GEORGETOWN UNIVERSITY LAW CENTER

Randy E. Barnett
Carmack Waterhouse Professor of Legal Theory

February 7, 2013

Hon. Ted Cruz, Ranking Member
Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Cruz,

Within minutes of the Sandy Hook murders, gun control advocates began exploiting this horrific event to promote their favored policies. I know this because I was contacted by reporters to respond to these calls even before I had heard that the event had taken place moments before. This was far too early to know what had happened, much less how and why. Yet the drum beat had begun for long sought after measures that would not have prevented these murders. That drum beat continues.

I understand that you are having hearings on various gun control proposals on Tuesday, February 12th. In your deliberations, you may find useful the attached article entitled, "Gun control fails rationality test," that appeared on January 29th in the *Washington Examiner*. In this article, I make the following points:

- The Supreme Court evaluates fundamental rights using a heightened standard of scrutiny;
- The Supreme Court has held that the individual right to keep and bear arms is a fundamental right;
- Some of these measures – for example, laws prohibiting such popular rifles as the AR-15 and the normal capacity magazines for such rifles – are flatly precluded by the Supreme Court's categorical protection of weapons "in common use" by ordinary citizens for lawful purposes, such as the protection of self and others;
- These and most other gun regulations currently under consideration would also fail the least demanding heightened scrutiny: rationality review;
- This is because most proposals either would not have prevented the incidents that are said to motivate their passage, they would keep legal weapons of identical lethality, or they are discriminatory in their treatment of the Second Amendment rights of American citizens;
- For this reason, these measures are irrational;
- This analysis is useful to identify such measures as pretextual efforts, the real purpose of which is to impose an undue burden on the exercise of the fundamental right to keep and bear arms, or to improperly stigmatize its exercise;
- For all these reasons most, if not all, of the measures being proposed are unconstitutional.

To this analysis, I would add that the Congress has its own independent obligation to

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Congress has the first word. And a refusal by Congress to enact a measure because, in its judgment, the measure violates the Second Amendment will take precedence over any judicial or executive branch opinion on that question. Only if Congress concludes that a measure *is* constitutional, does the executive and judicial branches have the opportunity to disagree with this assessment.

Therefore, it falls to your subcommittee to inquire seriously into whether any given measure under consideration would actually violate the Second Amendment. To this end, you should ask:

- Would the proposed measure would have prevented the event, such as Sandy Hook, that is being used to justifies its enactment?
- Are firearms with equal if not greater lethality and rate of fire left legal while others are being prohibited?
- Will some citizens – such as current or retired members of law enforcement or government officials – be privileged in the means by which they can protect themselves over others?
- If an American citizen who is employed to protect the safety of others, or an active or retired police officer, requires a certain type of weapon, with a certain rate of fire or capacity, to protect him or herself or others, why does not a law abiding citizen of the United States require the same sort of weapon for the same lawful purpose?
- Will those who are willing to violate laws be affected in any manner by the existence of this measure, or will its burden largely be borne by law-abiding, and in many cases licenced, citizens who pose no threat to others?
- Will a gun control measure, such as the maintenance of a data base, facilitate future violations of the fundamental guarantees of the Second Amendment, for example, by making confiscation of weapons easier?

The rationality of gun control measures turn on the answers to these and other such questions. Yet most law professors who opine on the constitutionality of gun control measures simply do not know enough about firearms, or the realistic effects of gun regulations, to have a genuinely expert opinion on whether any particular proposal is constitutional. Instead, their opinions are typically based either on their predictions of how courts will rule, often based on how they *hope* the courts will rule, or their opinion of how deferential courts should be to the Congress. Unless they address questions such as those I listed, however, their opinions can provide little guidance to Congress in its independent assessment of the constitutionality of these proposals.

It is the job of Congress to ask these questions in order to ferret out efforts to violate the fundamental rights of Americans by those who dislike the rights protected by the Second Amendment, or who have an irrational fear of firearms. The answers provided by such an independent inquiry will reveal many of the current proposals to be pretextual efforts having little or nothing to do with preventing the incidents that have roused the emotions of the public, and everything to do with imposing an undue burden upon, and stigmatizing the exercise of a fundamental right.

I hope this letter, and the accompanying article, helps inform the Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Human Rights discussion.

Sincerely,

Professor Randy E. Barnett
Carmack Waterhouse Professor of Legal Theory
Director, Georgetown Center for the Constitution

Opinion

Op-Ed: Gun control fails rationality test

January 29, 2013 | 8:00 pm

44 Comments

Randy Barnett
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The Washington Examiner

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On Wednesday, the Senate Judiciary Committee will hold a hearing on the various gun control proposals that have been floated in the wake of the Sandy Hook school shootings. Although they are said to be merely "reasonable regulations" of the Second Amendment's right to keep and bear arms, most or all of these proposals are irrational and unconstitutional.

The Supreme Court has established a two-tiered protection of liberty. Under the lowest tier, "rational basis review," it will uphold restrictions on liberty so long as it can imagine any possible reason why Congress might have adopted the measure. By contrast, if a liberty is deemed by the court to be a "fundamental right," it will subject restrictions of that right to "heightened scrutiny," meaning that it will skeptically examine the means Congress chose to achieve its ends. This close comparison of means to ends is intended to smoke out justifications that are really pretexts for efforts to improperly stigmatize or restrict the exercise of a fundamental right.

In 2008, the Supreme Court held that the right to keep and bear arms was a fundamental right. In DC v. Heller, the court did not specify the exact type of heightened scrutiny it would employ when legislation restricts gun rights, except to insist that it would be higher than "rational basis review," and that a complete ban on weapons "in common use" by the citizenry for self-defense and other lawful purposes -- such as handguns -- is unconstitutional under any type of heightened scrutiny.

So, when considering the constitutionality of bans on so-called military-style assault weapons, or restrictions on the capacity of magazines, senators should begin by asking whether the weapons being banned are in common use by civilians. When it comes to so-called assault weapons, like the AR-15, or 30-round magazines, the answer is clearly "yes." Millions of such weapons and magazines are in private hands.

That should settle the matter, but senators can go a step further and ask whether these or other measures are actually rational -- to articulate the end they are seeking to accomplish, then assesses whether the means adopted actually match up with the purported end. Would they actually have prevented a mass shooting or ameliorated real crimes?

This heightened "rationality review" could help ensure that the reason being articulated is the real reason for the law.

For example, "assault weapons" are a made-up category of weapons that is based solely on cosmetic features that make them look like the fully automatic weapons used by the military. Banning them leaves other rifles that are functionally identical in their lethality and rate of fire completely legal. Moreover, far more powerful hunting rifles are left untouched by the law, as are shotguns. This is simply irrational and therefore unconstitutional.

The same can be said for New York's law limiting handguns to seven rounds, while allowing both active and retired police officers to keep their handguns that hold up to 15 rounds. If retired cops need 15 rounds to effectively protect themselves and others, then so do other citizens. Arbitrarily discriminating among Americans in this way is irrational and unconstitutional.

In fact, heightened rationality review confirms what we independently know is going on. Within hours of Sandy Hook, gun control proponents were beating the drums for their long-desired measures, like background checks for private gun sales, that would not in any way have prevented that tragedy. But the exploitation of these deaths is not just morally offensive.

The measures now being rushed through Congress before emotions can subside are irrational and pretextual, which means they are also unconstitutional.

Campaign for Liberty
RECLAIM *the* REPUBLIC.
RESTORE *the* CONSTITUTION.
5211 Port Royal Rd., Suite 310, Springfield, VA 22151

February 11, 2013

United States Senate
Committee on the Judiciary
Subcommittee on the Constitution,
Civil Rights, and Human Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Cruz:

Thank you for holding this hearing on "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment." On behalf of over half a million members of Campaign for Liberty, I appreciate the opportunity to address this issue.

In the wake of December's tragic loss of life at Sandy Hook Elementary School, many Americans have called for new federal laws to prevent further incidents of gun violence. Unfortunately, most of the proposals currently before Congress not only violate the Second Amendment, as well as other parts of the United States Constitution, but they would fail to prevent future mass shootings.

Today, I want to recommend that Congress adopt a policy that would meet the constitutional test and prove effective in protecting schoolchildren from gun violence: full repeal of the 1990 Gun Free School Zones Act and all amendments to it.

Under the Gun Free School Zones Act, it is a federal crime for an individual to have a firearm either in a school or within 1,000 feet of a school. While the legislation does allow for lawful holders of concealed carry permits to possess firearms within a Gun Free School Zone, it makes it a federal crime for anyone other than an on-duty law enforcement officer or school security personnel to discharge a firearm on school premises. As a practical matter, this means that most schools, except for those that can afford to hire professional, full-time security personnel, are left defenseless.

The supporters of the law claimed it would guard school children from gun violence. However, in passing this law, Congress overlooked a crucial fact: mass murderers do not obey "gun-free zone" laws.

In fact, disarming school personnel, except those few specifically designated as "school security," can encourage deranged and violent individuals to specifically target schools. After all, what better way to ensure one will inflict maximum damage than to target a location where carrying a firearm is a federal crime?

Even if repeal of the Gun Free School Zones Act does not discourage all school shootings, it will still save lives by giving school personnel the ability to defend themselves and the children in their care.

Currently, federal law forces school personnel whose schools do not have full-time security staff to wait helplessly during a crisis until the police arrive. The horror of school shootings is compounded by the knowledge that some of the victims could have been spared had staff members simply been able to access a firearm.

If the Gun Free School Zones Act was effective in curbing violence against our children, one would expect statistics to show school shootings have declined since the law was enacted. Instead, they demonstrate exactly the opposite: before this law was passed, Americans had not experienced a mass shooting in a school since before 1900. Since the second version of the law was passed, there have been 13 such incidents.

The Gun Free School Zones Act in effect today is actually the second version of the law. Congress first passed the act in 1990. In the 1995 case of *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626, the Supreme Court held that, contrary to the claims of the law's backers, the Constitution's Commerce Clause did not give Congress the power to regulate gun possession in or around schools.

Following the *Lopez* decision, Congress quickly passed a revised version of the bill, limiting its application to the use of a firearm obtained through interstate or foreign commerce.

Backers of the Gun Free School Zones Act claim this change makes the bill a legitimate exercise of Congress' power to regulate interstate commerce. This is nonsense, as the Commerce Clause is intended to create a free trade zone among the states, not to give Congress unfettered regulatory authority over every use of a product made or sold in "interstate commerce."

It is impossible for the Gun Free School Zones Act to pass constitutional muster. Even if the Gun Free School Zones Act was a legitimate exercise of Congress' authority under the Commerce Clause, it would still be unconstitutional, as it violates the Second Amendment. The Second Amendment clearly prohibits <u>any</u> federal infringement on the right to keep and bear arms.

Legislation making it a federal crime to possess a gun within 1,000 feet of a school is clearly an infringement on the right to keep <u>and bear</u> arms.

Even if the Gun Free School Zones Act did not violate the Second Amendment, it would still fail to be constitutional, as the federal government has no legitimate authority to dictate to local schools how to best ensure the safety of their students. Instead, school safety (like all matters relating to education) is among the many areas left to states, local governments, and individuals. The system of federalism created by the Constitution thus ensures that individual school districts can adopt the school safety polices that best fit their unique needs. This is a much more efficient way of ensuring safety than forcing every school in the nation to comply with federal "one-size-fits-all" rules and regulations.

As an organization dedicated to restoring constitutional government, Campaign for Liberty not only supports full repeal of the Gun Free School Zones Act, but we oppose providing federal funding for

school safety officers, as this proposal is also unconstitutional. It is disappointing to see several high-profile defenders of the Second Amendment support expanding a federal role in school safety. It is also disturbing to see these so-called "advocates" of individual liberty support unconstitutional proposals such as expanding background checks and mental health databases. Those who claim to defend the Second Amendment undermine their cause when they support any unconstitutional expansion of federal power.

If Congress is serious about protecting our children and addressing school safety, it will reject calls for new infringements on the Second Amendment that will only satisfy those looking for photo-ops with scary-looking weapons and/or new opportunities to violate the American people's liberties. Instead, Congress should restore the people's right to determine for themselves how best to protect their children by repealing the unconstitutional Gun Free School Zones Act.

In Liberty,

John F. Tate
President
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February 7, 2013

The Honorable Ted Cruz
The United States Senate
Capitol Hill
Washington, DC

Dear Senator Cruz:

Thank you for inviting me to share my expertise concerning the problem of gun violence in America. My published books and law review articles examine, among other subjects, Black history, the origins of American gun culture, the judicial interpretation of both federal and state right to keep and bear arms provisions, and the history of mental health care in the United States. My work has been cited in *D.C.* v. *Heller* (2008), *McDonald* v. *Chicago* (2010), and many decisions of the U.S. Courts of Appeal and state supreme courts.

Attached please find an article from the Federalist Society publication *Engage* published last year: "Madness, Deinstitutionalization & Murder." The *Engage* article examines the role that the deinstitutionalization of the mentally ill, starting in the 1960s, and reaching full fruition in the 1970s played in increasing murder rates. Of most relevance to the recent tragedy in Connecticut, deinstitutionalization turned what had been a shockingly rare event--random acts of mass murder--into something that horrifies us, but no longer shocks us, because such incidents happen several times a year. This article is adapted from a chapter in *My Brother Ron: A Personal and Social History of the Deinstitutionalization of the Mentally Ill* (2012).

That deinstitutionalization increased murder rates is not an impressionistic or anecdotal claim: as the article points out, multivariate correlation analysis by Prof. Bernard Harcourt of the University of Chicago demonstrates a statistically significant negative correlation between murder rates and total institutionalization rates (the sum of prison and mental hospital occupancy) for the years 1928 to 2000. Using an entirely different technique, Prof. Stephen P. Segal of University of California, Berkeley demonstrated in 2011 that three measures of mental health care systems are statistically significant in relation to state-to-state variations in murder rates. Indeed, one-third of this variation can be explained by one factor alone: the relative ease of involuntary commitment of the mentally ill.

The evidence for this is includes not only the many examples in the *Engage* article, but by the details of many of the most recent and most horrifying of these mass murders. James Holmes is the man being tried for the murders in Aurora, Colorado. Several weeks before those murders, his psychiatrist was sufficiently concerned about him to contact local police. The exact nature of those contacts, of course, is now tied up in court proceedings,[1] but for a psychiatrist to break doctor/patient confidentiality suggests that she believed she had a *Tarasoff* obligation to inform the police that her patient was a danger to others.[2] Unfortunately, Colorado's current emergency commitment statute creates an extraordinarily high standard of what constitutes "imminent danger to others or to himself"[3] and James Holmes apparently was not considered an "imminent risk."[4]

Similarly, news reports quote a friend of the Lanza family that Mrs. Lanza was attempting to have her son committed at the time he went on the rampage in Newtown, Connecticut. Because court records on such proceedings are not public, the most that local police officials could confirm was that there was some discussion about future mental health care for the son.[5]

Yet while the connection between deinstitutionalization and these random acts of mass murder is abundantly clear, the focus on these relatively rare crimes (totaling less than 1% of all U.S. murders each year) obscures the far more common murders by mentally ill offenders that receive only local news coverage, because they involve *only* one or two victims. As the *Engage* article points out, at least 18% of Indiana inmates convicted of murder are mentally ill: a more detailed examination of the data shows that 11% of Indiana murder convicts are suffering from psychotic conditions that have caused them to lose connection to reality. By my estimate, it is likely that there are 1300 to 1400 murders a year in the U.S. by such severely mentally ill offenders. Of these, about 500 likely involve weapons other than firearms. (One example from last Tuesday: a mentally ill woman in Sebastopol, California charged with stabbing her mother to death.)[6] Any gun control measures are guaranteed to be ineffective at reducing *non-gun* murders by mentally ill offenders. At best, they can only reduce murders with guns--and only the

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[1] Mark Greenblatt, Carol McKinley, and Mike Gudgell, "James Holmes' Psychiatrist Contacted University Police Weeks Before Movie-Theater Shooting: ABC Exclusive," ABC News, August 6, 2012, http://abcnews.go.com/US/james-holmes-psychiatrist-contacted-university-police-weeks-movie/story?id=16943858#.UCGGtfaPWzk, last accessed February 6, 2013.

[2] Tarasoff v. Regents of the University of California, 17 Cal.3d 425 (1976)(obligates mental health workers to warn individuals or police of threats of violence by patients). Other courts have imposed variations of Tarasoff in most other American jurisdictions.

[3] Colorado Revised Statutes 27-65-105(a)(I) (2011).

[4] "Did CU Officials Consider James Holmes 'High Risk' For Violence?" The Denver Channel, August 16, 2012, http://www.thedenverchannel.com/news/did-cu-officials-consider-james-holmes-high-risk-for-violence-, last accessed February 8, 2013.

[5] Jana Winter, "EXCLUSIVE: Fear of being committed may have caused Connecticut gunman to snap," Fox News, December 18, 2012, http://www.foxnews.com/us/2012/12/18/fear-being-committed-may-have-caused-connecticut-madman-to-snap/#ixzz2KB2OXmv4, last accessed February 8, 2013.

[6] Paul Payne and Martin Espinoza, "Sebastopol woman accused of killing mom had a history of arrests," Santa Rosa (Cal.) *Press-Democrat*, February 7, 2013, http://www.pressdemocrat.com/article/20130206/ARTICLES/130209699/1350?p=all&tc=pgall, last accessed February 7, 2013.

very optimistic believe that gun control laws will make anything but a marginal improvement in murder rates.

On the other hand, if we look at the solutions that have been demonstrated to work--such as increasing the number of psychiatric beds available per capita and making emergency involuntary commitment statutes less restrictive (as discussed in Prof. Segal's paper)--we can reduce murder rates *regardless* of weapon type. However, because these involve state law changes, they must be the subject of state legislation, not congressional action. Congress can shine a bright light on the problems that the well-intentioned policy of deinstitutionalization caused, but state legislatures must take principal responsibility for solving these problems.

There has been considerable discussion of the problems of mentally ill offenders not ending up on the national firearms background check system. As an example, Massachusetts has supplied *one* such name to the national background check system since 1999 (as a test), apparently because the state's mental health law prohibits such disclosures. Fourteen states have submitted less than *five* mental health records during that time.[7]

While it would certainly be good for the states to submit records of involuntary commitments and adjudications of mental defect to the national background check system, this alone will make only a small difference because so many states do not involuntarily commit persons who clearly are severely mentally ill. As an example, Jared Lee Loughner, who shot Rep. Giffords and killed six others in Tucson, was expelled from college because of his bizarre, frightening, and obviously mentally ill behavior.[8] Yet because he was never involuntarily committed, his name was never submitted to the national background check system, and he was able to purchase a firearm without restriction. Similarly, Seung-Hui Cho, the Virginia Tech shooter, because he was not involuntarily committed for his bizarre, frightening, and obviously mentally ill behavior, was able to purchase a firearm as well. (He was ordered to undergo *outpatient* treatment, but did not do so, and fell through the cracks.)[9]

The core problem is that states are failing to provide involuntary mental health services to persons who are clearly too ill to recognize that they are ill. In 1960, it was possible to pretend that leaving such persons to their own devices was only an individual tragedy. Today we have too many examples to pretend that this zealous protection of the right of the mentally ill to die of exposure or by their own hands does not also have horrendous consequences for the larger society. Let me emphasize that this problem of mass murder

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[7] David Uberti, "Mass. keeps mental health data from FBI gun checks," *Boston Globe*, January 28, 2013, http://bostonglobe.com/news/nation/2013/01/28/massachusetts-among-worst-sharing-mental-health-data-for-gun-background-checks/WmvEKsnUWsQWxvvsXwLY5O/story.html, last accessed February 8, 2013.

[8] Peter Grier, "Jared Lee Loughner: what is known about Tucson, Arizona, shooting suspect," *Christian Science Monitor*, January 10, 2011, http://www.csmonitor.com/USA/2011/0110/Jared-Lee-Loughner-what-is-known-about-Tucson-Arizona-shooting-suspect, last accessed February 8, 2013.

[9] Richard J. Bonnie, James S. Reinhard, Phillip Hamilton and Elizabeth L. McGarvey, "Mental Health System Transformation After The Virginia Tech Tragedy," Health Affairs, February, 2013, http://content.healthaffairs.org/content/28/3/793.full, last accessed February 8, 2013.

by the deinstitutionalized mentally ill is not unique to the United States. My *Engage* article gives examples of many such mass murderers in Europe as well, and at rates not so terribly different from us, in spite of Europe's generally stricter gun control laws.

What is this going to cost? Perhaps nothing at all. Enclosed please find a draft of a paper I prepared for the Independence Institute after the Aurora shootings last year: "Reforming Colorado Mental Health Law." My estimate, based on figures put together for a Colorado task force looking into this problem, suggests that the states are spending about $3 billion a year in current and future costs prosecuting and incarcerating mentally ill murderers. Costs for prosecution and imprisonment of other severely mentally ill felons are likely on a similar scale.[10] You can provide a lot of mental health services, both inpatient and outpatient, for that kind of money without even considering the other social costs that deinstitutionalization has produced.

The United States is at something of a crossroads here: we can remain focused on gun control, or we can look at the root cause of not only the random acts of mass murder, but many other serious social maladies. The deinstitutionalization of the mentally ill has played a destructive role not only with respect to crime, but also the degradation of urban life, and the barbarous degradation of mentally ill people, who are a large fraction of the homeless in our country.[11]

Deinstitutionalization of the mentally ill is the root cause of most of these shocking acts of mass murder, and the much more common but less publicized murders that happen every day in America, which *very* seldom involve high-capacity magazines or scary looking black rifles. Pretending that gun control is going to have much of an impact on this is like putting a Band-Aid on an arm with a severed artery. It is only a short-term solution, because it covers up a deeper problem. It is time to recognize and solve the root problem.

Very Truly Yours,

Clayton E Cramer

[10] Using the numbers from Clayton E. Cramer, "Reforming Colorado Mental Health Law," Independence Institute, 9-10, scaled up to the United States as a whole.

[11] Clayton E. Cramer, *My Brother Ron: A Personal and Social History of the Deinstitutionalization of the Mentally Ill* (2012), 146-50.

Reforming Colorado Mental Health Law

[This is a preliminary draft of an Independence Institute issue paper, by Prof. Clayton Cramer.]

Executive Summary

- About 10% of all murders and other violent felonies are perpetrated by persons suffering from severe mental illness.
- This rate has increased very significantly since the mass deinstitutionalizations of the 1960s and 1970s.
- One-third of the current state-to-state variation in murder rates can be explained by differences in the strictness of involuntary commitment laws, with easier commitment correlating with lower murder rates.
- Evidence indicates that James Holmes had disclosed to his psychiatrist his intention to murder people. However, because the threat was not "imminent" at the time of disclosure, nothing could be done under Colorado law.
- A 1999 civil commitment law adopted by Wisconsin expands the scope of lawful civil commitment, and includes mentally ill persons in long-term danger of further physical or mental deterioration. The law should be considered as a possible model for Colorado.
- The Wisconsin statute has been upheld against challenges under the U.S. and state constitutions.
- An involuntary commitment of three months or more has the legal effect of putting the person's name on the FBI's prohibited persons list, so that he cannot pass the National Instant Criminal Background Check System for gun purchasers.
- Further, the person's mere possession of a firearm or ammunition becomes a federal felony.
- Even without considering the Aurora crimes, there about a dozen murders in Colorado perpetrated each year by the severely mentally ill. Using earlier intervention to preventing just half of them would save Colorado every year about $106 million in new long term incarceration costs—or over a billion dollars a decade.
- Many tens of millions of dollars of additional criminal justice system savings would result from prevention of some of the rapes and felony assaults (about 10% of all such crimes) perpetrated by the severely mentally ill.
- The final edition of this Issue Paper will detail the necessary additional spending required for Colorado's mental health systems.

I. The Problem

A. Murder and Mental Illness

The recent tragedy in an Aurora movie theater riveted the nation's attention on Colorado. While more dramatic than many similar mass murders that have taken place in recent years, it was not fundamentally different. Untreated, severely mentally ill persons are disproportionately the offender not just in the spectacular mass murders, but about 10% of all murders, and a roughly similar number of other violent felonies.[1]

This is a modern development; studies in New York and Connecticut from the 1920s through the 1940s showed a much lower arrest rate for crimes allegedly committed by the mentally ill than the general population.[2] It is significant that Marietta and Rowe's detailed study of murder cases in Pennsylvania in the years 1682-1800 finds only five murderers out of 513 surviving accusations whose actions appeared to be driven by depression or delusions—or less than 1% of all murders. Nor were the courts of the period unaware or unprepared to consider insanity as a factor in murder. Pennsylvania's first verdict of not guilty by reason of insanity was in 1743.[3] Similarly, Sarah Frazier of Connecticut, who killed an Indian woman with an ax, was found not guilty by reason of "distraction" in 1724.[4] Also in Connecticut, one Roger Humphry, who "while a soldier in the army in the year 1757, become delirious and distracted and in his distraction killed his mother…." At trial in Hartford, he "was found not guilty altogether on the account of his distraction…."[5]

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[1] Arthur Zitrin, Anne S. Hardesty, Eugene I. Burdock & Ann K. Drossman, *Crime and Violence Among Mental Patients*, 133 AM. J. PSYCHIATRY 142-9 (1976); Larry Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 Am. J. PSYCHIATRY 33-42 (1978); Larry Sosowsky, *Explaining the Increased Arrest Rate Among Mental Patients: A Cautionary Note*, 137 Am. J. Psychiatry 1602-5 (1980); H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVICES 483-92 (1998); Jeanne Y. Choe, Linda A. Teplin & Karen M. Abram, *Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns*, 59 PSYCHIATRIC SERVICES 153-164 (Feb. 2008); Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results From the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 ARCHIVES OF GENERAL PSYCHIATRY 152-161 (2009).

[2] PHIL BROWN, THE TRANSFER OF CARE: PSYCHIATRIC DEINSTITUTIONALIZATION AND ITS AFTERMATH 133-7 (1985); Thomas M. Arvanites, *The Mental Health and Criminal Justice Systems: Complementary Forms of Coercive Control*, in SOCIAL THREAT AND SOCIAL CONTROL 138-41 (Allen A. Liska ed., 1992).

[3] JACK D. MARIETTA AND G.S. ROWE, TROUBLED EXPERIMENT: CRIME AND JUSTICE IN PENNSYLVANIA, 1682-1800 112-14, 35, 164 (2006).

[4] JOSHUA HEMPSTEAD, DIARY OF JOSHUA HEMPSTEAD OF NEW LONDON, CONNECTICUT 139, 141-2 (1901).

[5] PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, 11:318.

B. Involuntary Commitment

While there is reason to suspect that mental illness rates has dramatically risen since the Colonial period,[6] there is a simpler explanation for the relatively low rates of murder by mentally ill offenders back then, and as late as the 1940s: the looser standards for involuntary commitment (both short-term and long-term). Into the beginning of the nineteenth century, anyone could arrest the "furiously insane" and the sheriff would hold them until a court could make a decision.[7] Because of this, those who were obviously mentally ill stood a good chance of being diverted into the mental health system before they put themselves or others at risk. At least in part, this diversion was built not on prejudice against the mentally ill, but experience. As an example, the opening of state mental hospitals in Vermont in 1836 and New Hampshire in 1840 reduced family murder rates. Early commitment of those with serious mental illness problems prevented murders.[8]

Unsurprisingly, concerns (sometimes legitimate concerns) about abuse of power led to increasingly formalization of the commitment process, especially for long-term commitment. Ohio was one of the early such examples, in 1824.[9] By the latter half of the nineteenth century, while the exact mechanisms varied from state to state, the laws required something recognizably like due process. Some states required a jury trial, some relied on panels of experts ("commissions of lunacy"), but a person could not simply be locked up for more than a short time without some legal process that was supposed to protect the rights of a person believed to be mentally ill.[10]

On the eve of deinstitutionalization in the early 1970s, most states relied on emergency commitment procedures as a mechanism for hospitalizing

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[6] CLAYTON E. CRAMER MY BROTHER RON: A PERSONAL AND SOCIAL HISTORY OF THE DEINSTITUTIONALIZATION OF THE MENTALLY ILL 27-28 (2012) (summarizing evidence for and against rising schizophrenia rates).

[7] ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES, 2nd ed. 419-20 (1949).

[8] Randolph A. Roth, *Spousal Murder in Northern New England, 1776-1865*, in OVER THE THRESHOLD: INTIMATE VIOLENCE IN EARLY AMERICA 72 (Christine Daniels & Michael V. Kennedy eds., 1999).

[9] 29 ACTS OF A GENERAL NATURE, ENACTED, REVISED AND ORDERED TO BE REPRINTED, AT THE FIRST SESSION OF THE TWENTY-NINTH GENERAL ASSEMBLY OF THE STATE OF OHIO 224 (1831) (1824 session law authorizing justices of the peace to accept applications by relatives or any overseer of the poor for commitment, with an inquest of seven jurors to return a verdict).

[10] HENRY F. BUSWELL, THE LAW OF INSANITY IN ITS APPLICATION TO THE CIVIL RIGHTS AND CAPACITIES AND CRIMINAL RESPONSIBILITY OF THE CITIZEN 25-36 (Boston: Little, Brown & Co., 1885). Spot checking of the stupefyingly complete collection of state laws in *George Leib Harrison, Legislation on Insanity: A Collection of All the Lunacy Laws of the States and Territories of the United States to the Year 1883, Inclusive…* (1884), confirms Buswell's claim. See also Isham G. Harris, *Commitment of the Insane, Past and Present, in the State of New York,* 7 NEW YORK STATE JOURNAL OF MEDICINE 12 [December, 1907] 487-91, for a detailed account of the increasing formalization of the commitment procedure in that state.

those believed to be either a danger to themselves or others, or in need of treatment before the situation became perhaps irretrievably bad. The justification for allowing hospitalization based only on a determination made by a doctor or police officer was that the risk of leaving such a person unrestrained exceeded the loss of the patient's liberty, especially because this emergency commitment was supposed to be short term. But some state laws provided for extensions without due process, and a few, such as Maine, had no time limit for such an emergency commitment.[11]

Some emergency commitment procedures were too easy back then. A variety of movements and concerns came together in the 1960s and 1970s to destroy the old way of caring for the mentally ill.[12] Today, however, the situation has gone too far the other way—and this is not simply arguing from one or two tragic examples, such as the Virginia Tech mass murder, or what happened in the theater at Aurora. Longitudinal studies at both national and state level demonstrate a statistically significant relationship between the total institutionalization rate (the rate of prisoners plus mental hospital inmates), and murder rates; as the TIR rises, murder rates fall.[13]

As states emptied out their mental hospitals, and made it increasingly difficult to commit those who were mentally in the 1970s, murder rates rose. (There were, of course, other factors in this.) Much of the reduction in murder rates in the 1990s was not just because states were giving longer sentences to criminals, but because many mentally ill offenders were now going to prison, instead of mental hospitals. Unfortunately, they were often going to prison *after* they had committed a violent felony against someone else. One-third of the current state-to-state variation in murder rates can be explained by differences in the strictness of involuntary commitment laws, with easier commitment correlating with lower murder rates. This state-to-state difference associated with strictness of commitment laws is more important that the availability of psychiatric in-patient beds and the quality of mental health care systems.[14]

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[11] ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 751-2 (1974).

[12] Generally, see chs. 7, 9, 13-15 of CRAMER, MY BROTHER RON, for a discussion of the various movements that came together, sometimes unwittingly.

[13] Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1766-75 (2006); Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution—Part II: State Level Analysis* (University of Chicago Law & Economics, Olin Working Paper No. 335, Public Law Working Paper No. 155, March 2007), available athttp://ssrn.com/abstract=970341.

[14] Steven P. Segal, *Civil Commitment Law, Mental Health Services, and US Homicide Rates,* SOCIAL PSYCHIATRY AND PSYCHIATRIC EPIDEMIOLOGY, Nov. 10, 2011, available http://kendras-law.org/national-studies/commitmenthomiciderates.pdf.

II. Solutions for Colorado

Mass murders are very atypical crimes in America, and in Colorado. The vast majority of murders are "little" incidents, with one, sometimes two people dead. Unless they involve someone famous, they are seldom considered worthy of news coverage outside the community in which they take place. The tragedy in Aurora is a distinct outlier from the average murder in Colorado—but actions taken to deal with a tragedy like this carries over to the tens of murders and hundreds of other violent felonies committed each year in Colorado by mentally ill offenders. It is therefore worth considering what part of Colorado's mental health laws failed its citizens at that midnight showing.

First of all, as is typical with other mass murderers,[15] the killer had given clear signs of serious mental illness problems to acquaintances—serious enough for Mr. Holmes' psychiatrist at the medical school to alert police. While the details of exactly who said what to whom and when are likely to be locked up in understandable efforts to protect individuals and institutions from civil suits, what is clear is that Dr. Lynne Fenton's efforts would indicate that she perceived Holmes to be at least at level 4 of the Behavioral Evaluation and Threat Assessment (BETA) matrix: "High Risk."[16]

Because Dr. Fenton broke doctor/patient confidentiality, it is reasonable to assume that she did so under the only condition under which she legally could in Colorado: "required by law."[17] The almost inescapable inference is that Holmes had communicated to Dr. Fenton that he desired, intended, or planned to kill or injure others. Mandatory disclosure under such circumstances is known as "the Tarasoff rule."[18] Pursuant to the Tarasoff rule, psychiatrists and other mental health workers have a duty to warn threatened persons based on conversations with a patient.

In short, public safety takes precedence over doctor/patient confidentiality where there is "foreseeable danger." Subsequent decisions in other states have created something of a checkerboard of results, with some states requiring an "identifiable victim" before a therapist has a duty to warn.[19]

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[15] Laurie Goodstein and William Glaberson, *The Well-Marked Roads to Homicidal Rage*, NEW YORK TIMES, April 10, 2000.

[16] Arthur Kane, Tak Landrock, and John Ferrugia, *Did CU Officials Consider James Holmes 'High Risk' For Violence?*, CALL7, August 16, 2012, http://www.thedenverchannel.com/news/31363132/detail.html, last accessed August 19, 2012.

[17] C.R.S. § 12-43-218 (2010).

