

Firearms and Violence

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Questions about firearms ownership and use are significant elements of crime policy and constitutional law in the United States. Two important recent issues involving guns are the distinction between prevalence and incidence effects of gun ownership and the important contrast between private gun rights in households and in public spaces. This chapter attempts to summarize the issues and known facts about firearms and violence, as well as the government strategies toward gun ownership and use in light of the Supreme Court's recent jurisprudence on the Second Amendment.

INTRODUCTION

Policy discussions about crime and about firearms control overlap in the United States more substantially, and are debated more passionately, than in any other nation. At either extreme in the debate about guns in the United States one hears confident assertions that gun policy is intimately connected to the volume of crime in the United States and its costs. Those who support efforts to restrict the access to firearms blame the proliferation of firearms for the high rates of death and injury associated with crime in the United States, while those who oppose restrictions on gun ownership and use go further than questioning the link between guns and crime rates, and instead argue that the many millions of firearms owned, carried and fired by American citizens are a major force for crime prevention on American soil. Whatever one's sentiments about this dispute, it is an important part of discussions of crime control policy only in America.

This chapter is my attempt to summarize the issues and known facts about firearms and violence in three installments. The first section presents my own view of current knowledge about three issues that concern the relationship between guns and violence in the United States, the relationship between gun use and the death rate from crime, the involvement of guns in accidental and suicidal acts, and the use of guns to prevent crime and defend against attackers. The second section concerns the broader patterns of how many firearms are owned by Americans and how they are used. The third section concerns strategies of governmental policy toward gun ownership and use. It outlines

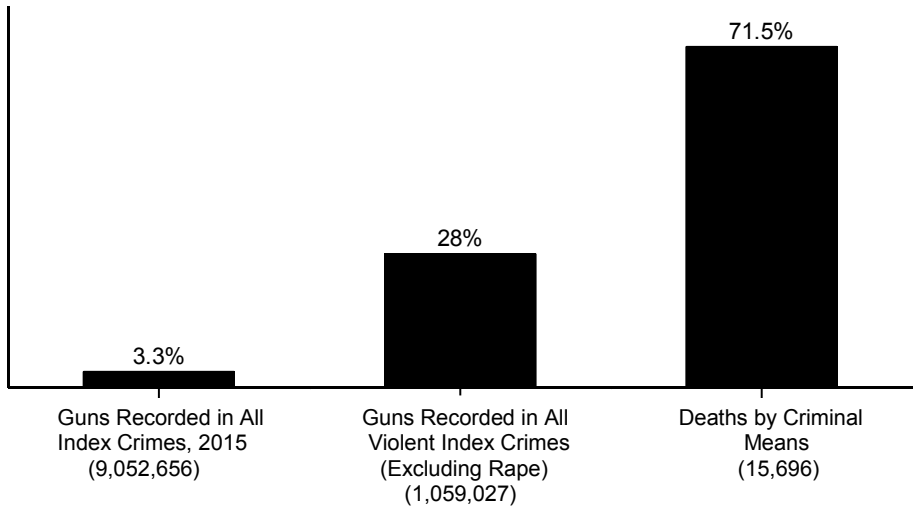
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traditional methods of limiting access to guns, attempts to restrict how and where guns may be used, and it then considers how these approaches may be affected by the emerging personal constitutional right to bear arms created in the United States Supreme Court.

I. DOES THE WEAPON MATTER?

The overlap between firearms and crime in the United States is incomplete in ways which clearly identify why and where firearms influence the cost of crime in the United States. There are many millions of guns in the United States and the odds that a particular gun will be used in a crime are very small. Even more striking, the overwhelming majority of all offenses, including even offenses of violence, do not involve the use of a firearm. Figure 1 tells the story of known gun involvement in three classes of reported crime in the United States profiled in the Uniform Crime Reports of the FBI for 2015, total index crime other than arson (seven major offenses: homicide, rape, robbery, aggravated assault, burglary, auto theft, larceny), total index crimes of violence other than rape (homicide, robbery, and aggravated assault) and murder and non-negligent manslaughter.

**Figure 1. The Role of Firearms Use in Crime –
Uniform Crime Reports 2015**



Source: Federal Bureau of Investigation.

Guns are reported as being used in fewer than 4% of all reported index crimes in the United States, and there is no method even of reporting use of a gun for almost 90% of all index crimes such as larceny and burglary where the victim and offender do not interact. For the million or so crimes involving personal violence, gun use is reported in 28% of all index offenses. But for criminal homicide, no fewer than 71.5% of homicides were committed with firearms. The contrast as one reads across the bar chart in Figure 1 is striking. Guns are used in a small number of total crime, in a significant minority of all violent index felonies but in more than 7 out of 10 criminal homicides.

