed carry, the outcry against such measures has been as intense as the opposition to equally popular "assault weapon" bans. These cases of gun control are useful to examine not only because of their high profile but because corrigible speculation plays a large role in the associated controversy.

A. Gun Bans

While the ultimate social goal of many ban proponents is complete civilian disarmament, as envisioned by total prohibitionists like Charles Krauthammer (see II.C.2 and below), selective bans are taken to be politically necessary incremental steps. The ultimate goal of other ban proponents, who may be more selective in the guns they see fit to ban, is reduction of criminal violence. In either case, the gun ban proposals on the public agenda at any time are apt to be selective bans, where total and selective prohibitionists can make common cause. Selective gun bans typically target firearms that can be easily stigmatized in some fashion or seem particularly conducive to criminal violence, such as "Saturday Night Specials" and "assault weapons" or even handguns in general. Arguments against banning such highly stigmatized guns will presumably tell against more comprehensive bans, the defense theory being that if the worst of the "bad" guns may not justifiably be

banned, no firearms may justifiably be banned. So we will focus on the forms of argument about selective bans, in particular bans on so-called "assault weapons," but we will first examine the salient instrumental role that selective bans play in more comprehensive ban strategies.

1. Comprehensive Bans and Civilian Disarmament

The political feasibility of a total ban or even a general handgun ban is arguably nil, because of the size of the political constituency that values guns of some sort, like sporting arms and handguns. On the occasions when popular referendums on categorical handgun bans have been held, in states where public support had appeared to be large before the ban campaign, the proposed bans were defeated by large margins. In view of the fact that 60% of Americans now support permissive right-to-carry laws and handguns are the very guns suitable for concealed carry, even a general handgun ban is not feasible politically.

In addition, the moral right of self-defense, while denied by some on moral grounds, is upheld by the law as well as by an overwhelming majority of Americans, as is the moral right to firearms as the most effective means of self-defense (a moral position quite separable from any debate over the meaning of the Second Amendment). The number of people cleaving to both of these putative rights as essentially connected probably pose insupperable political opposition to any very comprehensive gun bans. The right of self-defense (tantamount to the right to use deadly force therefor) and the right to possess guns for that purpose are, by some lights, segregatable: for example, English and Australian law uphold the quite universal right of self-defense but deny self-defense as a legitimate reason for possessing firearms. However, convincing most Americans of this, that the former right (self-defense) does not entail the latter (a right to arms) is not likely.

Comprehensive ban proponents know this and consequently adopt an incremental strategy and stealthy divide-and-conquer tactics against the general store of private firearms, attacking select types of firearms with smaller constituencies. A colorful description of this strategy is "the salami approach" (SA), which stealthily seeks to take one slice at a time. Stealth can prevail only up to the point where people notice how little salami is left and become more vigilant or resistant, so the SA must rely increasingly on another gradualist tactic, which works analogously to the "boiling frog syndrome" (BFS), as follows. If you want to boil a frog, dropping it immediately into a pan of boiling water is ill-advised, because it will

just as immediately hop out. The proper technique is gently to place the frog in the pan and heat the water very gradually. By the time the frog realizes that he is in very hot water, he will be too far cooked to escape. The human social-psychological analogue of this biological fact about frogs may require some ingenuity to achieve. But the total disarmament strategy must and does employ both stealthy SA and BFS tactics. Krauthammer had such tactical use of selective gun bans in mind in his April 5, 1996, *Washington Post* column, "Disarm the citizenry, but not yet," where he declared the "assault weapon" ban useless for crime control but essential to accustom the American public gradually to increasingly prohibitory gun controls.

In any case, it is clear what the SA stealth tactic requires at the stage of "first step" selective bans: a way of dividing the gun-valuing public into smaller partisan constituencies and overcoming them one at a time. The long list of protected "sporting purpose" firearms in the federal "assault weapon" ban in the Violent Crime Control Act of 1994 was intended to asssure hunters and sport shooters that their favorite firearms were not (for the time) at risk and thereby allay potential opposition from that large population. The "assault weapon" ban portion of the larger 1994 crime bill was called the Public Safety & Recreational Firearms Use Protection Act, in order to signal its intention to protect "recreational firearms." A crucial collateral tactic is to assure the even larger constituency interested in self-defense guns that "assault weapons" are not legitimate instruments of self-defense, in order to allay opposition from that quarter as well.

Similarly, "Saturday Night Special" (SNS) ban proposals attempt to allay the opposition of both sport shooters and gun-defense advocates alike by arguing that cheap SNS's are no good for either purpose by virtue of being both unsafe and unreliable. In looking to take a slice off the handgun end of the salami, SNS ban proponents have recently become more sensitive to the racist origin of the term "Saturday Night Special." In the 19th century, the "black codes" in the south were devised to disarm African Americans; "Saturday Night Specials" were so called because they were small, inexpensive handguns associated with "nigger-town Saturday night." To dissociate the enterprise from this ugly chapter in the racist origins of gun control, selective handgun proponents have devised a new stigmatic term, "junk guns," which, like "assault weapon" or "cop killer gun" is designed to allay public opposition: Who, after all, would want to stand up for "cop killer guns" or depend for defense on "junk guns"? Who would claim to need an "assault weapon" for defense? The attempt to oppose SNS or "junk gun" bans on the grounds that they discriminate unfairly against poorer people, who are just those most likely to need

handguns for defense, can then be countered by pointing out how untoward it would be to allow even the poor to bet their lives on "junk." In any case, SA tactics include undermining any sporting or defensive value that might be attributed to the targeted guns by significant political constituencies, in effect arguing that the slices of salami in question will not be missed (at least not by significant constituencies).

As the 1997 legislative session of Congress commenced, examples of this SA tactic employing the new stigmatic label "junk guns" were Senator Barbara Boxer's senate bill, SB-70 (the American Handgun Standards Act), and Representative Charles Schumer's house bill, HB-492. The thrust of these proposals is to exploit the "sporting purpose" criterion of the 1968 Gun Control Act used to ban the import of small, inexpensive handguns, in order to ban domestically manufactured handguns variously characterized as "junk guns" or handguns "not particularly suitable for sporting purposes." Ban opponents, in turn, refer to the targeted weapons as "affordable handguns" that are "particularly suitable for defensive purposes." The ostensible rationale of these national bills is the same as the ban on the manufacture of "junk guns" proposed by the Attorney General of Massachussetts under the rubric of consumer protection (see I.C.1.b). Sloganeering with the stigmatic "junk gun" label is important as a political ploy because a handgun's lack of "sporting purpose" is irrelevant to its defensive utility and the consumer-protection problem these proposals claim to solve at considerable public expense is arguably non-existent: there are only several hundred fatal handgun accidents annually and virtually none are a function of the size or "cheapness" of the handguns involved (see III.A.3). The credibility of the safety pretext is further undermined by the fact that both SB-70 and the Massachussetts proposal exempt law enforcement officers (as part of the saavy divide-and-conquer strategem), who often favor these guns as backup weapons, and are knowledgeable enough to know that they are not peculiarly unsafe.

The "junk gun" ban's ostensible consumer-protection strategy is even more demonstrably implausible than the "assault weapon" ban's crime-reduction strategy, which suggests that its ulterior aim is, as Krauthammer characterized the "assault weapon" ban's, "to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation." Thus, "junk gun" bans are apt illustrations of selective gun bans pursued as, or merely as, stealthly "first steps" towards more comprehensive civilian disarmament. The next section examines a strategic line of argument for a selective gun ban viewed, not merely as a vehicle for such ulterior agendas, which it also is, but in its own right.

2. Selective Gun Bans

In terms of the key evaluative questions about feasibility, efficacy and justifiability, selective bans can overcome the feasibility hurdle more easily than more comprehensive bans. From the efficacy standpoint, ban strategies divide markedly on appropriate success criteria and on the relevance of efficacy to justifiablity. Regarding justifiability issues, ban strategies divide like others about the relative priority of putative rights, on the one hand, as against a utilitarian interest in the balance of social harms and benefits, on the other hand. As a prohibitionist policy, gun banning harks to at least two different strategies, which for convenience of reference may be called the utilitarian ban strategy (UBS) and the fundamental moral objection (FMOS) strategy. While there are, in fact, significant numbers of influential gun ban proponents who adhere to or vascillate between each sort of strategy, the UBS and FMOS here serve simply to illustrate radically different approaches to gun bans.

a. The Fundamental Moral Objection Strategy (FMOS)

For the UBS, as will be seen, the ultimate goal is reducing criminal violence: the efficacy of a ban for this purpose is professedly essential to its justifiability. For the FMOS, by contrast, the reduction of the store of private firearms is the ultimate goal as a matter of fundamental moral objection to private force and firearms, so the efficacy of a ban may be rhetorically expedient to claim, but it is not taken as critical to the justifiability of the ban. The FMOS affords preeminence to certain residual moral values, such that trying the facts or weighing the balance of social harms and benefits of private firearms is not dispositive. The individual, social, and political values of private firearms (outlined in IV) are the very sort found objectionable; so, in principle, they are either dismissed or demoted to inconsequential status (even if in politic rhetoric they are entertained). Any putative rights to firearms for defense against criminal threat, let alone against the state, will carry no significant weight with the FMOS.

The FMOS has a counterpart among gun-rights positions that resort to empirical and utilitarian argument about the utility of firearms as a tactic but hold that, in principle, the numbers cannot gainsay what they take to be a fundamental right to arms derived from the paramount right of self-defense. Second Amendment fundamentalists, who believe that the constitutional right in question is not only a

fundamental individual right but an absolute one, would be one counterpart to FMOS partisans. Such partisanship, based on fundmamental and non-negotiable moral entrenchments inhospitable to empirical considerations, is one reason the gun control controversy is aptly called a "culture war."

The FMOS raises what in many ways is the deepest philosophical controversy, but for that very reason cannot be adequately entertained here. It is important to demark on the landscape of the gun control controversy, because it is a model that makes sense of the fact that many ban proponents are not very interested in the empirical research or disputes, a fact that cannot be explained simply by the appeal of, or complacency about, the conventional wisdom about gun control (discussed in III). The moral indignation as well as the prominence, if not prevalence, of those who declaim the moral illegitimacy of private fireams is illustrated by the following epithets and remarks (cited by Kates in a presentation at the 1990 meeting of the Law & Society Association on bigotry, symbolism, and ideology in the battle over gun control): "[G]un lunatics silence [the] sounds of civilization," says Bill Braucher,*Miami Herald* columnist; gun owners, or "gun fetishists," are deplored by syndicated columnist Garry Wills as "anti-citizens" and "traitors, enemies of their own *patriae* "; historian Richard Hofstadter ascribes to the American gun owner D.H. Lawrence's description of "the essential American soul" as "hard, isolate and a killer"; former Attorney General Ramsey Clark decries the American gun culture as "anarchy, not order under law - a jungle where each relies on himself for survival"; and a variety of prominent ideologues (Arthur Schlesinger, Jr., Harriet Van Horne, Rep. Fortney Stark, Dr. Joyce Brothers, Harlan Ellison, and others) deny that the interests of gun owners deserve respect or any consideration in the balance scales of social policy making.

Such views represent the extreme in *ad hominem* FMOS sentiment but illustrate the moral animus that can motivate a non-utilitarian program promoting firearm scarcity or eradication. The teleological ideal of some higher form of American civilization expressed by Charles Krauthammer (consistent with what is called "ideal" utilitarianism, which gives priority to certain social ideals over more prosaic costs and benefits) may lie at the heart of the FMOS, as when Krauthammer proclaimed the federal "assault weapon" ban useless for crime control but an essential, symbolic step towards the strategic goal of civilian disarmament (see II.C.2). The FMOS does not have a monopoly on moral animus against firearms, nor does conscientious objection to private firearms or their use commit one to the FMOS. So, gun ban advocates who harbor moral objections to some firearms but also believe

in the efficacy of gun bans have one alternative in the UBS (or hybrid strategies, whose subtleties cannot be analyzed here).

b. The Utilitarian Ban Strategy (UBS)

A more prevalent, and more tractable, sort of gun ban strategy is the generic utilitarian crime-control agenda whose goal is to reduce criminal violence (or, at least, its more indiscriminate, wanton forms, such as mass mayhem and massacres) by reducing criminal access to certain types of firearms whose features are accounted "particularly suitable" for perpetrating indiscriminate violence or otherwise likely to make these firearms "criminals' weapons of choice."

Non-criminal firearm violence (such as in suicide or gun accidents) is not typically used to promote selective bans because it is hard to make the case that select types of firearm are more conducive to gun suicide or accident than any other type. While handgun bans might be promoted because of the convenience of handguns for suicide, the fact is that long guns are generally much more lethal and, if anything, more susceptible of accidental discharge (see III.A.3). A clear exception are firearm consumer-protection initiatives (discussed in I.C.1.b) which are indeed (1) focused on gun accidents and firearms features allegedly conducive thereto and (2) equivalent to selective gun bans, because they seek to ban firearms that do not satisfy their notion of a sufficiently "safe" firearm. Such a standard can make a consumer protection policy tantamount to a ban on all current firearms; but these initiatives typically target handguns.

Thus, the UBS seeks to ban certain firearms that are claimed to figure significantly in crime (the ban-targeted guns, BTGs), in order to reduce criminal *access to* the BTGs and, thereby, reduce criminal *violence with* BTGs and, thereby, reduce death and injury from criminal violence *overall.* If reducing access to and violence committed with BTGs did not reduce criminal violence overall, either in severity (fatality or morbidity) or frequency (number of fatalities and injuries), there would be no reason to reduce access to BTGs rather than to other guns according to a utilitarian strategy. Regarding any gun ban, it is sensible to ask: Why ban these and not other, or all, guns? On the UBS, the answer, in part, must be that banning the BTGs promises a reduction in criminal violence overall, because there is something *special* about the BTGs that is peculiarly conducive to promoting greater injury, fatality, or other cost from criminal violence committed with BTGs.

at this point, the excessive use of initials makes the tone all but unreadable. Either a macro or search/replace should help — as should spell check except for the [redacted] wrong spelling which is correct for another word.