[18] The rule was announced in Tarasoff v. Regents of the University of California, 17 Cal.3d 425 (1976), and has been adopted almost everywhere in the U.S.

[19] John M. Greene, M.D., *Psychiatrist Duties: Tarasoff,* Stanford University Department of Psychiatry, http://www.stanford.edu/group/psylawseminar/Tarasoff.Greene.htm, last accessed August 19, 2012.

Nonetheless, Dr. Fenton's actions suggest that she recognized a *Tarasoff* duty to warn.

So why did Dr. Fenton's commendable concern not lead to any action? Here is where Colorado law appears to boxed itself in, and perhaps discouraged the police from taking action. Like many other states, Colorado law allows for an emergency commitment for a 72-hour observation period. As in many other states, a police officer or a variety of mental health professionals may cause police to take such a person into custody. However: the emergency commitment procedure only applies to persons who are "gravely disabled" or who present an "imminent danger to others or to himself or herself."[20]

Who is gravely disabled? Colorado law has two different definitions of "gravely disabled." One definition includes mentally ill persons at risk because they are unable or unwilling "to provide himself or herself with the essential human needs of food, clothing, shelter, and medical care" or "lacks judgment… to the extent that his or her health or safety is significantly endangered and lacks the capacity to understand that this is so."[21] This does not describe Holmes, whose actions in booby-trapping his apartment and planning the crime suggest a person of considerable intelligence and foresight.

The other definition of "gravely disabled" would fit *many* mentally ill persons, but not Holmes. It includes persons diagnosed with schizophrenia, but requires that such a person must have been hospitalized "at least twice during the last thirty-six months."[22] This means that a mentally ill person who has gone from well to severely mentally ill in a few months, as is alleged to be the case with Holmes, could not be considered gravely disabled until *at least* three years later.

In Colorado, a mentally ill person who is not "gravely disabled" can still be subject to emergency commitment if he is an "imminent danger" to self or others—but the evidence of how police responded to Dr. Fenton's inquiry suggests that Holmes was not yet "imminent." Perhaps "high threat" means that you are talking about mass murder; is "imminent threat" the situation where you are talking about mass murder, while loading magazines? The requirement for "imminent danger" excludes a mental patient who is making threats, but is not capable of immediately carrying that threat out—as appears to have been the case with not only the recent tragedy in Aurora, but many other incidents around the country.

Why does Colorado law have this requirement for "imminent danger" or "gravely disabled" before police or mental health professionals can use emergency commitment? To a large extent, this is an outgrowth of the due

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[20] C.R.S. § 27-65-105(a)(1) (2010).
[21] C.R.S. § 27-65-102(9)(a) (2010).
[22] C.R.S. § 27-65-102(9)(b) (2010).

process expansion in mental health law in the 1970s. It is significant that Colorado appears to have substantially revised its mental health commitment laws in the mid-1970s, vacating any commitment and incompetency decrees "entered by a court of this state prior to July 1, 1975."[23] The landmark decision in the Wisconsin case *Lessard v. Schmidt* struck down existing commitment laws on the grounds that the social stigma of having been released from a mental hospital was worse than being an ex-felon.[24] The same decision also claimed that mental hospitals caused insanity, not that people were committed to mental hospitals because of mental illness.[25]

Wisconsin was a national trend-setter. The *Lessard* decision not only forced Wisconsin to adopt a much stricter due process standard for commitment, but largely ended commitment unless the patient was an *imminent* danger to himself or others. The plaintiff in this case, Alberta Lessard, who had been running through her apartment complex "shouting that the communists were taking over the country that night" and other statements that were not even that rational.[26] She was probably not an *imminent* danger to herself or others, but it takes no great imagination to foresee serious public safety risks from someone suffering such delusions. The effect of the change was that large numbers of mentally ill people in Wisconsin "died with their rights on," as Darold Treffert, a psychiatrist with the Wisconsin Mental Health Institute described it. To conform to the *Lessard* decision, many other states followed Wisconsin's example.[27]

After considerable debate, Wisconsin in 1999 expanded its involuntary commitment law to include more than imminent danger; the new law includes long-term danger of further physical or mental deterioration. This statute has been upheld by the Wisconsin Supreme Court against both due process and equal protection challenges, under both the U.S. and Wisconsin state constitutions.[28] If Colorado adopted statutory language similar to Wisconsin's 1999 law for C.R.S. § 27-65-102(9), it seems that the revised statute would be reasonably safe from the dangers of the courts overturning it.

A review of Colorado case law on the subject suggests that there is nothing to fear from existing Colorado precedents. *P.F., Jr., v. Walsh* (Colo. 1982) held that different procedures and standards for involuntary commitment for minors vs. adults violated due process and equal protection

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[23] C.R.S. § 27-65-114 (2010).
[24] Lessard v. Schmidt, 349 F.Supp. 1078, 1089, 1090 (E.D.Wisc. 1972).
[25] Lessard v. Schmidt, 349 F.Supp. 1078, 1089, 1092 fn.18 (E.D.Wisc. 1972).
[26] E. FULLER TORREY, THE INSANITY OFFENSE: HOW AMERICA'S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS 76-78 (2008).
[27] RAEL JEAN ISAAC AND VIRGINIA C. ARMAT. MADNESS IN THE STREETS: HOW PSYCHIATRY AND THE LAW ABANDONED THE MENTALLY ILL 127 (1990).
[28] State of Wisconsin v. Dennis H., 647 NW2d 851 (Wisc. 2002); Wis. Stat. § 51.20(1)(a)2.e. (1999-2000).

rights. It did not directly address the question of whether imminent danger was required.[29] *People v. Lane* (Colo. 1978) held that "clear and convincing evidence" is required to deprive a person of his liberty because of dangerousness, the standard endorsed the following year by the U.S. Supreme Court in *Addington v. Texas* (1979).[30] The *Lane* decision recognized that psychiatric opinion *alone* was insufficient to meet this standard; there must also be "'recent overt acts, attempts or threats' constituting dangerous behavior" (as there was in the *Lane* case).[31] Dr. Fenton, we may reasonably infer, did not contact the police solely because of her own opinion; rather, she was acting because of particular statements that Holmes had made. Under the Wisconsin model, whatever statements Holmes made to Dr. Fenton would be sufficient for emergency commitment; and Colorado case law suggests that the Wisconsin model would not violate the Colorado Constitution.

There is a separate problem with Colorado's current law which requires two hospitalizations in 36 months as part of the "gravely disabled" definition: it may increase the number of schizophrenics who do not recover. Some evidence suggests that early and consistent treatment of schizophrenia with antipsychotic medications improves recovery rates and reduces the severity of disability for those who do not recover.[32] Especially because paranoid schizophrenics are unlikely to accept voluntary hospitalization, making it difficult to hospitalize persons who are just suffering their first schizophrenic episode may condemn individuals to lifelong mental illness, and our society to lifelong costs.

Emergency commitment is not the only strategy by which a mentally ill person may be committed under Colorado law. Another statute does not require *imminent* danger for a judge to order an observational hold, but it does require efforts "to secure the cooperation of the respondent" before taking him into custody.[33] For a paranoid schizophrenic, a police request may provoke more paranoia. For a mentally ill person who has already began to see zombies and government conspiracies, such a request seems like an action that might provoke violence

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[29] P.F. Jr., v. Walsh, 648 P.2d 1067, 1071 (Colo. 1982) ("We do not believe that this comports with due process standards under U.S.Const.amend. XIV or Colo.Const. art. II, sec. 25. ").

[30] Addington v. Texas, 441 U.S. 418 (1979) ("clear, unequivocal and convincing evidence" required for a civil commitment).

[31] People v. Lane, 581 P.2d 719, 723 (1978) ("The specific question before the trial court, therefore, was whether there was "clear and convincing evidence" of dangerousness sufficient to justify continued confinement for a certain period for a limited purpose.").

[32] IRWIN G. SARASON & BARBARA R. SARASON, ABNORMAL PSYCHOLOGY: THE PROBLEM OF MALADAPTIVE BEHAVIOR. 10th ed. 378 (2002); A. G. Jolley, S. R. Hirsch, E. Morrison, A. McRink, & L. Wilson, *Trial of brief intermittent neuroleptic prophylaxis for selected schizophrenic outpatients: clinical and social outcome at two years,* 837 BRITISH MEDICAL JOURNAL 1136 [October 13, 1990], http://www.bmj.com/content/301/6756/837.abstract.

[33] C.R.S. § 27-65-106 (2010).

C. Does Commitment Accomplish Anything?

One question that might be asked is whether it accomplishes anything to hospitalize persons who are psychotic. It is true that many will leave a hospital within a few months, better, but not well. Even so, there are benefits.

In Colorado and in many other states, when person has been held for observational hold or short-term treatment (up to three months),[34] the person's name to sent to the FBI's National Instant Criminal Background Check System as having been committed against his will. As a result, the persons is prevented from buying a gun. If the person obtains a gun anyway, the person's mere possession of the gun is a felony, for which he can be prosecuted and imprisoned.

After three years, Colorado removes that person from the prohibited persons list if he has not been subject to additional commitment orders or other provisions for those for whom "further treatment will not be likely to bring about significant improvement in the person's condition."[35]

Had Mr. Holmes been hospitalized under emergency commitment, he would have not had access to firearms, ammunition, or explosives while hospitalized. Even if he was later released, because of his commitment, he would have been unable to legally purchase a firearm or ammunition until at least three years had elapsed since his last commitment order. Would this have made it absolutely impossible for him to buy a gun? No. But it would have certainly made it more difficult. A law does not have to work 100% of the time to still be helpful.

III. The Costs

Mental hospitals cost money. So do trials of mentally ill offenders. Determining the costs of murder trials is surprisingly difficult, because so much of the published research is driven by attempts to prove that capital murder trials cost more than non-capital murder trials. Trying to just find raw data without the ideological motivations is hard.

An estimate of costs in murder cases in Clark County, Nevada for the years 2009-2011 determined that public defender costs *alone* for capital murder trials averaged $229,800; for non-capital murder trials, $60,100.[36] It seems quite believable that including prosecution costs, time spent operating

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[34] C.R.S. § 27-65-107 (2010).
[35] C.R.S. § 13-9-123 (2010).
[36] Terance D. Miethe, University of Nevada, Las Vegas, *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys*, Feb. 21, 2012, http://www.deathpenaltyinfo.org/documents/ClarkNVCostReport.pdf.

the courts, investigating the crime, as well as the inevitable appeals, that a non-capital murder trial can easily cost the government $500,000, especially because mentally ill defendants are almost always indigent, and thus receive public defenders. A capital murder case, of course, will be substantially more expensive because ardent opponents of the death penalty litigate every point, valid or not, for decades on end.

Colorado had 120 murders in 2010.[37] If 10% of those murders were by severely mentally offenders (a reasonable guess based on the Indiana data discussed above)[38], that is $6 million spent on trials that will often be preventable.

The costs of incarceration after conviction are substantial. Colorado currently spends $32,335 per year per inmate. A mentally sane murderer who spends thirty years in prison will cost $970,060 (in 2011 dollars).[39]

However, states are required to provide mental health services for prisoners. Mentally ill inmates are more expensive for states to care for than sane inmates. Pennsylvania several years ago found that mentally ill prisoners cost $51,100/year; sane prisoners, $28,000/year.[40] If a similar cost differential applies in Colorado, a mentally ill prisoner will cost about $1.77 million over a thirty-year term of imprisonment. If just six separate Colorado homicides were prevented each year by earlier treatment, this would save Colorado from adding $106 million worth of long-term financial obligations *each year*.

Murder is not the only crime involving mentally ill offenders. Previous studies suggest that the severely mentally ill commit more than 10% of rapes and felonious assaults. For 2010, this would be more than 1,300 crimes, most of which will result in a trial and a prison term. Even at an average cost of $25,000 (an estimate pulled out of the air, because no one seems particularly interested in calculating those actual costs), this would be more than $32 million in preventable costs, plus the long-term obligations of imprisonment. Money spent trying and imprisoning mentally ill offenders could be spent on preventative mental health care.

Victim costs are not included; it seems likely that anyone in the theater in Aurora would have gladly paid more taxes to hospitalize mentally ill persons before they opened fire.

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[37] FBI, *Crime in the United States 2010*, Table 5.

[38] Jason C. Matejkowski, Sara W. Cullen, & Phyllis L. Solomon, *Characteristics of Persons With Severe Mental Illness Who Have Been Incarcerated for Murder*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 36:1[2008]74-86, http://www.jaapl.org/cgi/reprint/36/1/74.

[39] Tom Clements, Colorado Department of Corrections, Budget Hearings, January 5, 2012, 2, http://www.state.co.us/gov_dir/leg_dir/jbc/2011-12/corhrg.pdf.

[40] Lynne Lamberg, "Efforts Grow to Keep Mentally Ill Out of Jails," *Journal of the AMA* 292:5 [August 4, 2004] 555-6.

IV. Conclusion

The costs of waiting until a person who is severely mentally ill goes on a rampage are very high, not just in lives, but in dollars as well, and, perhaps, for those mentally ill people who might, by receiving earlier and more consistent treatment, be helped on the road to recovery. Minor corrections to Colorado's mental health law, coupled with spending money on prevention, rather than on punishment, might well turn out to be cost-neutral, or better.

The Independence Institute's *Citizens Budget* has identified a billion dollars in potential savings in the state budget. Some of these savings could be used to provide full funding for all the additional beds and treatments that are needed. The final, published version of this Issue Paper will provide a detailed analysis of the additional resources that would be required.

February 7, 2013

Hon. Ted Cruz, Ranking Member
Subcommittee on the Constitution, Civil Rights and Human Rights,
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator:

Our violent crime statistics establish a simple fact: Over 99% of gun owners are good Americans who never commit any crime. In almost every case, gun crimes are committed by long time criminals whose gun ownership is illegal because of their prior felony convictions or because they are insane or juveniles. Their illegal gun ownership could easily be remedied – by spending billions and billions and billions of dollars to build and staff scores of new prisons and staff other criminal justice positions. If felons could expect mandatory life imprisonment for having an illegal gun, illegal guns and gun crime would almost disappear. But gun prohibitionists and many politicians find it easier to loudly scapegoat innocent gun owners for crime -- and enact new laws while the ones we already have go unenforced. What sense does that make.

THE HISTORY OF GUNS IN AMERICA

Because the American colonies were too poor to afford a professional military, colonial law required every house, and every male colonist, to have a gun. This applied even if the house was occupied only by women. Yet gun-ridden colonial America ″was one of the least homicidal societies in the Western world." Roth, AMERICAN HOMICIDE 13-14 (Harvard 2009).

That experience underlay the Second Amendment. Late 18th Century liberals firmly believed, as one prominent American divine (Timothy Dwight) expressed it, that the possession of arms by ordinary people was "harmless."

Modern criminology concurs: unlike ordinary people, murderers always turn out to be extreme aberrants, occasionally insane and in the great majority of cases felons. Prof. Elliott's review so characterizes "virtually all" killers. Delbert S. Elliott, "Life Threatening Violence is *Primarily* a Crime Problem: A Focus on Prevention," 69 COLO. L. REV. 1081, 1093 (1998) at 1087-88.

Likewise studies reviewed by Prof. Kennedy show killers

> are likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes but including larger than normal [for other criminals] proportions of violent crimes. [David M. Kennedy, et al., "Homicide in Minneapolis: Research for Problem Solving," 2 HOMICIDE STUDIES 263, 269 (1998).]

As the Academy of Criminal Justice Sciences summary of criminological studies states: based on actual criminal records, ″the average murderer turns out to be no less hardened a criminal than

the average robber or burglar." Gerald D. Robin, VIOLENT CRIME AND GUN CONTROL (Cincinnati, Academy of Criminal Justice Sciences: 1991) at p. 47 references omitted.

It is useful to contrast the studies I have cited to assertions of gun ban advocates falsely blaming murder on law abiding owners. Uniformly, if falsely, their articles attribute "most shootings" not to "felons or mentally ill people" but to ordinary gun owners. [Quoting gun ban advocate K.K. Christoffel, "Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course", 88 PEDIATRICS 294, 300 (1991).] What is most remarkable about such statements is that they are never accompanied by supporting references even though they appear in articles that have references for other points. There are no references because none exist!

Rather they contradict established criminological fact. Prof. Elliott summarizes murder studies from the 19th Century to 1997, the date of Elliott's article. More recent data agree: murderers are extreme aberrants whose prior felonies preclude their legally having guns. Thus a New York Times summary of 1,662 murders in that city in 2003-2005: "More than 90 percent of the killers had criminal records ...." [Jo Craven McGinty, "New York Killers, and those killed, by the numbers," N.Y. TIMES, April 28, 2006.]

A 2006 Massachusetts Kennedy School study found: "Some 95% of homicide offenders ... [had been] arraigned at least once in Massachusetts courts before they [murdered],... On average ... homicide offenders had been arraigned for 9 prior offenses...." Anthony A. Braga, et al., "Understanding and Preventing Gang Violence: Problem Analysis and Response Development," 9 POLICE Q. 20-4 6 (2006).]

My 2009 article cites later studies with identical results for Illinois, North Carolina, Milwaukee, Baltimore, Atlanta etc., etc.[Kates & Cramer, "Second Amendment Limitations and Criminological Considerations," 60 Hastings Law Journal 1339 (2009).]

In the District of Columbia -- which banned handguns in 1976, thereafter attaining America's highest murder rate -- Kristopher Baumann, Chairman of the Fraternal Order of Police comments:

> [There is no]... record of a registered gun having been used in the commission of a crime. The problem is not individuals who legally own guns; *the problem is criminals...."* [Washington Post, Sunday, April 18, 2010 emphasis added. A15.]

Though only 15% of Americans have criminal records, roughly 90 percent of adult murderers have **adult** records (exclusive of their often extensive juvenile records), with an average adult crime career of six or more years, including four major felonies. [Gary Kleck & Don B. Kates, ARMED: NEW PERSPECTIVES ON GUN CONTROL 20-21 (2001).]

In contrast, "areas in England, America and Switzerland with the highest rates of gun ownership were in fact those with the lowest rates of violence." [Joyce Lee Malcolm, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (Harvard, 2002) at 204.

So State University of New York criminologists Hans Toch and Alan Lizotte comment that "It is hard [for anti-gun advocates] to explain that where firearms are most dense, violent crime rates are lowest, and where guns are least dense violent crime rates are highest." [Toch and Lizotte "Research and Policy: The Case of Gun Control", in PSYCHOLOGY AND SOCIAL POLICY, edited by Peter Sutfeld and Philip Tetlock (1992) at p. 234 and n. 10.].

In sum, ordinary gun owners never commit gun crimes. Those who do commit murder and other gun crimes are long term criminals. We can dissuade them from having guns by enacting laws punishing them drastically. But enforcing such laws will cost money which we are unwilling to spend.

Very truly yours,

Don B. Kates
Research Fellow
Independent Institute

Dear Senator Cruz:

Thank you for inviting me to provide written testimony for the hearing before the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Human Rights entitled "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment".

Let me begin by saying that the gun owners and NRA members I've had the privilege of working with—as a fellow member, board member, and ultimately president of the NRA—are second to no one in their desire to protect our communities against violence of all kinds. Of course, they are also second to no one in respecting the Second Amendment—a completely compatible goal because fundamentally, the Second Amendment is about community protection. By guaranteeing the right of Americans to protect themselves, it also allows them to protect their communities, both directly and through its deterrent effect on crime.

Any discussion of these issues today must start with the *Heller* and *McDonald* cases. While the Supreme Court in those cases recognized the Second Amendment as protecting a fundamental, individual right, gun prohibitionists and some lower courts have tried to minimize that protection by reading into the decisions a host of limitations not intended by the Supreme Court. In particular, they have drawn comfort from two passages in *Heller*.

The first of those suggests that "presumptively lawful regulatory measures" would include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[1]

One common error in the interpretation of this passage is the assumption that "presumptively" means "inherently" or "automatically." This is obviously wrong. For example, it is easy to imagine "conditions and qualifications on the commercial sale of arms" that would be burdensome enough to make sales impossible, which in turn would have a crippling effect on the exercise of Second Amendment rights.

Another even more common issue is not an error but a deliberate legal strategy of trying to shoehorn any desired regulation into these categories. For example, we've seen state legislative proposals that would have prohibited the carrying of firearms in nearly any public area under the guise of protecting "sensitive places." Similarly, any effort to expand the classes of persons prohibited from possessing firearms is portrayed as similar to the prohibition on possession by felons. There's no doubt that proposals to ban private, non-commercial transfers of firearms will likewise be portrayed as analogous to restrictions on commercial sales.

[1] *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

The second passage often relied on is the statement that while the "arms" protected are those "in common use at the time,"[2] this "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[3]

This language is central to the debate over issues such as regulating "assault weapons," as anti-gun advocates suggest that it applies to any piece of hardware they want to ban. For example, in the follow-up *Heller II* litigation, the District of Columbia did not deny that guns affected by its "assault weapons" ban are common, but claimed that they were unprotected because they are "dangerous and unusual."[4]

But this argument distorts the historical record. The authorities the *Heller* court cited for that "historical tradition" made clear that the prohibition didn't relate to particular types of arms, but to the idea that any weapon—no matter how common—could be "dangerous and unusual" if used to terrorize the public. Arms were only considered "dangerous and unusual" if they were *used* in a dangerous and unusual way. In fact, one of the cases cited in *Heller* involved a defendant who carried no conventional "weapon" at all.[5]

It is also critical not to lose sight of the lower court decision upheld in *Heller*. That decision noted that "[t]he modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon ..."[6] This idea of "lineal descent" is important in responding to the absurd notion—very popular among editorial writers—that supporters of the Second Amendment want people to keep and bear ballistic missiles, biological weapons or other items that have no ancestors among the "arms" known to the Founders.

In addition to misreading *Heller* as to what laws should be upheld, anti-gun advocates and too many lower courts have also misread *Heller* as to how those laws should be measured. Many courts have adopted forms of "intermediate scrutiny" analysis that amount to nothing more than the kind of balancing test that Justice Breyer advocated in his *Heller* dissent, a point well stated by Judge Kavanaugh, dissenting in *Heller II*:

> *Heller* and *McDonald* didn't just reject interest balancing. The Court went much further by expressly rejecting Justice Breyer's intermediate scrutiny approach, disclaiming cost-benefit analysis, and denying the need for empirical inquiry.[7]

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[2] *Id.* at 627, citing *United States v. Miller*, 307 U.S. 174, 179 (1939).

[3] *Id.*

[4] *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011). The D.C. Circuit, unfortunately, agreed with the District—based almost entirely on the legislative testimony of an anti-gun group's lobbyist—that these guns were "dangerous and unusual." But the court also agreed that the record was clear that the guns were in "common use," with millions of AR-15s, for example, having been sold in the U.S. *Id.*

[5] *State v. Lanier*, 71 N.C. 288 (1874) (defendant riding horse through courthouse).

[6] *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007).

[7] *See Heller v. District of Columbia* ("Heller II"), 670 F.3d 1244, 1261 (D.C. Cir. 2011).

A final point, often overlooked in this debate, is the need for Congress to act on some independent constitutional basis. Up to this point, most firearms legislation has been based either on the Congress' power to regulate interstate and foreign commerce, or on its taxing power.[8] Proposals to regulate non-commercial, purely intrastate, transactions—as in current "universal background check" proposals—are therefore constitutionally suspect at best.

What can the Congress do within constitutional limits to protect our communities? The answer is, quite a bit. For example, the Congress can strengthen laws aimed at illegal commercial dealing in firearms, and adopt measures to make enforcement of those laws a higher priority. Congress can strengthen Americans' ability to protect themselves by removing restrictions on Americans' right to carry firearms on public lands, or while traveling interstate. And Congress can exercise its taxing power by offering tax credits for purchases of gun safes and other safe storage devices. Obviously, these are just a few examples of the ideas that can be considered if the Congress chooses to have a fair and honest debate on how to protect our neighborhoods and our children.

Again, thank you for the opportunity to offer my views on these issues.

Respectfully,

Sandra S. Froman

NRA Member, Board Member, Executive

Committee Member and Former President

[8] *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (striking down original Gun Free School Zones Act for lack of any nexus to interstate commerce); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (upholding National Firearms Act under taxing power).

GUN OWNERS OF AMERICA
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February 12, 2013

Senator Ted Cruz
U.S. Senate Judiciary Committee
Washington, DC 20510

Dear Senator Cruz:

I want to thank you for the opportunity to submit testimony to the U.S. Senate Judiciary Committee, which is conducting a hearing to deal with the following subject: "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment."

Gun Owners of America believes that all of the gun control proposals that are currently on the table in the Senate will infringe upon the rights of law-abiding Americans and will do nothing to make our communities and schools safer.

All of us have deeply grieved over what happened in Newtown, Connecticut this past December. The loss of any life is tragic, and especially when we see so many young children murdered by an evil, heinous individual.

But rather than punish law-abiding Americans, who would never even think of committing such horrible crimes, I hope that the Connecticut tragedy will be the tipping point that pushes us to eliminate the gun-free zone laws that are in fact criminal-safe zones. One measure of insanity is repeating the same failure time after time, hoping that the next time the failure will turn out to be a success. Gun-free zones are a lethal insanity.

Israel finally came to grips with this in the early 1970s, and they have decisively stopped these attacks after a busload of children was massacred by Muslim terrorists. When I was there in the late 1990s, if you saw a busload of students, you saw at least one young teacher with a firearm protecting the groups of students.

The Israelis have decisively stopped these school-related attacks and proved they want to live. Do we have the courage and fortitude to do the same?

As you will see in the corresponding testimony that is written by two senior members of the GOA staff, we do not support Universal Background Checks -- or any expansion to cover private sales at gun shows. And we do not support calls for banning certain firearms -- misnamed as "assault weapons" -- or limiting magazine capacity.

We are actually safer today than when the Clinton semi-auto ban sunset in 2004, as the FBI reports show that the murder rate has dropped 14% in the ensuing years (from 2004-2011).

I hope that you will prevail upon your colleagues to respect our God-given rights and to set their sights on eliminating truly harmful restrictions like the Gun-Free School Zones ban.

Sincerely,

Larry Pratt
Executive Director

Testimony of Gun Owners of America

Submitted to the United States Senate Judiciary Committee

for its hearing on:

Proposals to Reduce Gun Violence:

Protecting Our Communities While Respecting the Second Amendment

February 12, 2013

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Current Gun Control Proposals Will Endanger the Rights of Law-abiding Americans -- President ignoring real solutions to school violence

by Erich Pratt and Michael Hammond
February 12, 2013

In January, the President unveiled 23 Executive Actions on gun control and a myriad of other anti-gun legislative proposals. These initiatives run the gamut -- from imposing gun and magazine bans to expanding our current background check system.

Of course, none of the policies he recently unveiled would have stopped Adam Lanza in Connecticut from killing his mother, stealing her weapons and carrying them onto school grounds to commit his despicable crimes.

Sadly, the President didn't deal with the one proposal that would actually make a difference -- a proposal that is discussed below. But to be clear, none of the President's initiatives would have prevented the Sandy Hook tragedy. Yet, all of them would seriously infringe upon Second Amendment rights and endanger the safety of American citizens.

While all of his proposals are dangerous, perhaps the biggest threat is the call for Universal Background Checks, and the accompanying threat of gun owner registration. So that's where we will begin.

Background checks & ATF's illegal copying of 4473 forms

Several gun dealers have contacted Gun Owners of America and asked for our advice. Invariably, they say that the ATF is, or has been, at their store -- making wholesale copies of their 4473 forms -- and they want to know if that's legal.

We are not going to betray their confidence without permission, but GOA can say that this has occurred enough times to make us believe these are not isolated incidents. (GOA has attached several redacted stories from gun dealers in the Appendix.)

The copying of 4473 forms has happened despite the prohibition in 18 USC 923(g)(1)(D) which specifically prohibits anyone in the Justice Department from "seiz[ing] any records or other documents other than those records or documents constituting material evidence of a violation of law."

Our experience is not unique:

* **ATF using digital scanners.** "ATF has been copying FFL Bound Books for years -- with or without FFL permission. During annual compliance inspections in other states, FFL dealers have reported that ATF industry operations investigators (IOI) brought in digital cameras and photographed the entire dealer 'Bound Book' without permission of the FFL holder. Other dealers reported investigators brought in digital scanners and scanned portions of the Bound Book -- line by line. Of course, the Bound Book contains the dealer's full record of lawful firearm sales transaction records."[1]

***FFL's complain of illegal ATF activity.** "The [ATF] is engaged in new illegal activity, this time in the state of Alaska. According to gun store owners in Anchorage, ATF agents are requiring that they submit what is called '4473 Forms' going as far back as 2007…. The ATF has the authority to inspect or request a copy of the form if agents are conducting a criminal investigation.

"But nowhere does the law or the rules and regulations of the ATF permit the agency to require gun stores to simply turn over these records en mass as a matter of course. The gun stores in Anchorage are not being told that their records are being requested as part of a criminal investigation of any kind. The ATF has not specified certain forms from specific time frames as one would expect during such an investigation. The agency is telling the stores that it wants all of these records, in totality, going back to 2007."[2]

If the ATF is willing to engage in this activity -- in full view of gun dealers -- one can only imagine what is being done behind closed doors when the names of innocent gun buyers are phoned in for NICS checks. Can we truly be sure that every gun buyer's name that is entered into the NICS computer system is completely deleted and scrubbed, without a backup being made … anywhere?

Past attempts at turning background checks into a national registry

In 1989, a Justice Department report stated that, "Any system that requires a criminal history record check prior to purchase of a firearm creates the potential for the automated tracking of individuals who seek to purchase firearms."[3]

Indeed, several attempts have been made -- most notably during the Clinton administration -- to register the names of gun buyers:

* **Justice Department initiates registration (1994).** The Justice Department gave a grant to the city of Pittsburgh and Carnegie Mellon University to create a sophisticated national gun registry using data compiled from states' background check programs. This attempt at registration was subsequently defeated in the courts.[4]

* **More gun owner registration (1996).** Computer software distributed by the Justice Department allowed police officials to easily (and unlawfully) register the names and addresses of gun buyers. This software -- known as FIST -- also kept information such as the type of gun purchased, the make, model and caliber, the date of purchase, etc.[5] This

demonstrates how easily background checks can be used to register gun owners' information.

* **Federal Bureau of Investigation registers gun owners (1998).** Despite prohibitions in federal law, the FBI announced that it would begin keeping gun buyers' names for six months. FBI had originally wanted to keep the names for 18 months, but reduced the time period after groups like Gun Owners of America strongly challenged the legality of their actions. GOA submitted a formal protest to the FBI, calling their attempt at registration both "unlawful" and "unconstitutional."[6] Subsequently, Congress passed the "Smith amendment" in 1998 to mandate the "immediate destruction of all [gun buyer] information, in any form whatsoever."

Universal Background Checks will send us much further down road to registering every gun owner in the country. While this won't be able to stop creeps like Adam Lanza from circumventing those background checks (he stole his weapons) and attacking children, it will give bureaucrats a roadmap for gun confiscation.

The link between gun owner registration and confiscation

We know that gun confiscation is the ultimate endgame for many on the Left. While some will try to deny this, there have already been too many outspoken voices to ignore this simple truth. Consider just a few, well-known cases:

* "[Gun] confiscation could be an option," declared New York Governor Andrew Cuomo in a radio interview (December 27, 2012). In fact, a confidential memorandum advocating gun confiscation was circulated by New York Democrats prior to the most recent round of gun control which passed in the state.[7]

* "We cannot have big guns out here," said Iowa Rep. Dan Muhlbauer. "Even if you have them, I think we need to start taking them." (Interview with the Iowa *Daily Times Herald*, December 19, 2012.)

* "No one is allowed to be armed. We're going to take all the guns," said P. Edwin Compass III, the superintendent of the New Orleans police, right before several law-enforcement agencies began confiscating the firearms of lawful gun owners in the wake of Hurricane Katrina (2005).

* In the mid-1960's officials in New York City began registering long guns. They promised they would never use such lists to take away firearms from honest citizens. But in 1991, the city banned (and soon began confiscating) many of those very guns.[8] In 1992, a New York City paper reported that, "Police raided the home of a Staten Island man who refused to comply with the city's tough ban on assault weapons, and seized an arsenal of firearms.... Spot checks are planned [for other homes]."[9]

The task of confiscating guns is much easier when the government has a registration list. And, again, this is the number one reason that Gun Owners of America opposes background checks. They give federal bureaucrats the framework for a national registration system.

If the Left gets its way, we will be much further down road to giving the Andrew Cuomos of the world the registration lists they need to enforce the confiscation they so adamantly desire.

Background Checks Can Easily be Used to Deny Honest Americans (like veterans)

While the confiscation threat is, by far, the biggest reason for opposing Universal Background Checks, there are many other reasons, as well.

For starters, the NICS list currently contains the names of more than 150,000 law-abiding veterans who didn't do anything wrong (but honorably served their country and then sought counseling for their wartime experiences) -- and could soon contain millions of names of Medicaid patients with post partem depression, IDEA students with ADHD, and soldiers, police, and firemen with PTSD.[10]

Not only that, requiring a background check on every private sale or transfer would impose an incredible hardship upon decent people. Many sellers in very rural areas would find it very difficult to travel hundreds of miles, accompanied by their purchasers, in order to make a sale in a licensed dealer's place of business. This inconvenience for rural sellers would be even more significant if, as happens almost 10% of the time, the purchase -- usually for no reason at all -- is not immediately approved.

In a significant number of current transactions, purchases are held up for no reason other than the fact that the seller's name is similar to someone else's name. Often, these mistaken identities permanently block gun purchases when (1) the FBI's response remains non-committal after three days, (2) the gun dealer refuses to sell based on a non-committal response, despite the language of the Brady Law, and (3) the FBI's response is "sue us."

The pact that WalMart made in 2008 with New York Mayor Michael Bloomberg -- and his fraudulently-named Mayors Against Illegal Guns -- is symptomatic of this problem. In the deal, WalMart agreed to a ten-point agenda pushed by Bloomberg.[11]

In particular, point #9 prohibits firearms sales to purchasers who have not received an affirmative go-ahead at the end of the NICS check's three-day waiting period.

