

# Peril or Protection: The Risks and Benefits of Handgun Prohibition

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[This article is a reply to another article appearing in the same issue. Following this article, Prof. Dixon's reply appears. The Dixon articles are not posted on this website, because they are copyrighted. The hard copy of the issue containing Dixon's articles can be found in law school law libraries. Dixon's opening article makes an empirical case in favor of handgun prohibition. The boldface asterisks (**\*301**) indicate the start of a new page in the printed text. In the printed text, the notes are footnotes, rather than endnotes. More articles by Kopel on handgun prohibition are [available here](#).]

Dixon's article represents a valuable and intellectually honest approach to the gun control debate. To begin with, he acknowledges that the Second Amendment may pose "strong" legal obstacles to his proposal to confiscate all handguns. [1] Taking many of the familiar **\*286** arguments for handgun prohibition, Dixon examines them carefully, acknowledging their limitations. Moreover, Dixon has read much of the empirical literature produced by skeptics of handgun prohibition, and he devotes much of the article to meeting the skeptics head-on. Finally, Dixon addresses himself to the issue at hand, and does not **\*287** engage in invective about handgun owners or the National Rifle Association. Thus, Dixon presents one of the more comprehensive and carefully-reasoned arguments for handgun prohibition that has ever been written.

Despite these virtues, Dixon's argument does not succeed. The blame lies not in his skill in presenting arguments, but in the facts themselves. The more deeply one looks into the issue, the more difficult it becomes to conclude that handgun prohibition will save lives. Prohibition might instead result in a significant increase in the deaths of innocents.

## I. THE CASE FOR GUN PROHIBITION

### A. Police Exemptions

Before addressing the merits of handgun prohibition, Dixon discusses what some advocates of handgun prohibition consider to be a fatal flaw in his proposal: allowing police officers and security guards to continue to possess handguns. After all, if society acknowledges that handguns have significant

defensive value and can help save the lives of police officers and security guards, how can society deny that handguns can also help save the lives of other people?

Dixon replies with two arguments. First of all, "police are entrusted with the protection of society and the prevention and deterrence of crime, it is only to be expected and indeed encouraged that they be given superior force to the rest of society." [2] That police officers protect society, however, does not entitle them to own every type of weapon. No one would suggest that police officers should be allowed to carry hand-held nuclear weapons, if such weapons existed, nor would we want police officers routinely to carry nerve gas, surface to air missiles, grenades, mortars, or a score of other weapons. Thus, even if we assume that police officers are society's legitimate protectors in a way that ordinary persons are not, the police should not necessarily be authorized or entitled to possess handguns.

Perhaps what distinguishes handguns from nerve gas, in Dixon's view, is that the police "need" handguns in a way that they do not need nerve gas. Arguably, police officers, as protectors of society, are uniquely at risk, and thereby have a higher need for **\*288** defensive weaponry. In regards to officers who perform street patrol in high-crime neighborhoods, police officers face substantially higher risks than most other people. There are, however, many police officers who do work other than patrol of high-crime areas. Officers who process paper work, officers who direct traffic, command-rank officers who do not routinely engage in dangerous missions, and officers who do not patrol unusually dangerous neighborhoods would all be allowed, under the Dixon proposal, to possess handguns. While these officers face certain risks of attack, these risks are no greater than, and sometimes substantially less than, the risks faced by people whom Dixon would disarm, including the owners of businesses such as gas stations or grocery stores in robbery-prone neighborhoods, women who are being threatened by ex-boyfriends, crime witnesses and jurors who are at risk of retaliation from violent criminals, and elderly people who have to walk through dangerous neighborhoods. A police sergeant who sits in a fortified building, in which every entrance is protected by several heavily-armed police officers, is at much less personal risk of attack than is a clerk who works the night-shift at a convenience store on the wrong side of town. Except for police officers assigned to dangerous duty, need cannot justify Dixon's proposal to allow the police to possess handguns if all civilians are forbidden them.

A second argument Dixon offers in support of a comprehensive police exemption is that "[s]ince they are subject to extensive training and strict discipline, police are less likely to abuse handguns than the private citizen ..." [3] The empirical evidence, however, suggests that police misuse of firearms is quite common. [4] Whenever a New York City police officer fires a gun (outside of a target range), police officials review the incident. About 20% of

discharges have been determined to be accidental, and another 10% to be intentional discharges in violation of force policy. In other words, only 70% of firearms discharges by police are intentional and in compliance with force policy. [5] According to another study, when police \*289 shoot at criminals, they are 5.5 times more likely to hit an innocent person than are civilian shooters. [6]

Many police officers work difficult, stressful jobs for many years. Ordinary citizens, if they find themselves under stress, can simply retreat back to their houses or apartments. Since Dixon argues that too many ordinary, non-criminal citizens lack the emotional stability to be trusted with handguns, how can handgun possession be defended for a group of people who are under significantly higher emotional stress than ordinary people? Not only are police misuses of firearms in the line of duty far from uncommon, police misuse of guns outside the line of duty is all too frequent. When an off-duty New York City policeman fires a gun, one time out of four the firing will be an accident, a suicide, or an act of frustration. [7] The rate of substantiated crimes perpetrated by New York City police officers is approximately 7.5 crimes per year per thousand officers. The number of New York police criminal incidents alleged is 112.7. [8]

Further, Dixon is wrong to claim that police officers receive "extensive training" in use of handguns. More typically, they receive a few dozen hours of training at the police academy, and may be, at most, required every few years to recertify their ability to hit a target. A deplorably large number of handgun-toting officers have not practiced marksmanship since they passed their firearms certification test as a police recruit. The amount of training which police officers have in defensive gun use rarely exceeds what a civilian could learn at a good firearms instruction academy. With the advent of inexpensive \*290 indoor laser target systems and high-technology video trainers for "shoot-don't shoot" programs, and the proliferation of civilian firearms schools, citizens willing to invest some time can be schooled in defensive firearms use to at least the same level of competence as the average police officer.