The comparison across crime categories provides an important indication of why firearms dominate deaths from crime so much more completely than they are found in non-fatal crimes of violence. A generation of studies suggest that gun use increases the death rate when used in attacks because guns are much more likely to cause deaths, particularly when an attacker is not determined to cause a death. These “instrumentality effects” elevate the death rates both from assaults and in robbery.¹

The extensive use of firearms in American violent crime is not so much associated with higher rates of all kinds of crime but rather with higher rates of death associated with violent crime. Two decades ago, Gordon Hawkins and I reflected this pattern in the title of a book we published, *Crime Is Not the Problem: Lethal Violence in America*.² In the changed circumstances of 2017, the title of that book remains an accurate portrait of the American condition. Crime rates of all types have declined in the United States but even our diminished crime rate kills citizens at a rate substantially higher than other developed nations. We do not have more crime or more criminals, but the dangerous instruments so often used in American violence generate a higher death rate from crime that is a more specific but still substantial problem.

And the lethality of privately-owned firearms in the United States of 2017 is a major cause of violent deaths in some social settings where guns have not been an important issue in the public discussion. There were more than 1,000 killings of citizens by police in the United States in 2015, vastly more than the killings by police officers in other developed nations. The estimated 2.93

1. See PHILIP COOK & KRISTIN GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* (2014); Franklin E. Zimring & James Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1 (1986); Philip J. Cook, *The Technology of Personal Violence*, 14 CRIME & JUSTICE 1 (1991); Franklin E. Zimring, *The Medium Is the Message: Firearm Caliber as a Determinant of Death from Assault*, 1 J. LEGAL STUD. 97 (1972); Franklin E. Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721 (1968).

2. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

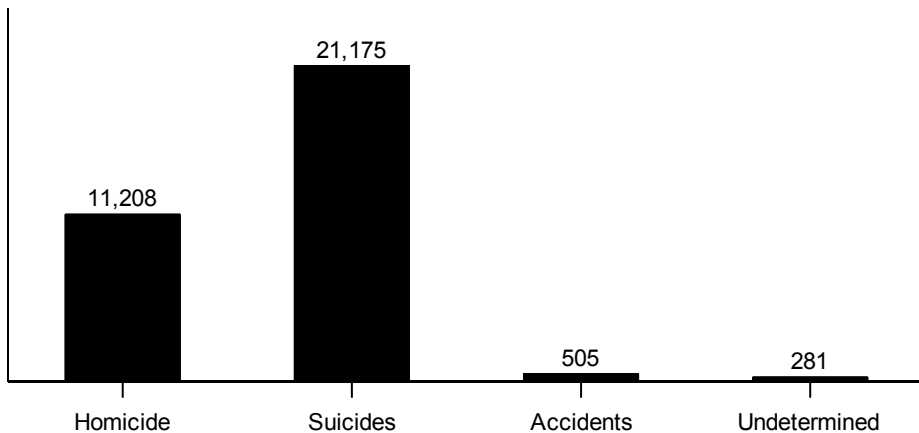
killings by police per million citizens were about 42 times the death rate from police in Germany and more than 100 times the shooting death rate by police in England and Wales.³ Why these huge differences in shootings by police officers? One major cause of the high American rate of killings by police is the much more substantial rate at which American police are killed by civilians. For the five-year periods we collected data for in a recent study, police officers in the United States were about 35 times more likely per capita to die from assaults on duty as were police in Germany and 17 times more likely to die per capita than in the United Kingdom. Why is police duty so much more hazardous in the United States? The FBI estimates that over 90% of all deaths from felonious killings of police are caused by guns and that turns out to be an *understatement* of the dominant role of guns in fatal attacks against police. When 17 motor-vehicle crashes are eliminated from the attack statistics over a six-year period, 268 of 275 police deaths from assault (97.5%) are caused by firearms. Civilian ownership and use of guns in the United States is thus the major cause of why police officers are at risk in the United States and also an important reason why police kill so many civilians. The same instrumentality effects that police fear are frequent reasons why they use lethal force and why three citizens a day die at the hands of police.

A. SUICIDE AND ACCIDENTS WITH FIREARMS

The use of firearms in interpersonal crime is only one of several types of firearms events that produce killings and woundings. A complete accounting of the death toll from firearms activity involves two other behavioral categories—accidents and suicides—as well as a number of deaths where health authorities cannot decide on whether the death was intentional or accidental. Figure 2 profiles the volume of all forms of gun deaths by type for 2013, using data from the Centers for Disease Control and Prevention.

3. FRANKLIN E. ZIMRING, WHEN POLICE KILL 76 fig.4.2 (2017).

**Figure 2. Volume of Deaths Caused by Firearms,
Four Classifications, United States 2013**



Source: Centers for Disease Control and Prevention.