In other words, if the FBI gives a "yellow light" -- perhaps, because a gun buyer is unlucky enough to have the same name as someone in the NICS system -- then WalMart was essentially saying it would not sell the firearm, even though federal law specifically allows the sale to proceed.

This three-day provision was inserted into federal law to prevent federal bureaucrats from illegitimately denying millions of gun buyers -- simply by its refusal to take a position. Some gun dealers choose not to sell a firearm after the three-day limit. Others don't.

The result is that many law-abiding gun owners can't purchase firearms, not because the FBI has disapproved them, but because it has refused to answer "yes" or "no."

It's actions like this which can fundamentally transform the Brady Act, making it so that a whole lot of law-abiding gun owners aren't able to purchase guns. And we bet that the FBI will be giving a lot fewer green-lights in the future, particularly if universal background checks are enacted.

Background checks violate rights, open door to abuses

Gun Owners of America has long argued that honest gun owners should not have to prove their innocence to the government before exercising their God-given rights. One should never give a bureaucrat a chance to say no -- it only leads to abuses.

For one thing, the FBI's computer system has often gone offline for hours at a time -- sometimes for days. And when it has failed on weekends, it results in the virtual blackout of gun sales (and gun shows) across the country.

When the NICS system is down, the only place one can buy a gun legally is from a private seller, and now the President wants to eliminate that last bastion of freedom!

Recently, the FBI's system went down on Black Friday, angering many gun dealers and gun buyers around the country. "It means we can't sell no damn guns," said Rick Lozier, a manager at Van Raymond Outfitters in Maine. "If we can't call it in, we can't sell a gun."[12]

Researcher John Lott says that, in addition to crashes in the computers doing the background checks, "8 percent of background checks are not accomplished within two hours, with almost all of these delays taking three days or longer." And almost 100% of these initial denials turn out to have been illegitimate.[13]

Such delays could be deadly for people, especially women, who need a gun in an emergency to defend themselves from an ex-boyfriend or husband. Consider some of the tragic consequences that result when a woman's right to protect herself is put on hold:

> * A California realtor, herein referred to as "Jane," was concerned about her safety at work, so she applied to buy a handgun. But the Golden State requires her to wait 10 days before picking up the gun. Sadly, she was raped by a client within that 10-day period.[14]
>
> * Likewise, Bonnie Elmasri inquired about getting a gun to protect herself from a husband who had repeatedly threatened to kill her. She was told there was a 48 hour waiting period to buy a handgun. Unfortunately, Bonnie was never able to pick up a gun. She and her two sons were killed the next day by an abusive husband of whom the police were well aware.[15]

* Marine Cpl. Rayna Ross bought a gun and used it to kill an attacker in self-defense two days later.[16] Had she had to wait like Bonnie or Jane, Ms. Ross would have been defenseless against the man who was stalking her.

While none of these tragedies specifically occurred because of delays resulting from a NICS check, it does underscore the truth behind the oft quoted adage that a "right delayed is a right denied."

Five more reasons for opposing Universal Background Checks

Gun Owners of America has produced pages and pages of arguments that explain the problems -- and abuses -- that have gone hand-in-hand with background checks.[17] But, in brief, it's important to note these five additional problems.

FIRST: The principle that no American can own a firearm without getting the go-ahead from the government is offensive to Americans. We don't require breathalyzer checks before people get into their cars even though drunk drivers kill more than 30 times more people than "assault rifles" do. Nor do we require background checks on clubs and hammers, which also kill more often than "assault rifles."[18]

SECOND: Universal background checks would not have stopped Adam Lanza (who stole his guns), or James Holmes or Jared Loughner (who passed background checks).

THIRD: One of the nation's leading anti-gun medical publications, the Journal of the American Medical Association (JAMA), found that the Brady law has failed to reduce murder rates. In August 2000, JAMA reported that states implementing waiting periods and background checks did "not [experience] reductions in homicide rates or overall suicide rates."[19]

FOURTH: Throughout its history, the background check system has been plagued by serious failures. On the one hand, large percentages of gun owners have been erroneously denied -- according to one GAO report, almost 50% of denials were the result of administrative snafus or unpaid parking tickets.[20] On the other hand, the law has failed to put real criminals behind bars -- in 2010, only 13 people were potentially sent to jail as a result of being stopped by NICS checks.[21]

FIFTH: Can we really trust the administration that gave us Fast & Furious to respect our Second Amendment rights? The Obama Administration knowingly approved (via background checks) the sales of thousands of guns to the Mexican Cartel in order to justify calls for greater gun control here at home. As a result, several hundred Mexicans have been killed -- not to mention at least one U.S. federal agent. Considering the administration's record on guns, the administration should NOT be trusted to keep guns out of the "wrong hands." Isn't this a case of the fox guarding the hen house?

Let's be honest: Universal background checks are nothing more than the ineffectual platform from which gun haters will make their next set of demands, based on the next horrific tragedy.

At this point, we now move on to some of the other gun control proposals that are on the table.

The High Cost of Limiting Semi-autos and Gun Magazines

Senator Dianne Feinstein has reintroduced her semi-auto ban, but her new version is one on steroids. Feinstein's bill (S. 150) would ban the types of shotguns, rifles and handguns that millions of Americans currently own. And possibly, depending on statutory interpretation, her bill could ban all magazines of whatever size. Among other things, S. 150 would do this by supercharging the 1994 semi-auto ban by:

> * Banning all semi-autos with just one cosmetic feature (pistol grip, forward grip, folding stock, grenade launcher, barrel shroud, threaded barrel);
>
> * Banning all semi-autos with fixed magazines of over 10 rounds (but see below as to how a sneaky "loophole" may use this to ban ALL magazines of any size);
>
> * Allowing for grandfathering and transfer of semi-autos (but prohibiting the transfer of magazines and prohibiting the transfer of semi-autos without a Brady Check); and
>
> * Banning all magazines that can be "readily restored ... [or] converted" to accept more than 10 rounds.

In regard to the final bullet item, there is one very important question: Does "readily" modify "converted" or does it merely modify "restored"? How will the ATF interpret this?

If it's the latter, the bill will ban ALL magazines of whatever size.

Does the Feinstein ban violate the Americans with Disabilities Act?

As noted above, S. 150 would cover all semi-automatics that contain just one cosmetic feature, such as a pistol grip. Ironically, agents from the Department of Homeland Security are acquiring 30 round magazines and 7,000 assault weapons because they are "suitable for personal defense use in close quarters."[22]

Indeed, there are many reasons that law-abiding Americans, including those who are disabled, would desire to have these types of firearms -- and to even have pistol grips on their firearms. Consider the testimony from one GOA member:

> Feinstein's ban on pistol grips is a violation of the Americans with Disabilities Act. I have severe arthritis in my hands and wrists due to repetitive motion injuries working as a correctional officer. I cannot operate a rifle or shotgun without a pistol grip as my hands don't bend enough to grip a traditional stock. If pistol grips are banned, I will be denied my 2nd Amendment rights. I am at considerable risk for retribution from criminal elements, and in fact a former inmate from the psychiatric ward showed up at my house just 2 weeks ago, luckily he was not intent on violence, at least this time.

It is the height of hypocrisy to say these firearms are useful self-defense weapons for Homeland Security agents, but that they are not useful for regular Americans like the GOA member listed above. Or that they shouldn't be available for women like Maryland resident Sharon Ramboz who used an AR-15 rifle to defend herself and her three children against several burglars.[23]

Banning standard magazines (or larger) will make people less safe

Some in Congress want to limit the size of gun magazines. But they can only do so by threatening our God-given rights and by putting people in greater danger.

Those who are unfamiliar with guns simply don't understand how self-defense works. Real life is not like the latest action movie where the bad guys shoot their guns endlessly (and miss), but the good guys fire off one or two rounds and hit their targets.

When Matthew Murray entered the New Life Church in Colorado Springs in 2007, intent on killing hundreds of people, it was Jeanne Assam (one of the worshipers there) who fired off 10 rounds before Murray was critically injured enough to halt the attack and end his own life.

Good thing there was only one attacker. If Assam had used a reduced-capacity magazine or there were multiple attackers, she would have been out of luck. So would have:

> * Those New Orleans residents who, in the aftermath of Hurricane Katrina, discharged more than two dozen rounds during one firefight, where they fended off a roving gang in the Algiers neighborhood; or,
>
> * The Korean merchants who armed themselves with so-called "assault" weapons (and lots of ammunition) during the Los Angeles riots. Their stores remained standing, while others around them burned to the ground.

All of this just underscores the point that when you are facing gang or mob violence -- and the police are nowhere to be found -- you need more than just a six-shooter.

Just last month, a Georgia woman defended her twins by shooting an aggressor in her home. She unloaded her six-shot revolver, hitting the perpetrator five times in the head and neck. Nevertheless, the thug was still able to get up and walk out of the house. Now, just imagine if this woman was facing multiple attackers. She would have been out of ammunition, and she and her children would have been in great danger.[24]

Self-defense expert Massad Ayoob talks about an Arkansas drunk who opened fire on an officer, who then responded by firing 29 shots. It was only the last bullet which finally killed the drunk and stopped him from shooting.[25] Same with an Illinois criminal who was shot 33 times by the police before the druggie finally dropped and was unable to shoot any longer.[26]

In the real world we live in, there are violent gangs who get high on drugs and are resistant to pain when they attack. Banning the tens of millions of "high capacity" magazines that are

already in circulation won't keep them out of dangerous hands. But infringing the Second Amendment will threaten our safety.

Firearms, and magazine capacity, is not about hunting deer

To listen to much of the discussion around Capitol Hill, one would think the Second Amendment is just about hunting. "You don't need an AK-47 to go deer hunting," said Rep. Hank Johnson (D-GA) on the floor of the U.S. House of Representatives (July 24, 2012).

"I don't know anybody that needs 30 rounds in the clip to go hunting," said Senator Joe Manchin on *Morning Joe* this past December.

Likewise, the President has stated that, "I believe in the Second Amendment. We've got a long tradition of hunting and sportsmen and people who want to make sure they can protect themselves."[27]

We are glad to hear the President make reference to "protection," but all of these comments -- and the whole emphasis on hunting -- distracts from the real reason that the Second Amendment was included in the Constitution.

On at least two occasions, the U.S. Supreme Court has forcefully presented the ultimate reason for the amendment's inclusion in the Bill of Rights. In *Heller v. McDonald* (2008), the Supreme Court stated that an armed populace is "better able to resist tyranny."[28] And in *McDonald v. Chicago* (2010), the Court reiterated the definitive purpose for owning firearms:

> * "[St. George Tucker] described the right to keep and bear arms as 'the true palladium of liberty' and explained that prohibitions on the right would place liberty 'on the brink of destruction.'"[29]
>
> * "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[30]

For these reasons, any discussion of "hunting deer" completely misses the mark. The Second Amendment was never about shooting Bambi or other animals. It was intended to protect the right of people to defend themselves against any aggressor -- both foreign and domestic.

The Second Amendment states that this right "shall not be infringed." This is very similar to the language in the Declaration of Independence which declares that people are "endowed by their Creator with certain unalienable rights." *Unalienable rights* are those God-given liberties which cannot be in any way infringed, delayed or denied to those who are law-abiding citizens.

We don't limit First Amendment rights and gag movie-goers to prevent them from yelling "fire" in a crowded theater. Likewise, we should not be "gagging" law-abiding gun owners and infringing their rights through background checks, gun bans and magazine limitations.

A policy that works to reduce school violence

It's not too much access to firearms that is plaguing America. That's not what has resulted in the recent spate of school violence. America was virtually gun control-free in the 1950s, and yet kids were not using guns to shoot up schools.

The problem is that there are too many restrictions today which prevent good people from acting in self-defense. Virtually all of the mass shootings that have occurred in this country over the past 20 years have occurred in gun-free zones.

And that's why the Congress should repeal the Gun-Free Zones Ban which prevents armed teachers or principals from protecting the children -- just like Assistant Principal Joel Myrick did at his Mississippi high school in 1997.

To this end, Texas Rep. Steve Stockman has introduced H.R. 35, the Safe Schools Act of 2013. This bill would repeal the federal Gun-Free School Zones act and allow teachers and principals, who are qualified by their state to carry concealed, to also do so at public and private schools.

The Stockman bill is truly the greatest step that Congress could take toward securing our schools. But some in Washington are so blinded by their anti-gun ideology, that they care more about protecting themselves than they do our children. In the roughly 15 square block area of Capitol Hill, there are 1,800 Capitol Hill police officers to protect every Representative and Senator. How many armed adults are protecting our kids on any given day at school?

It's this principle of self-defense which explains why we haven't seen any school massacres in places like Utah and Harrold, Texas, where teachers or principals can carry concealed. Come to think of it, we also haven't heard of any horror story scenarios in these jurisdictions -- like students finding a gun in a purse, or a teacher accidentally firing his weapon.

Concealed carry permit holders are the most law-abiding segment of society. They are eight times less likely to commit a crime than the average citizen and -- in light of a 2006 Bureau of Justice Statistics study on police abuse -- almost 800 times less likely than law-enforcement.[31]

That's why Gun Owners of America is encouraging more states to emulate places like Utah. Constitutionally, the states should be the ones working out their school security issues. But at the very least, Congress should repeal the Gun-Free School Zones Act and stop threatening to punish law-abiding teachers and principals who want a gun to stop another Adam Lanza from killing their students and fellow staff members.

Erich Pratt is the Director of Communications for Gun Owners of America. Michael Hammond is the legislative counsel for GOA.

[1] Robert Farago, TheTruthAboutGuns.com (May 27, 2012).
[2] See http://www.examiner.com/article/alaska-gun-stores-say-atf-engaging-new-illegal-activity (April 5, 2012).
[3] Richard B. Abell, Assistant Attorney General, Task Force Chairman, *Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms* (October 1989), p. 75.
[4] Bureau of Justice Assistance, Grant Manager's Memorandum, Pt. 1: Project Summary (September 30, 1994), Project Number: 94-DD-CX-0166.
[5] Copy of "FIST" (Firearms Inquiry Statistical Tracking) software at GOA headquarters, Springfield, VA. See also *Pennsylvania Sportsmen's News* (Oct./Nov. 1996). The default in the "FIST" computer software is for the police officials to indefinitely retain the information on gun owners—despite the fact that the Brady law only allows officials to retain this data for 20 days. One wonders who will ensure that this information will be deleted after the 20th day.
[6] FBI's Final Rule printed in the *Federal Register* (October 30, 1998) at 58311. After the FBI submitted its proposed regulations on June 4, 1998, Gun Owners of America submitted written comments (in September of 1988) to challenge the FBI's regulations. GOA stated, "These proposed regulations are unlawful and unconstitutional. They are so fundamentally corrupt that there are no incremental changes which will even marginally improve them. Rest assured that they will be challenged in every possible judicial and legislative forum. . . . The efforts to retain information on gun owners for eighteen months—and indefinitely in your computer backup system—constitutes an illegal system of firearms registration, in violation of 18 U.S.C. 926. The same is, in fact, true even for efforts to retain information about persons prohibited from purchasing firearms."
[7] "NY Democrat pleads with Republican not to share document proposing confiscation of guns," *The Commentator* (January 20, 2013). See http://tinyurl.com/bg7q3jy.
[8] On August 16, 1991, New York City Mayor David Dinkins signed Local Law 78 which banned the possession and sale of certain rifles and shotguns.
[9] John Marzulli, "Weapons ban defied: S.I. man, arsenal seized," *Daily News* (September 5, 1992).
[10] Based on research from the Congressional Research Service, more than 150,000 military veterans have lost their Second Amendment rights, despite the fact they have committed no crimes. [See Sen. Tom Coburn letter to Gordon H. Mansfield, Acting Secretary of the Department of Veterans Affairs (Oct. 16, 2007).] This process began during the Clinton administration when the Department of Veterans Affairs sent the names of more than 80,000 veterans to the FBI for inclusion in the NICS system. But as Senator Tom Coburn found out ten years later, these were not veterans that were guilty of crimes, rather, they were former soldiers who had gone to the VA for counseling to help them deal with the stress from prior combat. Many of them were suffering from PTSD. But because a doctor or psychiatrist determined that a third party should help them manage their financial affairs, they lost their Second Amendment rights. How could this happen? Well, the legislative history began in 1968 when Congress banned those who are "adjudicated mentally defective" from owning firearms. This was an attempt to keep those criminals who had escaped a conviction by reason of insanity from owning weapons. The problem with applying this to veterans, of course, is that they have lost their gun rights without being "adjudicated" in a court of anything -- no judge, no impartial jury, no nothing. These veterans are being disarmed because a guardian has been appointed to look over their checkbook and manage their financial affairs. (Would the President and most members of the Congress lose their gun rights based on this "inability to manage one's financial affairs" standard?) Sadly, what began illegally under the Clinton administration was later "legalized" by the Veterans Disarmament Act -- otherwise known as the NICS Improvement Act of 2008.
[11] See http://www.mayorsagainstillegalguns.org/html/partnership/partnership.shtml
[12] Nok-Noi Ricker, "Call volume shuts down FBI's firearm background checks, stops Maine sales on Black Friday," *Bangor (Maine) Daily News* (November 23, 2012).
[13] John Lott, "The '40 Percent' Myth: The figure gun-control advocates are throwing around is false," *National Review Online* (January 24, 2013) at http://www.nationalreview.com/articles/338735/40-percent-myth-john-lott.
[14] See http://townhall.com/columnists/larryelder/2005/08/25/michael__me_--_the_movie/page/full/
[15] *Congressional Record* (May 8, 1991), at H 2859, H 2862.
[16] *Wall Street Journal* (March 3, 1994) at A10.
[17] For example, see http://gunowners.org/fs0202.htm.
[18] For drunk driving-related fatalities, see Table 3 Statistics, US Department of Transportation National Highway Safety Administration Traffic Safety Facts Report 12/2012: http://www-nrd.nhtsa.dot.gov/Pubs/811701.pdf. For FBI statistics regarding rifle deaths (of which "assault rifles" would be a subset) and "clubs, hammers, etc.," see FBI Crime Report 2011, Expanded Homicide Data Table 11: http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-11.
[19] Jens Ludwig and Philip J. Cook, "Homicide and Suicide Rates Associated With Implementation of the Brady Handgun Violence Prevention Act," *Journal of the American Medical Association*, vol. 284, no. 5 (August 2, 2000).
[20] General Accounting Office, "Gun Control: Implementation of the Brady Handgun Violence Act," (January 1996), p. 39-40, 64-65. See fn. 16 at http://gunowners.org/fs0202.htm.
[21] Ronald J. Frandsen, "Enforcement of the Brady Act, 2010: Federal and state investigations and prosecutions of firearm applicants denied by a NICS check in 2010," Department of Justice (August, 2012), p. 8. According to the DoJ report, there were still another 12 cases were still pending as of December 13, 2011.
[22] "If 'Assault Weapons' Are Bad…Why Does DHS Want to Buy 7,000 of Them for 'Personal Defense'?" *The Blaze* (January 26, 2013).

[23] See Lauren Fox, "Conservative women say AR-15 rifles would keep women everywhere safer," *US News & World Report* (January 30, 2013) and "Assault weapon provides security, owner testifies," *Baltimore Sun* (February 11, 1992).
[24] Nick Chiles, "Georgia Woman Who Shot Intruder Hailed as Model Gun Owner," *Atlanta Blackstar* (January 10, 2013).
[25] Massad Ayoob, "Defending Firepower," *Combat Handguns* (October 1990), p. 25.
[26] *Ibid.*, at 71.
[27] Barack Obama, Second Presidential Debate, October 17, 2012.
[28] *D.C. v. Heller* (2008) at 24-25.
[29] *McDonald v. Chicago* (2010) at 22.
[30] *Ibid.*, citing Joseph Story (1833) at 22.
[31] Compare Bureau of Justice Statistics, "Citizen Complaints about Police Use of Force [in 2002]" (published 2006) at http://bjs.ojp.usdoj.gov/content/pub/pdf/ccpuf.pdf and Howard Nemerov, "Concealed Handguns: Danger or Asset to Texas?" (Tables 1 and 3) at http://www.prattontexas.com/documents/Texas%20CHL%20Study.pdf.

APPENDIX

A Sampling of Individual Testimonies Regarding ATF Copying of 4473s

NOTE: All the names, addresses and dates below are redacted, in compliance with the wishes of those GOA members who forwarded their testimonies to us.

Dear GOA:

I am a gun dealer. Recently the [ATF] agents have begun recording the submission of information on the 4473 forms. "Quality and customer assurance" are the reasons given for these recordings. I have asked how long these recordings are kept and who has access to them. I was told they were kept indefinitely was not told who had access. My question is how is this different than storing the information on gun owners. Is that not illegal? Hope you can look into this for me. Just does not feel right. Thank you.

<name redacted>

Dear GOA:

We have a gun store in <location redacted> where the ATF here … removed and had destroyed all paperwork (paper work of the corporation including customers receipts, utility bills, 4473's, A&D Books and personal paperwork). ATF also removed the video equipment in which would have incriminated them.

<name redacted>

Dear GOA:

Years ago I worked in a local gun shop. The ATF entered to do an inspection. They removed some 4473s and made a huge stink of missing periods or abbreviated state names -- like <state abbreviation redacted> -- instead of <state name redacted> and the like. The owner wound up in court explaining each and every clerical error.

During the ATF inspection the agent informed the owner that his intent was to shut down every gun shop within his region, and that they were merely waiting on the directive from the President. The owner promptly shut down and sold his business.

<name redacted>

Dear GOA:

I perform IT support for a local gun store, which I do not wish to name. (They pay me well, and I don't want retribution to them for these comments). I am willing to report this as long as I remain anonymous. They do a reasonably high volume of firearms sales, and I have assisted through 3 of the last ATF "audits."

In the first audit, the ATF agents requested copies of EVERY invoice containing a firearm and the full gun log. I received the support call when the printer died trying to print a 37,000-page report for the agents.

When the agents learned that the store had an electronic gun log, they requested a complete copy electronically. This audit found only 1 clerical error in over 35 thousand transactions. The next year's audit went smoother, as the store owner was prepared to produce the reports electronically. In this audit, there were no errors found (clerical or otherwise). Because the ATF decided that a "no error" audit was impossible, they sent a team of 4 agents to the store for the next year's audit, and they were on site for over 3 weeks.

They pulled every 4473 and invoice, and the gun log, and compared them all manually. They were given free reign at the store, and desks to work in. They insisted that their work through this "audit" be unobserved.

Again, they copied the gun log, it is suspected they scanned all the 4473s, and at the very least, entered all the information into a database or spreadsheet, so they could correlate their report. Their report found 2 errors -- in tens of thousands of transactions. In one, the address on the 4473 did not match the driver's license of the purchaser, and in the second, the county of residence was left off the form. In two cases, the ATF agents "implied" dire consequences with non-compliance to their requests.

<name redacted>

Dear GOA:

I was told first hand by the owner of <name of store redacted> that the ATF entered his firearms store and attempted to use the 4473s from his firearms sales activities to "make a list of all male Hispanics that had purchased a firearm during a certain period." He informed the ATF agent that he could not do this and that he was breaking the law by attempting to make the list. The ATF agent informed the store owner that "he was the federal government and he can do whatever he pleases."

At this point the store owner told the ATF agent that if he attempted to leave the store with the list he would use deadly force to prevent his departure. I was told that the ATF agent called his office and other higher ranking ATF agents arrived to smooth things over

with this store owner. The store owner's first name is <name redacted> and <name of store redacted> is located at <address redacted>.

<name redacted>

Dear GOA:

I am a 01FFL. At my last compliance check, the ATF agent was taking digital photos of records. I do not believe he took pics of 4473's but did take pics of records, such as bound book, personal firearms log. Why the personal log if not for future registration? They contain name and address, firearm make, model, serial #, caliber, quantities. While they are pleasant and polite during every visit (exception was one ordered by <name and date redacted>), I don't trust them at all, my gut feeling screams out.

<name redacted>

Dear GOA:

If you want a true HORROR story of government abuses of NICS records, their illegal/unconstitutional misuse (by state & local LE, and a public employer, and a federal FUSION center) and the destruction of a person's professional career/livelihood (and personal life) for the simple exercise of the Second Amendment, I recommend GOA take a hard look at the <case redacted>….

Specifically, per GOA's request for ATF's recent unlawful copying of all FFL dealer 4473 forms and records, I, as plaintiff pro se (by no fault of my own) in the above identified federal case <redacted>, personally observed two federal agents at the <name of courthouse redacted> discussing the fact "the ATF was in town," meaning regionally in <city redacted>. I witnessed this conversation at the Clerk of the Court's office, approximately <time period redacted> ago.

Following this event, by regular visits to local gun stores and gun shows, I have learned the ATF has apparently been in the <city redacted> region for the purpose to copy and record all Form 4473 records. I am not sure how far back the ATF's "investigation" goes, or for what specific purpose to infringe on the rights and privacy of law-abiding, legal gun owners/purchasers and Second Amendment supporters/advocates. I personally observed a likely ATF vehicle and agent at a gas station in <city redacted>, during this same approximate period. Federal agents with big handguns and lots of ammo magazines under their sports-jackets stick out like a sore thumb in <region redacted>.

Please contact me if you have questions or require additional information concerning this information. Thank you.

<name redacted>

Dear GOA:

First of all please don't use my name or other information and that of my ex co-worker…. I received [the email below] from a former coworker and we're both retired LEO's, Law Enforcement Officers. We have been talking about the Gun Control issues over the last several months and here are some seriously concerning emails I have gotten about what is happening on the inside. These troubling remarks are an indicator that the government who stated they were not going to collect and store information on gun purchases are doing exactly the opposite and have been doing this for some time.

Since the Form 4473 was introduced and adopted by my state I am concerned that what is said in these emails is true. The Form 4473 is required to be kept for 20 years and it may even exceed that. And with the new online version via the ATF -- http://www.atf.gov/applications/e4473/ -- you can see this information will be stored indefinitely and placed into a database for easy access by our government.

And since they can't seem to keep records safe who knows how many other agencies, hackers, or governments will acquire these records. Look at all the military records which were lost/stolen in <date redacted>.

These are blatant rights violations and a serious problem with these records for which the government has access to. This legislation needs to be revamped so that after a background check is completed the form 4473 paperwork gets stored for three months-time and once that time limit expires they are destroyed, and the governments are not permitted to access them without a search warrant signed by a judge in accordance with the U.S. Constitution as stated. And all rejected form 4473's are placed into a separate file for law enforcement to conduct further background investigations and for those trying to obtain a firearm illegally 100% prosecution should be mandatory in accordance with current laws.

Here [is] the email:

"My neighbor's kid is an agent working down south. I talk to him every so often and he tells me this is going to pass. They have been compiling a database of everyone who bought assault weapons over the past four years. They also have local agents making copies of all gun store surveillance cameras and have had agents photographing everyone going into gun shows where a lot of weapons are being sold under the radar…."

Good luck with the fight and hope these emails will provide insight into the nefarious activities of our government and the Anti-Gun crowds' unconstitutional slow erosion of or 2nd Amendment Rights.

Sincerely,

<name redacted>

Dear GOA:

I imagine that most gun owners don't know that the info from 4473 forms has been used as a form of registration, contrary I believe to the mandate of Congress that this info was to be kept for 90 days only. If I am wrong please correct me. I know this to be true because I was contacted by two <state redacted> law officials in about <date redacted> concerning a <gun type redacted> that was used in a felony. I was assured I had done nothing wrong, but they told me the history of the revolver from the sale in <location redacted> to me. I bought the gun from a dealer that had let his FFL go and turned in his paper work. I bought this gun prior to <date redacted>.

<name redacted>

Dear GOA:

I had an FFL which I sold guns from my home, it was all legal. When the taxes and business started to lose me money instead of make me money I closed it down. I was instructed by the ATF to send them all of the 4473's that I had accumulated. I sent them in after being told it was the law, and I didn't want any trouble.

<name redacted>

Addendum from Gun Owners of America

In the last two examples, the ATF told out-of-business dealers to turn in their 4473 forms to the Bureau. The problem is that it does not appear that the ATF ever notifies dealers that ATF can NOT order these records to be turned over to them.

Although the 1968 Gun Control Act allowed dealers going out of business to turn over the records (including their 4473s and bound books) to the ATF, the McClure-Volkmer Act of 1986 gave dealers the option of turning those records over to an active dealer. In particular, 18 U.S.C. 926(a)(3) says in part:

> *No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established….*

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February 12, 2013

Subcommittee on the Constitution, Civil Rights and Human Rights
Committee on the Judiciary
United States Senate

Re: Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment

CONGRESS HAS NO POWER TO CRIMINALIZE INTRASTATE TRANSFER OF FIREARMS BETWEEN PRIVATE INDIVIDUALS OR TO REQUIRE DEALERS TO PERFORM BACKGROUND CHECKS IN TRANSACTIONS TO WHICH THEY ARE NOT A PARTY

Honorable Members of the Subcommittee,

My name is Stephen P. Halbrook. I have litigated cases under the Gun Control Act and other firearm laws for 35 years. I am the author of the *Firearms Law Deskbook* (West 2012), *The Founders' Second Amendment* (2008), and *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* (1998), reissued as *Securing Civil Rights* (2010). I represented a majority of the members of both Houses of Congress as amici curiae in *District of Columbia v. Heller,* 554 U.S. 570 (2008), and participated in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010). Both of these decisions cited my books as authority. I have testified before this body regarding prior gun control bills and contributed to this Subcommittee's print *The Right to Keep and Bear Arms* (1982).

Today I wish to address proposals to make it a federal crime for one individual to transfer a firearm to another individual in a purely private transaction in the same State, whether as a gift or for payment, without a federal background check. These proposals would also require federally-licensed firearms dealers to conduct the background checks for such transactions to which they are not parties, and to do so for a maximum fee.

"This government is acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819). Congress has power "to regulate

commerce . . . among the several States . . . ." U.S. Const., Art. I, § 8. That is the basis for the Gun Control Act's provisions requiring persons engaged in the business of dealing in firearms to obtain licenses, to keep records of transactions, and to conduct background checks under the National Instant Criminal Background Check System (NICS). After all, firearm dealers are directly engaged in interstate commerce.

However, making it a federal crime for one private individual to transfer a firearm to another private individual, where both are in the same State and both are legally qualified to possess firearms, would be a radical extension of federal power without any warrant in the Commerce Clause or any other power enumerated in the Constitution. Mere transfer of a gun from a private individual to another is not "commerce . . . among the several States" which Congress may regulate. Congress has no general legislative power, as do the States.

United States v. Lopez, 514 U.S. 549, 567 (1995), rejected arguments that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." The Court invalidated a Gun Control Act prohibition on mere possession of a firearm at a school based on reasoning that applies equally here:

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . . Under the theories that the Government presents . . ., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement . . . where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564.

If a dealer undertakes to sell a firearm, the dealer may be required to conduct a NICS check. The license authorizes the dealer to transfer a firearm if he so chooses, which occurs when the dealer and the purchaser enter into a contract. But the dealer cannot be required to enter into a contract, or to be subject to a price ceiling for firearms the dealer sells.

Nor may Congress compel a dealer essentially to enter into a contract to conduct a NICS check for a private transaction, and to boot dictate the charge for the transaction. The dealer is no more a federal employee subject to conscription than were the state and local law enforcement officers that the interim Brady Act commanded to conduct background checks, which the Supreme Court invalidated in *Printz v. United States*, 521 U.S. 898 (1997).

I represented the sheriffs before the Supreme Court in *Printz*, which held: "'The Federal Government may not compel the States to enact or administer a federal regulatory program.' . . . The

mandatory obligation imposed on CLEOs [chief law enforcement officers] to perform background checks on prospective handgun purchasers plainly runs afoul of that rule." *Id*. at 933 (citation omitted). It may be said of the far more radical proposals at hand, that the Federal Government may not compel private citizens who have firearm dealer licenses to administer a federal regulatory program of performing background checks on strangers with whom they have no business dealings.

Printz found the conscription at issue unconstitutional for the further reason that the CLEOs were not federal employees, which is also pertinent here:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove).

Id. at 922.

Concurring, Justice Thomas wrote: "Absent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations." *Id*. at 937. He added:

> Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. . . . If . . . the Second Amendment is read to confer a personal right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.

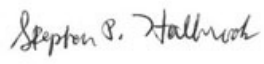
Id.

The proposals here are even more radically-far afield than the scheme invalidated in *Printz*. Making it a crime for one person to give, lend, or sell a gun to a family member, neighbor, or other person in a locality does not remotely qualify as a regulation of commerce among the States. Conscripting a firearm dealer involuntarily to conduct background checks on persons with whom the dealer is not conducting any business, and mandating how much may be charged, may not be justified by any provision of the Constitution. The entire scheme would infringe on the Second

Amendment right of the people to keep and bear arms.

Thank you for this opportunity to express my views.

Sincerely,



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February 10, 2013

Hon. Ted Cruz, Ranking Minority Member
Subcommittee on the Constitution, Civil Rights
and Human Rights
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Sen. Cruz,

I write in connection with the subcommittee's hearing on proposals to reduce gun violence. I will try to be concise.

Nature of the "Semiautomatic Assault Weapon" Concept

"Assault rifle" is a rough translation of the German "sturmgewehr," or "storm-rifle." The concept underlying this class of firearms dates to World War II. All the nations involved in that conflict entered it with semiautomatic or bolt action rifles firing cartridges that were remarkably similar, developing somewhat over 2,000 foot/pounds of energy, and designed to be effective out to 600-800 yards. These cartridges were too powerful for full automatic fire from a standard rifle: no solider could stand the recoil at full automatic.

During the War, however, German engineers realized that infantry battles occurred at 200-300 yards; in most terrain it was hard even to see opposing infantry beyond that distance. If the military cartridge's power were cut by about half, from 2,000 foot/pounds to about 1,000, it could be fired at full automatic, and still suffice for conflicts at 200-300 yards. This gave rise to the first sturmgewehr, the MP 43/44, firing a smaller rifle cartridge at full automatic.