Because the special features of the BTGs in question can make a material difference to the hypotheses of the UBS about why banning specific BTGs makes sense, we need to specify the type of ban at issue in order to illustrate any UBS selective ban argument. For example, one feature of handguns that makes them specially suitable to criminal violence as well as attractive to criminals is their compact size and consequent concealability. Handguns in general are most criminals' weapons of choice in most situations because they are so convenient to carry and conceal, the features that make handguns BTGs. But with regard to so-called "assault weapons" (AWs), which include a confounding array of rifles (ARs) and shotguns (ASGs) and pistols (APs), convenience and concealability for carry and stealth cannot be the common features of concern. Thus, the UBS can select different BTGs on the basis of different features, and the specific features are material to the plausibility of the rationale for the type of ban in question. In fact, it is the specific features that the variety of AWs all supposedly have in common (be they ARs, ASGs or APs) that make sense of that very variety. For illustration of the UBS, we will examine the specifics of the UBS argument for AWs, its distinctive rationale and problems.

The UBS argument for the *efficacy* and consequent *justifiability* of AW bans rests on empirical and vaulative hypotheses, and a principle of justifiability such as the following. Recall: efficacy (a net reduction in criminal violence or its effects) is *ex hypothesi* essential to justifiability in terms of the utilitarian ban strategy.

> (GDP) *The Greater Destructive Potential* Hypothesis: AWs are designed to kill or maim many people quickly, even while being fired unaimed from the hip, as in mililtary assaults. They possess certain features that render them capable of perpetrating massive and indiscriminate violence, of shooting more victims, including innocent bystanders, in shorter periods of time than other firearms, because they can fire more rounds more rapidly before being reloaded. Salient examples of such wanton violence are the massacres in Stockton CA and Killeen TX, but cases of babies killed in their cribs by stray rounds from drive-by shootings illustrate the gratuitous and indiscriminate destruction that can be caused with AWs.
>
> (CWC) The *"Criminals' Weapons of Choice"* Hypothesis: Such features as the above are very attractive to violent criminals, making AWs the "criminals' weapons of choice" (CWCs), which increases the frequency with which AWs are used in violent crime and, therefore,

increases the quantity of the harm (morbidity and fatality) done thereby.

(GOV) The *Greater Overall Violence* Hypothesis: Given the GDP and CWC factors, criminal use of AWs results in higher rates and greater severity of injury (including death) overall than would result if no criminals used AWs.

(RCA) The *Reduced Criminal Access* Hypothesis: Banning AWs will eliminate criminal access, or at least reduce criminal access to AWs appreciably.

(OVR) The *Overall Violence Reduction* Hypothesis: Given GOV and RCA, banning AWs will reduce criminal violence overall, if not its frequency then the rate and severity of injury (including death) resulting from criminal violence.

(NSP) The *No "Legitimate Sporting Purpose"* Hypothesis: AWs have no "legitimate sporting purpose," so banning them harms no "legitimate" recreational or avocational interests.

(NDV) The *No Defensive Value* Hypothesis: AWs are designed or useful only for military or criminal assault, in neither of which law-abiding citizens have any legitimate interest; at least, AWs are unnecessary for self-defense (ordinary fireams will suffice); so, in any case, banning them does no harm to anyone's interest in self-protection.

(UJ) The *Utilitarian Justiability* Principle: Given NSP and NDV and OVR, there is no harm to legitimate interests in banning AWs; but there will be a decrease in overall social costs from banning AWs, so banning AWs is justifiable, all things considered.

Since the use or possession of any firearm by criminals or for criminal purpose is already prohibited, extant criminal laws and penalties covering such use and possession have presumably exercized whatever deterrent effect of which they are capable. The UBS proposes to supplement general criminal law with an AW ban in hopes of reducing criminal violence in either the severity or the frequency of its injurious effects. This is a laudable ambition, but there are at least three kinds of problem for the UBS AW ban argument:

Empirical Defeasibility. The hypotheses upon which the UBS rests are arguably false; at least, they are open to serious enough objections to raise grave doubts about the *efficacy* of the UBS.

Ethical Problems. In addition, there are ethical problems for AW bans that render the UBS *justifiability* principle seriously remiss and objectionable.

Unjustifiability of UBS AW bans. The ethical objections, together with the grave doubts about the premises of the efficacy argument, erode the justifiability of UBS AW bans.

Baldly put, this line of objection comes to this: because AW bans do not work as claimed, and in addition, cause harm, they are unsupportable. More cautiously put, it comes to this: given the seriously dubious efficacy and justifiability of the UBS AW ban, other plausible alternatives to gun bans for reducing criminal violence or its fatal and injurious effects, if ones exist, are incumbant upon us to try before resorting to an outright ban. Such alternatives do exist (see III.B.2).

So, the above criticisms, if substantiated, would enjoin us to reject or suspend AW bans and seek alternative measures for reducing overall criminal violence. The ensuing discussion illustrates the alleged substance behind these criticisms point by point, the problematic terrain that must be crossed in order to establish the efficacy and justifiability of the UBS "assault weapon" ban. (Other UBS selective bans, such as "junk gun" bans, will be liable to similar difficulties, both empirical and ethical, but the substance of the objections will vary with the special attributes of the BTG's in question; therein hang other tales.)

i. "Criminals' Weapons of Choice" (CWC)

The CWC factor is irrelevant for a number of reasons, one being that it is logically gratuitous to the AW ban argument (although it serves to enhance the persuasiveness of AW ban rhetoric, which is one reason for its prominence in that rhetoric). The CWC factor is supposedly responsible for the frequency with which AW's are actually *used* in crime and, therefore, for the frequency and severity of resultant *injury* (including death), which in turn seems to imply that the *overall costs* of criminal violence could be reduced by reducing criminal access to AW's. While this postulated benefit of AW bans might seem plausible, it will be seen that the popularity of AW's with criminals is actually immaterial either to the argument for AW bans or to their supposed benefits.

As a matter of rhetorical or political strategy, the irrelevance of the CWC factor should be a relief to AW ban proponents because, in point of fact, the CWC factor is very small in the case of AW long guns, namely shotguns (ASG's) or semi-

automatic "assault rifles" (ARs). The AW ban argument loses credibility overall when false claims about ASGs and ARs are uncovered and contradicted by readily available facts. For example, it is the menacing-looking long guns (the AK-47 with its 30-round magazine or the "Streetsweeper" shotgun with its rotund 12-round cyclinder) that, for rhetorical purposes, are made emblematic of AWs (for example, in ads for AW bans, even though "normal"-looking semi-automatic pistols are more popular as CWCs). It stands to reason that long guns would not be most criminals' choice in most situations because they are less wieldy and less concealable than handguns, the very reason handgun ban advocates give for handguns being CWCs. For example, ARs (so-called "assault rifles") figure in perhaps 1% of gun crimes overall (their use varies from 0% to 3% by jurisdiction). For example, in New York City from 1987 through 1992, the highest annual rates of homicide committed with rifles and shotguns were 0.7% (7/10ths of 1%) and 2%, respectively, according to New York's Division of Criminal Justice Services 1994 report, "Assault weapons and homicide in New York City." Thus, the fact that ARs, while salient emblems of AWs, are very infrequently used in violent crime is established by published data on violent crime.

Claims in the gun control controversy about the relative rates of use of different types of firearm in violent crime are based on either (1)*violent crime data* or (2) BATF *firearm trace data.* National *crime data* come either from the FBI Uniform Crime Reports (and supplements), which reflect only crimes reported to and by law enforcement agencies, or from the Bureau of Justice Statistics (BJS), whose data derive from victimization or inmate surveys, which are not designed to gather information on the types of firearms actually used in crime. Data on the firearms involved in crimes of violence (as distinct from non-violent firearms violations) are gleaned from law enforcement agency reports on guns recovered from violent crime scenes or from perpetrators or, absent the crime gun, forensic data on wound-ballistics or recovered bullets and casings. For example, if a .223 caliber bullet is extracted from a victim, in the absence of the perpetrator's gun it can be inferred that the crime gun was a rifle. It is highly probable, then, that the rifle was semi-automatic, in which case it is also likely to have been either a Colt AR-15 or a Ruger Mini-14. The AR-15 is banned by the federal AW ban, while the Ruger is not; however, both would likely be considered "assault rifles" by AW ban proponents, so the .223 bullet could be counted as a datum on the use of ARs in crime. It is on such reported violent crime data that the low rates of AR use in crime are based. BJS estimates, from inmate surveys, of the popularity of certain weapon types by criminals support equally low assessments of the actual *use* of ARs in crime.

BATF *firearm trace data* are often exploited by ban proponents in order to inflate estimates of the criminal *use* of AW's, including AR's. AW's are traced more frequently than they are implicated in violent crimes, as compared to other guns, in part because of the attention focused on them by the AW ban controversy. Trace data are gleaned from ATF reports of how many traces are run on various types of gun at the request of law enforcement agencies. A trace is an attempt to match a given gun by serial number with, respectively, a given distributor after the gun leaves the manufacturer, the dealer to whom the distributor sold the gun, and the individual to whom the dealer sold the gun, or any other individuals who received the gun through further (recorded) transfers. The problem with ATF traces is that most are not made for guns involved in a *violent* crime but rather for requests on guns found in the course of other investigations, such as guns suspected of having been stolen or illegally transferred. The ATF expressly warns that trace data cannot be used for estimating use in crime or for any other statistical estimations because they do not constitute a properly representative sample of anything. Accordingly, only violent crime data can be used for estimating the rate at which any types of gun are used in violent crime. These are *estimates* because not all violent crimes are reported and the guns used in many crimes are not identified. For example, even in robberies that are solved, the gun used may not be retrieved or of interest, and, in unsolved crimes, the type of gun used may not have been identified (at all, or reliably) by the victim.

Another way that estimates of AW use in violent crime is inflated is by using arbitrarily variant definitions of "assault weapon." An example is the Pennsylvania State Police count of the use of AW's in violent crime in 1994. They used crime data but included in the category of assault weapons not only "military-style rifles and shotguns" (1.33% of the guns used in violent crime) and "high-capacity pistols" (defined as semi-automatic pistols with magazine capacities in excess of 20 cartridges, 1.33%), but also "low-capacity pistols" (9.33%). The inconsistency of AW criteria will, of course, confound estimates of their use. The federal AW ban defines "high capacity" as over ten rounds, so the Pennsylvania State Police under-counted, by this standard, while also including a category, "low-capacity pistols" (small, concealable semi-automatic pistols) that had never before been considered AW's.

Thus, the "criminals' weapons of choice" issue is a red herring in part because the counts of AW use in violent crime are confounded by inconsistent definitions and fallacious estimation methods. But, more crucially, the matter is logically irrelevant, because being a CWC is neither necessary nor sufficient to qualify a gun as a BTG. It is not *necessary* because AR's are used in violent crime very infrequently; so AR's

are not CWCs but they are regarded as paradigmatic BTGs. It is not *sufficient* because many types of gun that are most popular with violent offenders and most frequently used in violent crime, namely revolvers, are certainly CWCs but are not regarded as AWs (the BTGs in question). Revolvers either tie or exceed semi-automatic pistols (of whatever magazine capacity) in frequency of use in violent crime at 30% to 50%. If being a CWC means anything, any kind of gun chosen in 30% to 50% of violent crime would certainly qualify as a BTG, but revolvers do not.

Therefore, the CWC factor is irrelevant to AW bans and the special features that qualify AWs as BTGs do not include being "criminals' weapons of choice." Moreover, as will be seen, even if AWs represented 100% of the guns used in violent crimes, such that AWs were the only criminals' weapons of choice, it would make no difference to the force of the AW ban argument (see V.A.2.b.ii and iii). The advantage to AW ban proponents of acknowledging this logical fact is that it removes the CWC hypothesis as a point of vulnerability: if the GOV hypothesis does not have to assume the CWC hypothesis, its burden of proof is lightened and its vulnerabiilty to embarrassment is decreased. It will also be seen that the attribute "military style" (insofar as it includes features such as bayonet lugs and flash suppresors) is totally irrelevant to AW bans, because it is *neither necessary* (pistols lack such features) *nor sufficient* (such features are irrelevant to GDP, the Greater Destructive Potential factor, below) to qualify as a BTG. (A simple indication of the latter point is that bayonet lugs, or even mounted bayonets themselves, are not at all relevant to the rate or severity of injury that are specifically attributed to AWs: why should bayonets be likely to increase the morbidity or fatality rates peculiarly attributable to those firearms banned because of their rapid-fire and high-volume-of-fire capabilities, as opposed to weapons with less "firepower"?)

ii. Greater Destructive Potential (GDP)

If being "criminals' weapons of choice" is an irrelevant factor, what features of firearms *are* material to the BTGs (the guns targeted by AW bans)? The crucial hypotheses in the AW ban argument include, not claims about the popularity of AWs or the frequency with which they are used in violent crime, but rather the claims that AWs possess greater destructive potential than other guns (the GDP hypothesis) and that, consequently, the use of AWs, *whatever its frequency*, results in more death and injury in the aggregate (the GOV hypothesis) than if AWs were not used. Again, if criminals used nothing but AWs 100% of the time, the question would be

how much greater the quantity and severity of resulting injury (including death) would be as compared with the use of non-AWs. For example, when felons use high-capacity semi-automatic pistols instead of revolvers, perhaps the shooting incidents and the injuries they inflict involve a higher number of rounds being fired and striking intended, or unintended, targets. One would then expect to see a greater number of multiple-wound cases in trauma centers from 9mm or .380 semi-automatics than from .38 Special or .357 Magnum revolvers. That is, not just a greater number of cases where a 9mm was used, but, in those cases where a 9mm is used, more bullet wounds, greater morbidity, and a higher fatality rate than when a .38 was used. Greater popularity of high-capacity 9mm pistols (AWs) over .38 revolvers would be consequential only if greater morbidity and fatality resulted. So, while the CWC factor is arguably gratuitous to the GOV hypothesis, the GDP factor is essential.

