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SYMPOSIUM - GUN CONTROL AND THE SECOND AMENDMENT:  
DEVELOPMENT AND CONTROVERSIES IN THE WAKE OF  
DISTRICT OF COLUMBIA V. HELLER AND MCDONALD V.  
CHICAGO

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## Heller, McDonald, and Murder: Testing the More Guns = More Murder Thesis

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## **HELLER, MCDONALD, AND MURDER: TESTING THE MORE GUNS = MORE MURDER THESIS**

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## INTRODUCTION

In 2008, the Supreme Court recognized that the Second Amendment guarantees a right of law-abiding, responsible adults to own firearms for self-defense; it therefore struck down the District of Columbia's bans on keeping defensive firearms as violating that right.<sup>1</sup> It thereafter struck down Chicago's handgun ban, holding that the same right applies against states and localities.<sup>2</sup>

It is by no means our intention to minimize the Second Amendment legal issues, on which one of us has written extensively.<sup>3</sup> But it is fair to assume that the *Heller* Court gave at least some consideration to the criminological issues. The Court undoubtedly gave attention to the National Academy of Sciences' 2004 finding that, after exhaustive investigation, it could not identify any gun control measure that had reduced violent crime, suicide, or accidents.<sup>4</sup> The Justices also may have noted the same result that the Centers for Disease Control reached in an even more extensive study<sup>5</sup> as well as in the cognate results of other researchers.<sup>6</sup>

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1. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

2. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

3. See, e.g., Don B. Kates, Jr. *Second Amendment*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639–40 (Leonard Levy et al. eds., 1986); Don B. Kates Jr., *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211 (2009); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Handgun Prohibition*]; Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986); Don B. Kates Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992).

4. NAT'L RESEARCH COUNCIL, COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 49, 119, 150, 183 (John V. Pepper et al. eds., 2005).

5. *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, CDC (Oct. 23, 2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>. It is noteworthy that the CDC has again and again reiterated its political position that gun ownership should be eliminated from American life. This political position may explain the CDC study's literal conclusion, i.e., that none of the hundreds of studies it reviewed were done well enough to justify the conclusion that the gun controls examined do not reduce violent crime.

6. See, e.g., JAMES B. JACOBS, CAN GUN CONTROL WORK? 214 (2002); JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 114–15 (1998); Don B. Kates & Daniel D. Polsby, *Long Term Non-Relationship of Widespread and Increasing Firearm Availability to Homicide in the United States*, 4 HOMICIDE STUD. 185 (2000), available at <http://hsx.sagepub.com/content/4/2/185>; Gary Kleck & Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on City Violence Rates*, 9 J. QUANT. CRIM. 249 (1993); Carlisle E. Moody & Thomas B. Marvell, *Guns and Crime*, S. ECON. J. 720 (2005); Lawrence Southwick, Jr., *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*,

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Such research notwithstanding, politicians and other laymen still widely hold the belief that more guns mean more murder and fewer guns would mean less murder. This widely held faith is the basis of the gun ban ordinances challenged in *Heller* and in *McDonald*.

The purpose of this Article is to focus evidence on these widely held beliefs and to acquaint the legal community with that evidence. In that respect, it may be useful to recall the conclusion of the University of Massachusetts's Social and Demographic Research Institute from an exhaustive federally funded review of the extant gun control literature during the Carter Administration:

It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. *There is no persuasive evidence that supports this view.*<sup>7</sup>

Part I of this Article examines the misperception that murderousness is common among law-abiding people. Part II examines the illogic of the common error of assuming that if a high violence rate induces many people to buy guns, the number of guns is a cause of violence rather than a result of the violence. We examine examples of nations in which more guns have been associated with less crime. Parts III and IV establish that many societies with few or no firearms are far more afflicted with homicide than societies where guns abound. Finally, Part V traces the history of murder in America in relation to gun ownership.

We begin by examining two myths that may promote the belief that more guns mean more murder, and fewer guns less murder. One of these views involves a logical error, the other an outright falsehood.

### I. FALSEHOOD: THE ORDINARY-PERSON-AS-MURDERER

The reason why many people perceive that more guns necessarily will mean more murder is that they are misled by a common falsehood. That falsehood is that murderousness is a universal human trait and part of the make-up of ordinary people. Innumerable

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25 ATLANTIC ECON. J. 256 (1997); Tomoslav Kovandzic, Mark E. Schaffer & Gary Kleck, *Estimating the Causal Effect of Gun Prevalence on Homicide Rates* (Inst. for the Study of Labor, Discussion Paper No. 3589, 2008), available at <http://econpapers.repec.org/paper/izaizadps/dp3589.htm>.

7. JAMES D. WRIGHT, PETER H. ROSSI, KATHLEEN DALY & ELEANOR WEBER-BURDIN, WEAPONS, CRIME, AND VIOLENCE IN AMERICA: A LITERATURE REVIEW AND RESEARCH AGENDA, at i (1981) (emphasis added).

articles—even scholarly articles—offer falsehoods like “most shootings are not committed by felons . . . , but are acts of passion that are committed using a handgun that is owned for home protection.”<sup>8</sup> To see a similar argument, consider the Aug. 13, 2005 *L.A. Times* Op-Ed. “Targeted by Gun Nuts,” by Jenny Price, a scholar at the UCLA Center for the Study of Women. Her article claimed that “thousands of law-abiding citizens annually become criminals when they pick up a firearm and shoot other people.”<sup>9</sup>

From the premise that most murders are committed by previously law-abiding people in a fit of rage, it would follow that gun ownership by ordinary people would promote murder and that the more guns available, the more murder would result. The problem with this is that the premise is utterly false. Concomitantly, the scholarly articles that state that premise are truly remarkable for their absence of sources supporting the proposition.<sup>10</sup>

The reason why relevant references for the point are lacking—even in scholarly articles that reference all other points—is that *no studies support this false premise*.<sup>11</sup> Rather, studies of homicide—including those reaching back to the Nineteenth Century—document the opposite: far from being ordinary people, most murderers are extreme aberrants with life histories of psychopathology, crime, and/or violence.

Reviewing pre-1997 studies of murder and murderers, Elliott summarizes a perpetrator characteristic: “[*T*]he vast majority of persons involved in life-threatening violence have a long criminal

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8. Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 AKRON L. REV. 113, 118–19 n.28 (2005) (quoting Katherine Kaufer Christoffel, *Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course*, 88 PEDIATRICS 294, 300 (1991)).

9. Jenny Price, Op-Ed., *These People Own Guns?*, L.A. TIMES, Aug. 13, 2006, <http://www.latimes.com/news/opinion/la-op-price13aug13,0,4206961.story>. Typical assertions to the same effect with no supporting footnotes will be found in, inter alia, JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS 73 (2001); Daniel W. Webster et al., *Reducing Firearms Injuries*, in ISSUES IN SCIENCE AND TECHNOLOGY 73 (1991); FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 16, 61 (1997); Bruce R. Conklin & Richard H. Seiden, *Gun Deaths: Biting the Bullet on Effective Control*, 22 PUBL. AFF. REP., 1981, at 4.

10. See, for instance, the absence of references for the point in the otherwise referenced articles cited *supra*, note 9.

11. See Don B. Kates, *The Right to Arms: The Criminology of Guns*, 2010 CARDOZO L. REV. DE NOVO 86, 89 (2010).

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record with many prior contacts with the justice system . . . .”<sup>12</sup> Likewise, Kates and Cramer evaluate post-1997 homicide studies detailing the prior criminal and psychiatric histories of murderers in a 2009 study.<sup>13</sup> So invariably do studies document it that the criminal aberrance of murders has been characterized as one of the “criminological axioms.”<sup>14</sup>

## II. CORRELATIONS BETWEEN HIGH GUN OWNERSHIP AND MURDER

Because guns may be widely owned for reasons having no relation to crime, such as hunting, there is no necessary correlation between the two.<sup>15</sup> Thus, Norway has Western Europe’s lowest murder rate despite having the area’s highest proportion of gun ownership.<sup>16</sup>

Nevertheless, because individuals often own guns to protect themselves and their families against violent crime, there often is a correlation between high murder rates and widespread gun ownership. Such correlations are regularly cited as proving that guns cause crime. This conclusion is comparable to citing the fact that many diabetics use insulin as proof that insulin causes diabetes.