Thus any true "assault rifle" is capable of full automatic fire; that is core to its purpose. A "semiautomatic assault rifle" is simply a semiautomatic rifle of about half the power of a standard WWII rifle. To give a concrete example: the United States fought WWII with the semiautomatic M-1 Garand; it fired a .30-06

cartridge with about 2,400 foot/pounds of energy. The modern AR-15 platform rifle fires a .223 caliber (5.56 mm) cartridge with about 1,250 foot/pounds of energy. To give another: the Soviets fought WWII with a 7.62 mm rifle, shooting a 147 grain bullet at 2,717 feet per second. The AK-47 fires a 123 grain bullet at 2,350 feet per second; its projectile is both lighter and slower than the WWII round. An "assault rifle" is by definition full automatic (also known as select fire). A semiautomatic version is simply a semiautomatic rifle of less power than WWII semiautomatic rifles.

So what is the origin of the idea that there is such a thing as a "semiautomatic assault rifle," and that it is somewhere especially dangerous? Back in the 1990s, the Violence Policy Center, an antigun group, issued a report that proposed making such rifles a focus, because in the popular mind they were easily confused with fully automatic firearms. It essentially proposed a public relations campaign based on deception.

An attack on recognized constitutional rights, based upon deception and taking advantage of mistaken popular impressions, seems questionable to anyone who holds a commitment to the Constitution. Let us go into more detail.

The Scope of the Second Amendment: "Firearms in General Use"

Heller v. District of Columbia noted that "*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.'" 128 S.Ct. at 2817. The AR-15 platform has become the epitome of a firearm "in common use."

I refer to it as a platform, since the AR-15 is "modular"; its receiver has two parts: an upper receiver into which the barrel mounts, and a lower receiver, which holds the firing assembly, and mounts the buttstock and lower grip. The two can be disconnected in about a minute. By mounting another upper receiver and barrel, an AR-15 can be enabled to fire a wide range of rifle and handgun cartridges, and the length and weight of the barrel can be changed to suit the owner's needs. A single rifle can thus suffice for target matches, law enforcement, and hunting small and large game. While other firearms can be re-barreled to a new caliber or cartridge, this is generally work that can only be done by a gunsmith with specialized tools. An AR-15 owner might switch between .223 or .22-250 for small game and target competition, 6.8 mm for deer hunting, and .50 Beowulf for home protection or larger game such as bears.

The AR-15 is probably the semiautomatic rifle in *most* common use by

Americans today. Assessing this is not a simple task, because rifle manufacturers are required to report to the government only the total number of rifles made, not broken down by design. I base this conclusion on the following:

1. A friend and fellow researcher, Mark Overstreet, has compiled a breakdown of rifle manufacturers who produce *only* AR-15 type rifles. In 2008, the most recent year for which data was available, these manufacturers produced 22% of American civilian rifle production. (The fact that this portion of firearms manufacturing can be profitable producing nothing but AR-15s speaks for itself).

2. In addition to these, there are many manufacturers who make AR-15s together with other firearms, and this number is rising. For example, the handgun manufacturer Smith and Wesson recently brought out two rifles, both of them AR-15 types. Remington, which mainly produces bolt-action rifles, has brought out an AR-15. Ruger Arms, which manufactured the AR-15's main competition, the Ruger Mini-14, has now brought out its own AR-15.

3. In 2010, the National Shooting Sports Foundation surveyed over 8,000 shooters. The results indicated that about 8.9 million Americans went target shooting with AR-15 type rifles in the previous year.[1]

4. A 2012 survey by the National Shooting Sports Foundation found that 26.3% of shooters owned an AR-15-type firearm, up from 18.1% the previous year. In addition, 21% of shooters who did not already own one planned to acquire one in the next year.[2]

Based on these data, it is clear that the AR-15 platform qualifies as "in common use." The same would be true of the AR-15's standard magazines, which hold 20 or 30 rounds. The number of these in use (many of them sold as surplus by the government itself) is likely in the tens of millions.

Permissible Restrictions

Of course, constitutionally-protected activity is subject to some restrictions. The *Heller* decision indicates that these must pass some level of heightened

[1] http://www.nssf.org/NewsRoom/releases/show.cfm?PR=041910.cfm&path=2010.
[2] http://www.nssf.org/PDF/research/0412SurveyTrackerSupplement_MSR.pdf.

scrutiny – either strict scrutiny or intermediate review – which alike require proof of some relationship to genuinely achieving and important goal, while minimizing unnecessary impact on the protected activities. I see two considerations here, relating to the persons affected and to the arms regulated.

1. Persons Affected

Police and "civilians" own firearms for the same reason: self-defense against criminal activity. It is difficult to justify any legislation that would bind one but not the other, when both have the same purpose and need. That is to say, if law enforcement officials need an AR-15, or a 20 round magazine to defend themselves, it is hard to explain why a non-LEO would not.

Even less explicable are laws which exempt not only serving LEOs, but also retired ones. Retirement includes disability retirement, which includes disability due to mental status.

2. Scope of Regulation

As noted above, "semiautomatic assault rifle" is internally contradictory and thus meaningless. A "semiautomatic assault rifle" is simply a semiautomatic rifle of about half military power. Drafters of legislation are thus forced to define what they would restrict in ways that are arbitrary and irrational.

One approach is to ban rifles by name; this is exceptionally arbitrary, since it can ban one firearm while allowing others with exactly the same capabilities to be made. For example, the 1994 ban applied to the "Colt AR-15" but not to the Ruger Mini-14, even though both fired the same cartridge at the same rate of fire from magazines of the same size.

The other approach is to ban rifles with certain features, cosmetic in nature, affecting appearance but not function. To take some examples, from the 1994 ban:

Bayonet lugs. Enough said. I have never in my life seen a report of a criminal bayoneting someone. Banning this feature is utterly irrational.

Grenade launchers. Any real, functional, rifle grenade is so tightly regulated as to be impossible to obtain. A launcher for one is a matter of appearance, not of function.

Flash suppressors. The flash suppressor is a small structure at the end of the barrel, designed to minimize the firearm's flash at night. With modern ammunition, fired at semi-automatic rates, it is nearly impossible to see the flash,

even without such a suppressor. I have verified this by firing an AR-15 with and without the suppressor in a completely dark rifle range. Again, this is not something that has any effect on function.

"Pistol grips." I put this in quotations since all modern rifles have a pistol grip. What is meant is a pistol grip separate from the buttstock, the portion of the stock that leads back to the shoulder.

The separate pistol grip is a byproduct of designs that raise the buttstock, in order to reduce "muzzle flip." When a rifle fires, the recoil come back along the line of the barrel. Traditionally, the line of the barrel would pass above the center of the shooter's shoulder. This caused the rifle to flip up in recoil. This was undesirable in full automatic fire, since only the first shot would go where it was aimed, the following shots would go high.

The solution was to move the shoulder stock higher, closer to the line of the barrel, thus making the recoil push the shooter straight back, without the barrel flipping upward. But if the pistol grip remained integral with the buttstock, the hand holding the grip would be twisted into an unnatural position. The solution was to make the pistol grip separate from the buttstock. This result was an artifact of the decision to raise the buttstock.

With semiautomatic rifles, the problem of the rifle climbing during firing a burst does not exist. The separate pistol grip is a matter of design, not of function.

Sincerely,

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Feb. 8, 2013

Dear Senator Cruz:

I am submitting this letter for the Feb. 12, 2013, Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights hearing "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment."

To begin with, the Subcommittee should acknowledge that crime reduction policy has been a great success in the United States in recent decades. For example, in the early 1980s, the U.S. homicide rate was more than 10 per 100,000 population. Today, that rate has fallen by over half, to under 5. This is comparable to the early 1960s. Overall rates of violent crime have also fallen sharply since their peak of several decades ago.[1]

There are many causes for this progress. Perhaps one of them is that today, 41 of the 50 states respect the constitutional right to bear arms, so that a law-abiding adult can obtain a permit to carry a concealed firearm for lawful protection, or even

[1] The 2011 murder and non-negligent manslaughter rate was 4.7 per 100,000 population. FBI Uniform Crime Reports, *Crime in the United States 2011*, Table 1, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1. The violent crime rate was 386. *Id.*

Data as far back as 1960 are available via the FBI's UCR Data Tool. http://www.ucrdatatool.gov/. The tool can provide total crime data, and U.S. population, from which rates can be calculated. In 1980, the violent crime rate was 597. The homicide rate was 10.2. In 1962, the violent crime rate was 162, and the homicide rate was 4.6.

carry without a permit in a few states. In contrast, in the early 1980s, only about half a dozen medium or small states provided a fair system for licensing the carrying of firearms.

Second, the exploitation of the Newtown murders as an occasion to impose a plethora of new anti-gun laws is unwise. Professor Gary Kleck, of Florida State University, is by far the most eminent worldwide scholar on quantitative data about firearms, and the effect of firearms laws. His book *Point Blank: Guns and Violence in America* was the winner of the Michael J. Hindelang Award of the American Society of Criminology, for "the most outstanding contribution to criminology" in a three-year period.

Kleck's 2009 article "The worst possible case for gun control: mass shootings in schools" [American Behavioral Scientist 52(10):1447-1464] explains why gun control laws enacted as part of an inchoate desire to "do something" after an atrocious crime such as a mass murder in a school are particularly unlikely to prevent future such crimes. Rather, the "do something" anti-gun laws typically amount to an expression of rage against guns or gun owners, and fail to make children safer.

Regarding some particular proposals that have been raised, as alleged responses to Newtown:

The "assault weapons" issue is one of the most long-standing hoaxes in American politics. The guns suggested for prohibition do not fire faster, nor do they fire more powerful ammunition, than guns which are not singled out for prohibition. External features such as telescoping stocks, or forward grips, make it easier for a user to control the firearm, to shoot it accurately, and to hold it properly. Features which make a firearm more accurate are not a rational basis for prohibition.[2]

Magazines holding more than 10 rounds are not "high capacity." Semi-automatic handguns constitute over 82% of new handguns manufactured in the United States.[3] A large percentage of them have standard, factory capacity magazines of 11 to 19 rounds. The AR-15 type rifle has for years been the best-selling rifle in the United States. The factory standard magazine for an AR-15 rifle is 30 rounds.

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[2] *See* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 JOURNAL OF CONTEMPORARY LAW 381 (1994), http://davekopel.org/2A/LawRev/rational.htm. Cited in *Kasler v. Lungren*, 72 Cal. Rptr. 2d 260, 265 (Cal. App. 1998)

[3] 2011 manufacturing data from the Bureau of Alcohol, Tobacco, Firearms & Explosives. http://atf.gov/statistics/download/afmer/2011-final-firearms-manufacturing-export-report.pdf.

Assertions by some prohibitionists that the aforesaid common guns and common magazines are only made for mass murder are a malicious libel against the millions of peaceable Americans who own these self-defense and sporting tools.

Pursuant to *District of Columbia v. Heller*, such firearms and magazines may not be prohibited, because they are "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 625 (2008). As *Heller* explained, the Second Amendment prohibits prohibition of "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose" of self-defense. *Id.* at 628.

Senator Feinstein's prohibition bill targets an enormous class of arms. Taking into account the at least 4 million AR-15 rifles, plus everything else, the Feinstein ban would likely apply to at least 10 million firearms.

As for the magazines, the Feinstein ban does not focus solely on genuinely "high capacity," non-standard magazines (e.g. 75 or 100 rounds) but instead bans common magazines holding 11 or more rounds; the gigantic class of what she would ban probably numbers at least several tens of millions, and perhaps much more.

That in itself is sufficient, according to *Heller*, to make prohibition unconstitutional.

The conclusion is reinforced by *Heller*'s observation that handgun prohibition was unconstitutional "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628. For substantive rights (as opposed to procedural ones), the two main standards are Strict Scrutiny and Intermediate Scrutiny. The former is for most situations of racial discrimination by government, and for most types of content-based restrictions on speech. The latter is used for government discrimination based on sex, as well as for most "time, place, and manner" regulations of speech in public places.

So we know that handgun prohibition fails Strict Scrutiny and also fails Intermediate Scrutiny. Although formulations of Intermediate Scrutiny vary from case to case, the general approach is that to pass Intermediate Scrutiny, a law must involve "an important government interest" and must "substantially" further that interest.

Now consider Intermediate Scrutiny as applied to handguns. Handguns constitute approximately one-third of the U.S. gun supply. They are used in about half of all homicides.[4]

And yet, a handgun ban fails Intermediate Scrutiny. If a handgun ban fails, then the bans on magazines and on so-called "assault weapons" must also fail.

The large majority of firearms banned by Sen. Feinstein's bill are rifles. Rifles constitute about a third of the American gun supply. But rifles account for fewer than 3% of U.S. homicides—fewer than blunt objects such as clubs or hammers. The rifles covered by the Feinstein bill would account for even less.

Because handguns (very frequently used in crime) cannot be banned under Intermediate Scrutiny, rifles, or a subset of rifles (rarely used in crime) cannot be banned either.

There are no solid national statistics about the current use of 11+ magazines in crime. Given that 11-19 round magazines are standard for a large fraction of modern handguns, one might guess that 11+ round magazines would be used in some crimes. Even so, such magazines would be used less often in crime than handguns in general. Thus, a magazine ban also fails Intermediate Scrutiny.

It is important to remember that when applying Intermediate Scrutiny to a Second Amendment question, *Heller*'s methodology (by announcing that a handgun ban fails Intermediate Scrutiny) is that one must not consider solely the criminal uses of an arm. One must also consider the frequency of an arm's use by "law-abiding citizens for lawful purposes." The sheer quantity of what Senator Feinstein would

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[4] In 2011, there were 12,664 murders in the U.S. Handguns accounted for 6,220; shotguns for 356; rifles for 323; "other guns" for 97; and "firearms, type not stated" for 1,587. (Total of 8,583 firearms homicides). Knives were 1,694, and "Blunt objects (clubs, hammers, etc.)" were 496.
FBI, Uniform Crime Reports, *Crime in the United States 2011*, Table 8, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-8.

The FBI reports that firearms (not differentiated by type) were used in 41% of robberies in 2011. FBI Uniform Crime Reports, *Crime in the United States 2011*, Robbery Table 3. http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/robbery-table-3. Firearms were used in 21% of aggravated assaults. FBI Uniform Crime Reports, *Crime in the United States 2011*, Aggravated Assault Table, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/aggravated-assault-table. Given the preponderance of handguns, compared to long guns, in homicides, it is reasonable to infer that handguns are also disproportionately used in robberies and aggravated assaults. Firearms are rarely used in forcible rapes.

ban is itself evidence that the banned firearms and magazines are "typically possessed by law-abiding citizens for lawful purposes."

Heller makes it clear that some non-prohibitory controls are permissible. Because the *Heller* case was about a gun ban, the Court did not deeply explore the contours of legitimate non-prohibitory controls. However, the Court has said enough to at least raise questions about the constitutionality of "universal background checks."

It is often said, by anti-gun lobbyists, that 40% of firearms sales take place today without checks. Notably, the study on which this claim is based was conducted before the National Instant Criminal Background Check System became operational.

Besides that, a great many private transfers of firearms take place between family members, or other persons who have known each other for many years.

More fundamentally, private transfers are not with the proper scope of Congress's power to regulate "Commerce . . . among the several States." Pursuant to federal law since 1968, private sales may only take place intra-state. 18 U.S.C. §922(a). They are not interstate commerce. Nor, indeed, are they necessarily commerce of any sort, no matter how broadly defined, since many such transfers are gifts.

In *Printz v. United States* (1997), Justice Thomas's concurring opinion suggested that a mandatory federal check on "purely intrastate sale or possession of firearms" might violate the Second Amendment. 521 U.S. 898, 938 (2007).

This view is supported by the Supreme Court's opinion in *District of Columbia v. Heller*. There the Court provided a list of "longstanding" laws which were permissible gun controls. *Heller* at 626-27. The inclusion of each item on the list, as an exception to the right to keep and bear arms, provides guidance about the scope of the right itself.

Thus, the Court affirmed "prohibitions on the possession of firearms by felons and the mentally ill." Felons and the mentally are exceptions to the general rule that individual Americans have a right to possess arms. The exception only makes sense if the general rule is valid. After all, if *no-one* has a right to possess arms, then there is no need for a special rule that felons and the mentally ill may be barred from possessing arms.

The second exception to the right to keep and bear arms is in favor of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." This exception proves another rule: Americans have a general right to carry firearms. If the Second Amendment only applied to the keeping of arms at home, and not to the bearing of arms in public places, then there would be no need to specify the exception for carrying arms in "sensitive places."

The third *Heller* exception is "laws imposing conditions and qualifications on the commercial sale of arms." The word "commercial" does not appear because the Supreme Court was trying to use extra ink. Once again, the exception proves the rule. The Second Amendment allows "conditions and qualifications" on the *commercial sale* of arms. The Second Amendment does not allow Congress to impose "conditions and qualifications" on *non*-commercial transactions.

Federal law has long defined what constitutes "commercial sale" of arms. A person is required to obtain a Federal Firearms License (and become subject to many conditions and qualifications when selling arms) if the person is "engaged in the business" of selling firearms. This means:

> a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

18 U.S.C. §921(a)(21)(D). Of course a person who is "engaged in the business," but who does not have a FFL, is guilty of a federal felony every time he sells a firearm. 18 U.S.C. §§922(a), 924.

Currently, the federal NICS law matches the constitutional standard set forth in *Heller*. NICS applies to all sales by persons who are "engaged in the business" (FFLs) and does not apply to transfers by persons who are not "engaged in the business."

President Obama has already ordered the Bureau of Alcohol, Tobacco, Firearms and Explosives to inform FFLs about how they can perform a NICS check for private persons who would like such a check. On a voluntary basis, this is legitimate, but it would be constitutionally dubious to mandate it.

Finally, there has been talk of new federal laws against gun trafficking and against straw purchases. Fortunately, gun trafficking and straw purchases are already illegal, and there are many people who have the federal felony convictions to prove it.

Allegedly, federal prosecutors will be more willing to enforce the already-existing bans on trafficking and straw purchases if the laws are restated by enacting new legislation. A simpler approach would be for the President or the Attorney General to order U.S. Attorneys to give greater attention to the enforcement of the existing laws. Moreover, new statutes, especially when drafted in a "do something" crisis atmosphere may turn out to be highly overbroad, and to impose harsh new penalties on persons who were not the intended targets of the new statutes. The poorly-named "USA PATRIOT Act" should provide a cautionary example.

Below are some articles which might be interest to the Subcommittee.

"Guns, Mental Illness and Newtown." Why random mass shootings have increased and what to do about it. *Wall Street Journal*. Dec. 17, 2012. http://online.wsj.com/article/SB10001424127887323723104578185271857424036.html.

"Arming the right people can save lives." Good guys with guns have managed to thwart many mass attacks. *Los Angeles Times*. Jan. 15, 2013. http://www.latimes.com/news/opinion/commentary/la-oe-kopel-guns-resistance-nra-20130115,0,955405.story.

My U.S. Senate Judiciary Committee testimony on gun violence. Jan. 30, 2013. http://davekopel.org/Testimony-Senate-Judiciary-Kopel-1-30-13.pdf.

"Ronald Reagan's AR-15." Volokh.com. Jan. 15, 2013. http://www.volokh.com/2013/01/15/ronald-reagans-ar-15/.

"A Principal and his Gun." How Vice Principal Joel Myrick used his handgun to stop the school shooter in Pearl, Mississippi. By Wayne Laugesen. *Boulder Weekly*. Oct. 15, 1999. http://davekopel.org/2A/OthWr/principal&gun.htm.

Pretend "Gun-free" School Zones: A Deadly Legal Fiction. 42 CONNECTICUT LAW REVIEW 515 (2009). http://ssrn.com/abstract=1369783.

"Gun-Free Zones." *Wall Street Journal*, April 18, 2007. The murders at Virginia Tech University. http://davekopel.org/2A/OpEds/Gun-Free-Zones.htm.

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Back to Article

Reflections on gun control by a Second Amendment advocate

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From the beginning, the battle for gun rights was structured as a three-step process. Step 1: Determine the meaning of the Second Amendment. That was accomplished by the U.S. Supreme Court's decision in *District of Columbia v. Heller*, which affirmed that the Second Amendment secures an individual right to bear arms, in part for self-defense. Step 2: Determine where the Second Amendment applies. That was accomplished by the Court's decision in *McDonald v. Chicago*, which affirmed that the amendment covers every state and locality—not just federal enclaves such as Washington. Step 3: Determine the scope and limitations of Second Amendment rights. That's the next major task.

As co-counsel to Dick Anthony Heller, I was a vigorous advocate for the right to possess firearms for self-defense. But I understand, as does every rational individual, that the right is not absolute. The Second Amendment does not guarantee a 12-year-old's right to possess a machine gun in front of the White House when the president is walking on the lawn. Some persons, some weapons and some circumstances may be regulated. Subsequent cases will have to flesh out the details. But the Constitution does not foreclose common sense and the right to bear arms does not foreclose public safety Reasonable persons should be able to fashion reasonable restrictions —a framework for gun control in the aftermath of Newtown—without violating core Second Amendment rights.

Here is the key principle: Both *Heller* and *McDonald* corroborated that the right to bear arms is "fundamental"; i.e., it is implicit in the concept of ordered liberty and deeply rooted in our nation's traditions and culture. Consequently, the Constitution establishes a presumption of individual liberty. That means government bears a heavy burden to justify any regulations that would compromise the right.

With that principle in mind, let's examine several proposed restrictions that are currently front and center.

• *Banning high-capacity magazines*. Gun rights advocates posit a Korean shop-owner in the Watts riots needing multiple rounds to protect his store and family. But others cite multiple-victim killings like in Newtown where innocent lives might have been saved if high capacity magazines had been effectively banned.

Firearms experts note that murderers can easily load a second or third magazine in a matter of seconds. Accordingly, limiting magazine size to, say, 10 rounds will not have much practical effect. Perhaps so; but that would also mean individuals trying to defend themselves would not be seriously hampered by a 10-round limit. They too could reload very rapidly.

If regulators can show that the benefits of banning high-capacity magazines exceed the costs, I have little doubt that such a ban would survive a Second Amendment court challenge. But there are three related problems: First, magazines are simple metal boxes with a spring. They can be made in a well-equipped machine shop. Second, there is no way to confiscate the millions of high-capacity magazines now in circulation. Third, millions of existing semi-automatic pistols come with 12-19-round magazines; thus a ban on any

size below 20 rounds would encounter great resistance.

• *Re-enacting an assault weapons ban*. Evaluation of an assault weapons ban, like that of a magazine ban, should be based on empirical evidence. After the 1994 ban expired in 2004, the *New York Times* reported: "Despite dire predictions that the streets would be awash in military-style guns, expiration of the assault weapons ban has not set off a sustained surge in sales [or] caused any noticeable increase in gun crime." Millions of so-called assault weapons are now used by millions of Americans for hunting, self-defense, target shooting, even Olympic competition. Criminals typically use handguns; assault weapons are expensive and difficult to conceal.

In Washington, where the *Heller* case was litigated, the city experienced 46 violent crimes per day, each and every day for an entire year, nearly two decades after D.C. enacted an outright ban on all functional firearms for all people in all places at all times. The D.C. government insisted that gun smuggling—mostly from Virginia, where regulations were lenient—was the root of the problem. Not likely. Consider island nations that do not have to deal with cross-border smuggling, such as Ireland, the United Kingdom, and Jamaica. All three of them imposed bans but saw violent crime increase.

Cross-country comparisons can be misleading because there are so many differences that affect crime rates. That's why it's instructive to look at data serially, over time, and analyze what happened in each country before and after gun controls are enacted.

Jamaica is particularly revealing. Beginning in 1974, handguns were virtually banned. You could get them with a license, but you had to prove need, and licenses were almost never issued. Since the ban, the murder rate has soared to become one of the highest in the world—now more than double other Caribbean nations, six times higher than before the ban, and a dozen times the U.S. rate. Naturally, the ban is not wholly to blame, but it certainly did not help.

Moreover, even if we were to reenact the assault weapons ban, how could we deal with the millions of such guns already owned? Some people think a voluntary buy-back program would work. But it would be costly. And who might the sellers be? They would be individuals who valued the money more than the firearm. That would include low-income persons living in high-crime areas who obey the law but need a means to defend themselves. And who would keep the weapons? They would be individuals who valued the firearm more than the money. That would include criminals, terrorists and mentally deranged persons who are not motivated by financial incentives.

In the *Heller* case, Justice Antonin Scalia suggested that the Second Amendment would pose no barrier to outlawing weapons that are not in common use and especially dangerous. Clearly, some weapons can be banned. Essentially, automatic weapons have been banned since 1934; and they remain banned. The task is to identify those firearms or attachments that are not commonly used or needed for self-defense, and would improve public safety if they were banned. The 1994 Assault Weapons Ban went too far; but a better-crafted, limited version might be warranted.

Banning popular semi-automatic rifles, merely because they come equipped with a pistol grip or some other attachment that has no effect on their lethality, makes no sense whatsoever. FBI data for 2011 indicate that almost 13,000 people were murdered with a weapon. Of those, 1,700 were killed with knives; almost 500 with hammers, bats, and clubs; and 728 by someone's bare hands. Only 323 people were killed with rifles of all types.

• *Background checks for private sales at gun shows*. Gun control advocates occasionally misuse the phrase "close the gun-show loophole" to urge that all private sales be subject to background checks. Two clarifications: First, sensible proposals to extend background checks would not reach *all* private sales, but only those at gun shows. Second, most sales at gun shows are through licensed dealers that already have to conduct such checks.

Survey data indicate that less than 2 percent of guns used by criminals are bought at gun shows and flea markets—and that includes sales through licensed dealers. Still, the *New York Times* editorializes that background checks "prevented nearly two million gun sales" over a 15-year period. Of course, that's ridiculous; there is no way for the *Times* to determine how many sales did not happen. Violence-prone buyers who do not pass the background check go elsewhere for their purchases.

Here are the figures for a recent year: The National Instant Criminal Background Check System (NICS) denied 79,000 would-be buyers. Of those, 105 were prosecuted and 43 were convicted. That's a conviction rate of 5/100ths of one percent. Either the remaining denials were false positives – legitimate purchases unjustly blocked by NICS – or, if the denials were proper, then 99.95 percent of the 79,000 rejected applicants escaped punishment. Neither conclusion offers much hope for an expanded system of background checks.

Further, the claim that background checks take just a few minutes to process on the telephone is disingenuous at best. A significant number of checks last 72 hours, and most gun shows are two-day events. The intent of requiring checks for private sales may be to drive gun shows out of business. Indeed, existing delays and the large number of false positives have reduced gun shows by about 14 percent. Some say that's a good thing. But they know that a law banning gun shows would not pass constitutional muster; so they try to accomplish the same thing through the backdoor.

Remember, the "I" in NICS stands for "Instant." If technology were to facilitate truly speedy background checks – say, 24 hours maximum —without unreasonably intruding on privacy rights, I would have no objection to extending NICS to cover private sales at gun shows—not because I am convinced that expanded background checks would curb violence, but because it would get us past this particular debate and let us concentrate on options that might be more productive.

• *Drug legalization*. The single most effective option—which is not being discussed at all—would result in a huge reduction of gun violence: Legalize drugs. There are 1.5 million drug arrests each year, and more persons incarcerated for drug infractions than for all violent crimes combined. Fifty percent of our federal prison population comprises narcotics violators. Most important, because drugs are illegal, participants in the drug trade cannot go to court to settle disputes and enforce contracts. As a result, disputes are resolved by force. Meanwhile, the Drug Enforcement Administration has 10,000 agents, analysts, and support staff, who could be fighting terrorism or real crime—including gun violence.

• *Mental illness*. A second step is earlier detection and treatment of mental illness. I do not pretend to be an expert on mental health, so I am not prepared to offer specifics. But I do believe that early detection and treatment can be a legitimate function of government. It's part of a state's police power to protect residents against rights-violating activities, such as the criminal use of firearms.

There are, however, three corollaries: First, government funding should be limited to those mental illnesses that could cause harm to innocent bystanders. It is not the government's role to pay for private medical care unless third-party rights are involved. Second, federal funding is not constitutionally authorized. This is a state matter—an application of the state's police power, which the federal government does not possess. Third, to the extent that government peruses medical records and may even prescribe involuntary treatment, there are serious civil liberties implications that must be confronted.

• *Armed guards*. Another alternative—suggested by the National Rifle Association—is armed guards at schools. In the United States, there are approximately 100,000 public schools, so staffing should not be prohibitively expensive. About 28 percent of those schools already employ security officers who carry firearms. For the remaining schools, retired police and military personnel would be obvious recruits. The focus should be on entrance security, which reduces manpower requirements.

It's true that an armed guard did not prevent Columbine; but neither did the ban on assault weapons and high-capacity magazines then in effect. Moreover, the rules of engagement, which have since been changed, told the armed guard at Columbine to wait for SWAT team backup. No wonder the guard did not stop the carnage; although he did delay the killers, which gave some students time to escape.

About two-thirds of public schools are elementary schools, thus educators and parents would have to assess if young children could be psychologically stressed by the presence of armed guards. Assuming that problem can be addressed, the idea has considerable merit—and its implementation would have an immediate impact. Gun-free school zones have been a magnet for the mentally deranged. We have armed guards in banks, airports, power plants, courts, stadiums, government buildings, and on planes. There is no reason why armed guards at all public schools—not just 28 percent of them—should not be considered.

In fact, it might even be desirable to extend the program—on a strictly volunteer basis—to teachers and principals. They would require extensive background screening and psychological testing, as well as classroom and practical training—roughly equivalent to what sky marshals now get. The teachers and principals wouldn't necessarily carry firearms, but the weapons would be accessible—subject, of course, to proper safe-storage regulations.

In the Aurora, Colo., shooting, seven theatres showing the *Batman* premier were within a 20-minute drive of the suspect's apartment. Researcher John Lott reports that the killer did not pick the closest theatre or the largest theatre. He picked the only one of the seven that banned concealed weapons. With just two exceptions, every public mass shooting in this country over the past 60 years has taken place where citizens are banned from carrying guns. The same pattern is true in Europe, where three of the worst six school shootings occurred despite strict gun regulations.

The Israelis have learned that police and soldiers cannot protect all of the terrorist targets all the time. In exceptionally dangerous locations, licensed and trained citizens, including teachers, are armed with concealed weapons. An added benefit is that killers do not know whom to attack first.

That said, in urging armed guards at schools, the NRA's Wayne LaPierre got it wrong on two counts: First, a government mandate for armed guards should not be imposed on all schools—especially not private schools, which should adopt whatever security measures they deem appropriate, with liability only for unreasonable negligence. Fully informed parents who do not like the security arrangements are free to send their children elsewhere.

Second, Congress has no role to play in funding armed school guards. Like mental health treatment, this is a police power function that is constitutionally reserved to the states. Security that may be necessary in the inner city of Detroit is likely to be quite different than what's needed in the hills of Montana. Each state or locality should decide for itself, and foot its own bill. When the feds pay the piper, the feds end up calling the tune.

Our framers intended that the states serve as experimental laboratories. Residents who disapprove can vote with their feet. Even the indisputably anti-gun *Washington Post* editorialized: Armed guards are "not unreasonable where local schools feel they need [them]."

• *Cautionary comments*. In the aftermath of the horrific and heart-rending tragedy at Sandy Hook Elementary, our gun laws should and will be re-evaluated. But the process must be measured and dispassionate. And before we embark on a crusade for new controls, let's

remember a few facts:

First, random multi-victim killings are a fraction of 1 percent of all murders in the United States. Regrettably, they will occur even where stringent gun controls are imposed. In Norway, with tight controls and licensing, Anders Breivik gunned down 69 people. Here in the United States, our worst incident killed 38 elementary school children in Michigan. The weapon of choice was bombs, not guns. From a historical perspective, U.S. gun controls from 2000 to date have been relatively restrictive. Part of that time, we had a ban on assault weapons. The entire time, we had background checks. Nonetheless, random mass killings occurred three times more often since 2000 than over the decade of the '80s, when gun controls were weaker.

Second, the evidentiary debate in peer-reviewed journals centers on the question of whether gun laws such as right-to-carry reduce violent crime or have no significant effect. Despite dozens of studies, no reliable evidence indicates that such laws increase crime. The two most exhaustive studies on gun control were conducted by the National Academy of Sciences and the Centers for Disease Control. Neither agency could be accused of favoring the gun lobby. In 2004, the National Academy reviewed 253 journal articles, 99 books and 43 government publications evaluating 80 gun-control measures. Researchers could not identify a single gun-control regulation that meaningfully reduced violent crime, suicide, or accidents. In 2003, the CDC reported on ammunition limits, restrictions on purchase, waiting periods, registration, licensing, child access prevention and zero-tolerance laws. Conclusion: None of the laws demonstrably reduced gun violence.

Third, guns are already the most heavily regulated consumer product in the United States. Handguns are the only consumer product that cannot be purchased outside the buyer's state of residence. Firearms retailers, wholesalers, and manufacturers all require federal licenses. Each retail sale must be pre-approved by government. Nationwide, thousands of laws regulate who can own a gun, how it can be purchased, and where it can be possessed and used.

Overall, I am skeptical about the efficacy of gun regulations that are imposed almost exclusively on persons who are not part of the problem. Drug legalization would radically reduce gun violence overnight. Armed guards at schools and better detection and treatment of mental illness should help. The NRA thinks so, and I agree. But the NRA is less convincing in its opposition to a ban on magazines with 20 or more rounds, a sensibly refined version of the assault weapons ban, and background checks (if they can be completed in no more than 24 hours) on private sales at gun shows.

With regard to further regulations, the Supreme Court has directed government to certify two essential points: First, the proposals will make us safer. Second, the same ends could not be attained without unduly compromising individual rights that are secured by the Second Amendment. So far, the regulators have not met that burden.

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February 11, 2013

Hon. Ted Cruz, Ranking Member
Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Sen. Cruz:

In connection with tomorrow's Subcommittee hearing on "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment," I would like to submit the enclosed article for your consideration.

The article is entitled "Reflections on Gun Control by a Second Amendment Advocate." It will be published today on the website of the *National Law Journal.* I'll provide a link to your office as soon as it's available.