The "power" and caliber of AW cartridges are not greater on average than those of non-AWs: cartridges for revolvers and low-capacity semi-automatic pistols cover a comparable range of "power" and caliber, from .22 to .45 caliber (where, in the mid-range, a 9mm can be roughly comparable to a .38 Special but decidedly less powerful than a .357 Magnum). Cartridges for what are nominated as semi-automatic "assault rifles" are semi-automatic versions of military rifles, such as the AK-47 in 7.62x39mm or the M16 in .223 (5.56x45mm), and, on average, less powerful than the wide array of hunting rifle rounds in similar calibers (see "assault rifle," in the Glossary); and, 12- or 20-gauge shotgun cartridges are as devasting whether fired from a five-round "sporting" shotgun or from an eight-round (or the rare 12-round) combat shotgun. The GDP attributed to AWs is rather a function of what is called, ambiguously, their "firepower," a term that can refer to one or more of the following features.

(1) *Ammunition capacity* is tantamount to either (a) the capacity of the firearm's feeding device (for example, its fixed or detachable magazine) or (b) the number of a firearm's firing chambers (as with revolvers or revolver-action shotguns). It is useful to distinguish *feeding devices* from *reloading devices* in general: detachable feeding devices (such as detachable magazines, drums, or cartridge belts) serve as reloading devices, but not all reloading devices are feeding devices (for example: tubular speed loaders for charging fixed tubular magazines, clips for charging fixed box magazines, or cylindrical speed loaders or moon clips for charging revolver chambers). A feeding device is an ammunition container that is integral with the firearm in normal operation, whether also detachable (like a detachable box or drum magazine) or built into the firearm (like the under-barrel

tubular magazines of many repeating shotguns), from which rounds are fed into the gun's firing chamber. Reloading devices are ammunition containers that can be either separate from the firearm in normal operation (like a revolver speed loader) or integral (like a detachable magazine); reloading devices that are separate from the firearm in normal operation facilitate charging a firearm's fixed magazine or the several chambers of a multiple-chamber firearm at once in a stroke.

Thus, the ammunition capacity of revolvers is limited to the number of their firing chambers (which can vary between five and twelve, depending on their size and caliber), while the capacity of shotguns with fixed tubular magazines typically vary from three to eight rounds. Both revolvers and shotguns can be reloaded fairly quickly with speed loaders. Rifles with fixed tubular magazines usually need to be reloaded manually one round at a time, but their magazines can be replenished on the fly between shots, as can tubular shotgun magazines. The capacity of rifles with fixed box magazines can vary from three to eight rounds; some can be reloaded very quickly by inserting full-capacity "stripper" clips into the magazine (which are stripped out and ejected when the last round is fired). The ammunition capacity of pistols, shotguns, or rifles that accept detachable magazines will be the capacity of whatever magazines are available, which can vary from five to 30 or more rounds. (The maximum capacity of magazine-fed firearms is the magazine capacity plus one round in the chamber.) Detachable-magazine firearms can be reloaded very quickly by exchanging an empty for a loaded magazine. The speed with which detachable magazines can be exchanged makes restrictions on detachable magazine *capacity* inconsequential in deployments against helpless, unarmed victims (see V.A.2.b.iii).

(2) *Rate of fire* is the speed with which the firearm's action can be cycled, which is either (a) the ***maximum*** or theoretical cyclic rate of which the action is ***mechanically*** capable, or (b) the ***actual*** rate at which the action can cycled by a given operator (a function of the operator's skill as well as the firearm's mechanics), or (c) the *tactically effective* rate (for example, for purposes of accuracy, which is also operator-sensitive as well as situation-relative). In fully automatic firearms, the maximum and actual rates will be the same, irrespective of the tactically effective rate; whereas for semi-automatic and other action types the maximum, actual, and effective rates of fire can all vary.

(3) *Volume of continuous fire per reload* (VCF) is a function of feeding device capacity and rate of fire: how many rounds one can fire at a certain rate before having to reload, or how long one can maintain a certain rate of fire (maximum, actual, or effective) before having to reload, where x rounds per magazine divided by

y shots per second equals w seconds of continuous fire at the given rate before having to reload. For example: a 30-round magazine expended in fully automatic mode at the rate of 15 rounds per second affords a volume of continuous fire of 30 rounds over 2 seconds before having to reload. With fully automatic firearms, where the rate of fire is a given, tactical effectiveness is a function of burst control, how continuity of fire is managed: it might not be advisable to empty the magazine in one continuous burst, so maximum volume of continuous fire is not necessarily a tactically relevant commodity. For semi-automatic and other action types, where rate of fire can be varied, it might not be advisable either to fire continuously as long as one can or to do so as fast as one can. While both the theoretical or maximum rate of fire and the maximum volume of continuous fire might seem very impressive (or frightful) for semi-automatic AW's with "high capacity" feeding devices, neither is necessarily tactically effective (see V.A.2.b.iii).

(4) *Reloading time* is the speed with which the firearm can be reloaded either manually a round at a time or by using multi-round reloading devices (such as detachable magazines, speed loaders, or clips). Reloading time is, of course, a function of operator skill and dexterity. The difference in reloading time between performing a detachable magazine exchange in a pistol and recharging a revolver with a speed loader can be ~~as little as~~ less than three seconds. The practical significance of this difference can be great or negligible depending upon the tactical situation, but for purposes of shooting a large number of helpless people quickly is negligible (see V.A.2.b.iii).

(5) *Volume of sustainable fire across reloads* (VSF) is tantamount to the number of rounds that can be fired per some extended time frame that includes some number of reloads. This factor is a function of the interaction of the other factors and will be limited by the number of charged reloading devices available. For example: ([x rounds per magazine divided by y shots per second] plus z seconds for a magazine exchange) equals x rounds fired over w seconds. If we multiply both x rounds and w seconds by n (the number of magazine exchanges made or available), we have one instance of sustainable volume of fire: (x times n) rounds over (w times n) seconds. The same caveat applies regarding the *effective* volume of sustainable fire over reloads as applied to rate of fire and volume of continuous fire: the effective volume of sustainable fire will be a function of operator skill and the requirements of the tactical situation, whereby shooting unarmed "sitting duck" victims can render factor (5) inconsequential (see V.A.2.b.iii).

Shotguns are typically nominated for AW status either when they are 12-round revolver-action or when they are semi-automatic in operation with a six-

round or greater magazine capacity. Shotguns with detachable box magazines (which can vary from 6 to 12 rounds) are very rare. Sometimes (for example, in England) all repeating shotguns are accounted AWs, including pump-action guns. Shotguns and rifles equipped with any two of the following accoutrements are accounted AWs in the 1994 federal ban: a pistol-grip or folding shoulder stock, a bayonet lug, a flash suppressor or ventillated barrel shroud (handguard), none of which are functionally relevant to "greater destructive capacity" but all of which are considered "military style" and therefore "not particularly suitable for legitimate sporting purposes."

The paradigmatic AW is a semi-automatic (self-loading) pistol or rifle fed by "high-capacity" detachable magazines. "High capacity" is relative: AW bans define it variously as in excess of the following thresholds: 6 rounds, 10 rounds, 15 rounds, or 20 rounds. The federal AW ban defines it as over 10 rounds, mandating magazines of 10 rounds or fewer. But semi-automatic, detachable-magazine pistols and rifles score well on all the above "firepower" factors (1) - (5), which means that they are capable of a higher volume of continuous fire (VCF) and, depending on available magazines, a higher volume of sustainable fire (VSF) than non-self-loading firearms with either smaller-capacity or non-detachable magazines. The GDP hypothesis, that AWs are *potentially* more destructive than non-AWs will be true in any instant case insofar as the AWs in question are capable of higher volumes of both continuous and sustainable fire than the non-AWs in question. However, the VCF and VSF factors (and, hence, the truth of the GDP hypothesis) are arguably inconsequential to the aggregate of death and injury resulting from criminal violence, as will be seen in the discussion of the GOV hypothesis.

iii. Greater Overall Violence (GOV)

The GOV hypothesis postulates that, given the greater destructive *potential* of AWs, the rate and severity of injury (including death) resulting from criminal use of AWs is *actually* greater than would result if no criminals used AWs. The GOV hypothesis does not have to assume any special frequency with which AWs are used (the CWC hypothesis), but needs only the assumption that, when they are used in whatever number of cases, the rate or severity of resulting injury will be greater. Understanding the arguable fallacy of this hypothesis, as against its apparent plausibility, requires scrutiny of the tactical realities of criminal gun violence beyond the ken of the common knowledge to which the GOV hypothesis appeals. The

following discussion serves as a caveat to the effect that, even granted the GDP of AW's, the GOV hypothesis is not a foregone conclusion.

Typical cases of criminal gun violence that dominate people's imagination and speculation about how the GDP factor must necessarily compound the harmfulness of violent crime are as follows.

(1) The deliberate shooting of helpless, unarmed victims, such as in indiscriminate massacres, attempted murders, or armed robberies and assaults that degenerate into shootings or felony murders.

(2) The inadvertant shooting of innocent bystanders, such as by stray shots from drive-by shootings or shootouts involving AW-armed criminals.

(3) Deliberate shootings in firefights between AW-armed criminals and (either similarly or otherwise) armed defenders or police officers.

Of course, a given criminal episode can involve shootings of all three types. In essence, the cases of interest are ones where (1) *unarmed victims* are deliberately shot, (2) *innocent bystanders* are inadvertantly shot by stray rounds from an advertant shooting, or (3) *armed defenders* are put at greater risk or "outgunned" by AW-armed criminals. These situations are assumed to precipitate a greater rate or greater severity of injury (including death) than would be the case if no criminals used AW's or if the criminals in the given situations did not use AW's. Thus, the GOV hypothesis, appealing to the common-knowledge plausibility of the GDP hypothesis, entails counter-factual speculation about what would happen in such situations if no criminals used AW's or the criminals in the kinds of case in question did not use AW's.

A contrary hypothesis, what might be called the Tactical Reality (TR) hypothesis, holds that greater destructive *potential* does not equate to appreciably greater *actual* destruction and that criminals could, as a tactical matter of fact, produce an equal quantity of violence with non-AW's. The TR hypothesis posits the following speculations about what could happen in situations (1) - (3) if no criminals used AW's.

(1) Where a criminal has targeted unarmed victims for indiscriminate attack, he can perpetrate as great a quantity of injury or death with non-AW's such as a pump-action shotgun (that can release 13 .33-caliber projectiles per shot), with revolvers (especially with speed loaders), or even with a bolt-action rifle (especially with stripper clips, which allow a full load of cartridges to be expeditiously injected at once into fixed magazines) in the same time frames involved in typical AW

massacres of record, such as in Stockton CA (which involved a high-capacity semi-automatic rifle) and Killeen TX (which involved two high-capacity semi-automatic pistols). A shooter can take the time both to aim and continually reload, and still fire rapidly enough to equal the actual destruction of a Stockton or Killeen. Indeed, a shooter who took his time would be apt to make more, and more lethal, hits than occurred in either Stockton or Killeen. Of course, the theoretical volume of sustainable fire from an AW with high-capacity detachable magazines is higher than that of a bolt-action rifle or revolver. But this is irrelevant to massacres involving the shooting of, say, 30 sitting-duck victims in the generous time frame of 5 to 10 minutes: 60 to 120 lethal shots could easily be fired from any firearm (even a single-shot breech loader) at the rate of 12 aimed rounds a minute, allowing for reloads.

The hypothesis that massacre-minded criminals who shoot sloppily, as it were, "from the hip," as allowed or encouraged by high-capcity AW's, would shoot equally sloppily "from the hip" with lower-capacity, lower rate-of-fire guns, thereby causing fewer injuries and fatalities, is an empirical proposition unsupported by those mass-mayhem episodes executed with non-AW's. A case in point is that in France in the spring following the 1989 Stockton CA massacre, where a Frenchman with a bolt-action, low-capacity hunting rifle dispatched 18 victims from an automobile, between two different towns, within a 20-minute time frame. Had the Frenchman been stationary and shooting sitting-duck children in a school yard (per Stockton) rather than picking off stray innocents from his automobile while driving between two towns, his hit and injury rate could have easily rivaled Patrick Purdy's Stockton massacre (30 injured, 5 children killed) with a semi-automatic AW. Part of the empirical question is actuarial (hard facts from many actual incidents), part is speculative (based upon certain known cases, their tactical realities). In any case, the number of such incidents (massacres, shootings injuring five or more innocent victims) are so rare that any hypothesized differential body count posited as a function of weapon type will be extremely marginal as against the annual, national gun fatality or injury rate.

The "spray fire from the hip" capability of AW's is touted as if it were a devilish advantage, but in tactical reality (outside Hollywood lore or staged demonstrations) exploiting this capability is good for nothing but decreasing one's hit potential even at close range. In terms of effective, accurate rates of fire, an AW is not sufficiently faster than a non-AW to obviate mass or indiscriminate mayhem in a AW-scarce world. "Spray fire from the hip" is properly derided as the "spray and pray" method and has no place even in military doctrine except when massive suppresive fire is

called for, a contingency that does not apply to the massacre of unarmed and helpless victims, and a tactic that is contingent on having a coordinated team of combatants available. If criminals embrace the "spray fire from the hip" notion because they wield an AW, so much the better for their potential victims. The foregoing observations about the tactical commensurability of the effective volume of sustainable fire of which non-AWs are capable against helpless unarmed victims apply especially to firearms limited to low-capacity detachable magazines: the decrease in the volume of sustainable fire entailed by having to make quick magazine exchanges is negligible in such situations (except where a reload might eventually allow a disarm attempt, as in the cramped quarters of the Long Island commuter train). The claim rehearsed here, that the advantage of high-capacity semi-automatic AWs for perpetrating mass mayhem against unarmed victims is illusory, is an empirical hypothesis susceptible of testing. It has been confirmed in simulated Killeen- and Stockton-like time frames and scenarios. When AW ban proponents point to carnage perpetrated with AWs, they ignore the fact that even the heinous massacres they cite could have been easily accomplished with non-AWs.