The volume of firearms suicides in the United States at 21,175 is almost twice the number of gun homicides and 30 times the volume of accidental and undetermined deaths, but the number of fatalities by gun is not by itself an accurate measure of the extent to which firearms use increases the death rate and the number of years reduced from the lifespan because a firearm killed. For homicides, the death rate per 100 gun assaults is five times as high for guns as for knives, the next most dangerous frequently used weapon in assaults,⁴ so gun use instead of less deadly alternatives increases the death rate substantially. For suicides, the story is more complicated and not well studied. Firearms use in suicide attempts has a much higher death rate than the most frequently used methods of attempts such as drug overdoses and cuttings. So if those frequently used methods were selected instead of guns, the death rate would be much lower. There are, however, other methods of suicide attempt that do have high mortality rates—jumping from high buildings or bridges and possibly drowning, so that any good estimates of the instrumentality effects associated with gun use in attempts depend on determining what if any non-gun methods of attempt would be chosen if guns weren't available. More research is needed. A generation ago, observers concluded "[t]he relationship between firearms use and suicide is an important story waiting to be told."⁵ We are still waiting.

4. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 13–27 (1987).

5. *Id.* at 63.

The volume of gun accidents is quite low but two factors made their 500 to 800 accidental deaths from firearms discharge more problematic than the low volume would suggest. First, because no harm was intended in accidents, the net cost of life from gun accidents is pretty close to 100% of the death rate. Second, many of the victims of gun accidents are quite young; indeed, for handgun accidents the highest death rate is for persons too young to legally own handguns.

There is one other important distinction between the firearms used in accidents and in suicides and those that are used in homicides—their geography. Most accidents and suicide attempts happen within the home environment of the gun-owning household. But homicidal attacks are not concentrated in the household that owns the gun. The geography of death risk may be important both politically and legally. Because guns used in robbery and assault are usually carried outside the offender's home, citizens are concerned that their exposure to risk is not within their control. Even if I choose not to have a gun, the risk of my being assaulted or robbed with your gun is a risk beyond my control. If I don't have a gun in my home, by contrast, I can reduce the risk of either suicide or accident.

There may also be a geographical dimension to the evolving Second Amendment rights to own and use guns. Both the *Heller* and *McDonald* precedents have restricted the ability of municipalities to prohibit ownership of handguns for household self-defense.⁶ So the regulatory options available for household firearms may be much narrower in scope than for firearms that are carried or used in public spaces. I will return to this issue when discussing the Second Amendment issues that have emerged since 2008.

B. SELF-DEFENSE AND CRIME PREVENTION

Not all violent acts and potential exercises of violence result in high or even net social cost. For this reason, the criminal law provides a defense of justification in the use of force generally, and more restricted justifications for the use of force likely to cause death or great bodily harm. The discourse on firearms use contains two different controversies involving gun ownership and use and its effect on crime rates in the United States. The first dispute is on the number and quality of self-defense episodes by armed citizens. The main methodology on this question is survey research in which persons are asked if they defended themselves from attack with a firearm. Only crimes of personal confrontation will be possible to investigate in this fashion—assault

6. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

and robbery—and there are two major methodological problems. One is that only a small fraction of survey respondents will provide positive answers, and estimating volume and eliminating statistical noise and misunderstanding is difficult. The second problem is that the respondent to the poll asserts he or she was a victim of a crime but there is no method to verify this without checking against police records. Some poll data has been said to create very large numerical estimates,⁷ but estimates based on the national crime victimization surveys are much smaller.⁸ There are no reported statistics on civilians shooting firearms or non-fatally wounding persons in self-defense, but the FBI Supplemental Homicide Reports (“SHR”) has collected data from police departments on justifiable killings by both police and by citizens since 1976. If one uses this data as a measure of the relative importance of police versus civilian self-defense firearms volume, the numbers are dramatically different. In 2013, the volume of “felons killed by police” was reported at 393 in the SHR, and the volume of justifiable killings by other citizens was reported at 260. Since there are only about 600,000 police officers in the United States, the rate per 100,000 officers was more than 600 times the rate for adult civilians. The trends over time in justifiable killings by civilians are downward. The five-year average volume per year from 2001–2005 was 222, a 37% reduction from the volume in 1976–1980, despite substantial increases in the general population. So the only available data on trends is inconsistent with substantial growth in guns being fired in self-defense by civilians.

An even more astonishing statistical food fight concerns the impact of loosening restrictions on carrying concealed weapons on crime rates in states and counties in the United States. During the 1970s and 1980s, a substantial number of states that had previously allowed local law enforcement officials to require that citizens show a special need to carry concealed weapons changed their laws to allow any citizen who qualified to own handguns to also qualify to obtain a permit to carry concealed weapons in public. The previous laws often meant that very few permits to carry concealed weapons were granted. These new so-called “shall issue” laws were passed in a number of jurisdictions that had strong gun owner influence on the state legislature—Southern, Western and Midwestern states generally with low big-city populations. An econometrician, John R. Lott, published statistical evidence that the states that passed such laws had lower crime rates after they did so, and this set of statistics became

7. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).