If ordinary people do not commit murder, even with guns present, then by logical extension gun ownership by ordinary people does not increase murder. Furthermore, if people acquire firearms in response to crime in order to protect themselves, then an increase in crime implies an increase in gun ownership. If people protect themselves with guns and such behavior increases the cost of attack to the attacker, then more guns means less crime. In sum, the correlation

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12. Delbert S. Elliott, *Life Threatening Violence Is Primarily a Crime Problem: A Focus on Prevention*, 69 COLO. L. REV. 1081, 1093 (1998).

13. Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1342–43 (2009).

14. David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUD. 263 (1998).

15. See Chris W. Eskridge, *Zero-Order Inverse Correlations Between Crimes of Violence and Hunting Licenses in the United States*, 71 SOC. & SOC. RES. 55 (1986). Ironically, the Eskridge article evidences the strength of the faith that guns cause murder. On finding hunting license figures bore no relation to violence rates did not cause the author to see the most obvious explanation—that gun ownership among ordinary people does not promote violent crime. Instead, he theorized that killing animals just satisfies gun owners’ brutish impulses so they don’t need to murder other humans.

16. See Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL’Y 649, 651–94 (2007).

between high crime and high gun ownership could be positive, negative, or zero. Nevertheless, even if one found that more guns were positively correlated with crime, it does not prove causation, since people may well acquire guns in response to crime. Researchers have found all three values in studying guns and crime. However, Southwick showed that a positive correlation is more likely a result of causation running from crime to guns (more crime causes more guns) rather than from guns to crime (more guns cause more crime).<sup>17</sup> Moody updated and confirmed Southwick's analysis using more recent data.<sup>18</sup> Moody and Marvell found no significant relationship between guns and crime, which they attribute to the fact that guns can both cause crime and deter crime, with the net effect being approximately zero.<sup>19</sup>

While there may be no significant correlations in the United States today, this Article examines several examples from history and anthropology in which more guns have been associated with less crime.

### III. DO SOCIETIES WITH NO FIREARMS HAVE LOW MURDER RATES?

It may seem odd to begin our treatment by discussing societies that are obscure or long gone. However, doing so disposes of an unavoidable problem: the mere fact that guns have been outlawed in a society does not exclude them from that society. Banning guns just drives them underground.

As discussed *infra*, England discouraged gun ownership ever more stringently throughout the twentieth century.<sup>20</sup> But progressively discouraging gun ownership coincided with progressive increases in British violent crime.<sup>21</sup> Yet that does not necessarily prove anything about the presence (or absence) of guns promoting violence, because it does not prove that guns actually were absent. Yes, outlawing and confiscating handguns in 1997 resulted in more than 160,000 legal

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17. See Southwick, *supra* note 6, at 265–73.

18. See Carlisle Moody, *Firearms and Homicide*, in HANDBOOK ON THE ECONOMICS OF CRIME 432, 448 (Bruce L. Benson et al. eds., 2010).

19. See Moody & Marvell, *supra* note 6, at 720–36.

20. JOYCE LEE MALCOM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 133–218 (2002).

21. See *infra* notes 94–95 and accompanying text.

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handguns being surrendered by law-abiding owners.<sup>22</sup> But, as to the overall success of that measure, a 2002 report of England's National Crime Intelligence Service states, that while "Britain has some of the strictest gun laws in the world [i]t appears that anyone who wishes to obtain a firearm [illegally] will have little difficulty in doing so."<sup>23</sup> Therefore, it is appropriate to begin by discussing societies in which we can be confident that firearms actually are or were non-existent rather than merely illegal.

### A. Primitive Societies

One source of data to test the hypothesis of guns causing murder is the experience of modern day primitive gun-free societies. For example, according to Bruce Knauff, the Bushmen of the Kalahari (featured in the movie *The Gods Must Be Crazy*<sup>24</sup>) had a homicide rate equivalent to 41.9 per 100,000 over the thirty-five year period of 1920–55.<sup>25</sup> In contrast, current American murder rates are roughly five per 100,000 population, one-eighth that of the Bushmen.<sup>26</sup> In the 1950s and early 1960s American murder rates were about the same.<sup>27</sup> The American murder rate peaked in 1991 at 10.5 per 100,000.<sup>28</sup> This rate is approximately one-fourth that of the Kalahari bushmen. The Gebusi, a New Guinea gun-free society of 450 people, had a homicide rate of 568 per 100,000; the Yanomamo, who live in the Brazilian rainforest, had a homicide rate of 166 per 100,000 from 1970–74; and the Hewa of New Guinea had the amazing homicide rate of 778 per 100,000 during the period 1959–68.<sup>29</sup>

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22. See *Public Give up 160,000 Guns After Dunblane*, BBC NEWS (Sept. 3, 1998), [http://news.bbc.co.uk/2/hi/uk\\_news/164402.stm](http://news.bbc.co.uk/2/hi/uk_news/164402.stm).

23. See *id.* at 319.

24. See *THE GODS MUST BE CRAZY* (Jamie Uys 1980).

25. See Bruce M. Knauff, *Violence Among Newly Sedentary Foragers*, 92 AM. ANTHROPOLOGIST 1013, 1014 (1990).

26. See *Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1991–2010*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (last visited Oct. 1, 2012).

27. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 443 (1976).

28. See FBI, *supra* note 26.

29. See Bruce M. Knauff, *Reconsidering Violence in Simple Human Societies: Homicide Among the Gebusi of New Guinea*, 28 CURRENT ANTHROPOLOGY 457, 464 (1987).



High homicide rates characterize many other primitive societies including the Aboriginal Australians, Alaskan Eskimos, American Northwest Coast Indians, and Great Plains Indians.<sup>30</sup>

Many homicides in primitive cultures arise from wife-stealing, rustling, raids and counter-raids, and revenge killings.<sup>31</sup> It might be objected that such killings are a kind of warfare, which makes it unfair to compare them to domestic murder in the United States. To this it can be answered that large numbers of American homicides, such as those arising from gang warfare, are comparable.<sup>32</sup> More important, if we adjust the U.S. homicide rate between 1942 and 2005 to include all the deaths of U.S. soldiers killed in World War II, the Korean War, the Vietnam War, the Gulf War, and the Iraq war, we get an average homicide rate of 10.6 per 100,000 (compared to the average of 6.8 excluding war deaths).<sup>33</sup> This rate is still well below the homicide rate of the gun-free cultures examined above. Or, considering the issue from the standpoint of war deaths caused by the American military, American military forces would have had to have killed almost the entire population of South Vietnam between 1963 and 1972 to equal the homicide rate of the Gebusi.<sup>34</sup>

One of the problems with measuring murder as a rate per 100,000 is that it may misrepresent a society that has a population of, say, 450. However, this criticism is not as telling if the homicide rate is computed over a long period of time. One can make an alternative comparison by looking at the proportion of all deaths due to homicide. In the United States in 2005 homicide accounted for less than 1% of all deaths.<sup>35</sup> The corresponding number for the Gebusi is 29% for females and 35% for males<sup>36</sup> (of the 394 total adult deaths reported, nearly one-third were homicides).<sup>37</sup> Among the Waorani of the Amazon rainforest, 60% of adult deaths over five generations resulted from homicide.<sup>38</sup> This percentage implies a homicide rate that is twenty-two times higher for males and forty-nine times higher

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30. See Azar Gat, *The Pattern of Fighting in Simple, Small-Scale, Prestate Societies*, 55 J. ANTHROPOLOGICAL RES. 563, 575 (1999).