Overall, I am skeptical about the efficacy of gun regulations – in major part because they are imposed almost exclusively on persons who are not involved in gun-related violence. I suggest in the article, however, several steps that might enhance public safety without violating core Second Amendment rights – including background checks on private sales at gun shows, if the checks can be completed in no more than 24 hours. Because the Supreme Court has held that the right to bear arms is "fundamental," government bears a heavy burden in justifying further regulations. So far, the regulators have not met that burden.

Thank you for the opportunity to express my views on this important topic.

Sincerely,

Robert A. Levy
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Co-Counsel to the Plaintiffs in
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and the Second Amendment

February 11, 2013

Honorable Ted Cruz
Ranking Member
Senate Judiciary Committee Subcommittee
on the Constitution, Civil Rights and Human Rights
United States Senate

Dear Senator Cruz:

I am informed that the subcommittee will soon hold a hearing on "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment." In connection with that hearing, the subcommittee may be told that proposed bans on so-called assault weapons and on large capacity magazines are constitutionally permissible, and that Judge Douglas Ginsburg's opinion for the court in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) supports this conclusion.

The attached article explains that Judge Ginsburg's opinion for the court misapplied the applicable law. For the reasons set out in the article, this opinion should not be accepted as authoritative by other courts or by your subcommittee.

Regards,

Nelson Lund

Attachment

Civil Rights

No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment

*By Nelson Lund**

Note from the Editor:

This paper examines the largely unexplored subject of the different approaches courts are taking with regard the right to possess firearms following the Supreme Court's 2008 recognition of this right in *District of Columbia v. Heller*. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, while there is currently a limited amount of scholarship on this subject, we offer links below to various court decisions discussing this issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- District of Columbia v. Heller, 554 U.S. 570 (2008): http://www.supremecourt.gov/opinions/07pdf/07-290.pdf
- Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*): http://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/$file/10-7036-1333156.pdf
- Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011): http://www.ca7.uscourts.gov/tmp/ID0XPIFF.pdf

Introduction

For several decades, the District of Columbia banned the possession of handguns or any other operable firearm in the home. In *District of Columbia v. Heller*,[1] the Supreme Court concluded that the Second Amendment protects a private right to arms, which enables individuals to exercise their inherent right of self-defense, including the right to defend oneself against criminal violence. This conclusion was strongly supported by evidence about the original meaning of the constitutional provision. The Court then invalidated D.C.'s handgun ban on the ground that handguns are the most popular weapon for self-defense in the home today. Justice Scalia's majority opinion went on to endorse a broad range of gun control regulations without justifying them with evidence about the original meaning of the Second Amendment.[2] These included:

- Bans on the possession of firearms by felons and the mentally ill.
- Bans on carrying firearms "in sensitive places such as schools and government buildings."
- Laws imposing conditions and qualifications on the commercial sale of arms.
- Bans on carrying concealed weapons.
- Bans on "those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns" and apparently also machine guns.

In 1791, American citizens enjoyed an almost unlimited right to keep and bear arms because legislatures had chosen to impose almost no restrictions on that right. We have virtually no historical evidence about constitutional limits on the government's discretion to alter those legal rights because it had not become a matter of public controversy.

Heller might have been regarded as an exercise in judicial restraint if it had simply invalidated the D.C. law on the ground that it severely compromised what the Court called "the core lawful purpose of self-defense."[3] Unfortunately, the opinion's approval of various regulations not at issue in the case, combined with its lackadaisical reasoning in support of its various conclusions, created a mist of uncertainty and ambiguity.

After *McDonald v. City of Chicago*[4] held that the Fourteenth Amendment made the Second Amendment applicable to the states, the need for a workable framework of analysis became more acute. The lower courts have not enjoyed the luxury of confining their rulings to anomalous laws aimed at disarming the civilian population, which *Heller* said would be invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[5]

Faced with harder cases, and with the fogginess of the *Heller* opinion, these courts have understandably adapted the "tiers of scrutiny" framework widely used in other areas of constitutional law. They have quickly and fairly uniformly coalesced around an interpretation of *Heller* that provides an intelligible framework. The emerging consensus can be roughly summarized as follows:

- Some regulations, primarily those that are "longstanding," are presumed not to infringe the right protected by the Second Amendment.
- Regulations that severely restrict the core right of self-defense are subject to strict scrutiny.
- Regulations that do not severely restrict the core right are subject to intermediate scrutiny.

* *Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law*

This is an abbreviated version of Second Amendment Standards of Review in a *Heller* World, *forthcoming in the* Fordham Urban Law Journal, *published here with permission.*

The *Heller* Court seems to have self-consciously refrained from adopting such a framework, but neither did it specify any alternative. We might therefore expect Second Amendment jurisprudence to continue developing through the application of this model.

Maybe it will. But a vigorous challenge was recently advanced in a dissenting opinion by Judge Brett Kavanaugh of the D.C. Circuit. He rejected the consensus approach adopted by his court, arguing that a very different framework is dictated by Justice Scalia's opinion in *Heller*. It is therefore worth considering the differences between Judge Kavanaugh's approach and the one adopted by his colleagues and by other courts of appeals.

I conclude that the analytical framework in Judge Douglas Ginsburg's majority opinion is superior to Judge Kavanaugh's. The majority, however, misapplied that framework. A variation developed and applied by Judge Diane Sykes of the Seventh Circuit illustrates how the inferior federal courts can best approach novel Second Amendment issues.

I. *Heller II*

Prior to 2008, the District of Columbia had sought through its laws to effect an almost complete disarmament of the civilian population. After losing the *Heller* case, the D.C. government went back to the drawing board in an effort to restrict civilian access to guns as much as possible in light of *Heller*. In *Heller II*, the named plaintiff in that case, along with other individuals, challenged several provisions of the city's revised gun control laws.[6]

The plaintiffs in *Heller II* challenged three main elements of the D.C. gun control regime:

- A requirement that gun owners register each of their firearms with the government. The registrant is required to submit detailed information about himself and the weapon, and to renew the registration every three years. Citizens are forbidden to register more than one pistol in any thirty-day period.
- Every applicant for registration must in effect be licensed to register by passing a series of tests, attending a training course, and being fingerprinted and photographed.
- D.C. also prohibited a wide range of semi-automatic firearms, as well as any magazine with a capacity of more than ten rounds.

A. The Majority Opinion

Judge Ginsburg's majority opinion offered the following analysis and conclusions:

- The basic registration requirement, as applied to handguns but not long guns, is similar to longstanding regulations that are presumptively constitutional, and the plaintiffs failed to overcome this presumption by showing that the requirement has more than a *de minimis* effect on their constitutional rights.
- Some of the specific registration provisions are novel rather than longstanding, and are therefore subject to additional scrutiny. The court reached the same conclusion about the licensing requirements and about all of the registration and licensing requirements for long guns.

Relying largely on First Amendment free speech decisions, the court concluded that none of these requirements imposes "a substantial burden upon the core right of self-defense,"[7] and that strict scrutiny is therefore inappropriate. Instead, the court concluded that intermediate scrutiny should be applied, which requires the government to show that the regulations are "substantially related to an important governmental objective."[8] Finding that the record was insufficient to apply this standard of scrutiny, the court remanded for further proceedings.

- The court declined to decide whether semi-automatic rifles and large-capacity magazines receive any protection at all under the Second Amendment.[9] Assuming *arguendo* that they do, the court then concluded that it was "reasonably certain" that the prohibition does not substantially burden the right. Accordingly, it applied intermediate rather than strict scrutiny.

The court upheld the ban on certain semi-automatic rifles, primarily because of evidence suggesting that they are nearly as dangerous or prone to criminal misuse as the fully automatic rifles that *Heller* had excluded from constitutional protection. The ban on high-capacity magazines was upheld on the basis of evidence that they are useful to criminals and that they encourage an excessive number of shots to be fired by those engaged in legitimate self-defense.

B. The Kavanaugh Dissent

Judge Kavanaugh thought that the majority's approach to the case was based on a complete misinterpretation of *Heller*. In his view, the Supreme Court has rejected the tiers-of-scrutiny approach. Instead, *Heller* teaches that courts are to assess gun regulations by looking to the Constitution's text and to history and tradition, and by drawing analogies from these sources when dealing with modern weapons and new circumstances.

Judge Kavanaugh analyzed the new case as follows:

- He argued that D.C.'s entire registration and licensing scheme is unconstitutional because it does not meet *Heller*'s test approving of "longstanding" regulations. He conceded that registration requirements imposed on gun *sellers* meet *Heller*'s test, but pointed out that there is no tradition of imposing such requirements on gun *owners*. The city's licensing requirements, which are inseparable from the registration requirement, are similarly novel and therefore also invalid.

Judge Kavanaugh's analysis was based on a misreading of *Heller*. The Supreme Court said that certain longstanding regulations are at least presumptively constitutional, and Judge Kavanaugh is right that registration requirements on gun owners are not longstanding. But *Heller* nowhere said that novel regulations are always unconstitutional. The Court rested its decision on a perception that many Americans today have good reasons for making handguns their preferred weapon for defense of the home. The Court did not say that the novelty of the handgun ban rendered it unconstitutional, or that a longstanding ban on handguns would have been upheld.

• Judge Kavanaugh also concluded that D.C.'s ban on semi-automatic rifles is unconstitutional because (1) they are not meaningfully different from semi-automatic handguns, which *Heller* had already decided may not be banned, and (2) they have not traditionally been banned and are in common use today.

This reading of *Heller* is also technically flawed. The Supreme Court's holding involved only a particular handgun, which was a revolver, not a semi-automatic. *Heller* did not say, one way or the other, whether a ban on semi-automatic pistols would be unconstitutional.

Judge Kavanaugh also misread *Heller* on the common use test. In that case, the Supreme Court concluded that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[10] The awkward double negative in this statement strongly suggests that the Court was careful to avoid saying that all weapons typically possessed for lawful purposes *are* protected. Whatever the Court may decide in the future, it has not yet said that all weapons in common use for lawful purposes are *ipso facto* protected by the Second Amendment.

III. Applying *Heller*

A. The Rights and Wrongs of the Majority Approach in Heller II

Judges Ginsburg and Kavanaugh engaged in a detailed debate about the appropriate framework for analysis. Neither judge made a plausible case that his preferred framework can be derived from the *Heller* opinion. The real problem is that *Heller* is so Delphic, or muddled, that the kind of methodological debate found in *Heller II* is unresolvable. That said, Judge Ginsburg's approach seems to me to be clearly preferable.

First, as explained above, Judge Kavanaugh's approach required him to misread *Heller* in order to find guidance precise or clear enough to provide rules of decision in *Heller II*.

Second, and perhaps more important, Justice Scalia's *Heller* opinion itself shows that his use of history and tradition is little more than a disguised version of the kind of interest balancing that he purported to condemn. At crucial points, he simply issued *ipse dixits* unsupported by any historical evidence, and at other points, he misrepresented historical facts.[11] He could hardly have avoided doing so, given the paucity of relevant historical evidence about the original meaning of the Second Amendment. That problem is even more acute in cases dealing with less restrictive regulations. Covert interest-balancing dressed up as an analysis of history and tradition is no better than more straightforward interest-balancing in the form of strict or intermediate scrutiny, and almost certainly worse.

This is not to say that *Heller II* was correctly decided. Judge Kavanaugh's most powerful arguments are directed against the majority's application of its framework to the challenged regulations. Those regulations were manifestly meant to suppress the legitimate exercise of constitutional rights, and the majority was far too deferential to the government in reviewing them.

Judge Kavanaugh is right that D.C.'s registration and licensing scheme is quite different from the limited registration requirements that have been widely imposed for many decades. The important point, however, is not their novelty, but their lack of an adequate rationale. Whether under strict or intermediate scrutiny, they should not be upheld without a showing by the government, at a minimum, that they can make a significant contribution to public safety.

The government tried to do so by arguing that a registration system enables police officers who are executing warrants to determine whether residents in the dwelling have guns. This rationale is woefully inadequate. Even the greenest rookie officer in the District of Columbia would know that many residents possess unregistered guns. The regulation cannot accomplish the purpose advanced to justify it, and the justification cannot satisfy any form of heightened scrutiny.

Apart from the government's failure to show a substantial relation between public safety and its registration requirements, this kind of registration system has traditionally been resisted in American history for a reason closely bound up with an important purpose of the Second Amendment. When the government collects this kind of detailed information about individuals and the guns they own, it gives itself a powerful tool that it could use for the unconstitutional confiscation of guns or the unconstitutional harassment of gun owners.[12] Even a narrow reading of the Second Amendment would have to acknowledge that its purpose includes the prevention of such illegalities. For that reason, the District of Columbia should have an especially heavy burden to bear in justifying regulations that would help it to do what it has already demonstrated that it wants to do, namely disarm the civilian population. The government did not come close to meeting that burden.[13]

The majority's decision to uphold D.C.'s ban on a wide range of semi-automatic rifles is also inconsistent with heightened scrutiny. The banned rifles are defined primarily in terms of cosmetic features, and they are functionally indistinguishable from other semi-automatic rifles that are not banned. The regulation is therefore arbitrary and without any real relation to public safety. It certainly fails the majority's own test, under which "the Government has the burden of showing there is a substantial relationship or reasonable 'fit' between, on the one hand, the prohibition . . . and, on the other, [the Government's] important interests in protecting police officers and controlling crime."[14] That failure alone should have sufficed to invalidate the ban.

Heller assumed that fully automatic rifles are outside the protection of the Second Amendment. The *Heller II* majority analogized semi-automatic rifles to these unprotected weapons on the ground that semi-automatics can fire almost as rapidly as those that are fully automatic. This argument is fallacious. *Heller* treated fully automatic weapons as a special case, apparently on the basis of history and tradition, without saying anything at all to suggest some kind of penumbral rule that protected weapons must have a significantly slower rate of fire than those that are fully automatic.

Even assuming, *arguendo*, that such a penumbral rule was implied by *Heller*, D.C. allows other semi-automatic rifles that can fire just as quickly as those that are banned. The underinclusiveness of the regulation confirms it was not

based on a functional similarity between automatic and semi-automatic weapons. The putative similarity therefore cannot justify the regulation under heightened scrutiny.

The majority offered two justifications for the ban on large-capacity magazines. First, it accepted testimony that such magazines give an advantage to "mass shooters." Maybe they do. But how could the District's regulation possibly reduce this problem? Large-capacity magazines are freely available by mail order and at stores in nearby Virginia. The government apparently assumed that criminals bent on mass shootings will refrain from obtaining such magazines out of respect for D.C.'s regulation. Rather than accept this assumption, the court might well have taken judicial notice of the opposite. Or at least required the government to prove such a counterintuitive notion.

The majority also credited testimony that large-capacity magazines can tempt legitimate self-defense shooters to fire more rounds than necessary. This testimony shows at most that banning such magazines could conceivably have some good effects on some occasions. But the same could be said about D.C.'s original and unconstitutional ban on all handguns, which illustrates why the argument is fatally flawed. Banning medical books containing photos of corpses might save some children from psychological trauma, which would be a good thing, too. But nobody would consider such a book ban constitutional.

Assuming that intermediate scrutiny is appropriate, the government is required at a minimum to show a *substantial* relation between the regulation and public safety. The *Heller II* majority cited no evidence showing that the magazine ban would save any significant number of lives, or any lives at all. Nor did it even consider the possibility that innocent civilians might lose their lives because they ran out of ammunition while trying to defend themselves. The government failed to meet its burden of showing that the magazine ban satisfies even intermediate scrutiny, and the ban should therefore not have been upheld.

B. A Better Approach: Ezell v. City of Chicago

Chicago responded to *McDonald* in much the same fashion as the District of Columbia had responded to *Heller*: by adopting a sweeping and burdensome new regulatory regime to replace the handgun ban that the Supreme Court had invalidated. In *Ezell v. City of Chicago*,[15] the Seventh Circuit reviewed Chicago's decision to require one hour of range training as a prerequisite to lawful gun ownership, while simultaneously banning from the city any range at which this training could take place.

Judge Diane Sykes began by offering a more detailed and somewhat different interpretation of *Heller* and *McDonald* than that of the D.C. Circuit.[16] Briefly stated, she interpreted the Supreme Court's opinions as follows:

- Just as some categories of speech are unprotected by the First Amendment as a matter of history and tradition, some activities involving arms are categorically unprotected by the Constitution. To identify those categories, courts should look to the original public meaning of the right to arms (as of 1791 with respect to the Second Amendment and as of 1868 with respect to the Fourteenth Amendment).
- If an activity is within a protected category, courts should evaluate the regulatory means chosen by the government and the public benefits at which the regulation aims. "Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right."[17] Broadly prohibitory laws restricting the core Second Amendment right—like those at issue in *Heller* and *McDonald*—are categorically unconstitutional. All other laws must be judged by one of the standards of means-end scrutiny used in evaluating other enumerated constitutional rights, and the government always has the burden of justifying its regulations.

The court concluded that firing ranges are not categorically outside the protection of the Second Amendment. The evidence cited by the City fell "far short of establishing that target practice is wholly outside the Second Amendment as it was understood when incorporated as a limitation on the States."[18]

The more difficult question for the court involved the choice of a standard of review. Judge Sykes interpreted *Heller* to permit the use of First Amendment analogies, and she summarized the rather intricate set of tests generated by the Supreme Court in that area. From those cases, she distilled an approach to the Second Amendment. Severe burdens on the core right to self-defense will require an extremely strong public-interest goal and a close means-ends fit. As a restriction gets farther away from this core, it may be more easily justified, depending on the relative severity of the burden and its proximity to the core of the right.

Applying this test to the gun-range ban, the court concluded that the right to maintain proficiency in the use of weapons is an important corollary to the meaningful exercise of the core right. This requires a rigorous review of the government's justifications, "if not quite 'strict scrutiny.'"[19] The City did not come close to satisfying this standard. It produced no evidence establishing that firing ranges necessarily pose any significant threat to public safety, and at least one of its arguments was so transparently a makeweight that "[t]o raise it at all suggests pretext."[20]

The analytical framework adopted by Judge Sykes in this case is broadly similar to the one adopted by the *Heller II* majority. Her approach, however, is superior in at least two important respects.

First, *Heller II* adopted a view reflecting a somewhat loose consensus of other circuit courts. Judge Sykes, however, relied almost entirely on *Heller*, *McDonald*, and other Supreme Court decisions, and she exhibited a detailed and thoughtful familiarity with the Court's opinions. It is true that *Heller* and *McDonald* can be read differently, as Judge Kavanaugh showed in *Heller II*, but Judge Sykes' analysis has better support in the text of the opinions. Inferior federal courts are required to follow the Supreme Court,[21] but not to follow the lead of other circuits. It is therefore generally a better practice to focus on what the Supreme Court itself has said—to look, so to speak, for the Court's "original meaning"—than to play a kind

of telephone game by interpreting Supreme Court opinions on the assumption that other courts have read them correctly.

Second, and this is more important, Judge Sykes took the importance of the Second Amendment more seriously than the *Heller II* majority. Whereas *Heller II* casually applied intermediate scrutiny in a way that too often accepted flimsy justifications for the regulations, Judge Sykes insisted on the kind of rigor that courts routinely demand in First Amendment cases. Unlike the *Heller II* majority, she gave appropriate attention to the fundamental principle, expressly adopted by the Supreme Court, that the Second Amendment should not "be singled out for special—and specially unfavorable treatment."[22] If enough other judges will follow her lead, perhaps the Second Amendment will not return to its pre-*Heller* status as a kind of constitutional pariah.

Conclusion

The Supreme Court's *Heller* opinion disapproved a governmental ban on keeping a handgun in the home, while endorsing a number of other gun control regulations. The Court refused to adopt any clear analytical framework for resolving the countless issues about which *Heller* said nothing. Some of its reasoning, or rhetoric, suggests that such issues should be resolved solely by consulting American history and tradition, along with the text of the Constitution. Other parts of the opinion can be read to point toward the use of the Court's "tiers of scrutiny" approach.

The federal courts of appeals have declined to follow the history-and-tradition approach. The effort by Judge Brett Kavanaugh to take that approach in his *Heller II* dissent illustrates why this approach is not likely to prove fruitful, or even workable. The D.C. Circuit's majority opinion in *Heller II* illustrates the perils of adapting the "tiers of scrutiny" approach without an adequate regard for the value of Second Amendment rights. Judge Diane Sykes' opinion for the Seventh Circuit in *Ezell* shows that circuit judges who are so inclined can show appropriate respect both to the Supreme Court and to the Second Amendment. She deserves to be widely imitated.

Endnotes

1 554 U.S. 570 (2008).

2 For a detailed analysis, see Nelson Lund, *The Second Amendment,* Heller *and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1356-68 (2009), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1324757.

3 554 U.S. at 630.

4 130 S. Ct. 3020 (2010). In this case, the Court struck down a handgun ban similar to the one at issue in *Heller*. For further details, see Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in* McDonald v. City of Chicago, 63 Fla. L. Rev. 487 (2011), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1658198.

5 554 U.S. at 628-29.

6 Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011).

7 *Id*. at 1257 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994)).

8 *Id*. at 1257-58 (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

9 The court also refused to consider issues involving semi-automatic pistols and shotguns, on the ground that none of the plaintiffs had tried to register such weapons.

10 554 U.S. at 625.

11 For a detailed proof of these claims, see Lund, *supra* note 2, at 1356-67.

12 This is not a paranoid fantasy. *See*, *e.g.*, Stephen P. Halbrook, *"Only Law Enforcement Will Be Allowed to Have Guns": Hurricane Katrina and the New Orleans Firearm Confiscations*, 18 Geo. Mason U. C.R. L.J. 339 (2008) (discussing the aftermath of a police decision that only law enforcement officers would be allowed to possess guns in New Orleans after Hurricane Katrina struck the area).

13 To its credit, the majority recognized that the government had failed to meet its burden with respect to some of the registration and licensing requirements. In calling for further development of the record on remand, however, the court merely required the government "to present some meaningful evidence" to justify its predictions about enhanced public safety. 670 F.3d at 1259. That doesn't sound like much of a hurdle.

14 *Id*. at 1262.

15 651 F.3d 684 (7th Cir. 2011).

16 After the district court denied the plaintiffs' motion for a preliminary injunction, the Seventh Circuit reversed and remanded with orders to grant the motion. Because of the procedural posture of the case, the court of appeals did not issue a decision on the merits. In explaining why the plaintiffs had demonstrated a strong likelihood of success on the merits, however, the court provided a detailed analysis that I will treat for simplicity of exposition as though it were a merits decision.

17 651 F.3d at 703.

18 *Id.* at 704-06.

19 *Id.* at 708.

20 *Id.* at 709-10.

21 State courts may have more latitude than federal courts in dealing with guidance from the Supreme Court. *See* Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors*, 19 Geo. Mason L. Rev. 1029, 1039-41 (forthcoming 2012), *draft available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2033946.

22 McDonald v. City of Chicago, 130 S. Ct. 3020, 3044 (2010); *cf*. United States v. Skoien, 614 F.3d 638, 651-54 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing Judge Frank Easterbrook's majority opinion for relieving the government of its burden of justifying its disarmament regulation and for depriving a criminal defendant of an opportunity to contest the dubious non-record evidence on which the majority relied).

411 Jefferson Street
Alexandria, VA 22314
February 11, 2013

Hon. Ted Cruz, Ranking Member
Subcommittee on the Constitution,
Civil Rights and Human Rights
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Members of the Subcommittee:

A subcommittee that is charged to protect the Constitution, Civil Rights, and Human Rights is the appropriate one to determine how to protect our communities from gun violence while respecting the Second Amendment rights of the residents of those communities. To strike the right balance the Committee needs to keep two things in mind.

First, self defense is the most basic human right and the special focus of the Second Amendment. Our Founders agreed with philosophers and jurists on the centrality of this right. Because no one else, neither society nor the police, can protect all of us, all the time we must be able to protect ourselves. Firearms are the weapons best suited for self-defense permitting the weak—women, the elderly, one individual confronted by many -- to protect themselves against the strong. As a member of the British parliament put it when assured society would protect everyone, "It is not very much consolation that society will come forward a great deal later, pick up the bits, and punish the violent offender." In fact, according to the D.C. Court of Appeals in *Warren v. District of Columbia* the police have no duty to protect any of us. The Washington police in *Warren* were being sued for failing to respond to repeated 911 calls, leaving three young women to be horribly abused for fourteen hours. The judge informed the women: "it is a fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen."

In *District of Columbia v. Heller* the Supreme Court affirmed that the Second Amendment protects an individual right for Americans to have firearms for their self-defense and to keep and bear the weapons "in common use for self-defense and other lawful purposes." These weapons include handguns and semi-automatic rifles with their customary magazines. In *McDonald v. City of Chicago* the Court incorporated the Second Amendment to the states because it protected a fundamental right of Americans.

Second, enabling individuals to protect themselves does not make our communities more dangerous. Quite the opposite. Forty-four states have an

explicit right to keep and bear arms in their state constitutions. Thirty-nine states are now "shall-issue concealed carry" states, where any law-abiding resident who fulfills basic requirements can carry a concealed firearm. The number of firearms in civilian hands has continued to increase in the last few years. In 2009 the FBI reported 14,033,624 background checks for the purchase of a gun, up 10% from the prior year. Yet despite the increase in firearms the rate of violent crime in the US has been declining for 20 years. Since crime peaked in 1991 at 758.1 crimes per 100,000 people by 2009 it had declined to 429.4 crimes per 100,000. In January 2012 the *Christian Science Monitor* reported that the last time the murder rate was this low gasoline was 29 cents a gallon.

Since civilian disarmament is both unconstitutional and ineffective, how can we protect Americans from deranged, mass murderers? These so-called "gun-free" zones attract those bent on mass murder. The best way to protect our school children and others in "sensitive places" is to have someone trained and armed on the premises.

Secondly, we must find a better way to deal with the violent mentally ill. The present system offers little protection to the mentally ill or society. Present protections against reporting potentially dangerous individuals need to be reconsidered. This will entail your Committee examining the balance of rights and protections of a different sort, patient privacy rights.

Neither of these approaches will intrude upon the Second Amendment right and both will be far more effective than a ban on semi-automatic weapons or reduction of ammunition magazines in common use, policies unlikely to survive a constitutional challenge.

I strong urge the Committee to focus on solutions that will keep us safer while not infringing on the basic Second Amendment right of self-defense.

Sincerely yours,
Joyce Lee Malcolm
Professor of Law
George Mason University School of Law

The National Association for Gun Rights

Gun Control's Racist History

Subcommittee on the Constitution, Civil Rights and Human Rights

United States Senate

February 12, 2013

"No free man shall ever be debarred the use of arms."

– Thomas Jefferson, June 1776

"Be it enacted by the legislature of the state of Mississippi, that no freedman, free Negro, or mulatto not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, dirk, or Bowie knife."

Laws of the State of Mississippi, Passed at a Regular Session of the Mississippi Legislature, held in Jackson, October, November and December, 1965, Jackson, 1866, pp. 82-93, 165-167.

Since the founding of the United States, firearms ownership has been inextricably linked to the American ideal of individual liberty and freedom.

Today, as those who would prefer that only a certain class of citizen -- government officials -- ever be legally armed, law-abiding Americans have grave cause for concern. Even the current Feinstein Gun Ban (S. 150) under consideration before Congress exempts many government officials, targeting instead law-abiding citizens.

Historically, classes of American citizens who have found themselves targeted by gun control have been precisely those citizens that have seen their civil rights trampled.

This was true throughout the period of slavery in the United States and the Jim Crow-era in the southern United States.

History proves a free man is an armed man.

Today, those who value liberty and freedom should view the current fight over gun control as the premier civil rights issue of our day.

There can be no liberty and no freedom without the ability to defend it.

Founders on Gun Control

By far, the most well-known statement today regarding the Founders views on gun control is enshrined in the Second Amendment to the United States Constitution.

Politicians in both parties pay lip service to the Second Amendment. Virtually no one will come out in complete and total opposition. Instead, they'll say the Second Amendment is a "collective right" – to be controlled and regulated by government.

The United States Supreme Court partially struck down this reasoning in the *Heller* decision in 2008, reaffirming the Second Amendment reflects an individual right to keep and bear arms.

But the court certainly did not go far enough, leaving many unconstitutional state and local anti-gun laws untouched. And nowhere did the Supreme Court link the idea of individual gun ownership as clearly as the Founders did in their statements.

What's been lost is how directly linked the Founders viewed the right to self-defense – enshrined in the Second Amendment – with freedom. Time and again in their statements, the Founders linked the idea of slavery to being disbarred from the use of arms.

> "I ask, Sir, what is the militia? It is the whole people. To disarm the people is the best and most effectual way to enslave them."
>
> *George Mason*
> Virginia's Convention to Ratify the Constitution, 1788

> "The supposed quietude of a good man allures the ruffian; while on the other hand arms, like laws, discourage and keep the invader and plunderer in awe, and preserve order in the world as property. The same balance would be preserved were all the world destitute of arms, for all would be alike; but since some will not, others dare not lay them aside … Horrid mischief would ensue were the law-abiding deprived of the use of them."
>
> *Thomas Paine*
> *I Writings of Thomas Paine at 56 (1894)*

> "No free man shall ever be debarred the use of arms."
>
> *Thomas Jefferson*
> Proposed Virginia Constitution, 1776

Gun Control During Slavery

Since even before the nation's founding, black Americans were often singled-out as targets for gun control laws.

It was well understood by whites at the time that allowing slaves to be armed would result in an end to slavery.

Clayton E. Cramer, wrote extensively about this in an article for *Kansas Journal of Law & Public Policy* in the winter of 1995, entitled, "The Racist Roots of Gun Control."

> "The historical record provides compelling evidence that racism underlies gun control laws — and not in any subtle way. Throughout much of American history, governments openly stated that gun control laws were useful for keeping blacks and Hispanics "in their place" and for quieting the racial fears of whites.
>
> "Racist arms laws predate the establishment of the United States. This is not surprising. Blacks in the New World were often slaves, and revolts against slave owners often degenerated into less selective forms of racial warfare. The perception that free blacks were sympathetic to the plight of their enslaved brothers and the "dangerous" example that blacks could actually handle freedom often led New World governments to disarm all blacks, both slave and free."

Mr. Cramer goes on to cite examples from 1751 in which French colonist in Louisiana were required to "stop any blacks and if necessary beat 'any black carrying any potential weapon, such a cane.'"

Throughout the 1700s and on into the 1800s, racially targeted gun control laws would spread from including only enslaved blacks to free black citizens, as well.

In "The Racist Roots of Gun Control, Mr. Cramer writes:

> "Elijah Newsom, 'a free person of color,' was indicted in Cumberland County in June of 1843 for carrying a shotgun without a license."

The state of Tennessee, which stated that "freemen of this State" had a God-given right to own and carry firearms was later changed to "free white men."

Even the Supreme Court's *Dred Scott* decision of 1857 stated black Americans could no be full citizens of the United States because if they were, they would have "the full liberty . . . to keep and carry arms wherever they went."

Racial Gun Control Post Slavery

Sadly, targeting blacks with anti-gun schemes didn't end with slavery. According to *Reason Magazine's* article, "The Klan's Favorite Law" by David B. Kopel:

> "The states enacted Black Codes which barred the black freedmen from exercising basic civil rights, including the right to bear arms. Mississippi's provision was typical: No freedman 'shall keep or carry fire-arms of any kind, or any ammunition.'
>
> "Under the Mississippi law, a person informing the government about illegal arms possession by a freedman was entitled to receive the forfeited firearm. Whites were forbidden to give or lend freedman firearms or knives."
>
> These laws continued unabated for decades.

Even much of the push for gun control in the late 1960s was in response many black Americans decision to arm themselves with the increase of racial violence.

According to *The Atlantic's* "Secret History of Guns" by Adam Winkler from September of 2011, much of the rush to gun control in the late 1960s was racially motivated.

In California and elsewhere, in response to rising racial violence, blacks were arming themselves. In response to the Black Panther movement, Republicans in California passed the Mulford Act prohibiting the open carrying of firearms.

Adam Winkler went on to state in the "Secret History of Guns:"

> "Civil-rights activists, even those committed to nonviolent resistance, had long appreciated the value of guns for self-protection. Martin Luther King Jr. applied for a permit to carry a concealed firearm in 1956, after his house was bombed. His application was denied . . ."

At the federal level, there was a mad rush to demonize Saturday Night Specials" – inexpensive handguns often purchased by blacks – were suddenly demonized. According to Mr. Winkler.

> Because these inexpensive pistols were popular in minority communities, one critic said the new federal gun legislation 'was passed not to control guns but to control blacks.'

Today, with government going all-out to disarm as many Americans as possible,

this should make any freedom-loving American wary of keeping and maintaining our rights into the future.

Gun Control Today

Of course, the push for control launched in the 1960s has become less and less overtly racist, but the lessons are clear.

Aggressors use gun control to turn classes of citizens into easy potential victims.

Regardless of the intent of today's laws, this sadly has been the effect of modern-day gun control.

Federal laws prohibiting firearms in schools leave localities unable to protect against armed madmen. Bans on certain types of firearms and hurdles to carry concealed weapons are impediments to law-abiding citizens carrying firearms.

Criminals, by definition, simply avoid the law.

Even so-called "mental health checks" result in veterans who have served our country honorably being forbidden from buying firearms just because they acknowledge stress upon returning from war.

American history shows being denied the right to keep and bear arms results in lost freedom and the trampling of our God-given Constitutional rights.

So instead of looking for ways to expand gun control laws – which only end up causing more bloodshed – Congress should be looking to eliminate them.

STATEMENT OF CHRIS W. COX
EXECUTIVE DIRECTOR, NRA INSTITUTE FOR LEGISLATIVE ACTION
BEFORE THE U.S. SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS
HEARING ON "PROPOSALS TO REDUCE GUN VIOLENCE: PROTECTING OUR COMMUNITIES WHILE RESPECTING THE SECOND AMENDMENT
216 HART SENATE OFFICE BUILDING
FEBRUARY 12, 2013

Dear Chairman Durbin and Ranking Member Cruz:

Thank you for the opportunity to submit testimony today on behalf of the more than four million members of the National Rifle Association of America. A discussion of unprecedented scope regarding new proposed restrictions on our Second Amendment rights is taking place on Capitol Hill right now—the first substantive debate on these issues that the Congress has undertaken since the Supreme Court issued two landmark rulings on this subject. The subject matter of today's hearing is timely and necessary to inform the legislative debate that is soon to follow. In debating new restrictions on our Second Amendment rights, lawmakers must be careful to heed the parameters set forth in the Supreme Court's rulings.