Accordingly, Dixon does not articulate a good reason why police in general should be exempted from his general firearms ban, except for police who patrol high-crime areas, who have unusually high self-defense needs. A fortiori, the proposed exemption for security guards, even rigorously trained ones, lacks a logical basis. If training and licensing make security guards capable of being trusted with guns, then other persons who pass equally rigorous training and licensing systems may also be trusted with guns. As Dixon notes, security guards can be "visible targets for attack," [9] but so are proprietors of "convenience stores, gas stations, and other small businesses," [10] at least in dangerous neighborhoods. If the owners of these stores pass through a licensing and training system equivalent to that of security guards

and/or police, there is no basis for denying these persons a permit. To structure the gun permit system so wealthy owners of jewelry stores can hire security guards for protection, but low-income owners of convenience stores, who cannot afford a security guard, are deprived of protection - even though the convenience store owner is as objectively qualified as a security guard to carry a gun - is economic discrimination, and amounts to valuing the property of the jewelry store owner more highly than the life of the convenience store owner. [11]

**\*291** The overbroad police/security exemption might doom Dixon's gun prohibition scheme from the start. As Justice Brandeis observed, "Government is the great teacher," [12] and the democratic nations which have adopted strict handgun control systems that enjoy a high degree of voluntary civilian compliance, have in part succeeded through the example set by government. While the police have not been entirely disarmed of handguns, they are, in practice, far less oriented towards gun use than their American counterparts. For example, in Japan, which completely prohibits civilian handguns, the police do possess handguns, but in a manner very different from their American counterparts. The police only began carrying guns at the repeated insistence of General MacArthur's government of occupation. [13] Japanese police have merely .38 special revolvers, not the high-power or high-capacity .45 and 9 mm handguns often toted by the American police. [14] No officer would ever carry a second, smaller handgun as a back-up, as many American police do. Policeman may not add individual touches - such as pearl handles or unusual holsters - to dress up their gun. While American police are often required to carry guns while off-duty, and always granted the privilege if they wish (even when retired), Japanese police must always leave their guns at the station. Unlike in the United States, desk-bound police administrators, traffic police, most plainclothes detectives, and even the riot police in Japan do not carry guns. [15]

The official Japanese police culture strongly discourages use or glamorization of guns. One poster on police walls orders: "Don't take it out of the holster, don't put your finger on the trigger, don't point it at people." [16] Shooting at a fleeing felon is unlawful under any circumstance. [17] In an average year, the entire Tokyo police force only fires a half-dozen or so shots. [18]

The police being disarmed, criminals reciprocate. Although guns are available on the black market, there is little use of guns in crime. The riot police leave their guns at the station; and the masses of angry students who confront the riot police also eschew modern weapons. The two sides instead study medieval military tactics, using mass formations of humans as battering rams or as shields. [19]

Comparative criminologist David Bayley, a proponent of stricter American gun controls, suggests that American police attitudes towards guns makes it impossible for gun control to be achieved. As long as the police are armed,

writes Bayley, they send the implicit message that armed confrontations with civilians are the norm, and that shootings of police officers, while sad, are nothing extraordinary. [20]

In Britain as well, that the police are mostly unarmed is one of the important reasons why criminal and non-criminal civilians mostly avoid handguns. Even in London, only about 15 percent of the police carry guns. The sole police who are permanently armed are special security forces for "diplomatic, royalty and ministerial \*293 protection." [21] The patrolmen who are given guns are more lightly armed than almost all of their American counterparts. Patrol officers do not routinely carry backup guns. The primary guns are Smith and Wesson Model 10 revolvers loaded with .38 special +P ammunition. They must be carried concealed. Bobbies have no powerful Colt .45s on display. They do not carry the same gun from day to day. At the end of every shift, their duty gun goes back into the police safe. [22] High-ranking police administrators almost never carry guns. [23] All officers must follow the policy in the Association of Chief Police Officers' Manual of Guidance. The guidance, although officially secret, is "very largely consistent with Colin Greenwood's Police Tactics in Armed Operations and emphasizes "extreme caution in police use of deadly force." [24] In 1987, only five Britons were shot dead by the police, and even this number was seen as alarmingly high. [25] Police authority has, historically, rested not upon the ability to compel submission, but "upon the benign, non-aggressive image of the unarmed British bobby." [26] The police authority has been achieved "by presenting an image of vulnerability, instead of the invincibility of their Continental or American counterparts." [27] An almost totally unarmed police has long been the British ideal, but starting with the 1967 Shephard's Bush murders (in which criminals with stolen revolvers shot three police officers), a growing minority of police officers have begun to patrol armed. As the police have become more heavily armed, so have criminals; armed robberies and police armament closely correlate. [28]

The British police are mostly unarmed, and the Japanese police hardly ever draw their guns. Few people in either nation own guns. The Canadian police are well-armed, and more likely to use their guns than their British or Japanese counterparts. Canadian police use of guns legitimizes gun use in general, and is one reason why Canadians choose to own so many more guns, including handguns, than do people in Britain or Japan.

While some of Canada's local peace officers are unarmed, the federal R.C.M.P. (some of whom act as provincial or municipal \*294 police under contract from the Provincial Attorney General) all carry guns. [29] Most police cruisers carry a shotgun with buckshot loads in the trunk. [30] Although the Canadian police are well-armed, they do not use their firearms as frequently as their southern counterparts. In America, about a person a

day is killed by the police. The Canadian per capita homicide by police rate is less than a third of the American rate. [31]

In sum, one of the reasons that severe handgun controls have been partially successful in reducing handgun possession in Japan, Great Britain, and Canada, is that the police in each nation have, to varying degrees, minimized possession and/or use of handguns themselves; the examples set by the police and government may be an important reason why criminal and non-criminal civilians in those nations have, to varying degrees, voluntarily foregone the use of handguns. Accordingly, Dixon's proposal to allow police and security guards a broad exemption from his handgun prohibition may seriously undermine his proposal's chance for success. At the least, his proposal would need to be accompanied by drastic restrictions on the numbers of police authorized to carry guns, as well as major changes in the practices of police who do carry guns.