31. *Id.* at 564.

32. RONALD M HOLMES & STEPHEN T. HOLMES, *MURDER IN AMERICA* 94–95 (2d ed. 2001).

33. See Moody, *supra* note 18, at 449.

34. LAWRENCE KEELEY, *WAR BEFORE CIVILIZATION* 29–30 (1996).

35. See FBI, *supra* note 26.

36. Knaft, *supra* note 29, at 462.

37. *Id.*

38. See Gat, *supra* note 30, at 575.

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for females than the homicide rate in the United States today. In one fifteen-family group of Copper Eskimos in Canada, every adult male had been involved in at least one homicide.<sup>39</sup>

How about pre-historic humans? Excavators of the Madisonville, Ohio, late pre-historical site found that 22% of the adult male skulls had wounds sufficient to be the cause of death and 8% were fractured.<sup>40</sup> Similarly, 16% of the individuals found in the Norris Farm, Illinois, prehistoric site apparently died violent deaths.<sup>41</sup> Fifty-six percent of the Australopithecine bodies from the Pleistocene era found in Africa apparently died due to purposeful violence by other hominids.<sup>42</sup> Similarly, 64% of the remains of twenty-five individuals found in European prehistoric sites show evidence of death by violence at the hands of other hominids.<sup>43</sup>

We do not mean to imply by this litany of evidence of violence that all primitive, ancient, or pre-historical societies are or were extremely violent. There are several examples of peaceful primitive societies. For example, the Polar Eskimos of Greenland, the Mbuti Pygmies of central Africa, the Semang of Malaysia, the Mardudjara of western Australia, and the Great Basin Shoshone and Paiute of North America appear to be particularly peaceful.<sup>44</sup> In addition, the gun-free society of thirteenth century Iceland portrayed in the Icelandic Sagas had an estimated homicide rate roughly equivalent to twentieth century America.<sup>45</sup>

As discussed *infra*, over the very long run, a higher rate of gun ownership in societies has been associated with a lower rate of homicide.<sup>46</sup> At the very least, as the evidence so far considered shows, a complete absence of guns does not guarantee one's safety. In fact, the reverse is often true: pre-historic, ancient, and modern simple gun-free societies can have remarkably high homicide rates. It is therefore quite possible, and quite common in many societies, to commit homicide at very high rates without the aid of firearms.

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39. See KEELEY, *supra* note 34, at 29.

40. See Gat, *supra* note 30, at 575.

41. See *id.*

42. Marilyn K. Roper, *A Survey of the Evidence for Intrahuman Killing in the Pleistocene*, 10 CURRENT ANTHROPOLOGY 427, 430 (1969).

43. *Id.* at 437.

44. KEELEY, *supra* note 34, at 30.

45. David Friedman, *Private Creation and Enforcement of Law—A Historical Case*, 8 J. LEGAL STUD. 399, 410 (1979) (citing E.O. Sveinsson, *The Age of the Sturlungs*, 36 ISLANDICA 68, 73 (1953)).

46. See *infra* Parts III.B, IV, V.C, and note 50.

Contrary to the implications of the more guns mean more crime hypothesis, life in gun-free societies is typically neither peaceful nor safe. There are relatively peaceful gun-free societies, but these seem to be the exception.<sup>47</sup> Certainly the conclusion from this survey does not support any notion that gun-free societies will enjoy peace.

### B. The Dark Ages and Afterward

If the existence of firearms is the key to murder, the Dark Ages should have been blissfully peaceful. Dark Age violence cannot be explained “in terms of the availability of firearms, which had not yet been invented.”<sup>48</sup> Yet, in addition to war (both endemic and extremely brutal) the Dark Ages experienced rates of ordinary murder that were at least twice those of the United States at its worst.<sup>49</sup>

If more guns mean more murder and fewer guns mean less, there should have been an exponential increase in murders after the Dark Ages. It was only thereafter that firearms were invented and that they gradually became ever more efficient and more widely distributed among the citizens. But, contrary to the guns-cause-murder thesis, murder rates seem to have fallen sharply as guns became more efficient and widely owned in England, much of Europe, and Scandinavia over the five centuries after the invention of firearms.<sup>50</sup>

During much of this period, incidentally, because the military-age male population of England was deemed to constitute a militia, every military-age male was required to possess arms and appear with them when called out for militia training and actual service.<sup>51</sup> The same was true in America during the period of colonial and post-colonial settlement. Indeed, the basic English militia laws were superseded by the Colonies’ even more specific and demanding legal requirements of *universal* gun ownership.<sup>52</sup> Under those laws, every home and

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47. See Knauft, *supra* note 29 and accompanying text.

48. ROGER LANE, MURDER IN AMERICA 15 (1999).

49. *Id.* at 14.

50. *Id.* at 20; see also JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 19–20 (2002).

51. See generally STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT ch. 2 (1984); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT ch. 1 (1994); Kates, *Handgun Prohibition*, *supra* note 3, at 214–15 (1983)

52. See Kates, *Handgun Prohibition*, *supra* note 3, at 215.

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virtually all colonists had to have guns.<sup>53</sup> By law, male youths were deemed to be of military age at 16, 17, or 18 (depending on the colony)<sup>54</sup> and every military-age man, excepting the insane, infirm, and criminals, had to have arms<sup>55</sup> and military age male colonists were subject to being called for inspection, militia drill or service bringing their legally required guns.<sup>56</sup> To arm those too poor to afford guns, the laws required that guns be purchased for them and that they would have to make installment payments to pay back the cost.<sup>57</sup>

As the statutes quoted in the preceding footnote make clear, mandatory gun ownership was not limited to those in the militia. Women, seamen, clergy, and some public officials were automatically exempt from militia call up, as were men over the upper military age

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 265.

57. See MALCOLM, *supra* note 51, at 138–40; Kates, *Handgun Prohibition*, *supra* note 3, at 214–16. Typical laws (quoted with original spelling and punctuation) appear from the following sources: *An Act for Military Discipline*, in 1 ARCHIVES OF MARYLAND, ASSEMBLY PROCEEDINGS, FEBRUARY–MARCH 1638/9 at 77 (1883) (“[T]hat every house keeper or housekeepers within this Province shall have ready continually upon all occasions within his her or their house for him or themselves and for every person within his her or their house able to bear armes one Servicable fixed gunne of bastard musket boare [along with a pound of gunpowder, four pounds of pistol or musket shot,] match for match locks and of flints for firelocks . . .”); *August 2, 1619*, “*Proceedings of the Virginia Assembly, 1619*,” in LYON GARDINER TYLER, NARRATIVES OF EARLY VIRGINIA, 1606–1625, at 273 (1907) (requiring that everyone attend church on Sunday, further providing that “all such as beare armes [i.e., all able-bodied males aged 16 and above] shall bring their pieces, swords, powder and shot” with them to church on penalty of a fine.); *Att a Court of Assistants, Holden att Boston, March 22th, 1630–31*, in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 84 (Nathaniel B. Shurtleff ed., 1853), available at <http://ia600300.us.archive.org/25/items/recordsofgoverno01mass/recordsofgoverno01mass.pdf> (requiring that everyone, including servants, was to be armed, with anyone unable to afford a gun to be armed by the town, which the recipients were to reimburse when they shall be able); A. CRAWFORD GREENE & BROTHER, RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 79–80, 94 (Reprint Elibron Classics 2006) (1856) (“that every man do come armed unto the meeting upon every sixth day,” that militia officers go “to every inhabitant [in Portsmouth and] see whether every one of them has powder, and what bullet run,” and “that noe man shall go two miles from the Towne unarmed, eyther with Funn or Sword; and that none shall come to any public Meeting without his weapon”); CODE OF 1650, BEING A COMPILATION OF THE EARLIEST LAWS AND ORDERS OF THE GENERAL COURT OF CONNECTICUT 72–73 (1822) (“That *all* persons that are above the age of sixteene yeares, except magistrates and church officers, shall beare arms...; and every *male* person with this jurisdiction, above the said age, shall have in continuall readines, a good muskitt or other gunn, fitt for service, and allowed by the clark of the band.”).