(2) The "spray fire from the hip" employment of AWs with their high volume of continuous fire could plausibly be thought to contribute to greater inadvertant injury of innocent bystanders, precisely because the method is notoriously inaccurate even at close range. The GOV hypothesis postulates that, in the absence of AWs, criminals would cause less inadvertant (as well as advertant) injury and death. Criminals are, in the main, enamoured of the "spray and pray" method and, in any case, are notoriously inaccurate with whatever firearms they use, even at close range, at least when they are facing armed defenders. This fact is substantiated by the New York Police Department's (NYPD's) SOP-9 (Standard Operating Procedure 9) and like reports of shooting incidents involving police officers, which show criminals' hit probability to be on average less than 20% to less than 10%, leaving 80% to 90% of their rounds free to threaten innocent bystanders.

However, the same SOP-9 reports show that the number of shots taken by criminals in affrays with police to be fewer than 5 on average, a number that is attainable by criminals shooting five- or six-shot revolvers and that does not translate into a greater errant-shot risk for higher-capacity AWs. Likewise, in situations involving unarmed victims (such as armed robberies, assaults, or attempted murders) who are not shooting back, a perpetrator has as much opportunity to ensure hits with a high-capacity AW as with a revolver. While a high-capacity AW affords the shooter more *potentially* stray rounds, extrapolation from typical

shooting incidents both with police and civilian defenders (where the perpetrator is being shot at) does not support the hypothesis that criminals would fire more errant rounds when shooting at intended but unarmed or unprepared victims (where the perpetrators have more time to place their shots more carefully).

(3) In the situation where armed defenders might be put at greater risk or outgunned by AW-armed criminals, the criminological facts, as gleaned from the NYPD SOP-9 and similar incident samples for civilians, indicate that gunfights rarely involve more than a few shots on either side, well within the capability of revolvers or low-capacity long guns. For example, if more police officers were being shot with AW's than in the past, by itself this would be inconsequential unless the resultant injuries were more severe or would not have occurred had a non-AW been used. Being wounded by a 9mm round from a high-capacity pistol by itself is not worse than being wounded by a .357 revolver or .45 caliber round from a low-capacity revolver or pistol. A fatality resulting from a .223 round fired from a high-capacity semi-automatic rifle would not have been less likely had the weapon been a .30-30 lever-action deer rifle or 12-gauge sgotgun; quite the reverse is true. If more AW's were being used in shooting incidents, the relevant question would be whether more or more severe injuries were resulting than in comparable incidents where non-AW's were involved. Because the average number of rounds fired is below the capacity of revolvers and other non-AW's, there is no *a priori* reason to expect that a greater rate or severity of injury (including death) results from criminal use of AW's as compared with non-AW's.

In the rare instance of an extended firefight, armed defenders or police can indeed suffer a disadvantage in "firepower," such as being subjected to the high volume of suppressive fire of which AW's are capable. But the relevant question is whether these rare incidents result in injury or fatality that would not have occurred if non-AW's had been used or as compared to extended firefights in which AW's are not used. Criminals with high-capacity AW's can produce a higher volume of fire, raising the potential for inadvertant injury to bystanders from errant shots; but the relevant question is whether more bystander injuries actually occur from errant AW rounds than from errant non-AW rounds. High-volume firefights are extremely rare, as are bystander injuries in general, at less than 1% of homicides (1991, Kleck, 69). The risk of an extended gun fight with AW-armed offenders may be considered non-negligible and the potential of greater injury resulting, either to bystanders or intended targets, may be regarded as non-negligible. But these non-negligible risks also support the utility of AW's for civilian defenders as well as for

the police (see V.A.2.b.iv, Necessary Conditions for Showing Efficacy). Is Greater Destructive *Potential* sufficient to justify banning AW's? Only if banning AW's could itself reduce criminal access and use such as to appreciably reduce overall violence (see III.B.3.a.i) and such as to counter-weigh the advantages of AW's to inncent defenders, which question takes us to the OVR and RCA hypotheses. In short, merely observing that AW's are involved in criminal shootings where non-AW's could have produced comparable or worse results does not support the GOV hypothesis.

iv. Overall Violence Reduction (OVR)

At best, then, AW's GDP might account for some marginal increment in the overall rate and severity of injury (including death). The marginality of the risk or potential increment is a function of the extreme rarity of the situations in which AW's could actually cause more human carnage than non-AW's. The other side of the greater overall violence (GOV) postulated to result from the use of AW's by criminals is the overall violence reduction (OVR) hypothesized as a benefit of AW bans. What goes for the GOV, goes for the OVR: if the former is marginal, so is the latter. Putting aside the ingenuous, or disengenuous, plea "if it saves only one life, it's worth it," whether a marginal OVR can justify AW bans will depend on the costs of AW bans (in terms of their hypothesized tactical advantages, which apply to defenders as well as to offenders) and countervailing values of AW's in law-abiding hands. But there will not be even a marginal OVR to sustain an AW ban argument unless AW bans actually reduce criminal access to AW's, per the RCA hypothesis.

v. Reduced Criminal Access (RCA)

The RCA hypothesis about gun bans generally, that banning guns will translate to getting them "off the street" or out of "the wrong hands," is so firmly and widely believed as to be taken as common knowledge. The "uncommon knowledge" view holds that reduction of access to criminals who want AW's is hopeless of achievement, because for criminal demand there will always be a supply, even of contraband. The implausibility of the RCA hypothesis and the consequent futility of gun bans derive from a number of arguments. In particular, AW bans run afoul of the first three criteria of workable gun control enumerated in section III.B.1.

The first criterion requires sufficient popular support to be politically viable and to be susceptible of wide *compliance* (rather than being a provocation to

disobedience and loss of respect for law) as well as being susceptible of *enforcement*. Acceptability to criminal justice personnel (including street cops as well as command officers and politically appointed chiefs, prosecutors, and the judiciary) is as crucial to the enforcement dimension of efficacy as compliance on the citizenry's side of the equation. Even if the support for the federal AW ban expressed in polls by 70% of respondents cannot be discounted as "brainwashing" by misleading AW ban propaganda, the remaining 30% of the population represents tens of millions of opponents. Current AW bans, notably the long-standing California and New Jersey bans, have met with opposition by law enforcement rank-and-file as well as by command officers (notwithstanding the high-profile but unrepresentative support of many chiefs of police and officials such as the leadership of the Fraternal Order of Police). The bans have commanded meager compliance, despite extended grace periods, by only a small minority of previously legal AW owners. This leaves dissension in the law enforcement community, and criminalizes a great mass of citizens otherwise without criminal identities. John Kaplan, the late Jackson Eli Reynolds Professor of Law at Stanford University, articulated the basis for predicting massive non-compliance with any gun ban: "[T]he probable disregard of gun control laws by those whose constitutional, moral, or practical views about guns far outweigh their fear of punishment and their desire to obey legislative commands. . . . In case of severe restrictions [such as gun bans] . . . it is hard to believe that violation of the law by those without what criminologists call criminal identities would be less extensive than is the violation of marijuana laws today." The extremity of civil opposition to the federal AW ban is reflected in the militia movement, whose birth and rapid growth, while fed by other complaints against the federal government, was precipitated by the AW ban. While there was a surge in sales of instructional books and equipment for burying guns during and after its passage, the issue of compliance with the federal AW ban will likely be moot for some time because it grandfathered all the AWs legally possessed before the ban took effect in September of 1994. But the ban's advocates fret that the spirit of the ban is being undermined by the adaptive creativity of the firearms industry, which now turns out small ten-round-capacity pistols for consumers willing to trade magazine capacity for concealability (apropos one objection to so-called "Saturday Night Specials") as well as eight-round revolvers in .38 Special and .357 Magnum. The legal industry and its clientele creatively adapt, as do illicit markets and their criminal clientele.

The second criterion is susceptibility or likelihood of compliance by a non-negligible portion of the criminally disposed population: laws which command no

deference on the part of the seriously violence-prone as well as petty criminals and general citizenry court fecklessness. The most seriously violence-prone among the criminally disposed are precisely the ones who would be attracted to instruments supposedly capable of wanton and indiscriminate destruction. Such criminals as are willing to commit capital offenses are the least likely to fear minor penalties imposed by AW bans. To the extent that seriously violent criminals, the very ones apt to commit the most heinous violence with AWs or any firearm, might respond to the risk of significant enhanced penalties for crimes committed with an AW, such a policy can be instituted without banning AWs from law-abiding civilians. AW ban proponents counter that the idea of AW bans is to decrease the stock of AWs over the long run by banning AWs in all jurisdictions to obviate the "leakage" problem and to eliminate the civilian market as a source of AWs available for criminals to steal. Besides being hopelessly long-term and naive about the number of AWs illegally obtained through theft, this aspiration runs afoul of the third criterion's general caveat against supply-side prohibitionist strategies like gun bans.

The third criterion of workable gun control cautions against reliance on supply-side prohibitions not susceptible of realistic achievement, such as the ambition of producing significant gun scarcity in a nation of over 200 million durable firearms. Apart from the durability of the firearm stock, which could last over a century in working order, the unlikelihood of sufficient compliance, and the infeasibility of enforcement by intrusive confiscation, there is the resiliance and creativity of illicit markets, inveterately resistant to draconian enforcement efforts (because the incentive for criminals to find a way to obtain whatever firearm they think they need is far stronger than the disincentive provided by the consequent penalties for violating gun bans).

The futility of supply-side attacks on contraband for which there is adamant, unresilient demand is evident in the nation's experience with concerted, confiscatory enforcement of the prohibition on alcohol, a failure of historic proportion and disasterous social costs, as well as the ongoing "war" on illicit drugs (which are more susceptible of detection than guns). Guns, or gun parts, are more easily smuggled into the country than drugs, which pour into the country by the ton, and, failing sufficient supply from smugglers, are more easily and safely produced than many "designer" drugs. For example, fully automatic AK-47 clones are routinely manufactured by third-world peasants with tools inferior to those available in many high school machine shops. If theft is the preferred means of supply, the experience of totalitarian regimes with draconian weapons bans should be a lesson to the U.S. For

example, hundreds of thousands of military pistols and fully-automatic assault rifles, as well as tons of explosive ordnance, stolen from military armories in the Soviet Union, flood the criminal underground and black market of the new Russian Republic. Where there is criminal demand, the criminal market will adapt to meet it. (The undauntable dynamics of illicit markets and the consequent futility of supply-side prohibitions are described in more detail by Daniel Polsby, Kirkland & Ellis Professor of Law at Northwestern University, in "The False Promise of Gun Control" in the March, 1994, *Atlantic Monthly*.)

Notwithstanding the foregoing reasons for skepticism, the question remains whether a number of criminals will nonetheless comply with AW bans, such as to make at least a marginal difference to the use of AWs in criminal violence. Would not a marginal difference in AW use be worth the candle? Even if it is plausible to suppose that many criminals will not bother paying whatever the price, if indeed the price is an object, or will be motivated to avoid the risk of penalty imposed for possessing AWs, it is not likely that the compliant will include the most violent cohort who perpetrate the kind of indiscriminate violence that gives AWs their bad name. Again, criminals motivated to avoid the risk of penalty for possession of an illegal weapon, which by definition *all* firearms used by criminals already are, would as likely be deterred by greater added penalties for committing a crime with an AW. If penalty for illegal possession, which does not attach to AWs alone, deters some, then an AW-specific discretionary sentence enhancement policy might more effectively deter the use of AWs in crime (discretionary sentence enhancement is found to be more effective than mandatory sentene enhancement). It is deterring the *use* of AWs in crime, after all, that is the objective, not simply discouraging their illegal possession. If an AW ban is thought to be an effective deterrent, enhanced sentencing policy, *ex hypothesi*, would be more expedient for deterring actual use, and far less objectionable to law-abiding gun owners.

In the final analysis, if there is a way to reduce criminal *use* of AWs, it is not by a supply-side prohibition that targets criminal *access* while also burdening the law-abiding population, many of whom would comply but many of whom, unjustly disenfranchised by their government in their view, would prepare, as many have prepared, to resist. The question to AW ban advocates is whether marginal and likely inconsequential criminal compliance is worth the costs of significant non-compliance by the otherwise law-abiding, whether deterring some with prior criminal identities is worth generating a large new class of criminal from the stock

of disaffected citizens. This question shifts our focus from the dubious efficacy and benefits of an AW ban to its social costs and objections against it.

vi. No "Sporting Purpose" (NSP)

The "sporting purpose" issue, like the "criminals' weapons of choice" factor, is a red herring. But the flagrant exploitation of the NSP hypothesis in gun ban rhetoric requires attention. The propagandistic function of the "legitimate sporting purpose" pretext for distinguishing "bad" guns from "good" guns was briefly described in section IV.A.1. In summary, firearms that are "generally recognized as particularly suitable for sporting purposes" are presumptively excluded on that basis from proposed gun bans, however temporary may be the stay of execution. By contrast, firearms that are particularly suitable for combat (such as AW's), but which are assumed to serve no "legitimate sporting purpose," are prime targets of opportunity in proposed gun bans. The objections brought against the NSP hypothesis, the handmaiden of 20th century gun bans since before the Nazi Weapons Law of 1938, are three; these objections question both the empirical and the philosophical presuppositions of the NSP hypothesis.