## **B. Handgun Density and Handgun Homicide**

Would handgun prohibition save lives? Dixon builds his argument primarily by comparing the United States with other nations. He begins by setting forth the estimated per capita handgun ownership rates, and the estimated per capita handgun homicide rates for the United States, Israel, Sweden, Canada, Australia, and Great Britain. With a few minor exceptions (which Dixon carefully notes), the countries with higher handgun density have higher handgun homicide rates. America has about 3.5 handgun homicides per 100,000 population; Israel has about 0.5 per 100,000 population, Sweden about 0.25, and Canada, Australia, and Great Britain all have less than 0.1.

Dixon assumes that any flaws in the data which underestimate or overestimate handgun density are roughly the same for each country. [32] The assumption may not be correct in case of Canada; there may have been a substantial underreporting of gun ownership by Canadians at the time the poll which he cites was taken, since the poll was conducted for the government while the government was **\*295** considering gun confiscation. [33]

In regards to the United States, there appears to be a distortion of a different nature. Of the countries Dixon discusses, Israel and the United States are the only ones in which use of deadly force in self-defense, and use of a gun for that purpose, is generally approved by the legal system. [34] As Dixon discusses later, Florida State University criminologist Gary Kleck suggests that 1,527 to 2,819 American homicides a year are actually justifiable homicides committed by citizens using a firearm to defend themselves or another person **\*296** against violent attack. [35] The FBI statistics showing lower self-defense numbers are flawed, Kleck says, because the statistics are based on arrests, rather than final disposition of cases. [36] Other countries, which may also report their homicide data based upon arrests rather than



convictions, are less likely to substantially overstate their homicide rate by mistaken counting of justifiable homicides, because such homicides are relatively rare. If we take Kleck's high-end estimate of 2,819 and low-end estimate of 1,427 justifiable or excusable American homicides, and figure that about 70% of those homicides involved a handgun (73% of civilian justifiable homicides recorded by the FBI involve a handgun), [37] then between 999 (1,427 x .7) and 1,973 (2,819 x .7) justifiable or excusable homicides should be subtracted from Dixon's total of 8,634 American homicides involving handguns. As a result, the unlawful American handgun homicide rate per 100,000 population would be somewhere between 3.01 (low-end estimate of justifiable homicides) to 2.66 (high-end estimate of justifiable homicides). [38] Thus, even after self-defense handgun homicides \*297 are properly counted, the American criminal handgun homicide rate is still substantially larger than any other country on Dixon's list, although the exclusion of self-defense homicides drops the total American handgun homicide rate significantly.

While the six countries that Dixon lists show a correlation between handgun density and handgun homicide, the correlation appears less firm when other western democracies are considered. As part of a comprehensive international survey of crime and attitudes towards crime, Martin Killias, Pat Mayhew and Jan van Dijk analyzed firearms ownership rates and firearms homicide rates for nine democratic nations. [39] Switzerland, with more guns per capita than all but the United States, had fewer firearms homicides per capita than six of the eight countries. [40] In response, Dixon might note that he is only arguing for the prohibition of handguns, and the fact that long gun density does not correlate with long gun homicide is not\*298 inconsistent with his hypothesis.

But even if Dixon's point that higher handgun density relates to higher handgun homicide is true, so what? Unless it is assumed that handguns are some intrinsically evil totem, what difference does it make what kind of weapon is used to kill a person? During one debate on tightening Canadian gun laws, member of parliament Stuart Leggatt praised the benefits of strict gun laws: "New York, which has a fairly respectable Sullivan law, has a 25 percent murder rate by firearms, whereas Dallas, where unrestricted use of firearms is allowed, has a rate of 72 percent of murder by firearms." M.P. Otto Lang replied: "The honourable member has made an interesting case which, if read carefully, shows that murder by knife is a nicer game than murder by gun. I cannot see the point of that." [41] Other gun control advocates make the same point of M.P. Leggatt and Professor Dixon, praising a reduction in handgun homicides per se, without looking to see if overall homicides have gone down. [42]

Obviously it is possible that a greater rate of handgun homicides also correlates with a greater rate of overall homicides, since handguns could be a weapon uniquely suitable to the promotion of homicide. Dixon argues as

much later in his article, [43] and I respond below in this article. [44] But in the meantime, it is important to recognize the limitations of what Dixon has demonstrated thus far. At the most, he has shown that there is a relationship between handgun density and handgun homicide. He has not demonstrated a relationship between handgun density and overall homicide rates; he has not even presented figures regarding overall homicide rates. Dixon asserts that the international evidence which he has offered makes, by itself, a prima facie case for handgun restrictions. [45] His point can only be valid if it is believed that a reduction in the handgun homicide rate, unaccompanied by a reduction in the overall homicide rate, would be a good thing in itself. For persons who do not believe that murder by knife or shotgun is a nicer game than murder by handgun, nothing that Dixon has presented, thus far, shows any utility at all from handgun prohibition.

Does low handgun density and/or stricter handgun control **\*299** lead to a lower total homicide rate? The comparative evidence suggests not necessarily. In Great Britain, handguns may only be obtained after an extremely rigorous licensing process involving police inspections of the applicant's home and months of delay. [46] Carrying a loaded or unloaded handgun is absolutely forbidden without a license, and licenses are virtually never granted. [47] Every handgun transaction must be approved in advance by the police, and every legally-owned handgun is registered. [48] In Switzerland, handguns are readily obtainable after a person obtains a simple police permit which is valid for three months. [49] During the three months, the permit holder may buy as many handguns as he wishes, and purchases are generally not registered. Fifteen of the twenty-six cantons, representing about 57% of the population, have permit procedures for carrying handguns (some of which make permits difficult to obtain); the other cantons, representing 43% of the population, have no rules requiring a person carrying a loaded handgun to obtain any permission at all. [50] In England and Wales, the homicide rate per 100,000 population is 1.1; in Scotland (for which government statistics have always been recorded separately) the rate is 1.7. In Switzerland, where the handgun laws are immensely more lenient than in Great Britain, the rate is 1.1. [51] In the nine-country study detailed above, Switzerland had the third-lowest homicide rate, even though its handgun laws are less restrictive than all countries in the study except the United States. [52] (Indeed, most of the American states with high homicide rates have stricter handgun laws than Switzerland.) [53]

As Dixon points out later, Switzerland has a higher rate of handgun homicide than the other countries he analyzes, such as Australia, Canada and Britain. [54] Yet Switzerland, with a murder rate of 1.1 per 100,000 has a much lower murder rate than Australia (2.7) **\*300** and Canada (2.5), and a somewhat lower murder rate than Great Britain (1.1 for England and Wales, 1.7 for Scotland). [55] The data suggest that there is not necessarily a relationship between the handgun homicide rate and the overall homicide rate.