8. COOK & GOSS, *supra* note 1.

his book *More Guns, Less Crime*.⁹ The method here is not to directly measure either incidents of self-defense with guns or crime-prevention uses of firearms, but rather to compare places that pass the legal change to “shall issue” with jurisdictions that didn’t change their laws, attempting to statistically control for all of the other differences between places that might influence crime. Dr. Lott argues that passing “shall issue” laws reduced crime, since the jurisdictions that did so experienced lower crime trends thereafter than states that did not. He maintains his data analysis has already accounted for other factors that could have explained the different trends.

These claims were contested by a number of scholars, most prominently by John Donohue of Stanford Law School.¹⁰ One interesting pattern that made me doubt the power of multiple regression as social science in this case is the contrast between the 1980s (when the states with “shall issue” had better crime trends) and the 1990s (when states that *had not* made this change did better). One simple explanation for this is that many states with big cities that suffered during the crack cocaine epidemic faced more crime problems in the 1980s but also experienced more substantial recoveries during the 1990s, when the crack influence abated. A failure of statistical “controls” to fully account for this influence might have been more important than concealed weapons permit laws during this peculiar two decades.

II. FIREARMS OWNERSHIP AND USE

There are two methods of estimating the number of firearms owned in the United States, but each method carries a significant margin of error. One method is to count official records of guns manufactured and imported in the United States over the period that records are available and use that figure as a maximum population of currently owned and serviceable firearms. The first estimates of these totals were produced in 1968 (90 million),¹¹ and the 2016 update of total production since 1899 would be about 300 million guns, more firearms than adult citizens. This is a vast overestimate, of course, because it does not account for guns that became inoperable or are destroyed. The number of weapons produced in this aggregation is around 300 million, but firearms brought back as war souvenirs would push that total even higher.

9. JOHN R. LOTT, *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (3d ed. 2010).

10. See Ian Ayers & John Donohue III, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 STAN. L. REV. 1193 (2003).

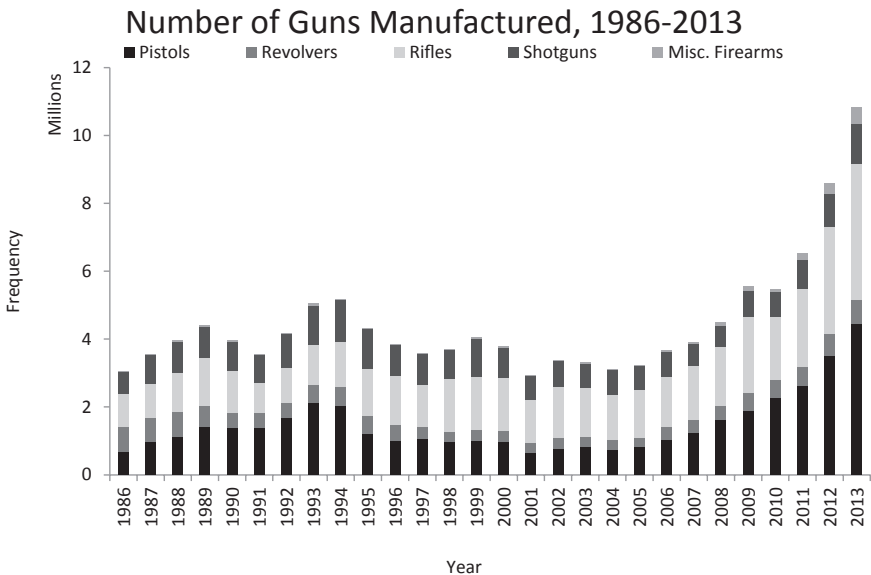
11. GEORGE NEWTON & FRANKLIN ZIMRING, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* (1968).

The second method of estimating gun ownership is by survey research, in essence asking a cross-section of the population whether they own firearms, as well as how many guns and what kinds of guns they own. There are two problems other than accurate sampling that threaten the validity of survey-based estimates of ownership—the willingness of respondents to report gun ownership, and the accuracy of an individual respondent's reports of his or her personally-owned guns, as well as guns owned by others in the household. Unwillingness to report would underestimate ownership, and inaccurate estimates of the number of weapons owned by others in the household could produce both underestimates and overestimates, particularly when a household might own many guns. The most recent poll-based estimate of guns owned is 265 million.

A. PREVALENCE VERSUS INCIDENCE— THE CONTRAST IN RECENT TRENDS

The pattern of gun-ownership trends that comes from statistics since 1980 is an apparent puzzle. The introduction of new guns into the civilian market has increased dramatically in the past decade, more than doubling since 2004, as shown in Figure 3.

Figure 3.