(1) The "sporting purpose" hypothesis presupposes that government has the authority or competence to judge what counts as "legitimate" leisure, sport, or avocation, and the right to curtail socially harmless and even socially useful leisure activities that some majority deems illegitimate. This arrogation of authority is tantamount to legislating ethics in the discretionary realm of leisure or avocation, where citizens' modes of creating meaningful lives are presumably held innocent until proven guilty of actionable harm to others or to society. This arrogation of authority is pernicious insofar as it offers no principled rationale for, or well-defined limitations on, government infringements on socially harmless recreations, not just those involving firearms (see also V.A.2.b.viii).

(2) The discriminatory notion of "sporting purpose" is also problematic because it presupposses without argument that "sporting purpose" should carry special privileged weight in the balancing of social harms and benefits. On the contrary, the weightiest interest in the balance scales of benefits is not the recreational value of firearms, but rather their protective value to individuals, along with their associated social value and political value (see IV). The invocation of "sporting purpose" in political horse trading (whether naively or disingenuously) suggests (although it does not strictly assure) that "legitimate" sporting arms will not

be banned, giving false hope to the temporarily privileged sport shooters. Yet, where the "legitimacy" of recreation is at issue, hunting, as a so-called "blood sport," is morally controversial and opposed in many quarters of American society. With an essentially arbitrary and elastic standard of "legitimate sporting purpose," just how long will the tools of the recreational hunter, which are as deadly as any AW, escape the ban?

(3) There is a sport and avocation with ample claim to "legitimacy" that is dedicated to the advancement of combat weaponcraft through recreational competition and training with firearms "particularly suitable" for combat, such as those stigmatized as "assault weapons." Practitioners of combat weaponcraft as a sport or avocation find the following argument of AW ban advocates rankly fallacious:

> Some guns are useful only for assault, warfare, murder or mayhem, such as the "assault weapons" targeted by AW bans.
>
> Law-abiding civilians as such have no legitimate interest in perpetrating assault, warfare, murder, or mayhem.
>
> Therefore, law-abiding civilians have no legitimate interest in combat firearms or "assault weapons."

While the second premise is certainly true, the first premise and conclusion above are flatly false. Law-abiding civilians have a legitimate interest in combat for their own self-defense. Therefore, law-abiding civilians have a legitimate interest in combat firearms and in defensive training therewith. This legitimate interest in combat firearms training for defensive purposes naturally gives rise to both legitimate and socially useful "sporting purposes" for which combat weapons (or AW's) are "particularly suitable," the sport and avocation known as combat weaponcraft.

Combat weaponcraft is a *sport* in any common sense of the term in which any martial art or, for that matter, fishing, hunting, and target shooting are sports. While there are hundreds of local, regional, national and international competitions, one can also compete *solo* against the rigorous performance standards calibrated for survival "in the gravest extreme," just as one can and must practice the *kata* of a martial art outside of formal competition. These rigors include the observance of ethical and legal standards for the judicious use of deadly force, which require study, just as the study of any martial art requires reflection on the ethos and moral discipline that both inspire and constrain its use. Also of the highest priority are firearm safety standards, which are religiously observed: the same rules of safety apply on the firing range and in a threat situation; there is no "double standard" for

safety. Consequently, the practitioners of this sport are among the most reliable and conscientious in safety discipline (and, for this reason, neither suffer nor cause any "accidents," per III.A.3). Among the many and varied competitions in combat weaponcraft, the epitome of this practical sport is the National Tactical Invitational Match. The NTI is attended by both law enforcement professionals and civilians, including leading police firearms instructors who are themselves private citizens; but it is organized by private citizens (an example of private civilian enterprise with a socially useful mission).

The sport of combat weaponcraft is *legitimate* by the most common of moral standards: those who engage in it do so safely and responsibly; they hold society and innocent others harmless thereby, and continually improve themselves in skill, judgment, and discipline. Are there other criteria of legitimacy or "legitimate sporting purpose" than those demanded by public safety and the common moral obligation to do no gratuitous harm to human or animal kind? President Clinton evidently thought so when he publicly admonished those who like to "target shoot" with so-called "assault weapons" to "go read a good book" instead. The President's remark reflects an ignorance of the avocation he derides. Combat weaponcraft is not about "target shooting," where any firearm could be used; it is not about hunting, where the object is always to shoot the target and to shoot it dead. Rather, it is about defensive training with firearms "particularly suitable" for combat (with the aim of achieving the defensive efficacy documented in III.A.4).

The prevailing conceit of "legitimate sporting purpose" is that one is not engaging in a legitimate sport if he does not seek to kill game with her firearms or stands still while punching holes in paper targets or blasting clay birds. Besides safely practiced and harmless recreations, the morally legitimate uses of firearms in civil life include threat management and, when all else fails, defensive combat. Unlike hunting or pure marksmanship competition, "target shooting," in which one always shoots the target, combat weaponcraft teaches legal and moral discernment (when not to shoot, what not to shoot, how to avoid the necessity of shooting) and how to maintain safety under dynamic duress as well as how to shoot accurately and judiciously under the stress of mortal threat. Why "blood sport" or static "target shooting" exclusively dedicated to marksmanship should be valorized as more "legitimate" than training and competition in a wider array of moral decision-making and defensive tactical skills escapes the practitioners of combat weaponcraft, just as the function of their avocation escaped President Clinton and other self-appointed authorities on "legitimate" sport.

Combat weaponcraft is a sport and avocation with a social mission and arguable social utility. While serving the social and political functions of an armed citizenry reviewed above (section IV), it also serves as a technology-transfer mechanism that advances the state-of-the-art of threat management and defensive firearms training for both law enforcement and civilians, and thereby advances the safety discipline and defensive skills of its own practitioners and their students. The contributions of private citizens to this technology-transfer function is especally noteworthy. Like most innovations in firearms training outside the military, the combat shooting arts have been pioneered by private citizens. Unlike the Olympic sporting events, which are abstracted from venerable military experience (the marathon, javelin, biathalon etc.), the practical shooting sports are devised to refine and inform modern technique with state-of-the-art combat weapons. Its techniques and technology are evolved through open competition, then applied, tested and refined through professional training and practical experience. The symbiotic feed loop is like that among research universities, industry, and government. Many of the best ideas in combat training and technology have evolved from the innovations of civilian practitioners.

In the final analysis, the NSP hypothesis alleges that banning AW's harms no "legitimate" recreational or avocational interests. This is, at best, question begging and, at worst, flatly false. Whether the recreational and avocational interests at stake, and the arguable social utility of recreational training in safe and responsible combat weaponcraft, are sufficient to weigh against the speculative benefits of an AW ban is a separate question. But the justifiability of AW bans cannot be established by summarily dismissing these lawful interests as "illegitimate." While it is easy to understand why the recreational interest in weaponcraft with purportedly evil "assault weapons" could be misunderstood and dismissed by people ignorant of the practice, the view that AW bans infringe no "legitimate" sporting interests in firearms "particularlly suitable" for combat purposes is nonetheless myopic.

vii. No Defensive Value (NDV)

The NDV hypothesis denies that AW gun bans harm the interests of people for whom AW's have protective value. This denial is based on one or both of two different arguments.

(1) One argument is flagrantly specious, based on the fallacy cited above (V.A.2.b.vi) that AW's are designed solely for military assault (in which civilians as such have no legitimate interest) and that they are otherwise useful only for criminal assault (in which, obviously, no one has any legitimate interest). That so-called "assault weapons" are inherently "bad" because they are designed only for killing (or, worse, only for killing and maiming many people quickly) is on the same order of moral obtuseness as the view that AW's are "bad" because they are "particularly suitable" for combat rather than hunting or target shooting. Combat is inherently defensive as well as offensive. Its moral or legal justifiability, in either case, must be assessed on the merits and has nothing to do with the instrument used. By the same commonsense reckoning, the martial arts are neither regarded nor outlawed as "assault arts." The good or evil done with a weapon is not a function of the instrument but rather is a function of the intent and consequences of its use. Law-abiding citizens, as well as the police, have use for, and therefore a legitimate interest in, AW's for threat management and defensive combat, in the exercise of the most fundamental of putative human and moral rights, the right of self-defense, including the right to resort to deadly force in defense of the innocent, albeit only in the gravest extreme and as a last resort. The fact that AW's are not useful solely for indiscriminate murder and mayhem is evident in the interest the police have in these as well as other firearms and the fact that no AW ban proposes to prohibit their use by the police.

The defensive utility of firearms generally consists in their use in dissuading criminal attack without killing anybody, in 99.85% of the two million cases of gun defense annually (see III.A.4.a). The defensive utility of AW's likewise largely consists in their ability to intimidate, as well as their particular suitability as an insurance option against the rare but non-negligible risk of criminal attack by multiple or undauntable assailants. This point relates to the second, more sophisticated, argument holding that AW bans do not harm any interest people have in firearms for defense.

(2) The second argument does not try to obscure the distinction between criminal assault and rightful defense with disingenuous semantics and does not deny

that AWs *can* be used defensively. Rather, it denies that AW bans do any harm to anyone's interest in firearms for protection by alleging that AWs are not *necessary* for defense, that other firearms can serve the defense interest just as well. There is often the added imputation that people who prefer or think they "need" an AW lack both good sense and good character.

The reply to this argument may at first seem to contradict the claim made above (V.A.2.b.iii) about the GOV hypothesis, that the criminal misuse of AWs, given AWs superior "firepower," does not result in greater overall injury in the aggregate of criminal violence as speculatively compared with criminal violence committed with non-AWs. But there is no contradiction. The anti-GOV claim is that criminal use of AWs does not happen to occasion more or more severe injuries (including death) than would occur were criminals not to use AWs. This is just to deny that the greater destructive *potential* (GDP) of AWs *actually* occasions extraordinary injury (with a possible exception allowed for the extremely rare situation where AW-armed criminal offenders outgun civilian or police defenders without AWs, or where the firepower of AW-armed offenders poses a greater threat even to AW-armed defenders in extended firefights). The GDP hypothesis itself was *not* denied. It was not denied that AWs *potentially* provide significant tactical advantages for committing murder and mayhem. The argument was that the occasions when these advantages *actually* result in extraordinary criminal violence are extremely rare and marginal in the aggregate. The GDP of AWs, on which their popularity as CWCs is predicated, is precisely the potential tactical advantage that appeals to the defensive interests of AW owners as well as the police. The Greater Destructive Potential (GDP) hypothesis has a non-criminologic flip side, Greater Defensive Potential (GPD).

AW ban advocates evidently want to have their cake and eat it too: they deny the tactical advantage of AWs to defensive users, except police, but appeal to that very advantage (in the guise of the GDP hypothesis) in the argument for AW bans. When ban advocates allege that AWs can be used, but are not *needed*, for defensive purposes, they imply that AWs have no special defensive advantages associated with their greater destructive potential (as itemized in V.A.2.b.ii). This premise of the "AWs are unnecessary for defense" argument not only contradicts the GDP premise of the AW ban argument, but is simply false. This is a case where what's good for the goose (the violent criminal offender) is certainly good for the gander (the innocent citizen defender). The special or superior tactical utility of AWs for civilian defense stands to reason on any reflection upon two related facts: the fact that in the vast majority of cases (99.85%) firearms work to foil criminal attack by means of

intimidation rather than by killing, and the fact that AW ban advocates, for purposes of negative propaganda, exploit the image of AWs as frightfully threatening (hence, the moniker "assault weapon"). From a lawful defender's point of view, threatening appearance is an unalloyed virtue. Firearms are supposed to be threatening to people on the wrong side of their muzzles, and this bears social utility even when firearms are used by criminal aggressors (see III.A.1.a). That's why they are useful and why they are successfully used *100 times more often to defend against criminal threat than to kill another person intentionally,* either criminally or justifiably (see III.A.4.a). Since the campaign to ban AWs began in the late 1980's, AW defenders have, in order to refute anti-AW propaganda, published countless accounts of incidents in which the GDP factor was singularly credited with tranquilizing multiple assailants by intimidation alone as well as cases in which the AWs high ammunition capacity and superior firepower, aptly deployed, was irrefutably necessary to save the lives of police officers or civilian defenders. Cases where semi-automatic shotguns and high-capacity semi-automatic rifles have been dramatically advantageous in deterring packs of rampaging offenders were the Los Angeles riots after the first Rodney King case verdict, the St. Petersburg riots in the fall of 1996, and civil disorders following natural disasters such as Hurricane Andrew. AWs are as prudent a form of protection against such threats as any disaster insurance.

While extended firefights with multiple assailants are rare, they do indeed occur and represent a non-negligible risk in the world of random violence. The fact that criminals resort to AWs at all only enhances the argument that AWs are reasonably "necessary" defensive options for lawful defense by civilians as well as for the police. To challenge "What does a decent citizen need with an AW? Why won't more couth firearms do?" is as impudent as to ask why people "need," or choose to carry, flood insurance in areas where floods rarely occur. The simple answer is: *just in case.* It is not a question of outlandish preference, where the firearm owner should have to justify her choice in insurance, but a question of reasonable and prudent resort analogous to any insurance against catastrophe, where the risk is salient despite the low odds because of the magnitude of the potential harm. When challenging the respectability or rationality of keeping AWs for defense, AW ban advocates see "evil assault weapons," an artifact of their own propaganda, where AW owners see semi-automatic firearms with detachable magazines, a useful technology that is a century old. Where AW ban advocates see "a deadly arms race," AW owners see a practice that for decades raised no eyebrows until disarmament partisans decided to demonize it in pursuit of incremental gun bans. AW ban advocates point

out that weapons, unlike insurance policies, are used to take lives and property, not secure them, to which AW defenders reply, that is true only for criminals, not the law-abiding, for whom the insurance analogy is apt.