American data also fails to provide support for a strict relationship between handgun density and total homicide. Population groups which are highest in handgun ownership rates—namely wealthier people, Protestants, whites, and rural populations—all have lower homicide rates than other groups. [56] In addition, the American homicide rate rose tenfold in the first three decades of the twentieth century [57] but U.S. per capita handgun ownership remained stable. Between 1937 and 1963, handgun ownership rose by 250 percent, but the homicide rate fell by 35.7 percent. Homicide fell again in the early to mid 1980s, even as handgun ownership was surging. [58] Of course there were likely confounding factors in the historical American data. One reason that the American homicide rate rose so sharply in the 1920s was the violence caused by alcohol prohibition, and one reason that the homicide rate fell from 1937 to 1963 was the improved quality of medical care. I am not suggesting that the evidence presented thus far proves that increased handgun density does not cause increased total homicide. I do suggest, however, that the evidence developed so far by Dixon shows no reason to believe that lower handgun density would save lives, although lower handgun density may, arguably, be associated with lower number of handgun homicides.

### **C. The Burden of Proof**

Dixon next proceeds to argue that the international correlation between handgun density and handgun homicide is not merely a co-incidence, but the result of a cause and effect relationship. Even if Dixon is, at the end of the exercise, found to be completely successful in proving his point, he has not yet shown evidence that adopting a handgun ban will save lives, although he will have (if successful), shown that the number of handguns in a society does correlate with the number of homicides by one particular method.

Unlike some proponents of handgun prohibition, Dixon does not claim that handguns are the only cause or the most important \*301 cause of the high American handgun homicide rate (or of the high overall murder rate). [59] He offers the more intuitively plausible argument that high handgun density is simply one important cause of the high handgun murder rate in America. In order to prove the cause and effect relationship between handgun density and handgun homicide, Dixon sets up a two part test for himself: 1. Show that no variables other than the cause (high handgun density) better correlate with the effect (high handgun homicide); 2. Provide a "probable theoretical explanation of how the causation occurred." [60]

Immediately after setting up the two part test for what he has to prove, Dixon alters the terms of the debate so that he is certain to win. Dixon had defined item 1 of his burden of proof to be showing that no variables other than handgun density better correlate with high handgun homicide. To prove item 1 of the hypothesis, Dixon would have to look at other variables which might affect handgun homicide (such as poverty, racial problems, or police density), and show how those variables correlate with handgun homicide.

Dixon could, by his initial terms, prove item 1 of his test true by showing that handgun density correlates with handgun murder better than do other variables such as poverty. But before beginning the test, Dixon switches the terms. He acknowledges that there are several non-gun causal factor variables which correlate with handgun homicide, but "none of them is nearly strong enough to be considered as the only cause, and hence disprove my hypothesis." [61] Thus, Dixon will consider item 1 of his hypothesis confirmed unless it can be proven that some murder-related variable (such as race or police density) is the only variable in handgun homicide.

Dixon's new standard is illogical. Rather than showing the relationship between alleged cause (handgun density) and effect (handgun homicide) by demonstrating handgun density is the best variable, Dixon claims that cause and effect will be proven simply by showing that no other potential cause can be considered "the only cause." Since almost all human behaviors, including homicide, spring from multiple causes, it is unlikely that any variable which helps cause handgun murder would be "only" cause. Thus, Dixon guarantees in advance that he will satisfy item 1 of his test. [62]

**\*302** Dixon then attempts to satisfy item 2, which required him to offer a "probable theoretical explanation of how the causation occurred." [63] As to providing a theoretical explanation, Dixon asserts "one need not go beyond common sense." [64] Dixon's defense of "common sense" as a satisfactory offering of a "probable theoretical explanation of how the causation occurred" begins with an assumption which he apparently considers non-controversial: "Assuming human nature to be relatively similar in different developed countries ... one would expect people to be subject to roughly similar amounts to stress, provocation ... and whatever other factors are liable to lead some people to violence." [65] But the assumption that human nature is "relatively similar in different developed countries" is not intuitively obvious. As a simple example of the differences in human nature, consider how people behave on a bus. The Swiss mass transit systems successfully depend on voluntary payment, [66] but any American subway or bus system that depended on the honor system for payment would quickly go bankrupt. Likewise, Swiss pedestrians almost always wait at traffic lights, even when there is no traffic. [67] In most major cities, American pedestrians apparently feel entitled to walk even when traffic is rushing forward. Could it be that the Swiss are, by nature, more cautious, more honest, or more law-abiding than Americans?

Automobile plants, steel mills, and coal mines are generally similar around the world, and if Dixon's assumption about human nature also being generally similar, industrial relations laws which work on one developed nation's coal mines ought to work about as well in another nation's technologically similar coal mines. But attempts to impose one nation's labor laws on another's labor force have failed badly. [68] The British Industrial

Relations Act, which was modeled after American statutes, attempted to outlaw the closed shop and to make unions liable for their members' actions, but the law did not work. One commentator concluded that the act's down-fall resulted from attempting to change human nature by statute and to alter existing national patterns of labor relations. [69]

Traffic and transit habits notwithstanding, perhaps the Swiss **\*303** really are essentially like Americans; and labor law experiences notwithstanding, perhaps working people are the same throughout the developed world; and the perhaps the researchers who believe they have found profound difference in human nature across cultures are wrong. But at the least, the assumption that human nature does not vary significantly among countries is hardly an easily-accepted starting-point for a "common sense" argument.