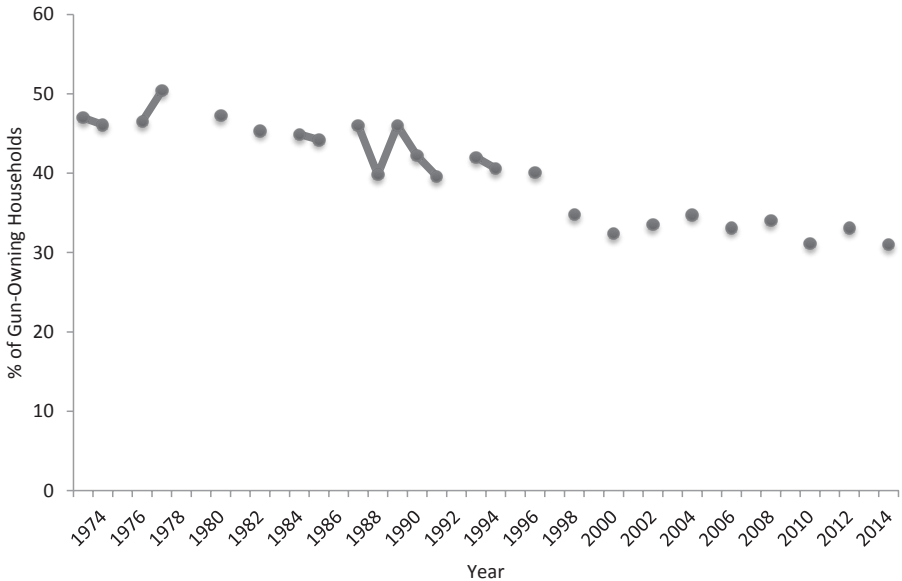


Source: Bureau of Alcohol, Tobacco, Firearms & Explosives, *Firearms Commerce in the United States: Annual Statistical Update* (2015).

But the rate of individual and household ownership reported in surveys has declined in most surveys. Figure 4 shows the trend in reported gun ownership in the National Opinion Research Center general social survey over four decades.

Figure 4.

% of Households with Guns, 1973-2014



Source: National Opinion Research Center, University of Chicago, *General Social Survey Final Report: Trends in Gun Ownership in the United States, 1972-2014* (2015).

The long-term decline in household firearms ownership is substantial across the decades and there is no recent upturn to match the large increase in new guns. How can this be?

There may be no contradiction between an expanding population of guns but consistency or decline in personal and household gun ownership. The distinction between the *incidence* of gun ownership and the *prevalence* of gun ownership could explain the divergent trends. The incidence of gun ownership is the rate of guns owned divided by the population, and that has almost certainly been increasing over recent years with the introduction of so many new guns. But the prevalence of gun ownership is the proportion of the population that owns guns, and what Figure 4 reported is that the proportion of households owning guns has declined. These two trends could coexist if most of the new guns introduced into the civilian market are purchased by persons

who already own guns. Multiple gun ownership is a major element in the U.S. population and one recent story asserted that 3% of the U.S. population owns 50% of guns.¹²

The increase in the number of guns (incidence) would have a substantial impact on the volume of guns at risk for theft or secondary transfer (what has been called the “hand-to-hand” market) but would not directly influence the proportion of guns readily available for suicide attempts, domestic conflicts or other violent acts. By contrast, an increased prevalence of household guns would directly increase the number of settings in which a gun is available for use in violence. It is whether or not a gun is available where people live (prevalence) not the number of guns in that house that are close at hand which should have the most direct impact on use in personal violence. For this reason, if the increase in guns hasn’t been accompanied by an increase in rates of personal or household ownership, it should not be expected to produce a major increase in the proportion of violence that involves gun use.

The major types of firearms in the United States are handguns and long guns. The major types of long guns are shotguns (which fire shells with multiple pellets) and rifles (which have long barrels and fire bullets). Handguns are short-barreled firearms that can be carried and easily concealed. Because they can be transported for use through public venues and in public, they are far more often used in criminal acts than long guns. Handguns are about 40% of the estimated population of guns owned in the United States but are more than 90% of the firearms used in crime.¹³ Both rifles and shotguns can be semiautomatic (requiring only a repetition of pulling the trigger to fire second and subsequent bullets) or single shot.

A variety of semiautomatic weapons have been classified as “assault weapons” in state laws as well as a federal law (passed in 1994 but not renewed in 2004). The number of such weapons in circulation depends on how the prohibited weapon is defined, and the definitions vary.

III. STRATEGIES OF FIREARMS CONTROL

Two basic strategies of firearms control are (1) limiting gun acquisition and ownership and (2) attempting to limit the times, places, and manners in which firearms can be used. The attempts to limit gun acquisition and ownership usually prohibit persons classified as high risk from owning any guns or forbid or restrict the ownership by any persons of guns that are regarded as particularly risky.