Firearms, including high-capacity semi-automatics, are emergency-rescue tools, possessed and even carried, like insurance, against the gravest of risks. As long as they are lawfully kept, as long as innocent others and society are held harmless by responsible gun owners and carriers, there is no cause for government to question, let alone interfere with, how those citizens calculate their risks and insurance options. AW ban advocates assume that because AW's are used feloniously by some, they should be denied to the whole of the law-abiding population. This raises the question of what justification government must have to infringe the very substantial interest in firearms for protection, particularly the interest in the superior insurance option afforded by so-called "assault weapons." The *interest* violated by AW bans, whatever its status as a *right,* is serious and must be weighed in the social balance scales, not summarily dismissed as gratuitous. There is insult added to the injury: not only does an AW ban deprive myriad law-abiding citizens of a valued liberty, it also impugns the moral character of those citizens. These are costs of AW bans that must be accounted in the balancing of harms and benefits.

viii. Justifiability "All Things Considered"

The question for the utilitarian ban strategy (UBS) is whether the benefits outweigh the harms, once all the relevant harms and benefits of AW bans are weighed in the balance scales. The benefits or efficacy claimed for AW bans have been seriously questioned, and important countervailing interests that are harmed by AW bans have been salvaged from facile dismissal, in order to illustrate the hill-climbing required to vindicate such bans. Here we consider other, moral, objections to AW bans. The question, then, is: What else is entailed in arguing justifiability, "all things considered"?

(a) The Selective Gun Ban Dilemma (SGBD)

A heuristic challenge, the Selective Gun Ban Dilemma (SGBD), has been posed for selective gun bans, including AW bans, according to which the moral choice is not simply whether or not to ban some limited category of gun, but whether to ban all guns, or none. The SGBD argues that, if the expectation of reducing criminal violence overall is taken seriously as a warrant for gun bans, one can not stand pat, morally, with a limited ban. In effect, claims the SGBD, the UBS rationale for selective gun banning leads inexorably to banning all guns, or else obliges us to ban none.

Undoubtedly some AW ban advocates sincerely believe that AW bans will remain limited to the selectively targeted guns in pursuit of their ultimate objective, a reduction in overall criminal violence. ~~Congressman~~ Then-Representative Dan Glickman spoke for many UBS ban proponents in the House of Representatives Committee on the Judiciary *Report on the Public Safety and Recreational Firearms Use Protection Act*, May 2, 1994:

> I don't believe that this bill [H.R. 4296 regarding the federal AW ban] is the first step in a long road to banning [all] guns. However, some of my constituents have expressed their fear that the Congress is moving slowly toward banning all guns for all people. We must be absolutely clear that this narrowly crafted legislation is not that first step and is not just a precursor to further, broader federal gun control and federal gun bans. Sport shooters and hunters tell me that they don't want . . . Congress to take the short step to saying that hunting rifles are being used on the streets, and should be taken away.

Congressman Glickman's view is ~~characteristic~~ expressive of the *ingenuous* (naive but sincere) denial that AW bans are not meant to be just the first step along an inexorable trajectory whose logical outcome is a total gun ban. Making common cause with the ingenuous selective ban proponents are the *disingenuous* selective ban advocates whose ultimate objective is not merely the reduction of criminal violence, but total civilian disarmament. These latter selective ban proponents disingenuously deny that AW bans are the first step towards banning all guns, for politic purposes, but nonetheless aspire to a total ban, either because they believe that only a total ban can hope to reduce criminal violence or because they cleave to the Fundamental Moral Objection Strategy (FMOS) and aspire for their own moral reasons to ban all private firearms. (Some also favor disarming the police.)

He was lying. He is, after all, in Clinton's cabinet.

The promise or assertion that gun banning will remain limited to the targets of selective bans, such as AWs, is either ingenuous (naive albeit sincere) or disingenuous according to the Selective Gun Ban Dilemma. The SGBD takes seriously the ostensible goal of selective bans, a reduction in overall criminal violence, and argues that the OVR hypothesis will prove to be either non-falsifiable or an overweening goal, according to a logic that will call for increasingly comprehensive gun bans whether AW bans are effective or not. The SGBD goes as follows.

Either (A) an AW ban will be effective and reduce criminal access to AWs, or (B) it will not be effective.

AWs ft) Suppose that it is even totally effective, so as to eliminate AWs from all criminal or civilian hands as if by divine intervention.

(A.1) If totally effective, criminals will no longer use AWs, but will need to resort to other firearms such as low-capacity pistols, revolvers, hunting rifles and "sporting" shotguns. To compensate for reduced magazine capacity, criminals will become adept at rapid magazine exchanges or the use of speedloaders. They will trade high-capacity for smaller handguns in larger calibers (as citizens are already doing under the federal AW ban), whereby they can easily conceal and carry more than one (as did outlaws of yesteryear, who were limited to "six guns"). With intermediately powered "assault rifles" no longer available, they will resort to higher powered hunting rifles and shotguns. No longer able to depend on large capacity magazines to support their wasteful "spray and pray" habits, they will do what any Boy Scout learns to do at a young age: take aim and make each shot count. Alternatively, the spendthrift use of more powerful weapons will result in injuries at least as severe as those seen in trauma centers today, and more fatalities will undoubtedly result. They will discover the impressive firepower of which pump-action or lever-action rifles and speed-loaded revolvers are capable and continue to perpetrate indiscriminate and mass violence at an unabated rate.

(A.2) As a result, criminal violence overall will be at least equal in the frequency and severity of resultant injury (or death) to what it was in the AW era. And there will be as much reason as in the AW era to target the great destructive potential of the remaining repeating firearms (and their acessories, such as speed loaders). In particular, the greater deadliness of hunting rifles, not to say shotguns, "designed to

kill" more robust mammals than human bipeds, will become salient. The hue and cry will be raised for bans on the new criminals' weapons of choice, the large-caliber but small, concealable "stealth" handguns, and the devastating repeating hunting rifles and shotguns.

(A.3) Either (A.5) the new ban on the remaining repeating handguns and long guns will be effective and reduce criminal access thereto, or (A.4) it will not be effective.

(A.4) If not effective, either the fecklessness of the original ban policy will be admitted, or more comprehensive prohibitions will be called for in the expectation of eventual benefits (see B).

(A.5) If effective, criminals will have to resort to single-shot and double-barrel handguns, rifles and shotguns (along with the similarly disarmed citizenry). The equalizing effect of firearms will be compromised by the greater aggressiveness and stealth of the criminals, who will be well advised to deploy in numbers and to carry multiple weapons, which the average citizen defender will not be able so conveniently to do. We will have regressed to the private single- and double-shot weaponry of our forebears, and felons will have to adopt the stealthier tactics of theirs. The frequency of injury from criminal violence would not decrease, because there is no reason to suppose that the frequency of victimization will decrease as a function of the unavailability of certain but not all firearms. Indeed, more citizens will be on the losing end of armed affrays, so an increase in the frequency of injury to innocents is likely. But, despite a predictable preference for large caliber single- or double-shot firearms, perhaps there will be a decline in the severity of injury from the lower volume of fire per affray and, hence, a reduction of fatalities from criminal violence.

(A.5) If such a reduction in morbidity and fatality is indeed expectable, at this or any previous point in the evolution of weapon bans, this expectation of reducing not just criminal *access* but also the overall *effects* of criminal violence becomes an argument for banning the weapons remaining in criminal hands. *If* such eventual efficacy is taken as a reason to ban X guns selectively, then it is a reason to ban Y guns and Z guns, indeed the whole alphabet of guns. Why should lives saved by banning X guns be morally privileged over lives that could be

saved by banning Y guns, or Z guns, or any guns remaining in criminal hands?

(B) Suppose, on the other hand, that an AW ban is not effective.

(B.1) If an AW ban is not effective and does not reduce criminal *access* to AW's appreciably or, insofar as it does this, it does not reduce the overall *effects* of criminal violence, in particular, the frequency or severity of injury (including death), then one of two things will be concluded. If a selective ban on AW's, firearms identified as having *greater* destructive potential than other firearms, is not effective, then either (B.2) we must conclude that no selective ban will be effective and that no guns should be banned or (B.3) we may rationalize that an AW ban does not go far enough and we should ban a progressively wider array of guns until we get the desired reduction in overall criminal violence (OCV).

(B.4) But if the expectation that a selectively progressive ban program will reduce OCV at some point is sufficient to warrant beginning such a program, then it is sufficient to warrant pushing that program to a total ban. Why should the savings in lives that are expected in the end be sacrificed to the delay of a progressive program?

Therefore, in the final analysis, either all guns should be banned, or no guns should be banned: we should ban all, or none.

The Selective Gun Ban Dilemma is not posed for the benefit of *disingenuous* selective ban advocates, because they have already concluded that a total ban is called for and pursue selective bans only as a politic stealth tactic.

Rather, the SGBD is a challenge to *ingenuous* selective ban proponents enamoured of what has been called "Goldilocks gun bans" (GGB's). GGB's sort "bad" guns from "good" guns the way Goldilocks selected among the Three Bears' possessions: these were "too this", those were "too that," but some were allowed, for whatever reason, to be "just right." Goldilocks gun banners sort through the possessions of American gun owners finding that some guns are "too small and too cheap," others are "too big (in capacity) and too deadly," while allowing, for the time being, that the remainder are "just right." About Goldilocks' tastes, one can aver *de gustibus non disputandum.* About Goldilocks gun bans, the people whose possessions are being criminalized want a better reason than fickle fancy or hapless hope. Unlike ingenuous ban proponents, the ban-targeted gun owners are not pacified by the ostensible discernment and assurances of selective gun bans, because they have

already calculated the inexorable outcome of the SGBD. To appreciate the SGBD is to understand that uncompromising gun owners are hardly paranoid in thinking that "reasonable and modest" gun bans are likely to be just the first steps towards their (gun owners') complete disenfranchisement. Their fears are plausible and logical, at least as plausible and logical as the SGBD, given the likelihood that *either* the apparent ineffectiveness *or* the apparent efficacy of any selective ban will be taken as an argument for more comprehensive and draconian measures.

The SGBD illustrates how the OVR hypothesis of the AW ban argument, in particular, can and likely would evade falsifiability. Any arguable lack of success, like any arguable success, will likely motivate a yet more comprehensive ban. The OVR hypothesis, if confronted with negative evidence, will counter with the argument, *ex hypothesi,* that a more comprehensive ban will produce the desired effect. If confronted with positive evidence, the expectation must be that banning yet more guns will effect a yet greater reduction in the OVR. In either case, the self-fulfilling expectation will be that banning more guns will mean a greater reduction in overall violence. In which case, if a selective ban makes any sense, a total ban makes more sense: why privilege the lives expected to be saved by a selective ban over the further lives that might be saved by a total ban?

On the other hand, if a total gun ban would be morally obnoxious and unjustifiable on its face because of the weighty self-defense interests and putative rights violated by total civilian disarmament, the SGBD compels the ingenuous selective ban proponent to ponder the skeptical argument against the RCA and OVR hypotheses and seriously consider the second alternative of the dilemma: *Ban none.* The evidence and arguments for opting for this horn of the dilemma were illustrated in V.A.2.b.iii and iv, undermining the hypotheses on which the OVR hypothesis depends, particularly the assumption that banning AW's, or any type of gun, will appreciably reduce criminal access or use. As noted previously, if criminal use is the offending factor, an alternative to an AW ban (and to the propensity of such a selective ban to metamorphize into a yet more comprehensive ban per the SGBD), is the threat of enhanced penalty, under a discretionary system, for criminal use of AW's, leaving non-criminal possession and use unmolested.

The SGBD shows that a great deal rides on the credibility of the *efficacy* argument extending from the GOV through the OVR premise. Is the dubious efficacy of an AW ban sufficient to counterbalance the interests violated by an AW ban per V.A.2.b.vi and vii? If so, per the SGBD, the slippery slope is open to total disarmament. If not, AW bans become the merely symbolic ploys Krauthammer forthrightly admits

them to be (II.C.2 and V.A.1) and, by the terms of the utilitarian ban strategy (UBS), where efficacy is a necessary condition of justifiability, we have reason to ban no guns whatsoever. Serious moral objection may tip the scales against the ban further.

(b) Injustice and *Malum Prohibitum*

Given the harm done by AW bans to legitimate citizen interests in AW's, the more trenchant harm to citizen rights threatenened by the disingenuousness of the selectivity of AW bans, and the harmful social consequences of criminalizing and alienating millions of non-compliant gun owners, many of whom are determined to resist enforcement of the bans, the case for the justifiability of AW bans needs something stronger than merely marginal or speculative social benefits. AW bans arguably bear the burden of proof, an obligation to demonstrate that the bans are instrumentally both neccessary and sufficient to prevent serious social harm (or reduce overall criminal violence), to overcome the presumption that harmless activities should not be criminalized. Speculation and good intentions do not meet this burden. A positive showing by at least a preponderance of the available evidence, assessed by the best available methods, is wanted to justify criminalizing otherwise harmless activities (possession and use by law-abiding citizens).

This line of argument draws upon the English common law distinction between crimes that are *malum in se,* wrong in themselves because of their inherent harmfulness, such as rape and murder, and crimes that are *malum prohibitum,* wrong because they are prohibited by legislation. The former are paradigms of what may justifiably be prohibited by criminal sanction. The latter are typically justifiable by showing their instrumental necessity and sufficiency for preventing *malum in se.* For example, driving in the left-hand lane on a two-way road is not bad or harmful in itself, but both wrong and harmful because prohibited by law, which is done in order to enforce a convention that will avoid harmful collisions. Which side of the road is proscribed is of no account, since driving on either side in itself is not harmful; but driving on one side or the other must be prohibited to ensure orderly and safe passage for all. Driving a vehicle safely and skillfully without a license is not a *malum in se,* but a *malum prohibitum* presumably justified by the need for a licensing system that strives to help ensure that only certifiably safe and able drivers are given lawful access to public roadways.