Having assumed human nature to be similar throughout developed countries, Dixon then assumes that people in those various countries are "subject to roughly similar amounts of stress, provocation, jealousy, anger, desperation, resentment of other people's affluence, and whatever other factors are liable to lead some people to violence." [70] The second assumption is even less supportable than the first. Perhaps people everywhere are subject to roughly the same amount of "resentment of other people's affluence," and perhaps everywhere a given amount of resentment will lead to a given amount of violence. Even so, resentment-based violence would still vary across cultures depending on the types of disparities of affluence. For example, in countries where the income spread between the rich and the poor is very large (as in America and France), there would logically be more resentment (and thus more resentment-based violence) than in countries where income gaps were smaller, such as Japan. [71] Similarly, one might expect different amounts of resentment-based violence in a society where class differences are seen as part of a long-standing social order (such as Great Britain) than in a society whose ideology insists that every person who is not wealthy has only himself to blame (such as the United States).

Similar arguments can be offered regarding rest of Dixon's list of violence-inducing provocations. While all people may react similarly to desperation, there could be considerably less desperation in countries which have effective social welfare systems than in countries which do not. While all people may (arguably) react similarly to jealousy, there may be different amounts of jealousy in countries where divorce is often considered socially unacceptable (such as Switzerland) than in countries where divorce is widespread.

Having assumed - perhaps prematurely - that people in all developed countries are basically the same and they are subject to basically the same amounts of factors which induce some people to violence, Dixon comes to the climax of his "common sense" argument: **\*304** If one of these nations has a vastly higher rate of private ownership of handguns, one would expect that the similar provocations to violence would spill over into handgun murder far

more often than in other nations." [72] Here Dixon has done nothing more than restate the intuition that began his article. Persons who, like Dixon, "expect" that handguns cause handgun homicide may have their intuition reinforced, but nothing Dixon has offered is sufficient to prove anything.

Having announced that he has met his burden of proof, Dixon then suggests that the burden of proof regarding handgun prohibition should be shifted to the opponents of prohibition, and that they should be forced "to produce an alternative causal account which proves that the United States' high handgun murder rate is caused by factors unrelated to its high rate of handgun ownership." [73] He then turns to discussion of several authors to whom he assigns the role of meeting his "burden of proof challenge." [74]

Dixon notes that two of America's most prolific writers on the gun issue, Don Kates and Gary Kleck briefly advert to "factors other than the higher prevalence of handguns in the U.S." which could be responsible for the higher U.S. handgun murder rates. Dixon finds the Kates argument unsatisfactory since Kates simply states that other cultural factors could be at work, but does not detail what they are; [75] Kleck does somewhat better, in Dixon's view, by spending a page and quarter arguing for improved job training and anti-poverty programs. [76] Dixon asks, not unreasonably, for opponents of handgun prohibition to provide considerably more detail to support their argument that factors other than handgun density explain the high American handgun murder rate.

If volume is what Dixon wants, it can be provided. My recent book takes on the challenge of providing many explanations for America's high handgun murder rate. The book runs 442 pages, and contains more than 1,900 endnotes, perhaps enough to meet Dixon's request for detailed analysis. Whether the book is persuasive can only be decided by persons brave and/or foolish enough to venture into such a tome, but a list of reasons for America's high handgun murder rate can be summarized here:

More than any other society in recorded history, the United States is premised on individualism. Mistrust of government, and faith in individual initiative are so deeply ingrained in the American **\*305** character that Americans may not understand how aberrational they are until they look at other countries. (To give a small example, America's major liberal party, the Democratic Party, supports less government intervention in the economy than do the right-wing parties in Canada and Great Britain.) American mistrust of government means that American police are less powerful legally, and less respected in the community than in most other democratic nations. Further, American police are constrained by Bill of Rights-based protections such as the exclusionary rule and the Miranda warnings that do not exist in other nations. [77] At the same time, the American government has chosen to fight a "war on drugs" with much more intensity than other nations have, and as a result, America's prisons are increasingly filled with small-time

drug dealers serving lengthy mandatory minimum sentences, while persons perpetrating serious violent crimes, including crimes with handguns, face a smaller and smaller expected sentence. [78] And of course American rates of abuse for drugs such as cocaine which have a psychoactive effect in lowering inhibitions against violence are higher than in other countries.

While the government is less able to control crime, Americans are more willing than the people of other nations to commit crimes. America's pervasive individualism means that Americans, compared to the peoples of other democratic nations, are less bound to the standards of family, church, employer, community, or state than other peoples. For the most part, American individualism and freedom produces benefits, such as America's great artistic creativity and its high rate of mechanical invention. But the weakening of social control leaves some people without the restraints that might, in other societies, prevent them from becoming criminals. While American criminals are increasingly ruthless and callous toward human life (even their own), even the criminals of other nations retain ties to the social order which would be incomprehensible to Americans. For example, Japanese gangsters, when tipped about an imminent police raid by corrupt informants, will speedily vacate the premises, but will leave a few handguns behind for the police to confiscate, so that the **\*306** police conducting the raid do not lose face. [79] Few American criminals display much concern for the emotional well-being of the police.

American individualism fits into a capitalist economy where survival of the fittest and blaming of victims for their own plight are emphasized more than in other countries. Income inequality is greater in America than in other nations; the social welfare safety net is considerably worse (and in some respects criminogenic); and the American ideology labels every poor person a failure. All of the above reinforce each other to produce high levels of resentment-based crime. The effect is enhanced by the American ideology of social equality in which persons are taught that there are no legitimate classes, and that one person is as good as another, which leads (in the minds of some poor people) to the conclusion that a poor person has a much right to a rich person's property as does the rich person.

Combined with unintended side effects of a strongly individualist, capitalist economic system are the effects of racism. America is more racially diverse than all developed democracies, and America's racial problem far exceeds those of other nations. Only in America was a major part of the population brought into the nation via kidnapping, enslaved for more than two centuries, viciously oppressed and segregated for another century, and then "liberated" into a destructive welfare system.

In addition, from the first moments of white settlement, America's history has legitimated and encouraged violence. While the whites moving into Australia quickly dispatched resistance from the stone-age Aborigines, and



while the Canadian government successfully negotiated Indian treaties to peacefully settle the Canadian frontier, the United States of America was wrested from Indian hands by a savage war of genocide that lasted three centuries. The cruel war between Indians and whites helped inculcate in white Americans the "heroic" willingness to die to protect what one has and the less than heroic willingness to kill to get what one wants. While America had 69 Indian wars, Canada had none. [80]

Unlike Great Britain or Canada or Sweden or Australia (but like Israel and Switzerland), the United States won its independence through a long and difficult war of national liberation, in which ordinary citizens bringing their own weapons to battle with an imperial standing army played a decisive role. Later, the American Civil War led to government-sanctioned killing on a vast scale, as well a \*307 sanctification of that killing for the noble ends of abolition or for the South's supposedly glorious "lost cause."