12. See Lois Beckett, *Gun Inequality: US Study Charts Rise of Hardcore Super Owners*, THE GUARDIAN (Sept. 19, 2016).

13. COOK & GOSS, *supra* note 1, at 13.

A. OWNERSHIP RESTRICTIONS

Restriction of high-risk weapons was the focus of the first major federal gun-control law, the National Firearms Act (NFA) of 1934. Two classes of weapons were subject to special restrictions in that law: automatic guns, which could fire repeatedly with a single pull of a trigger, and long-barreled guns that had been modified by sawing off the barrels to make rifles and shotguns easier to conceal. The Thompson submachine gun was notorious as a destructive automatic weapon associated with organized crime, and sawed-off shotguns and rifles were also regarded as both dangerous and not suitable for legitimate uses. The NFA attempted to ban such weapons but used a high tax (\$200 in 1934) as the device to eliminate the weapons.

A second strategy of ownership prohibition restricted the acquisition or ownership of any guns by particular classes of persons regarded as high-risk users. The Federal Firearms Act of 1938 was the first federal law to isolate high-risk users. The two major categories of person prohibited in the 1938 act were adults with records of felony convictions and youths under age 18. These federal categories were altered in subsequent legislation in 1968 and 1985, and all 50 states also have laws restricting ownership by defined high-risk groups.

One major effort to enforce restrictions on the acquisition of guns by identified high-risk users is to require persons to prove they are not prohibited from ownership as a precondition of being able to acquire guns. Many states require persons to submit to a screening and acquire a license that confirms their age and absence of a disqualifying criminal record. This system, which can be called "permissive licensing" because it allows most adults to acquire guns, operates in several states. The federal government has, since 1994, required dealers licensed by the federal government to submit the names and identification that prospective customers provide to enable the government to check for a criminal record. This is an attempt to screen out unfit purchasers.

Some state laws go much further to restrict those permitted to purchase handguns to those specially licensed, usually by local police. This insistence on special needs or qualifications is called restrictive licensing.

A second basic strategy of firearms control attempts to limit high-risk uses and locations of firearms. The regulation of high-risk uses and gun possession in particular places was the traditional province of state and local law. The almost universal traditional regulation of the use of concealed weapons was state and local laws that required persons to have a special license to carry a concealed weapon in public. All but a very few U.S. states require special permits to carry concealed weapons, but there is a major distinction between

states that will grant licenses to all persons who prove they are eligible to own handguns (these are called “shall-issue” systems) and states that allow local law enforcement agencies to restrict licenses to carry concealable guns to persons who establish a special need to use such weapons in public places (these can be called “may-issue” systems).

An outright ban on owning or producing high-risk weapons does not require extensive additional governmental screening of persons. As we shall soon see, attempts to keep guns from high-risk persons do require and often involve governmental systems to screen individuals who wish to acquire guns in order to assume they are not in a prohibited group.

B. HIGH-RISK USERS

While the first federal gun-control effort was directed at high-risk guns, the second law, the Federal Firearms Act of 1938, attempted to forbid particular persons regarded as problematic from acquiring firearms. But the federal act only licensed dealers, and it attempted to restrict sales to felons or fugitives by prohibiting dealers from selling to them. But only the “knowing” transfer by a dealer to a prohibited person was forbidden. The amendments to the 1938 act passed by Congress in 1968 extended the groups of persons prohibited from ownership to persons under 18 for long guns and 21 for handguns, as well as persons who have been adjudicated mentally defective or committed to any mental institution. And the 1968 act also continued the 1938 law’s prohibition of transfer of guns to persons who were not permitted to possess them under the law of the state in which they resided. The 1968 act also required notice to local law enforcement agencies of the buyer by a federally licensed dealer.

Many states also attempted to prohibit high-risk persons from owning or acquiring guns and frequently attempted to enforce these restrictions by requiring individuals to apply for a license to purchase a weapon. The governmental agency could then verify the lack of a criminal record. These screening systems have been called “permissive licensing” because all but modest classes of prohibited persons can acquire and own guns.

A few states reversed the presumption used in federal and most state laws and instituted licensing systems for handgun ownership that restricted ownership to persons who could establish a special need to own a handgun. The application process in these regimes is more complex and there is no presumption that a law-abiding citizen should qualify for ownership. These systems have been called “restrictive licensing” because their aim is to reduce the weapons in circulation. This is as much a control effort based on the notion

that the gun is dangerous rather than assuming that only the wrong kind of gun owner is the primary problem.