(which varied from forty-five to sixty, depending on the colony).<sup>58</sup> But, as a deterrent to criminal and other attack, *every household* was required to have a gun, even if its occupants were all female, under or over-age males, seamen, clergymen or public officials.<sup>59</sup> Likewise, all respectable men were legally required to carry arms when out and abroad (though it may be doubted that this command was honored and enforced in colonial cities and long-peaceful areas).<sup>60</sup>

As a result of these laws, by the eighteenth century, colonial Americans were the most heavily armed people in the world.<sup>61</sup> Yet, far from more guns meaning more death, murders were rare—and few involved guns despite their wide availability.<sup>62</sup>

#### IV. DO SOCIETIES WITH FEWER FIREARMS HAVE FEWER MURDERS?

##### A. England.

Once again, if guns cause murder, and more guns cause more murder, it would seem that societies with no guns at all should be the safest possible. There are few gun free societies in the world today. However, if we look back in history to the time before the invention of firearms, we can judge for ourselves whether those societies were tranquil and safe. Remarkably good homicide data is available for

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58. *See, e.g.* CODE OF 1650, *supra* note 57, at 72–73.

59. *See, e.g.* 1 ARCHIVES OF MARYLAND, *supra* note 57, at 77.

60. *See id.* For collections of many of the relevant laws, see Clayton E. Cramer, *Gun Control in Colonial New England*, CLAYTONCRAMER.COM, <http://www.claytoncramer.com/popular/GunControlColonialNewEngland.PDF> (last visited Oct. 12, 2012).

61. JOHN M. DEDERER, *WAR IN AMERICA TO 1775* 116 (1990). It should be noted that the foregoing facts are contradictory to assertions made in MICHAEL BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000). That book, which won the Bancroft Prize, deemed the premier award for a work of American history, is, unfortunately, still to be found in many libraries, especially university libraries. That book, however, has been discovered to be a fraud; the Bancroft Prize has been withdrawn, the author has found it necessary to resign from his former university and is now reported to be considering a future in high school teaching. *See* Robert F. Worth, *Prize for Book Is Taken Back from Historian*, N.Y. TIMES, Dec. 14, 2002, <http://www.nytimes.com/2002/12/14/business/media/14BOOK.html>; Alan Bock, *The Disarming of a Bogus Scholar*, ORANGE COUNTY REG., Nov. 24, 2002; James Lindgren, *Fall From Grace: 'Arming America' and the Bellesiles Scandal*, 111 YALE L.J. 2195, 2249 (2002); James Lindgren & Justin Heather, *Counting Guns in Early America*, WM. & MARY L. REV. 1777, 1842 (2002).

62. LANE, *supra* note 48, at 59–60.

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England, beginning in the 1200s.<sup>63</sup> The data indicate a homicide rate in England of roughly twenty per 100,000, over sixteen times higher than the rate in 2008–09 of 1.2 per 100,000.<sup>64</sup>

Firearms were introduced into England in the 1400s and were in wide use by the 1500s, coinciding with a decline in the homicide rate to 15 per 100,000.<sup>65</sup> However, these early guns were predominately of the matchlock design.<sup>66</sup> This design featured a slow burning fuse held in a clamp at the end of a serpentine lever.<sup>67</sup> When the trigger was pulled, the clamp dropped down so that the end of the lit fuse touched the powder in the flash pan, firing the weapon.<sup>68</sup> The design was simple and the weapons relatively inexpensive.<sup>69</sup> The major problem with the design from the point of view of personal defense was that, because of the need for a lit fuse, the weapon could not be kept and carried loaded and primed for quick use against a sudden attack.<sup>70</sup>

The first firearm that could be carried loaded and primed was the flintlock, introduced into England around 1630.<sup>71</sup> In this design, the fuse is replaced by a piece of flint. When the trigger is pulled the flint strikes a piece of steel producing a shower of sparks that ignite the powder in the flash pan.<sup>72</sup> This technology persisted through the early 1800s. While matchlocks were almost exclusively long guns, flintlock technology was readily adapted to produce handguns, which were particularly useful for self-defense. The flintlock pistol was relatively inexpensive, could be comfortably carried, was ready for action in an instant, and did not require a great deal of physical strength or expertise to operate.<sup>73</sup> The flintlock could be fired in an instant, making it the ideal self-defense weapon. It was inexpensive, and it

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63. MALCOLM, *supra* note 20, at 37.

64. HOME OFFICE STATISTICAL BULLETIN, HOMICIDES, FIREARMS OFFENCES AND INTIMATE VIOLENCE 2010/11: SUPPLEMENTAL VOLUME 2 TO CRIME IN ENGLAND AND WALES 2010/11 32 (Kevin Smith et al. eds., 2012) [hereinafter HOMICIDES, FIREARMS OFFENCES AND INTIMATE VIOLENCE].

65. J. M. Beattie, *The Pattern of Crime in England 1660-1800*, 62 PAST & PRESENT 47, 61 (1974).

66. HUGH B. C. POLLARD, A HISTORY OF FIREARMS 6–19 (Burt Franklin 1973) (1936).

67. *Id.* at 6–7.

68. *Id.*

69. *Id.*

70. H. L. PETERSON, A HISTORY OF FIREARMS 15–19 (1961).

71. *Id.* at 22–24.

72. *Id.*

73. *Id.*

did not require a great deal of physical strength to operate. Armed with a flintlock, the physically weak found themselves on an equal footing with the physically strong in a confrontation.

The introduction of the flintlock coincided with the largest decline in homicide in English history.<sup>74</sup> The homicide rate plunged to six per 100,000 in the 1600s.<sup>75</sup> The English homicide rate continued to decline slowly and steadily until well into the twentieth century.<sup>76</sup> For example, in 1900 the homicide rate was 0.96 per 100,000.<sup>77</sup>

The last hundred years of English history tells the reverse story. The first modern gun law in England was the Pistols Act of 1903, which required Englishmen to purchase a permit in order to acquire a firearm.<sup>78</sup> Since 1920, the English government's policy has been ever more restrictive.<sup>79</sup> The Firearms Control Act of 1920 imposed a true permit requirement to possess rifles as well as all types of pistols and empowered local authorities to determine if the applicant would be allowed to purchase arms.<sup>80</sup> This permit requirement was administered progressively more stringently and was amended to increase restrictions over time in an attempt to reduce the civilian gun stock.<sup>81</sup> The Prevention of Crime Act of 1953<sup>82</sup> and the Criminal Law Act of 1967<sup>83</sup> redefined the right to self-defense more restrictively, making any act of self-defense potentially criminal.<sup>84</sup> The Firearms Acts of 1968 and 1998 brought shotguns under strict regulation;<sup>85</sup> the Firearms Act of 1997 effectively banned the private ownership of handguns and provided for the confiscation of all legally owned handguns.<sup>86</sup>

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74. Beattie, *supra* note 65, at 61.

75. *Id.* at 61.

76. MALCOLM, *supra* note 20, at 88–90, 130–32.

77. JOE HICKS & GRAHAME ALLEN, A CENTURY OF CHANGE: TRENDS IN UK STATISTICS SINCE 1900 at 14 (House of Commons Research Paper 99/111, 1999), available at <http://www.parliament.uk/documents/commons/lib/research/rp99/rp99-111.pdf>.