While the Canadian west was peacefully settled under the supervision of a Mounted Police Force that was on hand to provide law and order before settlers began to arrive, the American frontier, whether the frontier was western Pennsylvania in the early 18th century or Nevada in the late 19th, was a Hobbesian, chaotic world, where government was ineffectual, and individuals had to protect themselves with force or die. (The influence of handguns in the American west is discussed below.) [81]

In the urban eastern United States, meanwhile, rapid industrialization and massive immigration proceeded simultaneously (as they did not in most other democratic nations), and immigrants, rather than coming from a relatively small region (such as the British Isles immigrants who settled Australia and New Zealand) came from astonishingly disparate backgrounds, and frequently encountered problems adapting to their new nation. Partly as a result, the violent crime rate in 19th century cities such as Philadelphia was far higher than in America's "wild west." Again and again, Americans displayed an unusual willingness to use violence to achieve their ends. Unlike the more accommodating British capitalists, American captains of industry of the 19th century were quick to use violence to suppress labor militance. In sum, for an immense variety of reasons, America is more violent than other nations, and would be even if handguns had never been invented.

Of course the above paragraphs are only an outline of the arguments detailed in *The Samurai, the Mountie, and the Cowboy*, and persons who are unpersuaded by the outline might or might not be persuaded by the book itself. Dixon's challenge to provide a causal explanation for something other than handgun density to explain the high American handgun murder rate is, arguably, met by *The Samurai, the Mountie, and the Cowboy*.

Dixon, for his part, does not deny that there are factors other than handguns at work in the American handgun murder rate, or that we should take steps to address those measures. [82] He does note, correctly, that explication of



those other factors does not disprove his **\*308** hypothesis that handgun density causes handgun murder. [83] True enough, since, as he also notes, it is impossible to disprove a causal hypothesis simply by suggesting alternative causes. [84] But if the historical and cultural analysis of the United States which I offered above is true, then it is certainly possible (although not provable) that handgun density plays a small role, or even no role, in America's violence and murder problem. By way of proof, Dixon has thus far done nothing more than to point out that, in six countries for which he compiled statistics, handgun density correlated with handgun homicide, with the United States having the highest levels of both. Given the fact that there are numerous violence-inducing factors at work in the United States which are not at work in the other countries Dixon tallies, Dixon is a very long way from proving that handgun density is a significant cause in America's high handgun murder rate, or even a medium-sized cause.

The weakness of Dixon's assertion that he has proved a relationship between handgun density and handgun homicide is illustrated by the fact that his analytic technique can be used just as easily to "prove" that handgun controls cause handgun homicide. Instead of looking at 6 countries, as Dixon does, let us look at 6 American cities. How about Washington, D.C., New York City, Los Angeles, Memphis, Denver, and Salt Lake City? These cities are listed in decreasing order of homicide rates. [85] The cities are also listed in decreasing severity of handgun laws. [86] Just as Dixon notices that countries with fewer handguns have fewer handgun homicides, I notice that American cities with fewer handgun laws have fewer handgun homicides.

Next, like Dixon, I ask whether the relationship between lenient handgun laws and low handgun homicide is one of cause and effect, or simply a coincidence. Pursuant to Dixon's analytic method, to prove a cause and effect relationship, I must do two things. First, "show that there are no other variables which correlate better with the effect, and would account for the effect better than, or in place of, the posited cause." [87] Regarding the first item, I, like Dixon, "do not rule out the existence of other causes," such as racial, economic, **\*309** or population density variables as partial explanations of why cities with lenient handgun laws have lower handgun homicide. [88] Like Dixon, I will have satisfied prong one of the burden of proof analysis as long as no one can point to another causal factor that is "strong enough to be considered as the only cause and hence disprove my hypothesis." [89] Since neither race, religion, economics, nor any other likely cause of low handgun homicide rates can be proven to be the only cause, I have (by Dixon's reasoning) met prong one of the burden of proof.

To meet the second prong of the Dixon burden of proof, I must provide a "theoretical explanation" of why lenient handgun laws correlate with low handgun homicide rates. [90] For a theoretical explanation, I, like Dixon, "need not go beyond common sense." [91] He begins by "[a]ssuming human

nature to be relatively similar in different developed democratic countries," so I will assume human nature to be relatively similar in different large American cities. Human nature having been assumed to be similar, Dixon then assumes that people in various countries are subject to "roughly similar amounts" of whatever factors "are liable to lead people to violence." I make the same assumption regarding people in various American cities. [92] Finally, I like, Dixon, provide a simple explanation for how my theory could work, simply substituting or adding a few words in Dixon's explanation: "If one of these nations [cities] has a vastly higher rate of private ownership of handguns [thanks to lenient gun laws], one would expect that similar provocations to violence of violence would spill over into handgun murder far more [less] often than in other nations [cities]." Note that Dixon's "theoretical explanation" [and my plagiarization of it] are not a theoretical explanation at all, but simply a statement of a hypothesis. His hypothesis is that handguns make murder more likely. My hypothesis is that handguns in the hands of non-criminal persons make murder less likely, by deterring criminal attack.

If you are not persuaded by my "proof" of my hypothesis - and you should not be - you also should not be persuaded by Dixon's proof of his hypothesis. Dixon's hypothesis could be true, as could mine, but neither of us has done more than present a simplistic and limited data set for which there are so many potential confounding \*310 variables that any claim to proof based on the data is hopelessly premature.