C. TIME, PLACE, AND MANNER RESTRICTIONS

Most states and many municipal governments attempt to restrict the places that firearms can be taken and the ways they can be used even when lawfully acquired and owned. The broadest prohibition found in most state laws makes it unlawful to carry a concealed weapon (including a firearm) in a public place without a special license. Almost all American states have laws requiring special licenses to carry concealed weapons. Some states require local authorities to grant such licenses when requested if the applicant meets the legal requirements to own the weapon (these are called “shall issue” laws), while other state laws allow local law enforcement officials who review applications to require demonstration of special needs to obtain CCW (Carrying Concealed Weapons) licenses. These “may issue” jurisdictions often only authorize a very few persons to carry. A prominent political movement to expand eligibility in the “shall issue” paradigm has been a feature of state-level legislative activity in states with powerful gun-owning groups. Other time, place, and manner restrictions forbid firearms in places where they might be a special hazard (bars and saloons) or inappropriate (churches and schools). Of all the time, place, and manner restrictions, the class of laws that produce the vast majority of arrests and criminal prosecutions are for carrying concealed weapons without a license.¹⁴

D. THE EMERGENT SECOND AMENDMENT AS A RESTRICTION ON GOVERNMENTAL FIREARMS CONTROL

While governmental restrictions on gun ownership and use have a long American history, there was little effort or impetus to use the language and concepts of the Second Amendment as a limit on governmental power to regulate firearms ownership and use until recent years. Claims to Second Amendment values as a symbol of “firearms liberty” carried an important emotional resonance for some gun-owning groups, but there had been no strong recognition of federal courts or the legal establishment of the Second Amendment as a source of personal rights to guns.

The Supreme Court law to the contrary prior to 2008 was neither extensive nor thickly principled. A series of challenges to state gun-control laws were rejected in the 19th century on the grounds that the Bill of Rights

14. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2015, tbl. 29 (2016).

only restricted congressional action.¹⁵ When Congress finally did pass gun restrictions in the Federal Firearms Act of 1934, in a challenge to a criminal conviction for shipping a shotgun with a barrel length of less than 18 inches, the Supreme Court relied on the “obvious purpose” of the Second Amendment of assuring the effectiveness of the militia; the Court continued, “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.”¹⁶ The issue and the decision in *Miller* were not regarded as important at the time of the decision or for some time thereafter.

There were isolated efforts in the legal academy to breathe some life into a personal Second Amendment. Don B. Kates’ 1983 *Michigan Law Review* article, “Handgun Prohibition and the Original Meaning of the Second Amendment,”¹⁷ and Sanford Levinson’s “The Embarrassing Second Amendment” in 1999,¹⁸ were followed by a series of historical and doctrinal arguments for personal rights under the amendment that could limit governmental restrictions.

The case that effectively reversed *United States v. Miller* and announced a personal Second Amendment right for citizens was *District of Columbia v. Heller*, decided in 2008.¹⁹ The law challenged in *Heller* was a 1975 ordinance in the District which prohibited civilian ownership and possession of handguns. The D.C. Circuit Court of Appeals held this prohibition of handguns violated a personal Second Amendment right. Writing for the appellate panel, Judge Silberman engaged the *Miller* Court’s argument about short-barreled shotguns not being militia weapons by finding references to a 1794 ordinance which included bulky ancestors of modern handguns as militia ordinance.²⁰ Justice Scalia in *Heller* rejected such arguments and instead found that citizens’ desires to use handguns as household self-defense created a right under the Second Amendment. The opinion in *Heller* had to address handguns specifically because the District of Columbia ban was only on handguns. But the *Heller* case, and the extension of *Heller* rights against the states in *McDonald*,²¹ struck down absolute prohibitions on handgun ownership, including within

15. See NEWTON & ZIMRING, *supra* note 11, at 254.

16. *United States v. Miller*, 307 U.S. 174, 178 (1939).

17. Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

18. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

19. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

20. See *Parker v. District of Columbia v. Heller*, 478 F.3d 370, 386-88 (D.C. Cir. 2007).

21. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

the home, a rare breed of government regulation different in form from even restrictive licensing of handguns and restrictions on carrying weapons or concealed weapons in public. Justice Scalia's opinion for the Court in *Heller* endorses both the notion of limits on its version of the Second Amendment right and provides approving citations to a number of restrictions with long histories, such as restrictions on carrying concealed weapons. The opinion also isolates the District of Columbia statute from more common attempts to restrictively license handguns: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."²² And the Chicago ordinance that the Court disapproved in *McDonald* was also a flat ban on handgun ownership.

So the doctrinal ingredients for establishing how this newly announced right interacts with state and local gun-control efforts are (1) a very broad personal right, (2) a long history of gun controls the *Heller* Court suggested were legitimate, and (3) a balancing process between state and personal interests where we have little indication of what level of interest must be found and who has the burden of proof.

Some very broad questions can be answered in 2017. While the only gun ordinances that the Court has struck down have been outright prohibitions on handgun ownership and use in the house, important claims for personal self-defense can be made in both public and private places. And many persons disqualified from handgun licenses because they haven't demonstrated special needs for ownership will feel just as disadvantaged as did the plaintiff in *Heller*. Even permissive systems that bar young persons or those with nonviolent criminal records raise real interests in the balance. What about those with criminal records and armed enemies?