78. MALCOLM, *supra* note 20, at 134, 196–97.

79. *Id.* at 133–216. Although perhaps intended to exclude handgun possession by the impecunious, this was a very minor restriction since the permit was available to anyone who could pay the fee.

80. *Id.* at 144–48.

81. *Id.* at 171–73.

82. *Id.* at 173.

83. *Id.* at 173, 180.

84. *Id.* at 173–89.

85. *Id.* at 199.

86. *Id.* at 199–205.

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According to the “more guns more crime” hypothesis, all this restriction of civilian guns should have resulted in England enjoying lower and lower rates of violent crime. Unfortunately, the facts reveal a pattern that is almost the opposite.<sup>87</sup> Detailed analysis of English gun control results began in the early 1970s with a thesis written (and then published) by a British police official on leave at Cambridge University.<sup>88</sup> Chief Superintendent Greenwood concluded:

No matter how one approaches the figures, one is forced to the rather startling conclusion that the use of firearms in crime was very much less [before 1920] when there were no controls of any sort and when anyone, convicted criminal or lunatic, could buy any type of firearm without restriction. Half a century of strict controls on pistols has ended, perversely, with a far greater use of this class of weapon in crime than ever before.<sup>89</sup>

For the even more dolorous conclusions which flow from later criminal statistics see the more recent discussions in Malcolm<sup>90</sup> and Kleck,<sup>91</sup> culminating in Kates’s evaluation:

Under the 1997 handgun ban 166,000 handguns were turned in by law-abiding owners. Yet that left untold numbers in criminal hands. Nor has England been able to prevent illegal importation of millions more guns. As of 2002, a report of England’s National Crime Intelligence Service lamented, that ‘while Britain has some of the strictest gun laws in the world [i]t appears that anyone who wishes to obtain a firearm [illegally] will have little difficulty in doing so.’<sup>92</sup>

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87. *Id.* at 209.

88. See COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES (1972).

89. *Id.* at 243.

90. MALCOLM, *supra* note 20, at 209 (“Armed crime, never a problem in England, has now become one. Handguns are banned, but the kingdom has millions of illegal firearms. Criminals have no trouble finding them and exhibit a new willingness to use them. In the decade after 1957 the use of guns in serious crime increased a hundredfold.”); see also *id.* at 219 (“When it had no firearms restrictions [in the 19th and early 20<sup>th</sup> Century], England had little violent crime, while the present extraordinarily stringent gun controls have not stopped the increase in violence or even the increase in armed violence . . .”).

91. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 19–21, 251–56 (1997).

92. Don B. Kates, *The Hopelessness of Trying to Disarm the Kinds of People Who Murder*, 12 BRIDGES 313 (2005), reprinted in GLENN UTTER, CULTURE WARS IN AMERICA: A DOCUMENTARY AND REFERENCE GUIDE 161, 164 (2010); see also *Public Give up 160,000 Guns After Dunblane*, BBC NEWS (Sept. 3, 1998), [http://news.bbc.co.uk/2/hi/uk\\_news/164402.stm](http://news.bbc.co.uk/2/hi/uk_news/164402.stm).



The first truly effective English gun control law, the Firearms Control Act of 1920, was enacted more than ninety years ago.<sup>93</sup> After more than nine decades of ever more stringent controls, the homicide rate in England is roughly double what it was in 1900 during the pre-gun control era.<sup>94</sup> In the 2000s it peaked in 2002-03 at 1.79 per 100,000.<sup>95</sup> This rate is well below the rate of 5.9 per 100,000 in the United States but is an 86% increase over the rate in 1900, when guns in England were essentially unregulated.<sup>96</sup> It is also considerably higher than the rates in Norway, Austria and various other Continental nations<sup>97</sup> where guns are as available as in the United States.<sup>98</sup> The English murder rate has since fallen back to 1.2 per 100,000 in 2008-09 but that is still a 25% increase over the 1900 rate<sup>99</sup> and far higher than Norway or Austria which approximate those of 1900 England.<sup>100</sup>

In fact, according to the United Nation's Office for Drug Control and Crime Prevention, England has surpassed the United States in terms of overall crime victimization.<sup>101</sup> In 2000, England and Wales had the highest crime rate among the world's twenty largest countries, higher than that of such notoriously crime-ridden societies as the United States, Russia, and South Africa.<sup>102</sup>

The International Crime Victims Survey reports that in 2000 the overall victimization rate per 100,000 in England was 45,100 while

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93. MALCOLM, *supra* note 20, at 141, 149-51.

94. See HICKS & ALLEN, *supra* note 77.

95. HOMICIDES, FIREARMS OFFENCES AND INTIMATE VIOLENCE, *supra* note 64, at 20.

96. See HICKS & ALLEN, *supra* note 77.

97. Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL'Y 649, 652 (2007). For European gun ownership see *infra* note 113 and accompanying text.

98. SMALL ARMS SURVEY, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 46-66 (2007), available at [www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2007.html](http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2007.html).

99. HOMICIDES, FIREARMS OFFENCES AND INTIMATE VIOLENCE, *supra* note 64, at 20.

100. United Nations Office of Drugs and Crime, International Homicide, Rate per 100,000 Population 2004, at 6-7, <http://www.unodc.org/documents/data-and-analysis/IHS-rates-05012009.pdf> (last visited Oct. 12, 2012).

101. David Bamber, *England has the Worst Crime in the World*, TELEGRAPH (Dec. 1, 2002, 12:01 AM), <http://www.telegraph.co.uk/news/uknews/1414855/England-has-worst-crime-rate-in-world.html>.

102. *Id.*

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that of the United States was 33,600.<sup>103</sup> The corresponding victimization rate for burglary was 3400 for England compared to 3300 for the United States while the robbery rate was 2000 compared to 600 for the United States.<sup>104</sup> The rate of sexual assault against women was 6100 per 100,000 in England in 2004, an astounding 217% higher than the United States rate of 2800 per 100,000.<sup>105</sup>

England today apparently has fewer *legal* guns and more crime compared to the United States, which has vastly more legal guns and less crime.<sup>106</sup> We deem it fitting to close this section of our Article with the rueful later comments of Chief Superintendent Greenwood:

At first glance it may seem odd or even perverse, to suggest that statutory controls on the private ownership of firearms are irrelevant to the problem of armed crime, yet that is precisely what the evidence shows. Armed crime and violent crime generally are products of ethnic and social factors unrelated to the availability of a particular type of weapon. The numbers of firearms required [to arm criminals] are minute [in comparison to the overall number] and these are supplied no matter what controls are instituted. Controls have had serious effects on legitimate users of firearms, but there is no case either in the history of [England] or in the experience of other countries, in which controls have been shown to have restricted the flow of weapons to criminals or in any way to have reduced armed crime.<sup>107</sup>

### B. Continental Europe: Myths of Gun Control

The myths of European gun control may be enumerated as follows: i) Europe has a low incidence of murder compared to the United States;<sup>108</sup> ii) Europe has much more stringent gun control than the United States;<sup>109</sup> iii) European gun controls gave Europe its low incidence of murder.<sup>110</sup>

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103. Jan Van Dijk et al., *Criminal Victimization in International Perspective* 249–52 (2007), available at [http://rechten.uvt.nl/icvs/pdf/ICVS2004\\_05.pdf](http://rechten.uvt.nl/icvs/pdf/ICVS2004_05.pdf).

104. *Id.*

105. *Id.*

106. See sources cited *supra* note 92.

107. Colin Greenwood & Joseph Magaddino, *Comparative Cross-Cultural Statistics*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 31, 39 (Don Kates, Jr. ed., 1979).