#### **D. Snow and Guns: Switzerland and Canada**

To support his hypothesis, Dixon turns to two foreign comparisons, one involving Switzerland, and the other involving a study of Seattle and Vancouver. Dixon notes that opponents of gun control often advert to Switzerland, where the government gives every adult male a full automatic assault rifle. [93] Dixon replies that whatever policy the Swiss have towards long guns does not disprove his case for handgun control. [94] In addition, Switzerland, while having a handgun murder rate lower than America, has a handgun murder rate higher than do Sweden, Australia, Canada, and Britain. [95] Dixon is right, but as discussed above, Switzerland has an overall murder rate lower than those other nations. [96] The Swiss evidence suggests, therefore, that while handgun density might correlate with the handgun murder rate, handgun density does not correlate with the total murder rate. Except for persons who think that murder by a handgun is somehow worse than murder with another weapon, handgun prohibition offers no benefits.

Dixon also notes that in Switzerland, gun ownership takes place in the context of "mandatory service in a citizens' militia, with its attendant training and discipline, which bears no comparison with the minimally controlled private handgun ownership in the United States." [97] The observation is not precisely accurate; while militia officers are issued

handguns for militia service, every adult in Switzerland can purchase private handguns under conditions less restrictive than those in many American states. [98]

More generally, it might be argued that, although Switzerland has a high rate of handgun ownership, it has a low homicide rate because\*311 other factors unique to Switzerland depress the homicide rate. More so than the citizens of most other democratic nations, the Swiss retain close ties to communities where their ancestors have lived for centuries; the patriarchal Swiss family system is strong; violent cinema is censored; and a tight network of social cohesion helps keep violent crime of all types very low. [99] Conversely, the very factors which keep violent crime in Switzerland low are conspicuously absent in the United States. [100] Accordingly, analysis of Switzerland and the United States could suggest that handgun density is no more than a trivial variable in overall homicide rates, being dwarfed by other socio-cultural factors.

After Switzerland, Dixon moves to the most well-known study of the impacts of foreign gun controls, a 1988 comparison of Seattle and Vancouver published in the *New England Journal of Medicine*. [101] The NEJM article contrasted Seattle, with its higher homicide rate, and Vancouver, with its lower rate. The article observed that Vancouver had stricter handgun laws than Seattle, and a lower handgun homicide rate. Many economic variables were similar in Seattle and Vancouver, and Seattle and Vancouver had roughly comparable robbery and assault rates. Seattle's homicide rate, however, was about 50% higher, and most of the excess homicides in Seattle were the result of handgun homicides.

In reading the Seattle-Vancouver study to demonstrate that handgun density causes handgun homicide, Dixon points to Vancouver's "significantly stricter gun control laws." In particular, "Vancouver does not allow concealed weapons and grants handgun permits for sporting and collecting purposes only. Handguns may be transported by car only if they are stored in the trunk in a locked box." [102] While Vancouver has long had stricter controls on the carrying of handguns, the most important aspect of the Vancouver law - the ban on owning handguns for self-defense (and the consequent prohibition of storing a loaded handgun in the home) was enacted in 1977 and went into effect in 1978. (The laws on carrying handguns outside the home were also tightened in 1977.) [103] If Dixon's hypothesis\*312 about handgun density and handgun homicide is correct, then Vancouver's murder rate would be expected to fall after the 1977 law. But in fact, Vancouver's handgun homicide rate (as well as the overall homicide rate) after the law went into effect remained the same as in the years before the law. A study sponsored by the Canadian government (which had an interest in finding the gun laws to be effective) found no evidence that the 1977 law had reduced handgun homicide in Vancouver. [104]

Critics of the Seattle-Vancouver study have also pointed to the importance of race in explaining the differing homicide rates in the two cities. Brandon Centerwall, a professor of Epidemiology at the University of Washington, suggests that if the homicide data "were subjected to a Mantel-Haenszel summary odds ratio, stratifying by race, the differences in homicide rates between Seattle and Vancouver would cease to be statistically significant." [105] J.H. Sloan, lead author of the Seattle/Vancouver study has declined to calculate the ratio.

Although Seattle whites have easier access to handguns than Vancouver whites, Seattle whites are no more prone to commit homicide than Vancouver whites. The fact casts serious doubt on the Dixon hypothesis that handgun density per se causes handgun homicide. In contrast to the Swiss, Seattle whites do not necessarily live under cultural conditions which serve to minimize handgun violence despite a high prevalence of handguns.

That Seattle had a higher overall homicide rate than Vancouver was due entirely to murders involving Blacks and Hispanics, who together comprise about 12% of the Seattle population, but less than 1% of Vancouver's. As Dixon notes, the fact does not itself disprove the need for gun control in America. The Seattle data would be consistent with a weaker version of the Dixon hypothesis: handgun density causes handgun homicide, but only among groups (such as American Blacks and Hispanics) who for other reasons are already vulnerable to violence.

While the Seattle-Vancouver data does not disprove a modified **\*313** version of the Dixon hypothesis, neither does the data convincingly support the hypothesis. The hypothesis would be supported if Canada, like the United States, had a large racial minority population that had been enslaved and otherwise oppressed and brutalized for more than three centuries. If that comparable Canadian racial group existed in Vancouver and had a substantially lower homicide rate than the Blacks and Hispanics of Seattle, then the modified Dixon hypothesis would be supported. But Blacks and Hispanics are less than 1% of the Vancouver population, and their history in Canada is, to Canada's credit, more benign than the history of Blacks and Hispanics in America. [106] The small numbers of these groups in the Vancouver population make the drawing of statistical inferences regarding their handgun murder rates problematic.

In sum, two non-controversial points can be concluded from the New England Journal of Medicine's Seattle-Vancouver study:

1. Among groups not at risk of violence (whites in Seattle and Vancouver), increased handgun density was not associated with increased risk of handgun homicide;
2. Among high-risk groups (Seattle Blacks and Hispanics), there was a high handgun homicide rate, but it is impossible to conclude that gun control

would or would not reduce the rate since a similar population was not present in large numbers in Vancouver.