Thus, the presumption is that the law may prohibit *malum in se* acts, where the "evil" inherent in the act is an uncontestable and serious harm, but create *malum*

prohibitum crimes only to enforce conventions whose general observance is instrumentally necessary and sufficient to prevent serious harm. There is an addtional factor to consider, the justice or fairness of creating *malum prohibitum* crimes out of otherwise harmless wrongdoing. Paradigmatically fair cases are the prohibition of driving on a given side of the road and of driving without a license, whose collective observance or enforcement benefit everyone alike and discriminates unfairly against none.

There is a problem in prohibiting some activities that are not *malum in se*, that in themselves are harmless and victimless, which turns on the distinction between *distributively* and *aggregatively* harmful activities, which Joel Feinberg articulates in *Harm to Others* (1984, Oxford University Press, New York, 193-198) in one of the few passages in the philosophic literature that makes reference to gun control. Distributively harmful activity is such that serious harm or social cost attaches to each and every individual instance of the activity itself, the general class of activity that provides candidates for being made *malum in se* crimes. An example is murder, each act of which is obviously harmful, to the victim and to society. But not all activities that are distributively harmful are made *malum in se* crimes. For example, driving high-powered cars is distributively harmful, albeit not (yet) a crime, because each instance consumes a limited resource and emits pollutants at a greater rate than is necessary for what might be called "legitimate transportation purposes," for which there are alternative means.

In the case of aggregatively harmful activity, harm does not accrue to each and every individual instance of the activity itself; rather, because some people's activity is harmful, serious social harm results in the aggregate. An example is the use of motor vehicles, which some people drive recklessly to disasterous effect. Social policy addresses this problem by prohibiting and punishing reckless driving. Another example is the enjoyment of alcoholic beverages. Not everyone drinks to excess and then drives or turns physically violent, but some do and this minority at least produces serious aggregative harm. Prohibitory and penal policy addresses the latter problem by targeting drunk drivers and those who commit physical violence (whether drunk or sober), not by prohibiting and criminalizing the possession or consumption of alcohol by everyone (which once was tried, however, to disasterous effect). Blanket prohibitions of aggregatively harmful activities, which distribute criminal sanctions among law-abiding and offending individuals alike, are unjust on their face and justifiable only if necessary (where there are no alternatives that do not penalize innocent citizens) and sufficient to appreciably reduce the harm. It

might not be clear what reduction in overall harm or what net social benefit would be sufficient to counter-balance the patent injustice of a blanket prohibition on the harmless and harmful alike (particularly when the innocent have a legitimate interest in the prohibited activity), but a very strong showing is certainly wanted.

Civilian possession and use of firearms is aggregatively rather than distributively harmful: merely owning and safely using a firearm, of whatever type, produces no harm in itself. Rather, it is a small minority of either career or proto-criminals who abuse firearms and generate serious harm in the aggregate. The annual size of the offending minority of previously law-abiding gun owners who turn rogue and misuse their firearms happens to be small indeed. For example, only several 1000ths of one percent of legal gun-owners turn homicidal each year: 4,163 out of, say, 60 million legal gun owners would be .000069, .0069% or 7/1000ths of 1% (see III.A.4.a for the estimate of 4,163). To be sure, the harm they do is grievous and hardly marginal in the aggregate. But penalizing the vast majority of law-abiding firearms users for the harm caused by the criminal acts of a few is unjust on its face. Feinberg succinctly describes the moral problem: "If the state prohibits [responsible and law-abiding] persons from possessing handguns [or AWs], it must tell them, in effect, that they cannot do something which is harmless, because others cannot be trusted to do the same thing without causing grievous harm."

In the case of AW bans, the UBS argument, unlike the PMOS argument, harks to an uncontroverted standard of harm prevention, the reduction of aggregate criminal violence. But AW bans are arguably not *sufficient* to reduce criminal violence appreciably, according to the arguments against their efficacy (V.A.2.b.iii through v). And AW bans are not *necessary*, insofar as there are untried alternatives less harmful and unfair to innocent citizens and more promising for reducing criminal use of AWs: more concerted enforcement of extant laws against firearm possession by criminals and enhanced sentencing for criminal possession or use (see III.B.2). If AW bans are neither necessary nor sufficient to reduce criminal violence, they do not meet the burden of proof required of a policy that unjustly disenfranchises a vast law-abiding majority for the *malum in se* crimes of a small criminal minority.

B. Right-to-Carry Laws

Basic issues regarding the carrying of firearms, on or about one's person, abroad in public by law-abiding civilians are: (1) Should it be allowed at all? (2) If so, should it be licensed? (3) If so, by what sort of licensing system; what should the qualifying criteria be, and how should the license be restricted, for example: as to manner (open versus concealed carry), place (bars, schools, and the like), or firearm (limited to a particular gun, a specific type of gun, or open-ended)? And, regarding any of the above, (4) why? Further policy questions are whether states should reciprocally honor other states' carry permits (as is the case with drivers' licences), or reciprocally honor only the permits of states with similar requirements (such as required training courses), or whether federal law should require all states to honor permits issued in any state (or the rights of citizens in states, like Vermont, that do not require such licenses).

These questions are all susceptible of considerable complexity and elaborate argument (technical, empirical, legal, philosophic) beyond our purview here, which will cut to the chase of the "shall issue" laws currently sweeping the country: Why should mandatory licensing be preferred over a discretionary system? What is known about the effects of permitting concealed carry? The former question is selected for review because, like all the basic questions posed above, it leads necessarily to the second, empirical question, regarding which there is important new research.

Thus, whatever one's philosophic disposition on the putatively paramount right of self-defense, the right to keep firearms therefor, the right to bear those arms in public therefor, or the manner in which they shall be borne, one must (whether as a pacifist or gun ban advocate, or as a Second Amendment fundamentalist, or whatever in between) come to grips with the facts of the matter regarding how the current social "experiments" are going. John Stuart Mill spoke of how the irreducible fallibility of both individual wisdom and collective social intelligence require "many and varied" experiments (which today, of course, social scientists would call "quasi-experiments") to assay the merits of both life style and social policy alternatives. The priority here is given to newly emergent research, including the first to take a comprehensive, nation-wide look at the effects of concealed carry laws.

1. "Shall Issue" versus Discretionary Licensing

As discussed in I.C.3, inconsistency tantamount to arbitrary or overtly unfair discrimination arises under discretionary licensing systems for concealed carry for two related reasons: that summary discretion in vetting applications for a license is allowed; and that the criteria and standards of "special need" or "good reason" typically employed exacerbate the inconsistency endemic to discretionary licensing.

Given the judgmental latitude allowed by the subjective nature of such criteria, a licensing official may, at one extreme, effectively institute a ban on concealed carry, or, at the other extreme, effectively waive the requirement to show need by approving otherwise qualified applicants who simply cite the general reason of self-defense. In states imposing such subjective criteria, the policies of local officials are notoriously variable between both extremes. Unfairness arises in case equally qualified, or equally disqualified, applicants are differentially issued or denied a license on the morally irrelevant basis of where they happen to reside. This is not merely a theoretical possibility but a prevalent reality in states with discretionary licensing (such as New York, Massachussetts and California). It poses not only problems of fairness, but also criminological problems: (1) where politics or favoritism allows, otherwise unqualified applicants may obtain licenses and (2), where very restrictive discretionary practices are known to be the rule, violent crime can increase as a function of criminals' expectations that victims will be unarmed and can result in consequent displacement of crime from jurisdictions where more citizens are apt to be armed (see V.B.2).

The New York State firearms licensing law, enacted in 1911, illustrates the different dimensions of discretion inherent in a discretionary licensing system and the unfairness that can result. Known as the Sullivan Law after its principal proponent, it requires licenses for the acquisition, ownership and carrying of handguns but allows local authorities discretion in construing, and qualifying applicants on, the statutory criteria. New York City subsequently implemented highly restrictive licensing practices, while some other county and city governments in New York have not. The Sullivan Law is most commonly associated with New York City because that jurisdiction implemented the most notoriously arbitrary policy for licensing the acquisition, possession and carrying of handguns.

The unfettered *discretion* that the Sullivan law allows local government authorities in the licensing of handguns is contrasted with *mandatory* licensing. The latter *requires* government to issue licenses to any qualified applicant on the

basis of relatively objective and egalitarian criteria (as is the case with drivers licenses) rather than on the basis of a showing of special "need," a criterion susceptible of subjective and arbitrary interpretation. The discretionary construal of "need" or "good reason" admits of two levels: (1) the discretionary *standards* adopted by a local authority that an applicant must meet on the *criterion* of "need" (for example, how "large" an amount of money one must routinely carry from one's business to "need" the protection of a concealed firearm, or how many documented death threats one must receive or muggings one must suffer to prove need); (2) the discretionary latitude a licensing authority employs in *judging* the extent to which an applicant meets the discretionary standard (a favorable judgment may be a function of how much "juice" one has politically or as a celebrity or how much one can afford to pay the graft or an attorney). Both factors result in such arbitrary variation in New York City that attorneys specialize in getting carry licenses for clients and are virtually a necessity for anyone "needing" the license.

The history of the New York law reveals its expressly discriminatory intent and effect. While the Sullivan Law was enacted under intense pressure from New York City politicians and media ostensibly as a crime control measure, gun crime was in fact quite low at the time. The well documented historical motivation attributed to its leading advocates, whose power base was strongest in New York City, was two-fold: fear of rising immigrant populations, and political patronage. Both were strong motives for giving the politicians in power complete discretion in licensing, so that licenses could be freely denied to political enemies or disfavored ethnic minorities, and freely awarded to political supporters or members of favored ethnic groups. Political power bases and allegiances at the time of Sullivan's enactment were intensively ethnic. New York City thus became the historic and most notorious exemplar of discretionary licensing of the most arbitrary kind. Today, however, other U.S. cities have much more restrictive laws (for example, Chicago and Washington, D.C., totally prohibit handgun acquisition or carry) and other cities also issue licenses to carry handguns in equally arbitrary fashion and to fewer applicants (for example, Los Angeles and San Francisco).

Endemic unfairness notwithstanding, if concealed carry is to be permitted, its opponents may prefer a discretionary system precisely because it is apt to be more restrictive overall in practice. However, the criminological factors, the effects of legal concealed carry on crime and violence in the balance of social harms and benefits, have to reckoned.

2. The Effects of Permissive Carry Laws

Negative reaction against allowing concealed carry where it has been proposed is easy to conjure, along with the dramatic visions of mayhem that sustain it: blood in the streets, shootouts over minor insults and fender benders. More sober negative speculation holds, not that an armed society would fail to be a polite society, but that any defensive or deterrent utility of allowing concealed carry would be outweighed by criminals becoming preemptively more violent. Contrary to the hypothesis that criminals' uncertainty about whether prospective victims were armed would result in fewer victimizations, opponents of concealed carry hypothesize that criminals would go armed more often themselves and shoot first, to obviate the risk of injury from encountering an armed victim (see III.A.1.a, for contrary evidence). The Preemptive Strike Hypothesis (PSH) is a special case of what might be called the Violence Escalation Hypothesis (VEH).

a. Speculation about Violence Escalation

The preemptive strike hypothesis does not stand up to the years of victimization survey data analyzed by Kleck (III.A.1.a). Although, by definition, in gun rapes and robberies, they pull guns first, criminal assailants do not tend to shoot first and then rape and rob later. The idea that it would make sense for criminals disposed to commit rape, robbery, or assault to raise the ante to murder or attempted murder as a preemptive strike is not as plausible upon reflection as it may seem in fantasy. In any case, it is a phenomenon that has not appeared in the many states where concealed carry has already been permitted for many years, nor was there a sudden rise in gun assaults in robbery or rape in the highly scrutinized states where concealed carry was recently legalized. So, there is no reason to expect that the criminals will suddenly become so imprudent in states that pass new concealed carry laws.

The Violence Escalation Hypothesis is broader: it posits an increase in the level of violence from preemptive strikes by citizens as well as by criminals and from trigger-happy responses to quarrels with other citizens, such as dramatized in the television movie "The Right of the People," in which newly licensed gun-toting citizens drew guns as gratuitous expressions of machismo in minors tiffs over offensive cigar smoke, being bumped by passers-by, and the like. There is no reason to believe that either defenders' or offenders' propensity to shoot one another

preemptively or gratuitously in public places would be any greater than the disposition to do so in contact burglary situations, in which armed defenders and offenders have been facing off for a long time. Firearm carriers who brandish weapons unjustifiably in public are subject to losing their licenses, and the penalty for discharging a firearm without cause, let alone shooting someone, is greater. People who own and carry guns are naturally more aware of these legal realities than those who fantasize about and, just as naturally, mistrust the practice.

Unlike the deliberate violence escalation fantasized by the VEH, speculation that the number of gun accidents are likely to increase along with concealed carry stands to reason on reflection. Firearm accidents require two things: a loaded gun and someone's handling the gun. It is a priori reasonable to suppose that the chances for an gun accident will increase as the occasions for people to handle loaded guns increase, which they do when more people start carrying concealed firearms that have to be holstered and unholstered daily. There are also reasoned speculations counter to the Violence Escalation Hypothesis, which expand the argument for the deterrent utility of privately owned firearms (III.A.5.a). But, instead of speculating about defender and offender misadventure, we need to look at the available evidence.

b. Evidence of How Licensees Behave

In effect, the Violence Escalation Hypothesis predicts that licensed concealed gun carriers (LGCs) will tend to commit criminal offenses and that many of these offenses will involve their carry guns; that is what the imagined misbehavior amounts to. Brandishing a gun in public out of gratuitous machismo or even inadvertantly revealing a concealed gun in public are grounds, at the least, for losing one's license. While, of course, not all law violators are caught, if LGCs are the gun-flashing or trigger-happy misadventurers posited by the Violence Escalation Hypothesis, we would expect to find some significant record of revoked licenses, in particular lisences revoked for violent gun crimes. So, the phenomenon is easy to check, especially when new state carry laws mandate close scrutiny of the behavior of license holders. Texas, whose "shall issue" law is among the newest, and Florida, whose historic law initiated what became a wave of such measures, are two cases in point.