108. RAMSEY CLARK, *CRIME IN AMERICA* ch. 8 (1970); PETE SHIELDS, *GUNS DON'T DIE, PEOPLE DO* 60–61, 66–69 (1981).

109. See sources cited, *supra* note 108.

110. Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 59 n.5 (1995) (comparing

1. *Europe Does Not Have a Low Incidence of Murder Compared to the United States*

The nations of *Western Europe* and Scandinavia—whose gun laws are often less stringent than American gun laws<sup>111</sup>—have comparatively low murder rates.<sup>112</sup> But the murder rates of Russia and many former Soviet possessions and satellites in Europe are three to four times higher than American murder rates even though those nations totally ban handguns.<sup>113</sup>

Moreover, comparing the murder rates of the twelve European nations for which gun ownership data are available shows that the nations with much higher gun ownership have much *lower* murder rates.<sup>114</sup> Kates & Mauser contrasted the nine nations in which gun ownership was very low (less than 5000 guns per 100,000 inhabitants) to the nine in which gun ownership was three times higher (more than 15,000 guns per 100,000 inhabitants).<sup>115</sup> The nations with high gun ownership had an average murder rate that was *much lower* than the average murder rate of the low gun ownership nations.<sup>116</sup> On average, the low gun ownership nations averaged *three times more murder* than the high gun ownership nations.<sup>117</sup>

The authors expand on this in reference to specific European nations, stating:

[M]urder rates are determined by basic socio-cultural and economic factors rather than mere availability of some particular form of weaponry. Consider Norway and its neighbors Sweden, the

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handgun murders in the U.S. and in selected foreign nations); *see generally* sources cited *supra* note 108.

111. *See* discussion *infra* Part IV.B.1.

112. The American murder rate is approximately 5.5 per 100,000 population. Western European and Scandinavian rates are less than half that number. *Compare* FBI, *supra* note 26 (years in the 2000s for the U.S.), *with* Kates & Mauser, *supra* note 16, at 652 (comparing the figures for various European nations given under “Homicide Rates for Selected Countries,” in the annual reports for the years 2001–04 issued by the Canadian Centre for Justice Statistics and entitled JURISTAT: Homicide in Canada).

113. *See* Kates & Mauser, *supra* note 16, at 651 (Russia); *see also* Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615, 623–25 (2001) (Soviet satellite nations).

114. *See* Kates & Mauser, *supra* note 16.

115. *Id.* at 652 tbl.1 (citing GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY 64 tbl.2.2, 65 tbl.2.3 (2003); CANADIAN CENTRE FOR JUSTICE STATISTICS, HOMICIDE IN CANADA, JURISTAT (2001-2004)); *id.* at 675 tbl.3 (citing GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY (2003)).

116. *Id.*

117. *Id.*

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Netherlands, and Denmark. Norway has far and away Western Europe's highest household gun ownership (32%), but also its lowest murder rate. The Netherlands has the lowest gun ownership rate in Western Europe (1.9%), and Sweden lies midway between (15.1%) the Netherlands and Norway. Yet the Dutch gun murder rate is higher than the Norwegian, and the Swedish rate is even higher, though only slightly.<sup>118</sup>

The authors also noted the following: "Greece has over twice the per capita gun ownership rate of the Czech Republic," yet gun murder is much less common in Greece and the Greek murder rate with all weapons is substantially lower;<sup>119</sup> though "Spain has over 12 times more gun ownership than Poland," the latter has almost a third more gun murder, and its overall murder rate is almost twice Spain's;<sup>120</sup> "Finland has 14 times more gun ownership than neighboring Estonia yet Estonia's gun murder and overall murder rates are about seven times higher than Finland's."<sup>121</sup>

It bears emphasis that the authors reject the idea that high homicide rates are caused by very restrictive gun laws:

To reiterate, the determinants of murder and suicide are basic social, economic, and cultural factors, not the prevalence of some form of deadly mechanism. In this connection, recall that the American jurisdictions which have the highest violent crime rates are precisely those with the most stringent gun controls. This correlation does not necessarily prove gun advocates' assertion that gun controls actually encourage crime by depriving victims of the means of self-defense. The explanation of this correlation may be political rather than criminological: jurisdictions afflicted with violent crime tend to severely restrict gun ownership. This, however, does not suppress the crime, for banning guns cannot alleviate the socio-cultural and economic factors that are the real determinants of violence and crime rates.<sup>122</sup>

As a result, areas with severe violence problems tend correlatively to have severe gun control, leading to the appearance that gun controls actually cause violence.

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118. *Id.* at 687; *see also id.* at 688 tbl.5 (citing RICHARD MUNDAY & JAN A. STEVENSON, *GUNS AND VIOLENCE: THE DEBATE BEFORE LORD CULLEN* 30, 275 (1996)) (footnotes omitted).

119. *Id.* at 689–90 tbl.6 (citing U.N. Secretary-General, *Criminal Justice Reform And Strengthening of Legal Institutions, Measures to Regulate Firearms: Rep. of the Secretary-General*, U.N. DOC. E/CN.15/1997/4/Corr.1 (Apr. 25, 1977)).

120. *Id.* at 691.

121. *Id.* at 690.

122. *Id.* at 663–64 (footnotes omitted).

2. *Europe Does Not Have More Stringent Gun Controls than the United States*

The stringency of firearms restrictions varies entirely depending on which European nations are involved and to which American states the comparison is made. In *Heller*, the Supreme Court received an amicus brief filed on behalf of twenty-five European academics asserting that their nations' gun laws were much less stringent than the gun bans of the District of Columbia that were challenged in that case.<sup>123</sup>

The following comparisons illustrate this point: most of the most densely populated U.S. states, including New York, New Jersey, Massachusetts, Michigan, Missouri, North Carolina and Hawaii as well as Puerto Rico, require individuals to have a permit in order to buy any kind of handgun.<sup>124</sup>

Contrast Italy, where law-abiding, responsible adults may buy handguns for self-defense with no permit restriction whatsoever.<sup>125</sup> Contrast Austria where a permit is required for a semi-automatic pistol but law-abiding, responsible adults may buy a revolver for self-defense without a permit.<sup>126</sup> Contrast France, where, though a permit is required for a handgun of modern design, no permit is required to buy for self-defense a modern version of a "cowboy gun," i.e., a brand new double-action revolver with a pre-1895 design.<sup>127</sup>

Moreover, a permit requirement is only as restrictive (or permissive) as its administration. In Austria, the permit requirement for semi-automatic pistols is moderated by a provision specifying that a permit must issue to every law-abiding responsible applicant who seeks a pistol for home protection.<sup>128</sup> It is our understanding that in Hawaii, Michigan, Missouri, and North Carolina, permit issuance is

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123. Brief for International Scholars as Amici Curiae Supporting Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 466090.

124. HAW. REV. STAT. § 134-3 (2012); MASS. GEN. LAWS ch. 140, § 129C (2012); MICH. COMP. LAWS § 28.422 (2012); MO. REV. STAT. § 571.101 (2012); N.J. ADMIN. CODE § 13:54-1.3 (2012); N.Y. PENAL LAW § 400.00 (McKinney 2005); N.C. GEN. STAT. § 14-404 (2012).