Though many proposed restrictions have been discussed, the number of bills introduced in this chamber as of this writing remains quite small. I will focus my remarks on the most notable, S. 150, as introduced by Senator Feinstein, in which she would:

- Ban 157 firearms by name. Her 1994 ban banned only 19 firearms by name.
- Ban detachable-magazine semi-automatic rifles and semi-automatic shotguns not exempted by name, for having a "pistol grip," defined to mean any "characteristic that can function as a grip." It would also ban rifles and shotguns for having a folding, telescoping, or detachable stock (defined as any stock adjustable for length or height, which would include many stocks used on rifles and shotguns used in competitive shooting); a forward grip; a threaded barrel; or a barrel shroud (handguard).
- S. 150 would also ban any semi-automatic shotgun for having a fixed magazine that holds more than five rounds of any size ammunition, a detachable magazine, or a revolving cylinder. It would also ban rifles and shotguns for having a "grenade launcher or rocket launcher," which is irrelevant, since launchers are restricted under the National Firearms Act and aren't commercially sold for the rifles and shotguns in question.

- Exempt a relatively small number of detachable-magazine semi-automatic rifles and semi-automatic shotguns, but only "as such firearm was manufactured on the date of introduction of the Assault Weapons Ban of 2013." This would mean that manufacturers of exempted rifles and shotguns wouldn't be permitted to change the names or the configuration of the exempted guns. It would also mean that a gun owner would violate the law by making routine kinds of modifications to an exempted firearm, such as by changing the barrel length, installing a heavier barrel in a rifle for accuracy in hunting or target shooting, changing a rifle's sights, or even reducing the magazine capacity of a tubular-magazine shotgun.
- Ban all semi-automatic rifles and pistols that have fixed magazines that hold more than 10 rounds, except for tubular-magazine .22 caliber rifles.
- Ban any semi-automatic handgun that uses a detachable magazine, if it has a threaded barrel, a second pistol grip, or a magazine that mounts anywhere other than in the grip, or if it is a semi-automatic version of a fully automatic firearm.
- Ban frames and receivers of guns that would not be banned, because they are identical to the frames or receivers of guns that would be banned. (For example, a Ruger Mini-14 with a folding stock—banned under S. 150—uses the same receiver as a fixed-stock Mini-14 exempted in the bill.)
- Ban "combinations of parts" from which "assault weapons" could be assembled. This could be read to ban the acquisition of a single spare part, which in conjunction with other spares, would constitute a "combination."
- Ban parts that accelerate the firing rate of a semiautomatic rifle. This could be read to ban common items such as competition trigger parts, which allow a user to shoot more quickly but which do not change the semiautomatic function of the rifle.
- Ban all belt-fed semi-automatic firearms.
- Ban magazines and other feeding devices that hold more than ten rounds of ammunition, regardless of the firearm for which they are designed.
- Prohibit people from transferring ownership of banned magazines, even through inheritance.
- Require people who sell existing "assault weapons" to process any subsequent transfer through a dealer.
- "Exempt" specifically named bolt-action, pump-action, lever-action and other manually-operated rifles and shotguns. As with Sen. Feinstein's 1994 exemption list, her current version doesn't contain any handguns.

This laundry list of restrictions goes far beyond the law that was in effect from 1994 to 2004. Sen. Feinstein proposes to dramatically expand the scope of the 1994 ban, but since that time, two landmark Supreme Court cases have set new precedent for what is and is not

constitutional under the Second Amendment. Those cases have tremendous implications for the upcoming debate over all firearms-related legislation, including S. 150.

The Supreme Court ruled in *District of Columbia v. Heller* that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation."[1] Contrary to suggestions that the amendment protects only muskets, the Court said:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.[2]

And contrary to gun control supporters' claims, *Heller* didn't exclude semi-automatic "assault weapons," as they are defined in S. 150, from the Second Amendment. The terms "semi-automatic" and "assault weapon" don't appear at all in the *Heller* decision. The Court suggested that *fully* automatic M16s might not be protected under the Second Amendment. Yet S. 150 would have no impact on the law regarding fully automatic firearms, which have been heavily restricted since 1934.

What the Court did do in *Heller* was invoke the American people as a barometer of what is protected under the Second Amendment. The Court struck down the District of Columbia's handgun ban, in part because "handguns are the most popular weapon *chosen by Americans* for self-defense in the home, and a complete prohibition of their use is invalid."[3] (Emphasis added.)

Heller thus designates the American public as the arbiter of which firearms are popular and in common use, and thus protected under the Second Amendment. Semi-automatic firearms and their magazines are commonly kept for self-defense, and the Supreme Court has accepted the judgment of American gun owners as to what firearms and magazines are most useful for that purpose. Most handguns sold today are semi-automatics, and a significant percentage of them are designed for magazines that hold 11 or more rounds. Indeed, the size of a standard pistol magazine sold today is in the teens. And if the Second Amendment protects the right to own handguns, it must also protect the right to own the standard factory magazines that handguns use.

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[1] *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

[2] *Id*. at 582.

[3] *Id*. at 629.

At the same time, nothing in the *Heller* opinion limited the Court's reasoning to handguns. As noted above, the Court said the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms"—which certainly include rifles that are popular and commonly used for self-defense. Most of the rifles targeted by Sen. Feinstein's bill, such as the AR-15, are particularly useful for self-defense, due to their low recoil, reliability and compact size.

This common-sense conclusion was also reached by Judge Brett Kavanaugh, of the U.S. Court of Appeals for the D.C. Circuit, in the follow-up case of *Heller vs. District of Columbia*. His opinion said:

> In my judgment, both D.C.'s ban on semi-automatic rifles and its gun registration requirement are unconstitutional under Heller. In *Heller*, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles. Semi-automatic rifles, like semi-automatic handguns, have not traditionally been banned and are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses. Moreover, semi- automatic handguns are used in connection with violent crimes far more than semi-automatic rifles are. It follows from Heller's protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.'s ban on them is unconstitutional.[4]

Under the sound reasoning put forth by Judge Kavanaugh, the ban on semiautomatic rifles that is proposed by S. 150 would also be patently unconstitutional.

Beyond the test of common use, the *Heller* decision also colors the attempt in S. 150 to ban magazines based on their capacity. A magazine ban would limit the ability of people to engage in self-defense. There is no way to foresee how many rounds of ammunition may be needed to fend off a criminal attack, especially when defenders may miss under stress; assailants may not drop at a single shot;[5] and nearly a third of violent attacks by strangers involve multiple assailants.[6] That's why magazines that hold more than 10 rounds are used by millions of private citizens and thousands of law enforcement officers—and while a police officer routinely carries spare magazines, a private citizen waking up to a burglar in the house is unlikely to have such

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[4] *Heller v. District of Columbia*, 670 F.3d 1244, 1269-70 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[5] For example, in a recent, widely publicized case, a Georgia mother protecting her children shot a home invader five times, but the assailant was nonetheless able to retreat to his car and drive away. *See* Alexis Stevens, *Home Invasion: Husband to wife: 'Shoot him again! Shoot him!'*, Atlanta Journal-Constitution, Jan. 10, 2013.

[6] Erika Harrell, *Violent Victimization Committed by Strangers, 1993-2010* 8, Bureau of Justice Statistics Special Report NCJ 239424 (Dec. 2012).

resources at hand. Law enforcement officers favor so-called "large" magazines because they don't want to be at an inherent disadvantage when confronting criminals; millions of civilians own them for precisely the same reason.

Supporters of S. 150 are fond of quoting a passage in *Heller* which notes that under the reasoning of *United States v. Miller*, "the sorts of weapons protected [are] those 'in common use at the time,' and that this limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[7]

Proponents of S. 150 argue that the guns they propose to ban are both dangerous and unusual. But even aside from the fact that this ancient prohibition only related to the manner and circumstances in which arms were carried, the Court's comment actually works against them; firearms that are in "common use" by definition are not "dangerous and unusual." And no one can legitimately argue that semiautomatic rifles are not in common use at this time. In fact, they are in such demand that it has become virtually impossible to buy any of the rifles S. 150 proposes to ban. And there are already millions in private hands. Semiautomatic technology is more than 100 years old, and has come to dominate the market not only for self-defense, but also for hunting and recreational use.

Finally, it is not just the Heller case that has established the boundaries of what is constitutional under the Second Amendment. The firearms that Sen. Feinstein considers "assault weapons" would also easily meet the Second Amendment standard articulated by the Supreme Court in *Miller*. In that case, the Court considered whether the Second Amendment protected the right to a short-barreled shotgun. Because the trial court decided the case by quashing the indictment and the defendant's counsel did not appear when the Supreme Court reviewed the case, the Supreme Court returned the case to the trial court, saying:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment, or that its use could contribute to the common defense.[8]

Today, rifles such as the AR-15 certainly have a "reasonable relationship to the preservation or efficiency of a well-regulated militia," and their use "could contribute to the common defense." After all, they are universally used in the national service rifle matches authorized by Congress

[7] *Heller*, 554 U.S. at 627, citing *United States v. Miller*, 307 U.S. 174, 179 (1939).

[8] *Miller*, 307 U.S. at 178.

and conducted by the Civilian Marksmanship Program, a privatized program once run by the United States Army.[9]

Heller reinforced the "common use" concept first put forth in *Miller*. The *Miller* Court also observed that historically, the well-regulated militia has consisted of individuals who, if called to service, are "expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[10] With Americans owning more than 4 million AR-15s alone, such firearms are certainly "in common use."[11]

Many who dwell inside the Beltway have little grasp of what's taking place in the rest of the country, and this is more true in the gun debate than in many others. Americans are voting with their pocketbooks, and the popularity of semiautomatics continues to soar. Civilian ownership of all of the firearms and magazines that Senator Feinstein is proposing to ban has risen to all-time highs. Americans now own about 100 million handguns, tens of millions of "assault weapons" as defined by S. 150, and so many tens of millions of "large" magazines that it seems pointless to venture an estimate. While Senator Feinstein tells reporters that Americans support another gun and magazine ban, Americans are buying everything she proposes to ban in unprecedented numbers.

Illustrating the point, Americans bought 11 million new guns in 2012. Background checks for firearms increased 53 percent during the November 2012-January 2013 period, as compared to the same three-month period a year earlier.[12] These increases followed President Obama's re-election; his statement that gun control would be a "central issue" of his final term; and Senator Feinstein's announcement that she intended to introduce another bill to ban guns and magazines.

There is no doubt that the political discussion about banning guns has resulted in this spike in sales. First-time gun buyers are rushing out to purchase the guns and magazines targeted by S. 150, precisely because they know that some in Congress are trying to ban them. What's ironic is that this trend further ensures that these guns and magazines are in "common use," and therefore even more strongly protected under *Heller*.

Thank you again for the opportunity to offer this testimony.

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[9] *See CMP Competition Rules* ¶¶ 6.1-.2, 8.1.1(16th ed. 2012) , *available at* http://www.odcmp.com/Competitions/Rulebook.pdf (requiring use of government-issued semi-automatic rifles or their commercial equivalents). The program, formally known as the Corporation for the Promotion of Rifle Practice and Firearms Safety, is chartered by Congress and authorized to receive under 36 U.S.C. 40701 *et seq.*

[10] *Miller*, 307 U.S. at 179.

[11] Estimate calculated from Bureau of Alcohol, Tobacco, Firearms and Explosives Annual Firearms Manufacturing and Export Reports, 1986-2011.

[12] *See* "Total NICS Firearm Background Checks," available at http://www.fbi.gov/about-us/cjis/nics/reports/20130205_1998_2013_state_program_to_date_purpose_ids.pdf.

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"Universal Background Checks" – Key Facts to Consider

The National Shooting Sports Foundation (NSSF) is the trade association for America's firearms, ammunition, hunting and shooting sports industry. Our more than 8,300 members include thousands of federally licensed firearms retailers, most of which are small business owners.

Under current federal law (the Brady Act), federally licensed firearms retailers must run a background check through the Federal Bureau of Investigation's (FBI) - National Instant Criminal Background Check System (NICS)[1] on the buyer before transferring the firearm (new or used) to that individual. The retailer must conduct the NICS check regardless of whether the transfer takes place at the licensed premises or at a gun show. Our industry has long supported the current NICS background check system.

The Obama Administration, some members of Congress and gun-control organizations now advocate expanding the Brady Act to require background checks for every firearm transfer in the United States between private citizens, whether it is a father passing his shotgun down to his son, a grandfather giving his granddaughter a Christmas gift of her first rifle, or two private collectors transferring a rare and valuable firearm from one collection to another.

So-called "universal background checks" raise important constitutional questions involving States rights under the 10th Amendment and the limits of Congress' Commerce Clause powers. But leaving those issues aside for a moment, based on the experience of licensed firearms retailers in the few states that require retailers to conduct background checks on the private transfer of firearms between individuals, we know requiring "universal background checks" will impose on federally licensed retailers significant increased regulatory burdens, tremendous additional costs, logistical nightmares, unacceptably lengthy delays in processing NICS checks, unprecedented liability exposure and other additional unintended consequences.[2]

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[1] Under the Brady Act, 13 states perform the background checks on all firearms (Point of Contact or POC states) and 8 states do the background check for the transfer of handguns only (Partial POC states). The state-performed background checks use the same federal databases as the FBI-NICS background checks.

[2] Creating the technology infrastructure within NICS to support such a system would also cost the American taxpayer a significant amount of money. Gun control groups claim that 40% of guns sold are not subject to a background check. This assertion is based on a 1990s telephone survey that said 60% of all firearm transactions go through licensed retailer with a check being performed, implying the other 40% do not involve a background check. The survey results make it clear that there are serious flaws in using a phone survey for this type of information gathering. For example, the same section said that 3% of respondents said they obtained guns through the mail, to which the authors said the respondents "may have misremembered or may have referred to a mail-order purchase arranged through an FFL." When considering the fact that the survey also found that the average firearm in circulation in 1994 was acquired by its present owner in 1981 - more than a decade before the survey - it's hard to take the self-reporting seriously. This 40% figure has been discredited by recent analysis which concluded the figure is actually 14-22% http://www.washingtonpost.com/blogs/fact-checker/post/update-obama-claim-on-

Universal Background Checks Raise Serious Constitutional Questions

Universal background checks raise important constitutional questions involving States rights under the 10th Amendment and the limits of Congress' Commerce Clause powers.

- The Federal government cannot constitutionally compel state governments to perform background checks on private party transfers of firearms. See *Printz v. United States*, 521 U.S. 898 (1997) (Brady Act violated 10th Amendment in that Congress may not require states to administer federal firearms laws.). Therefore, those checks would all be required to be conducted by federally licensed retailers. However, there are serious constitutional questions regarding whether Congress under its Commerce Clause powers can compel private businesses (licensed retailers) to perform a purely governmental function (background checks) unrelated to their licensed business (intra-state transfers between private parties)?

Increased Cost to Businesses

Before any expansion of NICS checks is mandated, consider the following:

- The universal background check is a pure cost to the retailer, most of which are small "mom-and-pop" businesses. The retailer would lose a significant amount of money generating the legally required recordkeeping entries, maintaining those records for decades for law enforcement, and performing the background check on a firearm they are not selling and for which they realize no profit. The market, and not the government, should set the fee for performing a "universal background check." A market determined fee will allow the retailer to recoup their costs, in the same way the retailer's regulatory compliance costs are factored into the price of the firearms they sell, and allow the retailer to realize a reasonable profit for their time and effort. Government established fee of $10.00, or some other nominal fee, is woefully inadequate.

- Licensed retailers would need to be free to decide not to conduct "universal background checks." However some states, including California, mandate that licensed retailers must perform this government function as a condition of their license, and then also cap the amount they can charge for the service.

- Licensed retailers would be forced to use paid staff hours or to hire additional staff and pay for additional infrastructure to accommodate such transactions, including, but not limited to additional surveillance equipment, secure firearm storage, parking, IT infrastructure, and acquisition and distribution (A&D) records. Staff conducting background checks on private party transfers will not be able to serve paying customers, many of whom will leave the store rather than wait, resulting in lost sales.

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background-checks-moved-from-verdict-pending-to-2-pinocchios/2013/01/25/59caeca6-672f-11e2-85f5-a8a9228e55c7_blog.html

Liability Risks

- In addition to the cost of providing this government function, the liability a retailer has in such transactions (e.g., retaining additional ATF Forms 4473 subject to inspections and litigation for 20 years; maintaining A&D records for the life of the business) would require a significant increase in compliance efforts. Any errors would be cited as violations by ATF against the retailer. A single violation of the Gun Control Act or the ATF regulations is sufficient to revoke a retailer's license. Imagine losing your livelihood for a record-keeping error for a product you didn't even sell.

- Licensed retailers would be forced to handle firearms that they are not familiar with because they do not stock them. It would no longer be the case that every firearm they now acquire, whether new or used, is a firearm that they want to acquire.

- Some "used" firearms in commerce may have been modified by their owners and may have missing markings, making proper firearm acquisition and disposition records difficult for retailers to achieve.

- The licensed retailer would also be subject to product liability and other lawsuits if the transferred firearm is alleged to be defective. Insurance coverage in those cases will likely be unavailable to the retailer since they did not sell the firearm. Imagine being sued over an accident involving a firearm you didn't sell and having no insurance coverage.

- Federal law requires licensed retailers to provide a "secure gun storage or safety device," typically a gun lock, when they transfer any handgun. See 18 USC 922(z). Who will pay for the cost of the gun lock?

- Some states require a waiting period (CA, CT, IL, etc.) before a firearm can be transferred during which time the licensed retailer must hold the firearm in inventory and become legally responsible for the firearm while in their custody. A party to the private transaction would assert a claim that the firearm was altered or damaged while in the retailer's exclusive custody and control.

- Similarly, if the firearm being transferred is in the retailer's possession, custody and control while a "delayed" NICS response is being resolved (up to three business days[3]), the retailer would face additional liability over claims that the firearm was altered or damaged while in the retailer's possession.

- There are significant safety concerns presented by a massive influx of "private party" firearms entering a carefully controlled retail establishment. For example, in California, persons have entered large retailers with a firearm and walked through

[3] Brady Act provides that after three business days the licensed retailer may transfer a firearm if the delay has not been resolved. However, ATF encourages retailers to hold the firearm beyond three days until the delay is resolved.

the store, e.g., past the shoe department, to get to the sporting goods section in order to conduct a private party background check.

Logistical Nightmare

In addition:

- Logistical questions remain such as whether the use of state Point of Contact (POC) systems would be authorized for such transactions.

- In the event a buyer is denied based on the background check results, it is unclear how the transaction should be handled. Would the retailer then be required to run a background check on the seller before returning the firearm to the seller? If the firearm is maintained overnight by the licensed retailer, federal law would require the retailer to conduct a background check and have them complete a Form 4473 in order to return the firearm to the private party seller.

- What is a licensed retailer to do in the event of a "double denial" (both the private party buyer and seller are denied). This has happened in California. How would such a transaction be noted on ATF Form 4473?

- In some states, consistent with the requirements of the Brady Act, ATF has qualified certain firearms permit holders, i.e., conceal carry permit holders as exempt from the NICS background check requirement because a check was recently conducted on that individual when the permit was issued. Would the same rules apply for private party transactions involving the holders of such permits?

- Some states allow retailers to opt out of doing private party transaction checks. For example, in Pennsylvania, retailers may opt out and the County Sheriff performs the checks instead. Would this be allowed under a federal mandate? And if all retailers opt out due to the high costs and compliance issues, what would happen next?

- The FBI NICS center is already overwhelmed with over-the-counter retail transactions. According to the FBI, this winter's activity surge required the cancellation of all Christmas leave and the calling in of all CJIS employees who ever worked for NICS to help with the traffic. Despite these efforts, the NICS system experienced extensive and unprecedented delays during this time.

- The Department of Justice declined to pursue industry supported legislation to allow federal firearms licensees access to NICS to conduct employment screening checks on current or prospective employees because it would have resulted in a mere 2% increase in NICS checks, an amount DOJ said NICS could not absorb. How can NICS be expected to handle a 14 to 22% increase, let alone a 40% increase?[4]

[4] See footnote 2.

- The same problem exists in Point of Contact states where the state facilities are also overwhelmed with retail transactions. The Colorado CBI is currently eight days behind in processing background checks. Adding a massive influx in transactions would further tax the systems to the point of potential collapse.

- Residents of Washington, D.C. would face an untenable situation under such a proposal. There is only one firearm retailer in the District of Columbia to facilitate the private party transactions. Residents of rural Alaska would face similar barriers as they may be 600 miles distance from a retailer.

- Additionally, there remains uncertainty about how to best handle temporary transactions, such as the loan of a firearm for a hunting trip or at the shooting range.

The NSSF urges lawmakers to carefully consider these important questions when considering public policies such as requiring universal background checks for the transfer of firearms between private parties.

Federally licensed firearms retailers depend on the NICS system to ensure that they do not transfer firearms to prohibited persons. But the NICS system is only as good as the records that are in the system. It is well documented that the current NICS system does not contain all of the records it should. NSSF believes it should be a top priority to Fix NICS℠ to ensure the safe and legal transfer of firearms. A high priority should be placed on enhancing the current FBI NICS system by getting all disqualifying records pertaining to mental health and other federal prohibitions on firearms ownership in the NICS system.

February 12, 2013

The Honorable Ted Cruz
United States Senate
B40B Dirksen
Washington, DC 20510

Dear Senator Cruz,

On behalf of South Texans' Property Rights Association (STPRA), that represents more than five million acres of land in South Texas; I find it necessary to address this committee today with my great concern of additional gun regulations called for by some in the United States.

A universal background check, bans on ammunition clips, and background checks for ammunition purposes will only punish the honest individual and will do nothing to lessen mass killings of the deranged.

I live less than 90 miles from the border of Mexico. I see what occurs in Mexico when guns are made illegal for use by their citizens. I see how the innocent are over taken by criminals, leaving them helpless and defenseless. We do not need or want the same thing to happen in the United States.

There are sufficient laws in the statues today. It is time now that they are fully enforced. Put the burden of proof on the criminals and the mentally ill, not on law abiding U.S. citizens. We need no more laws, we need common sense to prevail, and I hope that that is achieved in today's hearing.

Sincerely,

Susan Durham

Susan Durham
Executive Director

CATO

February 8, 2013

ILYA SHAPIRO
Senior Fellow in Constitutional Studies

Hon. Ted Cruz, Ranking Member
Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Subcommittee Hearing entitled "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment"

Dear Senator Cruz,

Thank you for your interest in my and the Cato Institute's perspective regarding the various legislative proposals that have been offered in response to the tragedy at Newtown. As you know, Cato is one of the nation's leading advocates of individual liberty and limited government and so we are at the forefront of all public debates regarding constitutional civil rights—including the Second Amendment's protection of the natural right to armed self-defense.

Being an advocate for individual rights and civil liberties can be difficult. When terrorists attack, when the economy fails, and yes, when evil visits elementary schools, the natural instinct is to demand security above all else. Politicians' natural instinct is just do something, anything, that seems responsive to the crisis of the day.

A good example of this tendency is the law signed by New York Governor Andrew Cuomo last month, which Cato research fellow Trevor Burrus dissects in a blogpost ("A Cosmetic Gun Law") that I enclose here. See also the absurd situations that the District of Columbia's draconian—but ineffectual—restrictions provoke, as I describe in a second attached blogpost ("D.C. Treats Celebrities Better Than Veterans, Illustrating the Absurdity of Gun Laws.").

Yet, as Cato's chairman Bob Levy wrote after the Tucson shooting—I enclose his op-ed ("Gun Control Measures Don't Stop Violence")—no gun regulation has ever been shown to reduce the incidence of violent crime, suicide, or accidents. So found a 2004 National Academy of Sciences study that reviewed 253 journal articles, 99 books, and 43 government publications evaluating 80 gun-control measures. A year earlier, the Centers for Disease Control examined a host of policies, ranging from ammunition bans to waiting periods, registration to zero-tolerance laws—and likewise found no evidence that the laws reduced gun violence.

The problem, as I write in a second op-ed that I enclose ("Why I Still Support the Right to Bear Arms," on which this letter is based), is that no law could make the 300 million firearms in America disappear, even if we wanted to do that. Even making it illegal to own a gun, were that constitutional, wouldn't prevent a criminal or madman from doing his malevolent deed. Robust policies to prevent legal gun ownership only translate to guns being overwhelmingly possessed by those willing to break the law.

Indeed, Connecticut has some of the strictest gun laws in the country, and Sandy Hook Elementary is a "gun-free zone"—as was the movie theater in Aurora, Colorado (which is why the killer there chose it, passing up more convenient venues).

None of the measures at the top of gun-control advocates' agenda—such as banning so-called assault weapons and closing gun-show loopholes—would've averted these shootings. And as you yourself demonstrated during the Senate Judiciary Committee hearing on January 30, adding certain cosmetic features such as pistol grips and bayonet mounts to ordinary hunting rifles does not in any way affect their functionality or otherwise transform them into weapons of war.

As Cato associate policy analyst David Kopel wrote in the third op-ed I'm enclosing ("Guns, Mental Illness and Newtown"), we'd be better off focusing on the identification and treatment of mental illness—the common factor in all these incidents—and ensuring that disqualifying records make it into the database used for background checks (which would've stopped the Virginia Tech shooter from buying his guns).

That's not to say that we shouldn't have *any* gun regulations. Cracking down on "straw purchasers" is a good idea and military-grade weapons like fully automatic "machine guns"—or rocket launchers, as I told Stephen Colbert on his July 8, 2010 show—indeed have no place in civilian life.

On the other hand, it's perfectly reasonable for someone to have a gun to protect herself or her family. That's why the Second Amendment is so important: Americans cherish their life, liberty, and pursuit of happiness so much that they instituted a government that protects their right to defend against anyone who would threaten them.

After the 1999 Columbine shootings, Colorado passed a series of laws that should serve as a national model (for states; the Constitution doesn't give the federal government the power to enact most of the legislation that's been floated lately.) As Kopel details in the fourth op-ed I'm enclosing ("Colorado Consensus on Gun Laws"), some of them consist of what people call "gun control," while others are in the "gun rights" category. The most important one was the Concealed Carry Act, which has already saved countless lives, including at an Aurora church—three months before the theater shooting—where an off-duty cop killed a career criminal who was targeting congregants.

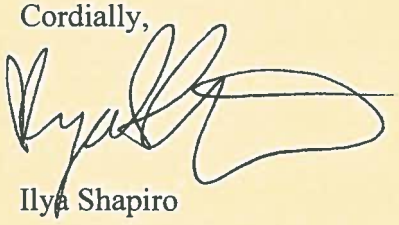
These cohesive measures are based on an obvious principle that enjoys broad public support: Guns in the wrong hands are dangerous, while guns in the right hands protect public safety—as Burrus details in the fifth op-ed that I enclose ("Face It: Guns

Are Here to Stay"). The Second Amendment exists to protect the grand American experiment in self-government. Call me a "Constitution nut," but I'm crazy about allowing people to live their lives with the maximum freedom possible.

If I could snap my fingers and end gun violence, I would. I would even take guns away from hunters and sportsmen if it meant better self-defense for the rest of us. Men aren't angels, however, and, by definition, criminals don't follow the law. Yes, in the wake of Newtown, my colleagues and I still support the right to bear arms.

Again, thank you for inviting me to submit my views. Should you have any questions, my email is ishapiro@cato.org and my direct line is (202)218-4600.

Cordially,



Ilya Shapiro

Enclosures:

1. Trevor Burrus, "A Cosmetic Gun Law," *Cato at Liberty Blog*, January 15, 2013.
2. Ilya Shapiro, "D.C. Treats Celebrities Better Than Veterans, Illustrating the Absurdity of Gun Laws," *Cato at Liberty Blog*, February 8, 2013.
3. Robert A. Levy, "Gun Control Measures Don't Stop Violence," *CNN.com*, January 19, 2011.
4. Ilya Shapiro, "Why I Still Support the Right to Bear Arms," *(New Jersey) Star-Ledger*, January 11, 2013.
5. David Kopel, "Guns, Mental Illness and Newtown," *Wall Street Journal*, December 17, 2012.
6. David Kopel, "Colorado Consensus on Gun Laws," *National Review Online*, July 26, 2013.
7. Trevor Burrus, "Face It: Guns Are Here to Stay," *New York Daily News*, January 7, 2013.

A Cosmetic Gun Law

By Trevor Burrus January 15, 2013 *Cato At Liberty*
http://www.cato.org/blog/cosmetic-gun-law

Last night, the New York Senate passed far-reaching reforms to New York's gun laws. The law should easily pass the Assembly and then be signed by Governor Andrew Cuomo. Almost assuredly, this law will save no lives and stop no mass shootings. In fact, it may make New Yorkers less safe.

I invite you to read over the previsions of the law—expanding the definition of already-banned "assault" weapons, banning the sale of magazines that hold over seven rounds, a requirement that licenses be renewed every five years—and ask if there is a single would-be killer out there who would be hampered by such restrictions in a country where he is already surrounded by 300 million guns? It is simply unreasonable to think that any unstable person with plans for mass carnage will be stopped by only having seven rounds per magazine. The Virginia Tech shooter, after all, solved this "problem" by carrying a bag with 19 magazines.

And how could this law make New Yorkers less safe? First, the law will inevitably limit law-abiding citizens' access to weapons, and those citizens may need those weapons to protect themselves or others from a crime. At minimum, this occurs 108,000 times per year, according to the federal government's National Crime Victimization Survey, and it likely occurs far more than that (you can read more about defensive gun use in the Cato study *Tough Targets*).

Second, onerous gun restrictions tend to drive gun purchasers underground. Those black and illicit markets are further expanded by gun-control advocates' attempts to shame and demonize those who own firearms and enjoy using them in a responsible manner (for example, the recent Gawker exposé publishing the names and addresses of gun owners in New York City, who were blatantly described as "a**holes," as well as the *Journal News* publishing similar data for gun owners in Westchester and Rockland counties). Moreover, as J.D. Tuccille recently documented in *Reason*, evading gun restrictions is not just a national pastime, it is an international pastime. Tuccille writes that there are approximately 58,000 registered gun owners in New York City, but that the Justice Department estimates that there are about 2 million illegal guns in the city.

Pushing more of the gun trade underground by passing onerous restrictions and creating bureaucratic labyrinths impairs our ability to keep guns out of the hands of dangerous people.

Some aspects of the law, such as the requirement that mental health professionals report patients who they believe are likely to harm themselves or others, seem like an honest attempt to prevent dangerous people from having guns. However, the requirement violates the traditional rules of therapist/patient confidentiality, and unfortunately it will

likely do more to dissuade people from seeking help out of fear that they may be disarmed by the state.

Governor Cuomo's statement—"Enough people have lost their lives. Let's act"—shows that this law is more an example of the "something must be done, this is something, therefore it must be done" tendency in politics rather than a carefully considered bill that offers workable solutions to the problem. In many ways, this is the biggest harm of these cosmetic gun laws: lawmakers can pat themselves on the back and incorrectly say, "we saved some lives today" and then move on to other tasks while having done nothing to solve the problem.

D.C. Treats Celebrities Better Than Veterans, Illustrating the Absurdity of Gun Laws

By Ilya Shapiro February 8, 2013 *Cato At Liberty*
http://www.cato.org/blog/dc-treats-celebrities-better-veterans-illustrating-absurdity-gun-laws

Last month, D.C. attorney general Irvin Nathan announced that he would not be prosecuting David Gregory for displaying an empty ammunition magazine on his national TV show *Meet the Press*—even though NBC knew ahead of time that this action would violate D.C. law. In a letter to NBC, Nathan admonished Gregory for knowingly flouting the law, but said he decided to exercise "prosecutorial discretion" and not pursue a criminal case. "Prosecution would not promote public safety in the District of Columbia, nor serve the best interests of the people," Nathan wrote.

In the *Washington Post* story about this episode, I was quoted as calling Nathan's decision "a wise use of prosecutorial discretion" but that the episode "illustrates the absurdity of some of these gun laws." My position apparently paralleled that of the NRA—even though Gregory had waved the illegal magazine in front of the group's executive VP, Wayne LaPierre—but "thousands of gun advocates" signed a White House petition calling for Gregory's arrest because he ought to be treated the same as anyone else.

Indeed, a friend soon pointed out to me that D.C. authorities were not treating people equally: Last summer, Army Specialist Adam Meckler, a veteran of the Afghanistan and Iraq wars, was arrested and jailed for having a few long-forgotten rounds of ordinary ammunition—but no gun—in his backpack in Washington. Meckler violated the same section of D.C. law as Gregory did, and both offenses carry the same maximum penalty of a $1,000 fine and a year in jail. [H/t: Jason Epstein]

Well, that's disgusting, and D.C. authorities ought to be ashamed of themselves. But the correct response isn't to waste taxpayer dollars on prosecuting David Gregory, but rather to not prosecute the Adam Mecklers of the world.

Now, I've never been a prosecutor or even practiced criminal law, so it could well be that it's outside the ethical bounds of discretion not to charge someone who so brazenly flaunts the law as Gregory and the NBC producers did. But if incidents like these doesn't make people realize that it's lunacy to criminalize, as a strict liability offense, no less (meaning that your knowledge or mental state is irrelevant), the mere possession of magazines, bullets, and other gun-related accoutrements (without even getting to an "assault weapon" ban, etc.), then nothing will. A magazine is a metal box with springs, of which there are hundreds of millions in the country. A bullet is a piece of metal that, in

the absence of a gun, is less deadly than a rubber band. It's people who insist on demonizing such objects that lend creedence to those on the other side who believe that any gun regulation is a step toward confiscation and tyranny.

Let me be even clearer: Criminalizing the possession of a magazine or bullet is as extreme as legalizing the private ownership of nuclear missiles. The idea that celebrities should be treated no differently than anyone else is an important one to draw from the David Gregory incident. But it's even more important, at least in the context of our ongoing discussion over gun policy, to understand that putting stupid laws on the books doesn't make us any safer and indeed draws resources away from actions (like investigating, prosecuting, and preventing violent crime) that do.