Texas passed a "shall issue" concealed carry law that took effect on January 1, 1996. In the year following, 1,202 applicants were denied, 111,408 licenses were issued, and there were 57 incidents in which licensees committed offenses (on the order of

carrying a gun while intoxicated or failing to keep the weapon concealed). The one case of a violent crime was a licensee who was charged with a murder commited on his business premises where the gun would have been legally kept regardless of his carry permit. There was another homicide committed by a licensee and actually committed with a carry gun "on the street," but that was a case of defense against purportedly lethal assault and no-billed by the Grand Jury (who found the incident a case of justifiable self-defense). The offense rate by licensees at that point was .05% or 5/100ths of 1%. The violent offense rate (assuming eventual conviction) by licensees was .0009% or 9/10,000ths of 1%. Critics may object that Texan LGC's have not been given enough time to act out their expected proclivity for violence, so a state with a longer documented history is wanted. Florida, which has some of the nations most violent cities, and is a major staging area for the illicit drug trade, should be an interesting case.

Florida passed a "shall issue" concealed carry law in 1987. It is incumbant upon the Florida Department of State to compile data on carry licenses denied and revoked and the reasons therefor. According to Secretary of State, Sandra Mortham, in a January 11, 1996, letter responding to published criticism of the Florida law, her department had so far denied 723 applications and had issued 207,978 licenses, of which 324 were revoked for some manner of offense, of which 54 involved a firearm and 5 were violent crimes (none of which resulted in fatalities): .16%, or 16/100ths of 1%, were revoked for some offense; .026%, or 26/1000ths of 1%, for an offense involving a gun; and .0024%, or 24/10,000ths of 1%, for a violent crime.

If these fractions of a percent of LGC's that commit offenses (as reflected by license revocation or arrest data) are taken to constitute a significant problem or confirmation of the Violence Escalation Hypothesis, the next step is to weigh the disutility perpetrated by offending LGC's against (a) the defensive utility of guns carried by LGC's, (b) the residual value of concealed carry to LGC's, and (c) the crime-deterrent benefits attributable to the institution of concealed carry. A critic may reply that the apprehended offenses must not reflect the actual incidents of offending by LGC's. This hypothesis calls for a look not at license revocation rates (reflecting only arrests and convictions) but at overall comparative crime rates. If the addition of LGC's to the environment occasions a significant increase in crime, we would expect to see an increase as compared, under suitable controls, with the period before the carry law went into effect, or with jurisdictions that prohibit or restrict concealed carry (see V.B.2.c).

North Dakota is generally lower. N.H sometimes is

One hypothesis to explain the extremely low incidence of (apprehended) misadventure by LGCs is the training that is required to obtain a carry permit. For example, the Texas law requires a training course that includes not only basic marksmanship, firearm safety, and the law on the defenive use of deadly force, but also general techniques of conflict resolution. But while training requirements are typical of the new wave of carry laws, they are by no means universal among the older laws. For example, concealed carry has been permitted without training in Pennsylvania for decades and the track record of LGCs is basically as clean as elsewhere. The violent crime rate in Pennsylvania outside Philadelphia (where fully half the violent crime in the state occurs and which, until 1995, had a very restrictive discretionary law like New York City) is as low as Europe's. New Hampshire, the "Live Free or Die!" state, likewise has no training requirement and enjoys one of the lowest crime rates in the country. Vermont, which enjoys one of the lowest of U.S. violent crime rates, has neither a training requirement nor even a licensing requirement: concealed carry with lawful intent is a right of every adult citizen without a criminal record. An alternative hypothesis to explain the clean record of LGCs is the sobering mindfulness that power and responsibility are commensurate which taking up the gun with defensive purpose can and should inspire (see also III.A.1.a regarding the inhibitive versus the facilitative effect of firearms on criminal aggression). This hypothesis regarding LGCs comports with the good track record of legal gun owners generally (see III.A), of whom training is not ususually required. If something like the responsibility-transmission hypothesis is true, the surprise would be if LGCs, who self-select to assume an even heavier responsibility than gun owners at large, were to offend at a greater rate.

c. The Overall Impact of Concealed Carry Laws

The following three studies of the effects of concealed carry laws differ and in illustrative ways: one is an intra-state study comparing violent crime across counties whose policies varied widely in permissiveness and restrictiveness under a discretionary licensing system; the second is a before and after study of the homicide levels associated with the introduction of "shall issue" laws in a collection of five urban areas; and the third is a national study of crime rates across all U.S. counties with all manner of carry laws.

i. The California Study

Cramer and Kopel did a study ("Shall Issue": The new wave of concealed handgun permit laws, Independence Institute, Golden CO, 1994), accounting for demographic factors, comparing violent crime rates by county in California, which has a discretionary carry law resulting in extreme variation in policy from prohibitory to very permissive. They found that counties with high LGCs and permissive policies had lower violent crime rates than counties with restrictive policies, which in turn had lower rates than counties with prohibitive policies.

ii. The Violence Research Group Study

McDowall, Loftin, and Wiersema of the Violence Research Group (VRG) at the University of Maryland (1995 Discussion Paper #15, College Park MD) did a CDC-funded study, "Easing concealed firearms laws: Effect on homicide in three states," that compared gun homicides versus other homicides in five select urban areas (hence, the title of the study is misleading) in three states before and after new "shall issue" laws went into effect: Tampa, Jacksonville, and Miami, Florida; Jackson, Mississippi; and Portland, Oregon. The VRG study found that after the news laws went into effect the number of people killed by *guns* in four of the cities increased (74% in Jacksonville, 43% in Jackson, 22% in Tampa, 3% in Miami) while the average number of homicides by other means stayed the same; adjusting for the general national rise in homicide rates during the same period did not appreciably affect the increases. The suggestion is that the relaxation of restrictions in the carry laws is the cause of the homicide increases.

While the VGR study is judicious in its policy recommendation ("we strongly suggest caution"), it flirts with the "ingenious speciousness" which has been attributed to other CDC-funded firearm research (see II.B.2). In Portland the homicide rate fell about 12% after the new law, which the researchers suggest could be explained by the fact that Oregon instituted background checks for firearm purchases coincident with the new carry law. This factor is relevant only because they count homicides committed *in the home*, which could be perpetrated by non-LGCs and, for that matter, by unlawful gun owners.

Regarding the relevant homicides committed *outside the home*, where one would properly look for effects of concealed carry, the VGR authors suggest that, while LGCs may not be committing homicide, the new laws might increase incentive

for unlawful carrying by the criminally inclined (which is tantamount to the preemptive strike hypothesis discussed above). The study does not distinguish criminal from justifiable homicides, leaving open the alternative to the preemptive strike hypothesis that the latter by a new generation of LGCs might account for the increase in homicides, especially in the violent environs studied where LGCs are apt to be assaulted.

The VRG study's analysis does not control for confounding factors such as demographic shifts or trends in drug trafficking. Worse, the study results are attributable to the artifact of selecting different starting points for establishing the before-reform homicide baselines, thereby ignoring higher-homicide years that would have shown a post-law decline. Finally, the researchers do not provide a rationale for their particular selection of so few urban areas as opposed to looking at the data for the whole states themselves. Florida's state-wide homicide rate fell 21% after enactment from 1987 through 1992 and has held consistently below the national rate after having been 36% higher before "shall issue." The VRG authors do not explain why their preemptive strike hypothesis does not apply to the state as a whole or how the homicide rate in the rest of the state could decrease so far as to overwhelm the increases in Tampa, Jacksonville, and Miami.

Advocates of concealed carry are certainly not willing to grant, as an ethical matter, that an increase in criminal homicide would undermine the defensive efficacy of the practice. Quite the contrary, the defensive rationale for concealed carrying and for the right to do so would only increase. To defeat the heavy interest so many have in the arguable right to effective means of self-defense, even on purely utilitarian grounds that grant no presumptive weight to this right, the evidence showing concealed carry laws to be the culprit in any observed increase in criminal violence must be very strong. The VRG study has been widely touted as proof in the media and by carry critics who see it as the thumb in the dike against the rising tide of "shall issue" laws. But it is not a compelling case for the proposition that laws permitting law-abiding citizens to carry guns for protection are the probable cause of increased criminal homicide. At least the authors are too judicious to make this claim.

iii. The Lott and Mustard Study

At minimum, one wants to see canonical social scientific rigor in the investigation of such a serious issue and, ideally, a comprehensive study of all jurisdictions across the nation as well as all violent crime. Lott and Mustard have provided such a study ("Crime, deterence, and right-to-carry concealed handguns. *Journal of Legal Studies,* January 1997). Lott and Mustard set out to address systematically, regarding carry laws, what they take to be (as Kleck takes to be) "the crucial question underlying all gun-control laws: What is their net effect? Are more lives lost or saved? Do they deter crime or encourage it?" These questions of efficacy are not the only or last issues for the justifiability of gun controls; there are strong rights-based objections to restrictive gun control on the one hand, and, on the other hand, fundamental non-utilitarian moral objections to firearms and their use and, supervening both, the meta-issue of how to weigh such residual or non-fungible moral values in the balancing of social goods and ills. But a rigorous address to the efficacy of firearms and their regulation is certainly the foremost if not the final word on justifiability.

Like the Kleck and Gertz study of defensive gun use (III.B.4.a), the Lott and Mustard study is meticulously designed to anticipate criticism. It analyzed the FBI's crime statistics for all 3,054 counties in the United States from 1977 to 1992. (The FBI data come from *reported crime* that may underestimate actual crime rates, as versus the Bureau of Justice Statistics data that come from *victimization surveys* that tap unreported crimes. However, any artifactual deflationary effect would be consistent across the "sample" of the entire nation: before-and-after and jurisdictional comparisons of crime increase or decrease are all based on the same sort of data.) A brief catalog of the study's findings reveals the challenge posed to the Violence Escalation Hypothesis and to utilitarian opponents of permissive concealed carry laws. Lott and Mustard's (most conservative) estimates and major observations follow.

- "Shall issue" laws reduced murder by 8.5%, rape by 5%, aggravated assault by 7%, and robbery by 3%.
- If states that did not permit concealed carry in 1992 had allowed it at that time, the citizenry would have been spared 1,570 murders, 4,177 rapes, 60,000 aggravated assaults, and 12,000 robberies.
- "Free rider" deterrence benefits: enjoyment of the deterrent effects implied by the results above are generally distributed, not limited to those who carry guns and use them defensively. This

phenomenon is a major advantage of *concealed* carry: uncertainty about who is carrying; the possibility that any potential victim, or potential defender nearby, may be armed renders everyone an unattractive target for many criminals. Unarmed folk are in effect free riders on the efforts of their armed fellow citizens.

• There is some displacement of criminal activity from violent crimes to property offenses like larceny (such as automobile theft). This is likely an acceptable trade-off in aggregate cost saved, let alone lives saved.

• In large cities, where typically both crime rates and gun control advocacy are highest, right-to-carry laws produced the largest drops in violent crimes. For areas with concentrated populations of over 200,000, the decrease in murder rate averaged 13%.

• Carry laws seem to benefit women more than men. Murder rates decline regardless of the ~~gender~~ sex of the LGCs, but the impact is more pronounced when women are considered separately. An additional female LGC at the margin reduces the murder rate for women three to four times more than an added male LGC reduces the rate for men. (The relative-equalizer hypothesis: victims of violence are typically weaker than their assailants; armed women defending themselves enjoy a greater relative increase in their advantage than do armed men.)

• Contrary to the alleged beneficial impact of the Brady ~~Law~~ Act on crime rates (predicated by Brady advocates simply on the number of applications for purchase denied, without acknowledging the high rate of false positives later corrected or the extremely low yield, seven, of felon-applicants apprehended), the Brady ~~Laws~~ Acts introduction is positively associated with higher rates of assaults and rapes.

• While the number of fatal handgun accidents is only 200 [sic] a year, if states without "shall issue" laws adopted them, there would be at most nine additional accidental handgun deaths, an increase of 4.5%. Presumably the trade-off with 1570 murders avoided is beneficial. (The more recent Lott and Mustard study found a lower number of accidental handgun deaths than the higher estimate based on oldre data used above, 500. Also, official counts of fatal gun accidents are arguably inflated by virtue of misidentifying suicides and homicides as accidents.)

• The nearly 50,000 observations in the data set allowed for more rigorous controls for more variables than in any previous gun control study, including regression controls for arrest and conviction rates, prison sentences, changes in handgun laws such as waiting periods and background checks, enhanced-sentencing policies for using a gun in a crime, income, poverty, unemployment, and demographic changes.

Lott has modestly commented that the rigor and results of the study should "give pause" to opponents of permissive "shall issue" concealed carry laws: "[t]he opportunity to reduce the murder rate by simply relaxing a regulation ought to be difficult to ignore."

The initial reaction to the study by many of those opponents was illustrative of how emotion can rule the gun control controversy: a public press conference was called by prominent political gun control advocates at which Lott's scholarly integrity was attacked. In particular, it was alleged that Lott was in the service of the firearms industry. This inference was based on the fact that Lott is the John M. Olin Fellow at the University of Chicago Law School together with the astonishingly implausible presumption that the Olin Fellow at an eminent law school would be dedicated to the interests of Olin/Winchester, of ammunition and firearms manufacturing fame, and a subsidiary of the Olin Corporation. In fact, of course, the Olin chair is funded by the Olin Foundation, which was created by money from John Olin's personal fortune upon his death, not by the Olin Corporation, and which neither chose Lott as a Fellow nor approved his topic. Since this unseemly spectacle transpired, researchers have embarked upon a more appropriate response to the challenge of the Lott and Mustard study, critical analysis. The first hasty wave of critical response Lott has rebutted, if not refuted. But the most promising critical resonse is yet forthcoming from a new center for violence research at Carnegie Mellon University. Therein will hang an interesting tale.

of course, Carnegie Mellon's money comes from the feds (DOJ), who are funding anti-gun research only.

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