125. Art. 11 R.D. 18.6, N. 773 Costituzione [Cost.] (It.).

126. WAFFENGESETZ [Weapons Act] 1997, BUNDESGESETZBLATT I [BGBl I] No. 12/1997 (Austria).

127. LAW OF 1998, implementing the decree law of 1939, §§ 30-35.

128. WAFFENGESETZ [Weapons Act] BUNDESGESETZBLATT I [BGBl I] No. 12/1997 (Austria).

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pro forma for a home defense weapon.<sup>129</sup> But in Massachusetts, New Jersey, and New York, permit issuance is legendarily highly restricted, expensive, and protracted.<sup>130</sup>

3. *The Anti-Gun Policies Prevailing in England and Some of the Smaller Nations of Continental Europe Cannot Be Responsible for Low European Murder Rates*

As stated in Barnett & Kates:

Laws against gun ownership cannot have caused low Western European murder rates, since those low rates *long preceded* the gun laws. Violence was low, and falling, in Western Europe from at least the mid-nineteenth century, but anti-gun policies only appeared after World War I, aimed not at crime but at the political turmoil of that tumultuous era.<sup>131</sup>

## V. GUN OWNERSHIP AND AMERICAN CRIME

### A. The Colonial Period

To reiterate, the colonial laws required universal household gun ownership and “colonial Americans were the most heavily armed people in the world.”<sup>132</sup> Yet murders were rare, and few murders involved guns despite their wide availability.<sup>133</sup>

### B. Pre-Civil War United States

Gun availability appears to have markedly declined after the American Revolution. By the mid-nineteenth century the militia was a faded anachronism, the militia laws were at best spottily enforced, and Americans were no longer universally armed.<sup>134</sup> Yet this era of

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129. See, e.g., HAW. REV. STAT. § 134-3 (2012); MASS. GEN. LAWS ANN. ch. 140 § 129C (2012); MO. REV. STAT. § 571.101 (2012); N.C. GEN. STAT. § 14-404 (2012).

130. See JACOBS, *supra* note 6, at 32–33.

131. Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1238 (1996) (emphasis added) (citing DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* 89–136 (1992)).

132. DEDERER, *supra* note 61, at 116.

133. LANE, *supra* note 48, at 48, 59.

134. See generally WALTER MILLIS, *ARMS AND MEN* 100 (1956).

reduced gun ownership was the time in which violent crime began to be a major problem in America.<sup>135</sup>

Indicative of the bias and false assumptions that so often blame murder on inanimate objects is Lane's erroneous attribution of this homicide surge to the invention and distribution of the Colt revolver.<sup>136</sup> It is true that Colt invented his revolver in 1836 and was marketing it by 1840.<sup>137</sup> But it was so expensive that it was not at all widely distributed.<sup>138</sup> Indeed, so poor were its sales that Colt went bankrupt in 1840 and ceased production.<sup>139</sup> He resumed production after the outbreak of the Mexican War in 1846, selling largely to American and foreign armies and to the wealthy primarily in England.<sup>140</sup>

In sum, the revolver cannot be blamed for a murder epidemic beginning when revolvers were not being manufactured and continuing during a period when revolvers were financially inaccessible to the ordinary citizenry.

### C. The Civil War and Later in the Nineteenth Century

The revolver—the first modern firearm—did not become widely available to American civilians until after the Civil War.<sup>141</sup> Contrary to the guns-cause-murder thesis, what occurred as the deadlier technology of the revolver became available and commonplace among Americans of all classes was a sharp *decrease* in murder.<sup>142</sup>

The widespread diffusion of revolvers Lane attributes to the 1840s actually came after the Civil War when the country was awash with

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135. In the 1840s and 1850s American homicide rates in more settled areas, such as New York City, began to soar above those in comparable English places. LANE, *supra* note 48, at 344.

136. LANE, *supra* note 48, at 109; LEE KENNETT & JAMES L. ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 86–99 (1976).

137. KENNETT & ANDERSON, *supra* note 136.

138. *Id.*

139. JOSEPH G. BILBY, *CIVIL WAR FIREARMS: THEIR HISTORICAL BACKGROUND, TACTICAL USE AND MODERN COLLECTING AND SHOOTING* 157 (1996).

140. Colt's revolver was adopted by foreign armies and was widely sold to officers and the wealthy in England and Europe. KENNETT & ANDERSON, *supra* note 136, at 90 (noting use by British, Turkish and Russian forces during the Crimean War). This was so especially after Colt's prize-winning exhibit at the 1851 Great Industrial Exhibition in London. JOSEPH G. ROSA, *COLONEL COLT—LONDON* ch. 1 (1976).

141. See DENNIS ADLER, *GUNS OF THE CIVIL WAR* 145 (2011).

142. See LANE, *supra* note 48, at 307.

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surplus military pistols.<sup>143</sup> Officers on both sides of the Civil War had had to buy revolvers and they were also issued to non-commissioned officers, artillerymen, cavalry, and dragoons.<sup>144</sup> How many revolvers this involved is suggested by the fact that over two million men served in the Civil War United States Army and the Confederates had over half that number.<sup>145</sup> When their enlistments were up, or when they were mustered out at war's end, former officers and soldiers walked off with hundreds of thousands of these weapons.<sup>146</sup> Even so, the United States Army and Navy were left with vast numbers of surplus revolvers, both those they had procured and those they had captured from Confederate forces.<sup>147</sup> As the Army plummeted to a force of slightly over 10,000 men,<sup>148</sup> hundreds of thousands of military surplus revolvers were sold to jobbers at rock-bottom prices.<sup>149</sup> The market became so glutted that at the end of the 1860s the jobbers had

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143. DAVID T. COURTWRIGHT, *VIOLENT LAND: SINGLE MEN AND SOCIAL DISORDER FROM FRONTIER TO THE INNER CITY* 42 (1998).

144. *See generally* BILBY, *supra* note 139, at ch. 5. It must be understood that the generalizations made in the text are subject to multiple caveats and clarifications, *inter alia*: the revolvers involved were by no means all Colts—the Federal government also purchased large numbers of Remington, Starr and Whitney revolvers, as well as the guns of other (American) makers. *Id.* at 158. Vast numbers were also purchased in Europe where, in the first 15 months of the war, the Union bought over 738,000 firearms (including long arms as well as revolvers). ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES* 216 (1984). In addition to cavalry, dragoon and artillery units, some Union infantry units were issued revolvers and many enlisted infantrymen in other units bought their own. BILBY, *supra* note 139, at 160. The Confederacy manufactured its own revolvers and bought large numbers from Europe. *Id.*

145. These are just estimates. While for the Union Army at least somewhat reliable figures exist for how many served at any one time, *see infra* note 146, that number is not co-extensive with how many served in total. Some Union soldiers served throughout the war, re-enlisting when their original enlistments were up. Others mustered out, being replaced with new recruits. Still others deserted long before their terms were up, again requiring replacements. Some scoundrels enlisted just for the enlistment bonus, and deserted as soon as they could; some of these went through the enlistment-then-desertion process multiple times, collecting a new bonus under a new name time after time. THE WORLD ALMANAC AND BOOK OF FACTS 145 (Sarah Janssen et al. eds., 2011) estimates of 2,128,948 for the Union Army and 600,000 to 1.5 million for the Confederate Army.

146. *See* COURTWRIGHT, *supra* note 143, at 42.

147. *Id.*

148. The names of 1,000,516 officers and men were on the U.S. Army's roles on May 10, 1865; by 1866, the draft had ended and only 11,043 volunteers remained. RUSSELL F. WEIGHLEY, *HISTORY OF THE UNITED STATES ARMY* 262 (1967).

149. KENNETH & ANDERSON, *supra* note 136, at 98–100 (discussing Sears advertising firearms for as low as \$1.69).



thousands of unsold war surplus revolvers left to ship off to Europe for the Franco-Prussian War.<sup>150</sup> Indeed, as late as the late 1920s jobbers were still selling crates of surplus Civil War revolvers they had been unable to completely dispose of in the preceding sixty years.<sup>151</sup>

The diffusion of even cheaper revolvers continued through the end of the century with the introduction of the two-dollar pistol—as in the expression, “hotter than a two-dollar pistol.” These were very cheap guns manufactured largely out of pot metal.<sup>152</sup> Sold nationwide through Montgomery Ward catalogs from 1872 on (by Sears from 1886), they were priced as low as \$1.69, and marketed under such names as Little Giant and Tramp’s Terror.<sup>153</sup>

Despite this geometric increase in the number of revolvers and their diffusion to all social classes, homicide seems to have fallen from the 1870s through the end of the nineteenth century.<sup>154</sup> Once again, meaningful explanation for homicide rates must look to fundamental cultural and socio-economic factors rather than to the mere availability of a particular kind of deadly weaponry.