Gun control measures don't stop violence

By Robert A. Levy , Special to CNN
January 19, 2011 5:47 a.m. EST

CNN.com

Editor's note: Robert A. Levy is chairman of the Cato Institute. He served as co-counsel to the plaintiffs in District of Columbia v. Heller, the successful Supreme Court challenge to Washington's handgun ban.

(CNN) -- Against the horrific backdrop of the Tucson, Arizona, tragedy, new gun control proposals are on the way. Some of our legislators will be tempted to apply Rahm Emanuel's aphorism, "Never let a good crisis go to waste."

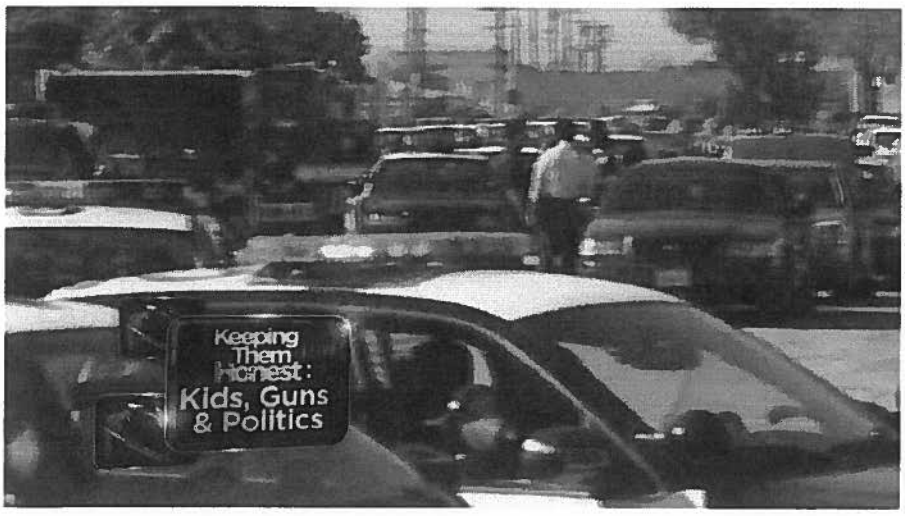
For example, Rep. Carolyn McCarthy, D-New York, wants to outlaw magazines with more than 10 rounds -- even those already in circulation. She hasn't explained how a ban on previously sold magazines would deter anyone but law-abiding citizens.

Still, the Supreme Court has suggested that sensible gun regulations may be constitutionally permissible. Sensible is not, however, what we have in Washington, Chicago, New York and other cities, where you can probably get a pizza delivery before a response from a 911 call. Police cannot be everywhere.

Selected proposals may nonetheless be constructive, with three important qualifications. First, government has the burden to show that a regulation will not unduly impede the use of firearms for self-defense. Second, ostensibly modest steps down a slippery slope must not compromise core Second Amendment rights. Third, a regulation must be effective in promoting public safety, when weighed against reliable evidence that past restrictions have not lessened the incidence of gun-related crimes.

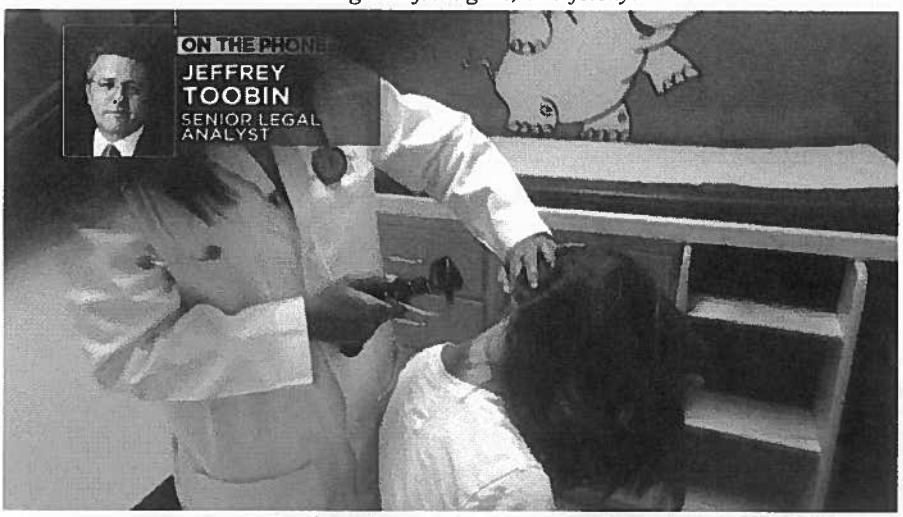
Recall that Washington banned handguns for 33 years; during some of those years the city was known as the nation's murder capital. Killers not deterred by laws against murder were not deterred by laws against owning guns. Moreover, anti-gun regulations did not address the deep-rooted causes of violent crime -- illegitimacy, drugs, alcohol abuse and dysfunctional schools -- much less mental instability.

For another view, read Sarah Brady on gun control

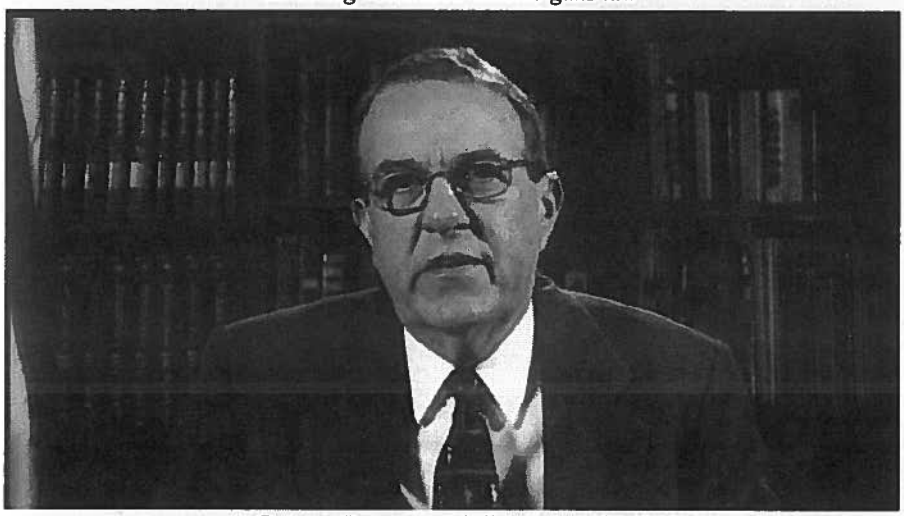


In 2004, the National Academy of Sciences reviewed 253 journal articles, 99 books and 43 government publications evaluating 80 gun-control measures. Researchers could not identify a single regulation that reduced violent crime, suicide or accidents. A year earlier, the Centers for Disease Control reported on ammunition bans, restrictions on acquisition, waiting periods, registration,

Protecting kids from guns, or a felony?



Breaking down kids-doctors-guns law



Doctor: Doctor-gun bill is 'horrendous'

Lawmaker defends kids-guns bill

licensing, child access prevention and zero tolerance laws. CDC's conclusion: There was no conclusive evidence that the laws reduced gun violence.

So much for the quasi-religious faith that more controls mean fewer murders. There are about 500,000 gun-related crimes annually in the United States. Further, Americans own roughly 250 million guns. Assuming a different gun is used in each of the 500,000 crimes, only 0.2% of guns are involved in crime each year. A ban on firearms would be 99.8% over-inclusive.

We should also resist seemingly measured gun controls such as raising the age limit from 18 to 21, requiring background checks at gun shows, and reinstating the assault weapons ban.

Eighteen-year-olds are allowed to vote, go to war, get married and divorced, and have an abortion. Maybe that cutoff is too low; but an individual sufficiently mature to engage in those activities is responsible enough to own a gun for self-defense.

Gun shows did not play a role in Jared Loughner's rampage. He apparently acquired his firearm at a retail store through a licensed dealer. In fact, merely 2% of guns used by criminals are purchased at gun shows. That includes straw purchases, which are already illegal, and purchases through dealers, which are subject to background checks. Nearly all rejected buyers turn out to be false positives. Others, bent on committing crimes, just shop elsewhere, on the black market if necessary.

Expiration of the assault weapons ban in 2004 did not -- contrary to popular belief -- legalize automatic firearms. Those weapons have been banned since 1934 for all practical purposes. The ban covered semi-automatic weapons, which are used by tens of millions of Americans for hunting, self-defense, target shooting, and even Olympic competition. Take it from The New York Times, written a few months after the ban expired: "Despite dire predictions that the streets would be awash in military-style guns, expiration of the assault weapons ban has not set off a sustained surge in sales (or) caused any noticeable increase in gun crime."

The U.S. Constitution imposes no obstacle to more thorough screening of gun applicants for mental impairment. Nor does the Constitution likely preclude reasonable background checks, or even tighter constraints on high-capacity magazines. Those proposals, which may reflect the common-sense views of many Americans, must be tempered by this reality: Experience indicates that gun restrictions have minimal effect on access to weapons by criminals and deranged people.

The opinions in this commentary are solely those of Robert Levy.

Everything Jersey

Why I still support the right to bear arms: Opinion

By Star-Ledger Guest Columnist

on January 11, 2013 at 5:31 AM, updated January 11, 2013 at 5:32 AM

By Ilya Shapiro

Being an advocate for individual rights and civil liberties can be difficult. When terrorists attack, when the economy fails, and yes, when evil visits elementary schools, the natural instinct is to demand security above all else.

On learning of the horror in Newtown, Conn., I could thus easily understand the reaction that soon filled my Facebook feed: "We have to do something. There should be laws restricting guns so they don't get in the hands of these deranged murderers."

The logical impulse for those of us who defend private gun ownership is to duck such discussions altogether, to let the passions settle. But on the contrary, with the White House task force preparing its recommendations, it's more important than ever to present our position with clear-eyed resolve.

Even against the backdrop of last month's tragedy, I still support the fundamental right to armed self-defense. Especially in an imperfect world where madness abounds, I oppose policies that would restrict legal gun ownership by law-abiding citizens.

I say this despite having grown up in Canada and never owned a gun. I've shot handguns and rifles about a dozen times at friends' invitation, but never gone hunting. The last eight years I've lived in Washington, where, despite the Supreme Court's 2008 ruling, it's still near-impossible to obtain a personal firearm (and illegal to carry one outside your home).

So I hope you can accept that I'm not a "gun nut."

But you don't have to be crazy about guns to recognize that no law could make the 300 million firearms in America disappear. Even making it illegal to own a gun wouldn't prevent a criminal or madman from doing his malevolent deed. Robust policies to prevent legal gun ownership only translate to guns being overwhelmingly possessed by those willing to break the law — i.e., criminals.

Indeed, Connecticut has some of the strictest gun laws in the country, and Sandy Hook Elementary is a "gun -free zone" — as was the movie theater in Aurora, Colo.

None of the measures at the top of gun-control advocates' agenda — such as banning so-called assault weapons (ordinary rifles with certain cosmetic features like pistol grips or bayonet mounts) and closing gun-show loopholes — would've averted these shootings. The Newtown killer stole the pistols he used from his mother.

We'd be much better off focusing on improvements we can make in identifying and treating mental illness — the common factor in all these incidents — and ensuring that disqualifying records make it into the database used for background checks (which would've stopped the Virginia Tech shooter from buying his guns).

That's not to say that we shouldn't have any gun regulations. Cracking down on "straw purchasers" is a good idea and indeed military-grade weapons like fully automatic "machine guns" have no place in civilian life.

On the other hand, it's perfectly reasonable for someone to have a gun to protect herself or her family. That's why the Second Amendment is so important: Americans cherish their life, liberty and pursuit of happiness so much that they instituted a government that protects their right to defend against anyone who would threaten them.

After the 1999 Columbine shootings, Colorado passed a series of laws that should serve as a national model. Some of them consist of what people call "gun control," while others are in the "gun rights" category. The most important one was the Concealed Carry Act, which has already saved countless lives, including at an Aurora church — three months before the theater shooting — where an off-duty cop killed a career criminal who was targeting congregants.

These measures are based on an obvious principle that enjoys broad public support: Guns in the wrong hands are dangerous, while guns in the right hands protect public safety.

The Second Amendment exists to protect the grand American experiment in self-government. Call me a "Constitution nut," but I'm crazy about allowing people to live their lives with the maximum freedom possible.

If I could snap my fingers and end gun violence, I would. I would even take guns away from hunters and sportsmen if it meant better self-defense for the rest of us.

Men aren't angels, however, and, by definition, criminals don't follow the law. Yes, in the wake of Newtown, I still support the right to bear arms.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.

THE WALL STREET JOURNAL.
WSJ.com

OPINION | December 17, 2012, 7:04 p.m. ET

Guns, Mental Illness and Newtown

There were 18 random mass shootings in the 1980s, 54 in the 1990s, and 87 in the 2000s.

By DAVID KOPEL

Has the rate of random mass shootings in the United States increased? Over the past 30 years, the answer is definitely yes. It is also true that the total U.S. homicide rate has fallen by over half since 1980, and the gun homicide rate has fallen along with it. Today, Americans are safer from violent crime, including gun homicide, than they have been at any time since the mid-1960s.

Mass shootings, defined as four or more fatalities, fluctuate from year to year, but over the past 30 years there has been no long-term increase or decrease. But "random" mass shootings, such as the horrific crimes last Friday in Newtown, Conn., have increased.

Related Video

Editorial page editor Paul Gigot discusses the Newtown shooting and its political aftermath.

Alan Lankford of the University of Alabama analyzed data from a recent New York Police Department study of "active shooters"—criminals who attempted to murder people in a confined area, where there are lots of people, and who chose at least some victims randomly. Counting only the incidents with at least two casualties, there were 179 such crimes between 1966 and 2010. In the 1980s, there were 18. In the 1990s, there were 54. In the 2000s, there were 87.

If you count only such crimes in which five or more victims were killed, there were six in the 1980s and 19 in the 2000s.

Why the increase? It cannot be because gun-control laws have become more lax. Before the 1968 Gun Control Act, there were almost no federal gun-control laws. The exception was the National Firearms Act of 1934, which set up an extremely severe registration and tax system for automatic weapons and has remained in force for 78 years.

Nor are magazines holding more than 10 rounds something new. They were invented decades ago and have long been standard for many handguns. Police officers carry them for the same reason that civilians do: Especially if a person is attacked by multiple assailants, there is no guarantee that a 10-round magazine will end the assault.

The 1980s were much worse than today in terms of overall violent crime, including gun homicide, but they were much better than today in terms of mass random shootings. The difference wasn't

that the 1980s had tougher controls on so-called "assault weapons." No assault weapons law existed in the U.S. until California passed a ban in 1989.

Connecticut followed in 1993. None of the guns that the Newtown murderer used was an assault weapon under Connecticut law. This illustrates the uselessness of bans on so-called assault weapons, since those bans concentrate on guns' cosmetics, such as whether the gun has a bayonet lug, rather than their function.

What some people call "assault weapons" function like every other normal firearm—they fire only one bullet each time the trigger is pressed. Unlike automatics (machine guns), they do not fire continuously as long as the trigger is held. They are "semi-automatic" because they eject the empty shell case and load the next round into the firing chamber.

Today in America, most handguns are semi-automatics, as are many long guns, including the best-selling rifle today, the AR-15, the model used in the Newtown shooting. Some of these guns look like machine guns, but they do not function like machine guns.

Back in the mid-1960s, in most states, an adult could walk into a store and buy an AR-15 rifle, no questions asked. Today, firearms are the most heavily regulated consumer product in the United States. If someone wants to purchase an AR-15 or any other firearm, the store must first get permission for the sale from the FBI or its state counterpart. Permission is denied if the buyer is in one of nine categories of "prohibited persons," including felons, domestic-violence misdemeanants, and persons who have been adjudicated mentally ill or alcoholic.

Since gun controls today are far stricter than at the time when "active shooters" were rare, what can account for the increase in these shootings? One plausible answer is the media. Cable TV in the 1990s, and the Internet today, greatly magnify the instant celebrity that a mass killer can achieve. We know that many would-be mass killers obsessively study their predecessors.

AFP/Getty Images

State troopers leaving Sandy Hook Elementary School in Newtown, Conn., Dec. 14.

Loren Coleman's 2004 book "The Copycat Effect: How the Media and Popular Culture Trigger the Mayhem in Tomorrow's Headlines" shows that the copycat effect is as old as the media itself. Johann Wolfgang von Goethe's 1774 classic "The Sorrows of Young Werther" triggered a spate of copycat suicides all over Europe. But today the velocity and pervasiveness of the media make the problem much worse.

A second explanation is the deinstitutionalization of the violently mentally ill. A 2000 New York Times study of 100 rampage murderers found that 47 were mentally ill. In the Journal of the American Academy of Psychiatry Law (2008), Jason C. Matejkowski and his co-authors reported that 16% of state prisoners who had perpetrated murders were mentally ill.

In the mid-1960s, many of the killings would have been prevented because the severely mentally ill would have been confined and cared for in a state institution. But today, while government at most every level has bloated over the past half-century, mental-health treatment has been decimated. According to a study released in July by the Treatment Advocacy Center, the number of state hospital beds in America per capita has plummeted to 1850 levels, or 14.1 beds per 100,000 people.

Moreover, a 2011 paper by Steven P. Segal at the University of California, Berkeley, "Civil Commitment Law, Mental Health Services, and U.S. Homicide Rates," found that a third of the state-to-state variation in homicide rates was attributable to the strength or weakness of involuntary civil-commitment laws.

Finally, it must be acknowledged that many of these attacks today unfortunately take place in pretend "gun-free zones," such as schools, movie theaters and shopping malls. According to Ron Borsch's study for the Force Science Research Center at Minnesota State University-Mankato, active shooters are different from the gangsters and other street toughs whom a police officer might engage in a gunfight. They are predominantly weaklings and cowards who crumble easily as soon as an armed person shows up.

The problem is that by the time the police arrive, lots of people are already dead. So when armed citizens are on the scene, many lives are saved. The media rarely mention the mass murders that were thwarted by armed citizens at the Shoney's Restaurant in Anniston, Ala. (1991), the high school in Pearl, Miss. (1997), the middle-school dance in Edinboro, Penn. (1998), and the New Life Church in Colorado Springs, Colo. (2007), among others.

At the Clackamas Mall in Oregon last week, an active shooter murdered two people and then saw that a shopper, who had a handgun carry permit, had drawn a gun and was aiming at him. The murderer's next shot was to kill himself.

Real gun-free zones are a wonderful idea, but they are only real if they are created by metal detectors backed up by armed guards. Pretend gun-free zones, where law-abiding adults (who pass a fingerprint-based background check and a safety training class) are still disarmed, are magnets for evildoers who know they will be able to murder at will with little threat of being fired upon.

People who are serious about preventing the next Newtown should embrace much greater funding for mental health, strong laws for civil commitment of the violently mentally ill—and stop kidding themselves that pretend gun-free zones will stop killers.

Mr. Kopel is research director of the Independence Institute and co-author of the law school textbook, "Firearms Law and the Second Amendment" (Aspen, 2012).

A version of this article appeared December 17, 2012, on page A17 in the U.S. edition of The Wall Street Journal, with the headline: Guns, Mental Illness and Newtown.

NATIONAL REVIEW ONLINE www.nationalreview.com PRINT

Colorado Consensus on Gun Laws

By Dave Kopel

July 26, 2012 4:00 A.M.

After the Columbine High School murders, Colorado enacted eight specific gun-law reforms. Three of these reforms are examples of what people usually call "gun control," and five of them are in the "gun rights" category. But to many Coloradoans, all eight of the measures are cohesive and consistent. They are all based on the same principles: Guns in the wrong hands are very dangerous, and guns in the right hands protect public safety. Colorado strengthened its laws to make it harder for the wrong people to acquire guns and simultaneously strengthened laws to remove obstacles to the use and carrying of firearms by law-abiding citizens. As a whole, the laws embody a compromise that enjoys broad public support; they settled a gun-policy debate that had raged in Colorado for 15 years. The Colorado consensus has already saved lives.

CONCEALED CARRY ACT

The most important element of the Colorado reforms is the Concealed Carry Act, which became law in 2003. This law strongly protects the right of law-abiding adults to carry handguns for the defense of self and others. Forty other states have similar laws.

The reform has so far thwarted at least one massacre. In December 2007, a man murdered two teenagers at the Youth with a Mission training center in the Denver suburbs. He then drove south to Colorado Springs and attacked the New Life megachurch in Colorado Springs. He killed two people in the parking lot and then entered the building, carrying hundreds of rounds of ammunition. Fortunately, a volunteer security guard for the church, Jeanne Assam, was

carrying a licensed handgun, and she quickly shot the attacker. According to Pastor Brady Boyd, "she probably saved over 100 lives."

Elsewhere in the United States, three school shootings have been stopped because teachers or other responsible adults had firearms: Edinboro, Penn.; Pearl, Miss.; and the Appalachian Law School in Grundy, Va.

Colorado law allows government buildings to be declared "gun-free zones," but Colorado law insists that when a government promises a gun-free zone, the government must keep the promise: Licensed carry may be forbidden in a government building *only* if all entrances to the building are controlled, and if the public entrances have metal detectors manned by armed guards.

Under Colorado law, therefore, government entities may not simply post a NO GUNS sign and leave law-abiding, licensed citizens defenseless against violent criminals. Earlier this year, in a unanimous decision, the Colorado supreme court ruled that the University of Colorado may not forbid licensed carry on its campuses. All the other public universities in Colorado had already been complying with the law by allowing licensed carry, and there have not been any problems.

K–12 schools have special restrictions: Licensed carry is allowed only in automobiles on school property, not in buildings or on sports fields. Although this approach is not ideal, it does allow the possibility that in case of an attack, an adult could retrieve a firearm from an automobile and then confront the attacker. That is how lives were saved in Pearl, Miss.

The Concealed Carry Act did not disturb the property rights of business owners — if they wish to, they may prohibit concealed carry on their business premises. Fortunately, very few Colorado businesses have done so. But one that did was Century Theaters. Compounding the problem, Century Theaters did not

create an actual "gun-free zone" (as some government buildings in Colorado have). Instead, Century Theaters created a *pretend* gun-free zone. Century Theaters did *nothing* to prevent armed criminals from entering the theater.

As is common in mass homicides, the killer in this case chose to target victims in a "gun-free" zone — with predictable and horrific results. When armed police finally confronted him, he surrendered quickly. This, too, is common; mass killers tend to be cowards who crumble at the first resistance.

The *San Francisco Chronicle* reports that the vest the Aurora killer bought from the website Tactical Gear was not bulletproof. An even if he was wearing a different vest that he procured elsewhere, such a vest does not make the wearer invincible. A shot to the chest can still knock a shooter down and break a rib, providing time for someone to tackle him.

Among the victims in the Century Theater's "gun-free" zone were members of the U.S. Armed Forces. Had one of them — or any other law-abiding adult — had a handgun on Friday night, the shot might have stopped the killer. Any resistance almost certainly would have saved lives by distracting the killer's attention.

The Concealed Carry Act was primarily written by the County Sheriffs of Colorado and was based on the permit-issuance policies developed by Larimer County (Fort Collins) sheriff Jim Alderdan. As in most American states, the procedure for issuing a permit is objective in routine cases: Has the applicant provided proper documentation of the required safety training? Did the applicant's ten-point fingerprints, collected and sent to the FBI and to the Colorado Bureau of Investigation, confirm that the applicant does not fit into any of the disqualifying categories?

But, as in many states, Colorado law goes farther and allows the sheriff to make discretionary denials — if the discretion is properly applied. The sheriff may deny a carry-permit application if the sheriff "has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others." In case of a denial, the applicant can appeal to a court, and the burden of proof is on the sheriff.

This provision is informally called "the naked man rule," meaning that the sheriff can deny a permit to the man who sits naked in his front yard, muttering about the Martians, but who has a clean record. The County Sheriffs of Colorado deemed it essential that the Concealed Carry Act include the naked-man rule. Yet the Brady Campaign inaccurately claims that Colorado has zero "law enforcement discretion when issuing [concealed-carry] permits."

The National Rifle Association expressed strong support in the Colorado legislature for the Concealed Carry Act. By contrast, another group, Rocky Mountain Gun Owners, fought hard against the Concealed Carry Act, because of the naked-man rule and because of other provisions that failed to meet RMGO's standards of perfection. Ultimately, not a single pro-gun legislator voted with RMGO. The NRA-endorsed Concealed Carry Act won a bipartisan majority of 46–16 in the House (including almost every Democrat outside Denver and Boulder) and 23–12 in the Senate.

Surprisingly, an article in *Politico* on July 21 claimed that the Concealed Carry Act was written to RMGO's specifications. Exactly the opposite is true: To help the Concealed Carry Act become law, the NRA had to defeat RMGO just as much as it had to defeat the Colorado affiliates of national anti-gun organizations such as the Brady Campaign.

ADDITIONAL LAWS TO PROMOTE SELF-DEFENSE

A second post-Columbine reform in the "gun rights" category is the strengthening by the Colorado legislature of an existing state law that stops local jurisdictions from interfering with the carrying of firearms in automobiles, for which Colorado has never required a permit.

The third gun-rights reform is also in this area of state preemption: Another post-Columbine state law preempts some other aspects of gun control, such as a Denver ordinance that prohibited parents from teaching firearms safety to their children. The Colorado preemption law is nonetheless rather weak by U.S. standards — in the majority of states, local gun laws are prohibited, and many of the remaining states allow local gun laws only on certain enumerated topics — and it's weakened further by judicial interpretation. However, because most Coloradoans view the gun issue as well settled, local governments have enacted essentially no new gun controls recently, for they know that if they did, the long-term result would be much stronger preemption laws at the state level.

Colorado was one of 34 states that enacted a statute prohibiting lawsuits against gun companies for the misdeeds of criminals — the fourth gun-rights law passed since Columbine. The laws protect self-defense rights by thwarting the attempts of anti-gun groups and a few big-city mayors to destroy the firearms industry through litigation. No such lawsuit against a gun company had ever been filed in a Colorado, and the legislature intended to make sure it stayed that way. Congress enacted a similar federal law in 2005, the Protection of Lawful Commerce in Arms Act.

In the early 20th century, during a period of labor strife caused by coal companies' refusal to recognize the rights of miners to join unions, a corporate-dominated legislature enacted a law allowing the governor to ban gun sales

during an "emergency." That law had never been used, but the post-Columbine legislature, enacting its fifth gun-rights reform, repealed it — thus ensuring that guns would be available at a time when they were needed most.

STRENGTHENING GUN REGULATION

Complementing the five laws to protect the self-defense rights of law-abiding citizens, Colorado passed three laws that aim to keep guns out of the wrong hands.

A "straw purchaser" is someone who can legally buy a gun — but who buys a gun on behalf of a prohibited person, such as a convicted criminal. Straw purchases have been illegal under federal law since 1968, and in 1986 the straw -purchase ban was strengthened by the NRA's flagship bill, the Firearms Owners' Protection Act. Colorado's first post-Columbine "gun control" law is similar to the federal one, and it allows local law enforcement to bring cases in state court instead of depending on busy federal prosecutors to file federal charges.

The Columbine guns had been procured by adults who bought the guns on behalf of the killers. So, as the second gun-control measure, Colorado enacted a statute against transferring a firearm to a minor without consent of the minor's parent or guardian. Previously, Colorado law had forbidden such transfers of handguns, but not long guns.

Finally, Colorado voters in 2000 passed a law imposing some special restrictions on gun shows, because three of the four Columbine guns had been obtained at a gun show. In most states, the laws for selling guns at a gun show are exactly the same as for selling a gun anywhere else. Thus, persons who are in the business of selling guns must have a federal license and must conduct a background check on every sale.

In contrast, according to federal law, persons who are not "engaged in the business" of selling firearms are not covered by the rules applicable to firearms businesses. So if a private person sells a rifle to his neighbor or to his friend at a hunting club, the federal rules about background checks and paperwork do not apply. But under Colorado's 2000 law, if that very same private sale takes place at a gun show, then there must be a background check.

I didn't support that law, because I think that laws about gun sales should be uniform, not dependent on the location of the sale. However, the Colorado gun-show law is much more moderate than the gun-show bills that have been introduced in Congress. Unlike those laws, the Colorado law does not give a bureaucrat the administrative power to prohibit gun shows, does not structure the background checks so as to create a gun-registration system, and does not create new restrictions for licensed firearms dealers.

The gun-show initiative won 67 percent of the vote — only a little bit less than the proportion favoring Colorado's Concealed Carry Act. Polls found that the supermajority support for concealed carry actually increased slightly after Columbine.

While Colorado strengthened laws to keep guns out of the wrong hands and put them in the right hands, it rejected all proposals to restrict law-abiding gun ownership — such as bills that would have banned certain guns or magazines, or outlawed guns at schools and colleges.

In broad terms, the Colorado consensus matches the national consensus that solidified a few years later, and which was ratified by the Supreme Court's decisions in *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010).

There is still room for refinement and technical improvements in Colorado's statutes, but the post-Columbine period in Colorado resolved a contentious social debate. Coloradoans, including their liberal Democratic governor John Hickenlooper, are unlikely to let themselves by bullied by the national media into abandoning their consensus, which is based on strong rights and sensible regulations.

— David Kopel is research director at the Independence Institute, in Denver, and an adjunct professor at Denver University, Sturm College of Law.

Permalink

DAILY NEWS

OPINION

Face it: Guns are here to stay

Weapons do less harm and more good than many Americans will acknowledge

BY TREVOR BURRUS / NEW YORK DAILY NEWS

MONDAY, JANUARY 7, 2013, 4:22 AM

ERIK S. LESSER/EPA

A gun shop owner in Georgia.

The horrific massacre in Newtown, Conn., is reigniting the debate over guns — which must begin with the realistic premise that there will never be a gun-free America. Until we own up to this truth, we won't get anywhere.

An emotional revulsion toward guns inhibits productive dialogue between gun-control advocates and their opponents. For many gun-control supporters, a good world is one where private ownership of guns is both unnecessary and illegal.

I have sympathy for the appeal of this ideal, but such a daydream cannot guide our public policy.

There are approximately 300 million guns in private hands in the United States. Even if the government enacted a massive program to confiscate these weapons, the feds would fail in their task and frighten millions of Americans in the process.

And if they did somehow manage to take away legal weapons? That would still leave criminals happily armed.

We must simply accept the inevitability of an America teeming with guns (to the chagrin of Piers Morgan and his fellow liberals). If we at least agree on this realistic starting point, we can move the debate toward reasonable and effective policy proposals: better mental-health care to prevent seriously ill people with violent tendencies from acquiring weapons; background checks; better enforcement of existing laws.

None of these need to involve taking guns out of the hands of law-abiding Americans in order for us to avoid the next Newtown. In fact, guns may well help prevent it.

In December 2007, for example, Matthew Murray entered the New Life Church in Colorado Springs, Colo., armed with two handguns and an assault rifle (the same arsenal possessed by Adam Lanza). Murray had killed two people in the parking lot before entering the church. Inside, he shot one man in the arm before being shot by Jeanne Assam, a former police officer with a concealed-carry permit.

Potential massacres were also stopped in 1997 at a Pearl, Miss., school and in 1998 at a school dance in Edinboro, Pa. In both cases, responsible citizens prevented mass bloodshed by drawing their weapons and using them for the public good. Mock the NRA's Wayne LaPierre all you want, but in those two cases — and plenty of others — good guys with a gun did save the day.

Forty-one states currently have safe and effective concealed-carry permitting systems, and eight other states have more restrictive discretionary permitting laws. Since the 1980s, there has been a profusion of states that allow concealed carry and — despite the dire predictions of many — there has been no corresponding increase in crime rates.

Permit holders are not having parking-lot shootouts or brandishing their weapons during mall scrums over toys. In the past 20 years, the cases of permit holders using their guns improperly are quite rare — and they are certainly much rarer than the times in which people used a concealed weapon to successfully defend themselves.

In short, we have become a society that allows widespread gun-carrying for law-abiding citizens, and this has occurred largely in silence not because of political pressure by the gun lobby or cowardice by Democrats but because there is almost nothing to report.

Almost nothing. We have been mostly silent about just how many times Americans use guns to lawfully and successfully defend themselves from crime.

At minimum, according to the Justice Department's own data, this occurs about 110,000 times per year.

There are, however, many reasons to suspect that this data severely under-reports the true number; other studies have found that Americans use guns defensively between 830,000 and 2.45 million times per year.

Moreover, these numbers don't include the inherently immeasurable instances where would-be criminals decided not to commit a specific crime due to the fear that the would-be victim might be carrying a gun.

In the wake of the Newtown tragedy, stricter gun laws will almost certainly be proposed. But if we make the reasonable assumption that criminals will evade these laws if at all possible, and that identifying shooters before their crimes is a monumentally difficult task, then we can start to deal with actually attainable, second-best solutions.

While we should do everything we can to prevent massacres like Newtown, we should also remember what it takes to stop a New Life Church.

Burrus is a research fellow in the Cato Institute's Center for Constitutional Studies.

OTHERSTORIES

11 Foods You Can't Buy Anywhere Anymore
(The Fiscal Times)

Gonzalez: President Obama calls on Congress to act on immigration reform while patrolling the border has become big business for the government

Victoria Justice in New York City
(Zimbio)

No thank you, Karl Rove

[?]

Texas State Rifle Association

Protecting Our Constitution
Since 1919

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Toll Free Membership Hotline 800-462-8772
www.tsra.com Email agtripp@aol.com

February 7, 2013

Senate Judiciary Committee

Gentlemen:

The Texas State Rifle Association Officers, Board of Directors, Members and Staff urge Senators Cornyn and Cruz to stop and not support any additions to Federal law which further restrict law-abiding gun owners.

We strongly oppose what's being called "universal background checks" on firearm sales and transfers and oppose the addition of ammunition. We strongly oppose passing bans or limiting the ownership on any category of firearm or magazine not currently covered by federal law.

TSRA members are aware that existing law is not being fully utilized. We know courts outside our state are not reporting-up mental health records to NICS, ATF is not following up and prosecuting those who "straw purchase" a firearm for a person not eligible to purchase or possess a firearm.