The historical credentials of substantial restrictions on carrying concealed weapons are impeccable but the risk of much criminal victimization for citizens is also higher on the street. Two elements that haven't yet made powerful impressions on courts considering challenges to bans on carrying concealed weapons might make a difference. The first is that carrying a loaded gun in public affects the safety and feelings of security of others in public who might prefer limiting concealed firearms in streets. There are externalities to carrying guns outside one's house in a shared public space that don't apply with equal force in the household setting of the *Heller* decision.

The second problem is the violence threat of concealed guns in public to police on patrol. For instance, 97.5% of all attacks that kill police are with guns,

22. *Heller*, 554 U.S. at 629.

and the concealed guns an armed police officer cannot see are a particular hazard.²³ Further, anything that increases the risk of gun attacks to police also increases their tendency to shoot first. Over a thousand civilians a year are now killed by police in the United States. Increasing concealed handguns on the street by constitutional fiat won't help matters for cops or citizens.

The current state of Second Amendment doctrine in 2017 is the American legal realist's ultimate theory on all law—the U.S. Supreme Court can decide anything it wants to decide about challenges to state licensing requirements and public carrying of concealed weapons. To date, circuit courts have been prone to defend all but absolute prohibition from Second Amendment claims. But there are no clear principles emerging.

The *Heller* doctrine could be a minor restriction if highly restrictive handgun licensing is allowed in the tradition of New York's Sullivan law of 1911. Or it could become a personal right stronger than claims for the primacy of the police power in public spaces.

At the far extreme would be a conflict between property rights and personal rights to bear arms when owners of public accommodations use technology to screen for and prohibit guns in their facilities. Is that discrimination equivalent to the racial discrimination that provoked the Civil Rights Act of 1964? Or is it instead a property owner's right to self-defense against other people with guns? Stay tuned.

CONCLUSION

The major contingency that will influence the course of firearms controls in the American future is the degree to which the Supreme Court's holdings on the Second Amendment will allow legislative regulation of firearms ownership and use by the federal government as well as states and localities. If long-standing forms of restriction on carrying concealed firearms continue to be allowed, substantial differences in patterns of firearms regulation will exist in urban vs. rural states and in regions with different sentiments about gun policy. A more aggressive architecture of the evolving Second Amendment's personal rights will mandate less diverse and more uniformly deregulatory policies.

The most important contingency in federal legislation will be whether background checks will be extended to all or most person-to-person transfers. This is an important detail in the regulatory approach to a country with more than 300 million citizens and almost that many firearms. But it is only

23. ZIMRING, WHEN POLICE KILL, *supra* note 3, at 96.

a regulatory detail rather than a change in the importance of guns in the 21st century. The singular status of the United States as a gun-owning and gun-using nation is assured.

RECOMMENDATIONS

Given the foregoing, I would emphasize two points:

1. **Recognize that the Constitution allows firearms regulations.** As mentioned above and acknowledged by the Supreme Court, governmental restrictions on gun ownership and use have a long history in the United States. The *Heller* opinion does not, and could not, ignore the pedigree of firearms regulations: “[N]othing in our opinion should be taken to cast doubt on 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.”²⁴ *Heller* also recognized the tradition of bans on carrying “dangerous and unusual weapons,” like short-barreled shotguns.²⁵ The traditional powers of the states to restrict carrying concealed weapons in public should be recognized as categorically different from regulating household ownership, and the vulnerability of police and other citizens to concealed weapons in public places should be integrated into a coherent jurisprudence of the Second Amendment.
2. **Focus on specific strategies and contexts.** The question of whether gun control can work is subject to a highly qualified answer of “yes, but.” If and to the extent that regulation reduces the use of loaded guns in crimes it will save American lives. But reducing the share of violence with guns is not an easy task to achieve in urban environments with large inventories of available handguns. Most gun control efforts do not make measurable impacts on gun use, particularly low budget symbolic legislation. If Congress when creating what it called a “gun-free school zone” by legislation did reduce firearms violence, the result would be on a par with that of the miracle of loaves and the fishes. But New York City’s effort to tightly enforce one of the nation’s most restrictive handgun laws did apparently have a substantial payoff in reduced shootings that saved many lives.²⁶ What I would emphasize here is the fallacy of categorical generalizations. We have no business asking

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

25. *Id.* at 625, 627.

26. See Jeffrey Fagan, Franklin E. Zimring & June Kim, *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277 (1998).

whether broad classes of laws—criminal prohibitions, anti-theft statutes or gun control strategies—work or don't. That is an aggregation error as long as guns are a contributing cause to the death rate from violent crime in the United States. The serious work is in identifying the specific strategies and contexts in which regulation can reduce the use of firearms in violent assault and attempting to achieve these results at tolerable public and personal cost.