#### D. Twentieth and Twenty-First Century America

The ultimate refutation of the guns-cause-murder myth is the gun numerosity and murder figures from twentieth and twenty-first century America. It should be understood that gun numerosity

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150. See GREG LEE CARTER, GUNS IN AMERICAN SOCIETY: A–L at 116 (2002) (“A surprising amount of U.S. surplus firearms was offered on the international market, being sold to the French and ending up as Prussian war booty following the Franco-Prussian War.”).

151. See, e.g., BANNERMAN’S CATALOG OF MILITARY GOODS 121 (1927) (selling three different models of Civil War U.S. Army Starr Revolver, plus a U.S. Navy Starr Revolver and Civil War Savage Revolvers).

152. See, e.g., ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 90 (2003) (“Firms such as the Norwich Pistol Company manufactured pistols made with pot metal or other cheap materials and sold them for a dollar or two.”).

153. KENNETT & ANDERSON, *supra* note 136, at 98–100. SCIENTIFIC AMERICAN, in its June 14, 1879 edition, contained an advertisement on page 381 for a cash-on-delivery purchase of the \$2.75 Czar revolver, presumably an attempt to capitalize on the S&W Russian, a very high quality weapon S&W manufactured for the Russian government and sold through the 1870s. The 1884 PRICE LIST-FIREARMS CATALOG for N. Curry & Brother, arms dealers of San Francisco, listed prices from \$2.00 for the 7 shot Fashion and Blue Jacket revolvers to \$2.50 and \$3.50 for the Kitemaug and Ranger revolvers to various Colt and Smith & Wesson revolvers selling at from \$15.00 to \$17.00.

154. LANE, *supra* note 48, at 307.

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figures for the years before the end of World War II are at best approximations.<sup>155</sup> We know that during the colonial period the law—enforced by officials—required every man and every household to possess at least one gun.<sup>156</sup> Jumping forward more than half a century, we know that the post-Civil War period saw the country “awash with military pistols.”<sup>157</sup> But that is as specific as the facts available allow.

The first reliable comprehensive estimates of American gun ownership—and these are only estimates—date from right after WWII as do also reliable counts of homicide.<sup>158</sup> From that time to the present, we know that three to five-plus million new firearms have been added to the American gunstock in each year. For instance, figures kindly supplied to us by Kleck indicate that firearms produced in or imported into the United States totaled 3.6 million in 2000 (1.2 million handguns, 2.4 million rifles and shotguns), 2.75 million in 2001, 5.1 million in 2002, and 4.5 million in 2003.<sup>159</sup>

Adding up available production and importation figures from 1899 on, it is estimated that the current American civilian gunstock exceeds 300 million.<sup>160</sup> That is roughly six times higher than the 1946 American civilian gunstock of less than 48.5 million.<sup>161</sup>

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155. *Id.* (“Before 1900 there are no national figures at all.”).

156. KATES, *Handgun Prohibition*, *supra* note 3, at 215–16.

157. COURTWRIGHT, *supra* note 143, at 42.

158. Gary LaFree, *Declining Violent Crime Rates in the 1990s: Predicting Crime Booms and Busts*, 25 ANN. REV. SOC. 145, 146 (1999) (“Figure 1 [of this article] shows UCR [FBI, Uniform Crime Reports] trends for murder and robbery, 1946 to 1997. I begin the series in 1946 because of serious validity problems with pre-World War II UCR data.”).

159. KLECK, *supra* note 91, at 97. The book only provides statistics up to 1994. However, a revised table, which Kleck supplied us, extends the data to 2003. See DEP’T OF THE TREASURY & BUREAU OF ALCOHOL, TOBACCO & FIREARMS, ANNUAL FIREARMS MANUFACTURING AND EXPORT REPORT, 2001/2002 (2002); Russ Thurman, *U.S. Firearms Today 2012*, SHOOTING INDUSTRY MAG. (July 2012), <http://www.shootingindustry.com/u-s-firearms-industry-today-2012/>. From the totals in our text must be subtracted the following: an unknown (but probably quite small) number of guns are smuggled into Mexico and other lands; an unknown (but probably quite small) number become unserviceable because of poor maintenance; hundreds of thousands of guns are confiscated by police annually, though many of those are then resold to the public as used guns. Against these unknown numbers must be counted the unknown number of guns smuggled into the U.S., e.g., by returning military personnel.

160. See Thurman, *supra* note 159.

161. Don B. Kates, *The Limited Importance of Gun Control From a Criminological Perspective*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 62 (Timothy D. Lytton ed., 2005).

If guns cause murder, one would expect that a sixty-year period of massively increased gun acquisition and possession (1946–2005) would result in a massively higher murder rate. So how much more murder has a six-fold increase in guns occasioned? None!<sup>162</sup> Rather, the homicide rate for 2010 was roughly 32% lower than the rate for 1946.<sup>163</sup> And year by year in the 2000s, American murder rates remained nearly the same or dropped—notwithstanding that each of those years saw the addition of four to five million new guns to the total gunstock.<sup>164</sup>

### CONCLUSION

The findings made in this Article are subject to the objection that they are speculative, and some of them are highly so. Obviously, we can say that firearms did not exist in the Dark Ages, but the fact that that was a time of extreme violence rather than blissful peace is necessarily inexact since there was not even a rough annual murder count. Social historians have estimated annual murder figures for various nations and eras before the mid-twentieth century, but these estimates are assumptions and speculations as must also be estimates of gun numerosity. Gun numerosity and murder rates are inexact even for the mid-twentieth century to date. We can only work with what data exist.

Furthermore, mere correlations between lesser or greater firearms ownership and homicide rates do not prove causation. We have taken pains never to suggest the correlations we have found prove that the more guns in a population, the less murder there will be.

With those caveats, the questions addressed here may be summarized as follows: Gun-less societies are not necessarily less murderous than a society, such as the United States, which is often characterized as gun-ridden. Rather the gun-less societies noted here were considerably more murderous than the United States. Historically, for whatever reason, centuries characterized by murder

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162. *Id.* at 62–63.

163. *Compare Table Ec190-198—Reported Homicides and Homicide Rates, by Sex and Mode of Death: 1900–1997*, HIST. STAT. U.S., <http://hsus.cambridge.org/HSUSWeb/toc/tableToc.do?id=Ec190-198> (showing a murder rate of 6.1 per 100,000 residents in 1946), with Tracy Russo, *New Report: U.S. Homicide Rate Falls to Lowest Rate in Four Decades*, JUSTICE BLOG (Nov. 18, 2011), <http://blogs.justice.gov/main/archives/1765> (reporting a homicide rate of 4.2 per 100,000 residents in 2010).

164. *See* FBI, *supra* note 26.

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decreases have gone hand-in-hand with the development and diffusion of guns in various societies. For whatever reason, in modern Europe, nations whose populations have much higher gun ownership have much lower murder rates than low gun ownership nations. As to the United States: the colonial period of universal gun ownership saw few murders and few of those were gun murders; the 1840s and 1850s, during which gun ownership was no longer universal, saw an apparently rapid increase in murder; the post-Civil War period—in which armament with multi-shot, rapid-firing firearms became widespread—saw a decline in murders; and over the past sixty-five years and beyond, a vast increase in citizen gun ownership saw a sharp decrease in murder.

Thus, the historical and anthropological evidence suggests that more guns tend to lead to less murder, not more. Thus, nations considering enacting highly restrictive gun controls should assess the risk that if the controls are effective in reducing gun possession this could increase murder and other crimes by disarming the citizenry or making it difficult for people to defend themselves in public places.

In short, what can be said as a matter of historical fact is that widespread diffusion of firearms among the general population has gone hand-in-hand with decreased murder. As to whether these things are causally related, readers may draw whatever conclusions they deem appropriate.