In addition, TSRA members have seen the FBI Uniform Crime Report, Murder Victims by Weapon, which indicates a steady decline over the previous five year period for categories related to murder by weapon. FBI statistics do not support the need for additional firearms-related law, rules or regulations. The report demonstrates a declining rate within all categories of weapon including "Blunt Instruments" and "Knives or Other Cutting Instruments". Obviously the decline is not tied to background checks.

Our 38,000 Texas members rely on good information and good data. We urge our Government to do the same.

Sincerely

Alice Tripp

Alice Tripp

Texas Trophy Hunters™ Association

The Honorable Ted Cruz
B40B Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Dear Senator Cruz:

Texas Trophy Hunters Association is a membership based organization started in San Antonio over 37 years ago with a mission to facilitate the advocacy of and defend the rights and traditions of the sport of hunting, the Second Amendment, outdoor recreation and wildlife management through direct promotion, education and community outreach; in so doing, Texas Trophy Hunters Association is the Voice of Texas Hunting. We currently have approximately 20,000 members, over 4 million viewers of Trophy Hunters TV and 50,000 attendees to our Trade Shows that regularly advocate to us their desire to protect their Second Amendment rights, their hunting traditions and the right for law abiding citizens to protect their families. We also receive regular feedback from our Facebook followers and e-newsletter subscribers

Texas is a very popular state for law abiding gun owners and hunters alike. Sportsmen in Texas spend over $6.6 billion a year on related outdoor recreation purchases, including firearms and ammunition, and hunters alone spend $2.3 billion a year. It is obvious to us that restricting our Second Amendment rights any further would have a huge impact on the Texas outdoor recreation economy, hunting and all related industries.

We at Texas Trophy Hunters Association represent our members and subscribers when we say that we support whole heartedly the enforcement of our existing gun laws first and do not wish to see any further restrictions placed on our gun ownership rights. We believe that the vast array of new restrictions being proposed would further dilute the ability for law enforcement to enforce the current laws on the books. Texas Trophy Hunters Association and its members are prepared to defend our Second Amendment rights by joining our voices in strong opposition against the liberal proposals to restrict our Constitutional freedoms!

Sincerely,

Jim Butcher
SVP Finance & Operations
Texas Trophy Hunters Association

Hal Gahm
SVP Sales & Operations
Texas Trophy Hunters Association

326 Sterling Browning Rd., Suite 101 • San Antonio, Texas 78232 • (210) 523-8500 • FAX (210) 523-8871
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Texas Wildlife Association

"Working for tomorrow's wildlife … TODAY!"

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February 12, 2013

U.S. Sen. Ted Cruz
B40B Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cruz,

The Texas Wildlife Association strongly supports your efforts and leadership to protect the Second Amendment and its constitutional rights for U.S. citizens.

The Texas Wildlife Association is a statewide membership organization of over 6200 members who own or manage nearly 40 million acres of private property in Texas. TWA serves Texas wildlife and its habitat, while protecting property rights, hunting heritage, and the conservation efforts of those who value and steward wildlife resources.

The Texas Wildlife Association firmly believes every sportsman, sportswoman, and American has the right to keep and bear arms. The constitutional right to keep and bear arms protects the means by which the vast majority of American hunters equip themselves to go afield. Efforts to preserve our Hunting Heritage can be undone if new barriers to hunting are added by limiting the tools that the vast majority of sportsmen depend on to hunt.

Our organization is committed to assisting you and other Congressional leaders who support the Second Amendment and the right to keep and bear arms in anticipation of increased Congressional activity aimed at increasing federal gun control regulations.

As vital as free speech is to a free society, the Second Amendment is equally vital. Therefore, we should refrain from picking and choosing how Americans exercise their Second Amendment rights.

The rationale for gun control is to keep guns from the hands of criminals. Rational people agree guns do not belong in the hands of criminals. The irony is that if we outlawed every gun in the world, the AR 15 (and others) would only be in the hands of criminals, the government, and not everyday U.S. citizens.

Thank you for your strong leadership and efforts on this very important issue. The Texas Wildlife Association looks forward to assisting you in the protection of the Second Amendment and its constitutional rights.

Sincerely,

Glen Webb
President

THE UNIVERSITY of TENNESSEE
KNOXVILLE
COLLEGE of LAW

February 7, 2013

Senator Ted Cruz
United States Senate
Washington, DC 20510

Re: Gun Control and the Second Amendment

Dear Senator Cruz:

As I discussed with your assistant Max Pappas, attached is a copy of my recent article from the Southern California Law Review, entitled *Second Amendment Penumbras: Some Preliminary Observations*.[1] Now that individual possession of firearms has been firmly recognized as a constitutional right, this piece explores related issues such as gunowners' right to travel, the right to carry weapons in public and to transport firearms and ammunition from place to place, the right to purchase firearms and ammunition, and the like.

Let me just add a few other observations. First, although I have seen some pundits suggest that the language in *Heller* about the common law's tolerance for bans on "dangerous and unusual" weapons might permit an "assault weapons" ban, I think that such claims are poorly founded, for the simple reason that so-called "assault weapons" are neither dangerous nor unusual.

All weapons are dangerous, of course, but so-called "assault weapons" fire no more rapidly than other semiautomatic rifles or pistols, nor are their cartridges particularly powerful. Likewise, the archetypal example, the AR-15, can hardly be called unusual, given that it is the most popular rifle in America today.[2] Thus, a categorization of the AR-15 as "dangerous and unusual" would seem untenable. Likewise, while similar rifles such as the AK-47 variants, the SKS, etc., might not be as popular as the AR-15, they can hardly be characterized as unusual, nor are they any more dangerous. The same is true of full-capacity (e.g., 30-round) magazines, which are owned by millions of Americans.

It is for this reason that many have suggested that legislation singling out particular makes and models of firearms for prohibition would be not simply a violation of the Second Amendment, but constitutionally invalid on grounds of irrationality. As Georgetown University law professor Randy Barnett recently wrote:

> For example, "assault weapons" are a made-up category of weapons that is based solely on cosmetic features that make them look like the fully automatic weapons used by the

[1] 85 So. Cal. L. Rev. 247 (2012).

[2] Patrik Jonsson, Is the AR-15 as popular as the iPod? Christian Science Monitor, February 6, 2013. Available online at http://www.csmonitor.com/USA/DC-Decoder/2013/0206/Gun-debate-101-Is-the-AR-15-as-popular-as-the-iPod. (Calling the AR-15 "the most popular gun in America.")

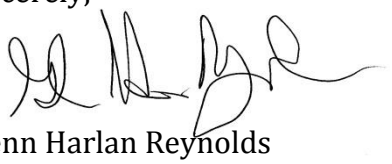
military. Banning them leaves other rifles that are functionally identical in their lethality and rate of fire completely legal. Moreover, far more powerful hunting rifles are left untouched by the law, as are shotguns. This is simply irrational and therefore unconstitutional.

The same can be said for New York's law limiting handguns to seven rounds, while allowing both active and retired police officers to keep their handguns that hold up to 15 rounds. If retired cops need 15 rounds to effectively protect themselves and others, then so do other citizens. Arbitrarily discriminating among Americans in this way is irrational and unconstitutional.[3]

I would add that, although I am aware of no authority on the subject, laws that grant different classes of people – for example, retired law enforcement officers – greater rights to arms should be considered to implicate the constitutional ban on titles of nobility.[4] Though we tend to think of titles of nobility as involving terms like Duke or Baron, the chief characteristic of titles of nobility (which were not necessarily hereditary) was holders' freedom from legal restraints that applied to the masses, and one of the chief characteristics of the gentry in England at the time of the framing was that they had a right to bear arms that the common people did not.

At any rate, I hope that you find my Second Amendment article useful, and these brief thoughts at least moderately interesting. Should you have any further questions, please feel free to contact me.

Sincerely,



Glenn Harlan Reynolds
Beauchamp Brogan Distinguished Professor of Law

[3] Randy Barnett, Gun Control Fails Rationality Test, Washington Examiner, January 23, 2013, available online at http://washingtonexaminer.com/gun-control-fails-rationality-test/article/2519971.

[4] U.S. Const., art I, sec. 9. A similar ban applies to the states under art I, sec. 10.

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Second Amendment Penumbras: Some Preliminary Observations

Glenn Harlan Reynolds

ESSAY

SECOND AMENDMENT PENUMBRAS: SOME PRELIMINARY OBSERVATIONS

Glenn Harlan Reynolds*

I. INTRODUCTION

The Second Amendment to the Constitution[1] is now part of "normal constitutional law,"[2] which is to say that the discussion about its meaning has moved from the question of whether it means anything at all, to a well-established position that it protects an individual right, and is enforceable as such against both states and the Federal Government in United States courts. The extent of that individual right has not yet been fully fleshed out, and, of course, will (like other items of normal constitutional law) occasion disagreement on one issue or another into the foreseeable future.

Nonetheless, now that the right has achieved a measure of concreteness, it has begun, like other parts of the Bill of Rights, to cast its shadow across the law. And if the core of the shadow—or umbra—remains a bit unclear, what of the edge or penumbra?[3]

* Beauchamp Brogan Distinguished Professor of Law, The University of Tennessee; J.D. 1985, Yale Law School; B.A. 1982, University of Tennessee. Thanks to Richard Casada for excellent research assistance.

1. U.S. CONST. amend. II ("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.").

2. *See* Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL. 273, 274–77 (2011) (describing new status of Second Amendment as normal constitutional law).

3. *See* Henry T. Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMMENT. 251, 252 (1989). As Greely points out, the term "penumbra" originates with the astronomer Johannes Kepler, who observed that during an eclipse there is a dark shadow, or "umbra," surrounded by a less distinct shadow or "penumbra"—from the Latin "paene" (almost) and "umbra" (shadow).

In this brief Essay, I will discuss some possible penumbral aspects of the Second Amendment, as it may be applied in the future. I will also discuss its possible interaction with other (up to now, at least) "underenforced" constitutional rights, and consider whether the normalization of the Second Amendment might imbue those rights with additional force. I will conclude with some guidelines, or at least suggestions, for further research.

II. PENUMBRAS

The question of "penumbras" in constitutional law is a long and somewhat thorny one, and the term is used in two different fashions. Sometimes the term is used to describe auxiliary protections for a core constitutional right. At other times, it is used to describe the process of interpolating additional rights based on the provisions of rights that are explicitly spelled out in the Constitution.[4] I will offer some thoughts on both.

A. AUXILIARY PROTECTIONS

When talking about constitutional rights' penumbras, speakers are sometimes describing auxiliary protections for the core right—for example, those provided in the First Amendment realm by "chilling effect" considerations, overbreadth, or prior restraint doctrine. These auxiliary protections ensure that the core right is genuinely protected by creating a buffer zone that prevents officious government actors from stripping the right of real meaning through regulations that indirectly—but perhaps fatally—burden its exercise. Such an approach seems particularly appropriate with regard to the Second Amendment, which plainly commands that the right to keep and bear arms shall not be "infringed"—and what is a penumbra, after all, but a kind of fringe?

What would such auxiliary protections look like in the context of the Second Amendment? If the core right is, as indicated in *District of Columbia v. Heller*, the right to possess firearms for defense of self, family,

4. *See* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089 (1997) (describing penumbral reasoning in this fashion); Glenn Harlan Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992) (same). *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 43 (3d ed. 2000) (describing approaches that "reveal that the gaps between the rights-defining provisions enumerated in the Bill of Rights are only apparent and do not represent substantively empty space but instead serve to juxtapose, in an almost Impressionist fashion, individual commitments in combinations also showing additional guarantees").

and home,[5] then the auxiliary protections that might matter most would be those that would make that right practicable in the real world. That would include such auxiliaries as the right to buy firearms and ammunition, the right to transport them between gun stores, one's home, and such other places—such as gunsmith shops, shooting ranges, and the like—that are a natural and reasonable part of firearms ownership and proficiency.

Such protections are already a part of state constitutional law relating to firearms ownership. For example, the Tennessee Constitution's right to arms has been interpreted in this fashion:

> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.
>
> But further than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.[6]

Does such reasoning, developed for the Tennessee Constitution's right to arms, apply to the Second Amendment? There seems no reason why it should not. Fortunately, we do not have to look far, as the 2011 Seventh Circuit case of *Ezell v. City of Chicago* provides an illustration.[7] *Ezell* demonstrates that the Second Amendment's right to arms extends significantly beyond the simple aspect of self-defense in the home that played a key role in the Supreme Court's *Heller*[8] decision.

In *Ezell*, the question revolved around a Chicago ordinance banning firing ranges within city limits.[9] This was controversial for two reasons. First, Chicago residents wished to be able to practice shooting without having to leave the city. Second, in a particularly heavy-handed catch-22, the City mandated that citizens who wanted a gun license must practice on

5. District of Columbia v. Heller, 554 U.S. 570 (2008).
6. Andrews v. State, 50 Tenn. 165 (3 Heisk), 178–79 (1871).
7. Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).
8. *Heller*, 554 U.S. 570.
9. *Ezell*, 651 F.3d at 690.

a firing range even as it outlawed firing ranges within its jurisdiction.[10]

In tones reminiscent of the Tennessee case quoted above, the Seventh Circuit opined:

> The plaintiffs challenge only the City's ban on firing ranges, so our first question is whether range training is categorically unprotected by the Second Amendment. *Heller* and *McDonald* suggest to the contrary. The Court emphasized in both cases that the "central component" of the Second Amendment is the right to keep and bear arms for defense of self, family, and home. The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective. Several passages in *Heller* support this understanding. Examining post-Civil War legal commentaries to confirm the founding-era "individual right" understanding of the Second Amendment, the Court quoted at length from the "massively popular 1868 Treatise on Constitutional Limitations" by judge and professor Thomas Cooley: "[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them . . . ; it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order."[11]

The right to practice at a firing range, then, is at the very least one of the aspects of the Second Amendment right to arms that reinforces its core purpose. On similar logic, what other rights might be protected?

If citizens have the right to own guns, presumably they have the right to buy them—since, unlike the pornography in *Stanley v. Georgia*,[12] the right to have guns in the home is constitutionally protected, not simply a byproduct of privacy law.[13] This presumably means that they have a right to expect that gun shops will be permitted to operate in their jurisdiction, and, of course, that they will be permitted to transport guns that they purchase freely from the gun shops to their homes or other places (businesses, perhaps) where they possess them for the purpose of self-defense. Indeed, the District of Columbia—which, perhaps because of political hostility, or the legacy of its prohibitive gun laws, has only a

10. *Id*. at 691.

11. *Id*. at 704 (citations omitted).

12. Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the right of privacy extends to possession of pornography in home, even if its sale could be barred under obscenity law).

13. *But cf*. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (arguing for a somewhat *Stanley*-like treatment of firearms). This approach is high academic cleverness, but unlikely to persuade either courts or voters. For a response, see Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009).

single, nonoperational federally licensed firearms dealer—has, in a tacit recognition of this aspect of Second Amendment protection, moved to facilitate the dealer's entry into operation, even offering space in a police station to overcome zoning issues.[14]

Likewise, punitive controls on ammunition, designed to make gun ownership or shooting prohibitively expensive or difficult, would be unlikely to pass constitutional muster. If firing-range regulations that impose burdens on target practice violate the Second Amendment, then restrictions with a similar effect—such as the dollar-per-bullet tax proposed by a Baltimore mayoral candidate[15]—would also constitute violations, it seems. Making it "difficult to buy bullets in the city"—the avowed purpose of the tax—would seem to be precisely the sort of purposeful discrimination that would violate the Second Amendment. It might even be analogized to discriminatory taxes on newsprint, or the licensing of newsracks, both of which have been found to constitute excessive burdens on First Amendment rights.[16]

First Amendment analogies, in fact, suggest another doctrine that might apply: chilling effect. Traditionally, violation of gun laws was treated as mere malum prohibitum, and penalties for violations were generally light.[17] During our nation's interlude of hostility toward guns in the latter half of the twentieth century, penalties for violations of gun laws, especially in states with generally anti-gun philosophies, became much stiffer. Gun ownership was treated as a suspect (or perhaps "deviant" is a better word) act—one to be engaged in, if at all, at the actor's peril.

But with gun ownership now recognized as an important constitutional right belonging to all Americans, that deviant characterization cannot be correct. Regulation of firearms cannot now justifiably proceed on an in

14. Tom Sherwood & Matthew Stabley, *D.C. Gun Dealer Could Operate Out of Police Headquarters*, NBC WASH. (July 20, 2011, 7:42 PM), http://www.nbcwashington.com/news/ local/DC-Gun-Dealer-to-Operate-Out-of-Police-Headquarters-125900203.html?dr.

15. *Bullet Tax Proposed By Mayoral Candidate*, WBAL TV (July 19, 2011, 11:21 AM), http://www.wbaltv.com/print/28595846/detail.html ("'This is not a revenue enhancement tool,' [mayoral candidate Otis] Rolley said of the tax idea. 'It's a make it difficult for you to buy bullets in the city tool.'").

16. *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (discriminatory tax on newsprint violative of First Amendment); Minneapolis Star Tribune Co. v. Comm'r, 460 U.S. 575 (1983) (same); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (city licensing scheme for newsracks violated First Amendment by vesting excessive discretion in mayor).

17. Bill Winter, *NY Gun Law: Aiming at Local Controls?*, 66 AM. B. ASS'N J. 1060 (1980). (joining other major jurisdictions, New York's adoption of minimum sentencing for repeat offenders for carrying unlicensed guns marked the beginning of what some observers predicted would "boost the local approach to controlling handguns" with increased penalties and new laws).

terrorem approach, in which the underlying goal is to discourage people from having anything to do with firearms at all. Laws treating fairly minor or technical violations as felonies must be regarded with the same sort of suspicion as pre–*New York Times v. Sullivan* laws on criminal libel: as improper burdens on the exercise of a constitutional right.[18]

This change has important penumbral implications. At present, Americans face a patchwork of gun laws that often vary unpredictably from state to state, and sometimes from town to town. Travelers must thus either surrender their Second Amendment rights, or risk prosecution. Two recent cases from the state of New Jersey illustrate the risks.

Brian Aitken visited his mother while traveling cross-country with three unloaded handguns in the trunk of his car.[19] Though the guns had been legally purchased in Colorado, they were not registered in New Jersey, and Aitken was tried and sentenced to seven years in prison (though the federal Firearm Owners' Protection Act[20] immunizes those in transit from local laws, the trial court did not apply it to Aitken). According to one news account,

> Aitken had purchased the guns legally in Colorado, and he passed an FBI background check when he bought them, his father said. And he said Brian also contacted New Jersey State Police before moving back home to discuss how to properly transport his weapons. But despite those good-faith efforts, he said, Brian was convicted on weapons charges and sent to prison in August.[21]

Aitken was subsequently released after New Jersey's governor commuted his sentence to time served,[22] but there is no doubt that such risks are likely to create (and were intended to create) a chilling effect with regard to firearms ownership. Nor are such cases limited to those traveling by automobile.

Utah resident Greg Revell was traveling by air, with a change of

18. *Cf*. David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEG. J. 737 (1995) (arguing for Second Amendment protections in lawsuits filed against firearms manufacturers analogous to those announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

19. Chris Megerian, *Gun Owner Brian Aitken Is Released from Prison After Gov. Christie Commutes Sentence*, NJ.COM, (Dec. 22, 2010, 12:15 PM), http://www.nj.com/news/index.ssf/2010/12/gun_owner_brian_aitken_is_rele.html.

20. Firearms Owners' Protection Act, 18 U.S.C. § 926A (2006).

21. Joshua Rhett Miller, *New Jersey Gun Case Exposes "Patchwork" of State Laws, Experts Say*, FOXNEWS.COM (Dec. 2, 2010), http://www.foxnews.com/us/2010/12/02/new-jersey-gun-case-highlights-patchwork-state-gun-laws-relatives-experts-say/.

22. Megerian, *supra* note 19.

planes at New Jersey's Newark Airport, when his flight was canceled.[23] He wound up in jail when the airport misdirected his luggage:

> Revell was flying from Salt Lake City to Allentown, Pa., on March 31, 2005, with connections in Minneapolis and Newark, N.J. He had checked his Utah-licensed gun and ammunition with his luggage in Salt Lake City and asked airport officials to deliver them both with his luggage in Allentown.
>
> But the flight from Minneapolis to Newark was late, so Revell missed his connection to Allentown. The airline wanted to bus its passengers to Allentown, but Revell realized that his luggage had not made it onto the bus and got off. After finding his luggage had been given a final destination of Newark by mistake, Revell missed the bus. He collected his luggage, including his gun and ammunition, and decided to wait in a nearby hotel with his stuff until the next flight in the morning.
>
> When Revell tried to check in for the morning flight, he again informed the airline officials about his gun and ammunition to have them checked through to Allentown. He was reported to the TSA, and then arrested by Port Authority police for having a gun in New Jersey without a New Jersey license.
>
> He spent 10 days in several different jails before posting bail. Police dropped the charges a few months later. But his gun and ammunition were not returned to him until 2008.
>
> Revell said he should not have been arrested because federal law allows licensed gun owners to take their weapons through any state as long as they are unloaded and not readily accessible to people. He said it was not his fault the airline stranded him in New Jersey by making him miss his flight and routing his luggage to the wrong destination.
>
> Prosecutors said it doesn't matter whose fault it was: Revell was arrested in New Jersey with a readily accessible gun in his possession without a New Jersey license.[24]

Cases like this are common enough to give gun owners pause, and to support the publication of various guides to compliance. Legal approaches like New Jersey's seem intended to stigmatize and denormalize firearms possession generally, and to produce an in terrorem effect that will make gun ownership less common. The question is, does this chilling effect run afoul of the Second Amendment? If, as noted above, the right to keep and

23. Jesse J. Holland, *High Court Denies Man's Gun Arrest Appeal*, HUFFINGTON POST (Jan. 18, 2011, 11:20 AM), http://www.huffingtonpost.com/huff-wires/20110118/us-supreme-court-gun-arrest/. Despite the headline, this was not an "appeal," but a civil-rights lawsuit against the New Jersey authorities, as criminal charges against Revell were eventually dropped.

24. *Id*.

bear arms implies the right to use them in ordinary ways, these burdens would seem problematic.

Certainly one could argue that in today's highly mobile society, travelers with firearms should be treated as ordinary Americans, rather than deviants, and violations that do not involve some sort of genuinely criminal activity should be treated more like violations of traffic laws, rather than as felonies.[25] When gun ownership was not recognized as a normal, constitutionally protected act, these sorts of laws might have been on firmer footing, but with that right now established, they would seem ripe for close judicial scrutiny.[26]

One might also ask if the right to bear nonlethal arms is protected by the Second Amendment, and if not, why not? Had the Supreme Court hewed closer to the "insurrectionist theory" approach to the Second Amendment—in which the primary, if not sole, justification for the right to arms is to allow the overthrow of the federal government should it become tyrannical[27]—then questions involving the treatment of tasers, pepper spray, and the like might be avoided: such weapons have limited military utility, and their presence among the populace probably does little to deter tyranny. But since the *Heller* and *McDonald v. City of Chicago*[28] cases have stressed the importance of individual self-defense under the Second Amendment, it is difficult to see why that right should be protected only when lethal means are employed.

Indeed, nonlethal self-defense may allow those unable, for reasons of age or other incapacity, to defend themselves with firearms to nonetheless

25. Turning citizens exercising constitutional rights into felons over technicalities would seem to be not only a Second Amendment violation but perhaps a due process violation as well—that is a subject for another paper.

26. One might even imagine an overlap between Second Amendment penumbras and those of the right to travel. *See* Saenz v. Roe, 526 U.S. 489 (1999) (finding a durational residency waiting period for welfare benefits an unacceptable burden on the constitutional right to travel).

27. *See generally* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464–89 (1995) (describing Second Amendment scholarship and its relationship to the right of revolution). Note, however, Don Kates's point that the Framers regarded violent resistance to criminals and violent resistance to tyrants as essentially the same, since tyrants and their servants, whatever badges of office they might possess, were nonetheless acting outside the law, and hence outside its proper protection. Thus, modern distinctions between self-defense against tyrants and self-defense against criminals are something of an anachronism. *See* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 89 (1992) ("[E]xploring the numerous and protean ways in which the concept of self-protection relates to the amendment in the minds of its authors.").

28. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment).

partake of the right to self-defense protected by the Second Amendment. The reasons for not entrusting sixteen-year-olds with handguns for self-defense, after all, may not apply with nearly the same strength where pepper spray is concerned.[29]

There are, one suspects, many other opportunities for such scrutiny where the penumbra of the Second Amendment is concerned.[30] As a full-fledged constitutional right that until recently was regulated as if it were not a right at all, the right to bear arms is likely to raise questions in numerous contexts as activists and litigants continue to explore its boundaries. This will provide considerable grist for courts and, happily, for constitutional law professors for years to come.

B. SECOND AMENDMENT PENUMBRAS AND UNENUMERATED RIGHTS

Penumbras and penumbral reasoning, as mentioned earlier, are also frequently used to describe the sort of reasoning-by-interpolation used in cases like *Griswold v. Connecticut*,[31] among many others. Which raises the question: Now that the Second Amendment has been firmly enshrined as normal constitutional law, does the recognition of an individual right to arms shed any light on how courts should address the question of rights not enumerated under the Constitution?

29. For a pre-*McDonald* view of this subject, see Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009). One might also imagine penumbral protection for other nonlethal implements, such as cameras, which—while of limited use for physical self-defense—may be of considerable use in legal self-defense. *See generally* Morgan Manning, *Less Than Picture Perfect: The Relationship Between Photographers' Rights and Law Enforcement*, 78 TENN. L. REV. 105 (2010) (describing importance of photography in legal self-defense). *See also* Glenn H. Reynolds & John Steakley, A Due Process Right to Record the Police (unpublished work in progress) (on file with author).

30. In particular, two other areas suggest themselves: The relationship between the Second Amendment and the Commerce Clause, and whether Second Amendment penumbras might justify a narrower view of Congress's regulatory authority where firearms are concerned, and the extent to which states and the federal government may regulate the wearing of weapons in public places. Both are now under pressure from gun rights activists. *See, e.g.*, Jess Bravin, *A Gun Activist Takes Aim At U.S. Regulatory Power*, WALL ST. J. (July 14, 2011), http://online.wsj.com/article/SB10001424052702304584404576442440490970 46.html (describing state legislative challenges to federal gun regulation under commerce clause); Ashby Jones, *Bearing Arms In Public Is Next Legal Battlefield*, WALL ST. J. (Aug. 1, 2011), http://online.wsj.com/article/SB10001424053111903635604576474660122080894.html?mod=googlenews_wsj ("Gun-ownership advocates are filing lawsuits in courts across the U.S., hoping to get rulings that people have a constitutional right not only to keep firearms in their homes, but to carry them in public."). These issues will be addressed in a future paper, Brannon P. Denning & Glenn H. Reynolds, Heller and McDonald in The Lower Courts: A Progress Report (unpublished work in progress).

31. Griswold v. Connecticut, 381 U.S. 479 (1965).

It is perhaps worth noting that the term "penumbra," though famously used in the *Griswold* opinion,[32] has a much longer history in legal usage. In particular, Karl Llewellyn used the term in his *The Constitution as an Institution*, writing:

> The discussion above with reference to the nature of an institution and the inevitable character of its gradual shading off into surrounding complexes of ways (be they complementary, competing, or merely cross-currents fulfilling other needs) will have made clear my belief that, whatever one takes as being this working Constitution, he will find the edges of his chosen material not sharp, but penumbra-like. And the penumbra will of necessity be in constant flux. New patterns of action develop, win acceptance (sometimes suddenly), grow increasingly standardized among an increasing number of the relevant persons, become more and more definitely and consciously "the thing to do," proceed to gain value as honored in tradition—i.e., become things to be accepted in and of themselves without question of their utility—until they take on finally, to more and more of their participants, the flavor of the "Basic."[33]

But if penumbral reasoning means using the enumerated rights as guidepoints in determining the shape of unenumerated rights, as the Court did in *Griswold*,[34] how does the Supreme Court's recognition of the Second Amendment's right to arms affect the analysis? It is true, of course, that even before *Heller*, the Supreme Court mentioned the right to arms in the course of penumbral analysis, as in Justice Harlan's famous *Poe v. Ullman* dissent:

> This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . . Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.[35]

32. *Id*. at 484.

33. Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 26–27 (1934); Burr Henly, "*Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83–92 (1987). As Henly points out, the term "penumbra" had been used by such well known authorities as Oliver Wendell Holmes, Benjamin Cardozo, Felix Frankfurter, and Learned Hand, as well as Justice Douglas himself and Professor H.L.A. Hart, before the *Griswold* opinion came down.

34. For an extensive discussion of the methodology in *Griswold* and a response to a leading critic of the decision, see Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold*, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

35. Poe v. Ullman, 367 U.S. 497, 543–44 (1961) (Harlan, J., dissenting).

But though Harlan mentions the right to arms, presumably the explicit recognition provided by *Heller* and *McDonald* amplifies the importance of the Second Amendment in penumbral analysis of unenumerated rights. But how? Given the uncertainties involved in penumbral reasoning (as with most other kinds of legal reasoning), absent a concrete dispute, it is difficult to answer this question completely, but here are some thoughts.

The core of *Heller* is a constitutionalization of the right of self-defense. The right of individuals to protect themselves against violence is, in this analysis, so important that it is, in many ways, beyond the power of the state to regulate. Though the state might prefer to sacrifice citizens' lives in order to limit gun ownership, such a sacrifice is not permitted. This indicates that individual citizens' lives and autonomy are themselves, in some significant respects, beyond the power of the state to sacrifice. Does that have implications for other, unenumerated rights? It just might.

In addressing this question, one area that comes to mind involves an individual's right to control his or her medical treatment. Eugene Volokh has even, suggestively enough, termed this a right of "medical self-defense."[36] If, as *Heller* and *McDonald* indicate, the right of an individual to use firearms to defend his or her life is constitutionally protected even where the exercise of that right might frustrate, or at least inconvenience, regulatory schemes favored by state or federal officials, might that strengthen the right of individuals to engage in medical self-defense?

Though his analysis precedes *Heller* and *McDonald*, Volokh, drawing on Supreme Court treatment of life-saving abortion procedures, suggests that a right to medical self-defense might permit individuals to make use of unapproved medical treatments in order to save their own lives, including a right to purchase and sell organs for transplant.[37] Volokh makes a persuasive case that these results follow from the common law right of self-defense, but this position is certainly strengthened by the explicit endorsement of a constitutional right of self-defense under the Second Amendment.[38]

36. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007).

37. *See id*. at 1815–17.

38. Self-defense need not involve humans, of course. For example, a man charged in 2011 with a violation of the Endangered Species Act for shooting a grizzly bear that was threatening his child would presumably benefit from a reweighting of the individual versus social-policy calculus. Becky Kramer, *Not Guilty Plea Entered in Federal Case of Shot Grizzly*, SPOKESMAN-REV. (Wash.) (Aug. 24, 2011), http://www.spokesman.com/stories/2011/aug/24/not-guilty-plea-entered-in-federal-case-of-shot/. *See also* David Cole, *Grizzly Shooter Garners Support*, COEUR D'ALENE PRESS (Idaho) (Aug. 24, 2011, 12:00 AM), http://www.cdapress.com/news/local_news/article_65972651-9003-5b14-b4e6-730e29

On a broader scale, the incorporation of a strong Second Amendment into penumbral analysis strengthens the role of the citizen against the interests of the state more generally. It is arguable, in fact, that we have already seen some penumbral influence from the Second Amendment at the Supreme Court level. Though not explicitly mentioned in the majority opinion, it seems likely that Second Amendment concerns led to the majority's heightened sensitivity to federalism questions in *Printz v. United States*, where the Supreme Court struck down a federal gun-control law that would have commandeered state and local officials to enforce a federal regulatory scheme aimed at gun purchasers.[39] Though only Justice Thomas's concurrence specifically addressed Second Amendment questions,[40] the majority opinion does give the impression of additional care based on the subject matter involved. One might expect that a similar case today would be treated with even more circumspection, and perhaps even with an explicit invocation of Second Amendment concerns.

But the penumbral influence of the Second Amendment may go farther still. As Sanford Levinson observed in the early days of the Second Amendment scholarship boom:

> Such analyses provide the basis for Edward Abbey's revision of a common bumper sticker, "If guns are outlawed, only the government will have guns." One of the things this slogan has helped me to understand is the political tilt contained within the Weberian definition of the state—i.e., the repository of a monopoly of the legitimate means of violence—that is so commonly used by political scientists. It is a profoundly statist definition, the product of a specifically German tradition of the (strong) state rather than of a strikingly different American political tradition that is fundamentally mistrustful of state power and vigilant about maintaining ultimate power, including the power of arms, in the populace.
>
> We thus see what I think is one of the most interesting points in regard to the new historiography of the Second Amendment—its linkage to conceptions of republican political order.[41]

The Second Amendment is, indeed, linked to "conceptions of republican political order," and the notion that an individual's right to his or her own life is prior to any claim that the state might have constitutes a dramatic departure from any number of Continental political philosophies.

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39. Printz v. United States, 521 U.S. 898 (1997).

40. *Id*. at 936–39.

41. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989).

Precisely how this may play out in future cases is unclear, but to the extent that penumbral reasoning incorporates this aspect of the right to arms, the result is likely to be a more strongly individualistic approach in general. Further research on this topic might profitably focus on the implications of these conceptions of republican political order for both state power and individual autonomy, the role of the judiciary in policing the resulting boundaries, and the likely evolution of conventional wisdom on the Second Amendment toward a new version of Karl Llewellyn's sense of the "basic."

III. CONCLUSION

Where interpretation and application of the Second Amendment is concerned, we have reached the end of the beginning. Though numerous specific questions regarding Second Amendment application remain to be resolved, the existence and general outline of the right to arms has now been established. Less clear, still, is how this right will influence the interpretation of other constitutional rights, both existing and yet to be identified. But if the Constitution can be described, as it frequently is, as a web of rights and powers, then the addition (or recognition) of a new textual right can be expected to generate a tug on the strands that will be felt elsewhere. I hope that this brief essay has at least been sufficient to spur further thought regarding what those changes might be.