At this point, it may be useful to note briefly some other data and studies analyzing American and Canadian crime rates to test for the efficacy of gun control laws. The overall death rate for non-hispanic white Americans from all types of shootings (murder, suicide, accident, etc.) is the same as the rate for Canadians, even though American whites own far more handguns per capita than do Canadian whites. [107] In American states which border Canada, the homicide rate is generally no higher (and often lower) than in adjacent Canadian provinces. [108]

A study by Robert J. Mundt study compared twenty-five \*314 Canadian cities with twenty-five comparably-sized American cities. When the covariates of "percent Black" and "city size" were considered, the difference between American and Canadian samples diminished to the point of insignificance. [109] Another study by Mundt compared Winnipeg with Minneapolis/St. Paul, and Duluth with Thunder Bay, both city pairs having many similarities. [110] Mundt's four-city study found that racial composition and city size were not sufficient to account for all of the crime rate differences between the American and Canadian cities, and thus Mundt could not exclude the possibility that the Canadian gun laws had crime-reductive effects. [111]

In sum, the Canadian data does not conclusively disprove Dixon's hypothesis, but the data, at best, does no more than weakly support the hypothesis. If, as Dixon seems to acknowledge, handgun ownership presents a problem mainly among at-risk population groups, directly addressing the problems of those groups might be a more efficacious way to reduce handgun homicide than to implement across-the-board handgun prohibition, which, as will be discussed below, would have a devastating effect on the American criminal justice system, possibly leading to increased violent crime, and almost certainly leading to massive erosion of the Bill of Rights. [112]

\*315

## II. OBJECTIONS TO HANDGUN PROHIBITION

### A. Interstate Data

Finished with international comparisons, Dixon turns to interstate analysis. If gun controls reduced crime, then it would be expected that states with stricter gun laws would have lower gun crime rates. But as Dixon acknowledges, states with stricter gun laws have higher crime rates. [113]

There are several possible explanations. First, the states which enacted the strict gun laws had high crime to begin with; that is why the stricter laws were enacted.

A second, not inconsistent explanation, is that gun control itself causes higher crime, making the already high-crime states even worse than they would otherwise be. Dixon deals with the explanation by dismissing it as "perverse." [114] Argument by epithet is not persuasive, and (as will be discussed below), there are plausible reasons to believe that some gun controls may increase crime, and that Dixon's proposed handgun ban would substantially aggravate crime. [115] Dixon admits that at least sometimes handguns prevent crime, [116] so it is hardly "perverse" to suggest that it could be possible that states which weaken the deterrent effect of civilian handgun ownership suffer increased crime.

A third explanation for why states with stern gun laws have more crime than other states is that guns from other states, with looser laws, are smuggled into the high crime states, thus reducing or eliminating the crime-reductive effect of the strict state's law. This explanation is not inconsistent with the first two explanations. Dixon devotes the rest of his interstate discussion to arguing for this third explanation.

Even if Dixon's explanation about leakage is generally true, it remains difficult to account for the dismal performance of many gun controls. For example, in 1976 the Washington, D.C. murder rate stood at 26.9 per 100,000 population, according to FBI statistics. The city council enacted a handgun ban which went into effect in February \*316 1977, and since then the Washington rate has always been higher than 26.9 (except in 1985). [117] Today, the rate is three times higher than it was before the ban was enacted. [118] If handgun bans work, why would the homicide rate rise after 1977 (which was years before the "war on drugs" made Washington's homicide problem even worse)? Smuggling guns into Washington, D.C. from other states was no easier in 1980 than it was in 1976. The ban on possession by law-abiding citizens should have reduced the supply of handguns available for Washington, D.C. criminals to steal, and should have prevented law-abiding citizens from shooting each other with handguns in heat-of-passion homicides. The D.C. handgun ban's impact on law-abiding citizens would not be defeated by interstate smuggling, since law-abiding citizens would, by definition, not buy an illegal gun. And yet the Washington homicide rate rose. Similar increases in gun crime in other jurisdictions, such as Chicago after its own handgun ban, [119] and New York City after its severe "Sullivan" handgun licensing law, [120] at least raise doubt about the complete sufficiency of interstate gun smuggling as an explanation for the failure of the gun laws. If interstate smuggling were the whole story, then it would not be expected that crime rates would rise immediately after gun laws were enacted.

These doubts may be enhanced by analysis of gun controls in other nations with uniform national handgun laws, and consequently no problem regarding interstate smuggling. Neither Canada's 1977 gun controls nor the Pistols Act



of 1903 in Great Britain nor the Firearms Act of 1920 in Great Britain, were associated with reductions in handgun crime. [121]

To support the theory that interstate gun-running explains why states with severe gun controls have so much more crime than states which do not, Dixon points to a study published by the Bureau of Alcohol, Tobacco and Firearms in 1976. [122] Comparing "crime guns" found in Atlanta, New Orleans, Detroit, and New York City, BATF \*317 found that the cities in the states with the stricter gun laws (Detroit and New York City) had smaller percentages of traced guns with origins within their states. The correlation between stricter laws and a higher percentage of out-of-state guns was not, however, exact. New York City has much stricter gun laws than Detroit, but 23% of New York City handguns came from New York State, whereas only 8% of Detroit guns came from Michigan.

Several limitations of the BATF methodology should be noted. First, the "crime" guns included not only guns used in violent crime, but also guns which were simply found on citizens who had not complied with local licensing laws, such as New York City's, which at the time made it nearly impossible to obtain a handgun license. [123] One analysis of handgun seizures (conducted by a handgun prohibitionist), found that 20 to 25% of police handgun seizures were not associated with any crime, not even a licensing violation. Some of the guns may simply have been turned into the police by lawful owners who wanted to get rid of them. [124] BATF made numerous methodological errors, such as counting some guns twice, or counting guns seized outside the time period for the study. [125] More importantly, the study did not detail how the guns moved from one state into another. For example, a gun which was lawfully purchased in Ohio, stolen, and then sold on the black market in Detroit was not distinguished in the BATF data from a gun which was bought illegally in Ohio by a Michigan criminal, as a result of Ohio's "lax" gun laws. [126]

But assume that Dixon's broader point is correct, and that more lenient gun laws in some states undermine more severe laws in other states. Accordingly, suggests Dixon, a comprehensive federal handgun law would be necessary. But would a federal handgun succeed? Dixon acknowledges that even if interstate smuggling of the current American gun stock somehow ended, guns would still be available from illegal manufacture and illegal import. [127] Indeed illegal \*318 gun production is already not unheard of; a Bureau of Alcohol, Tobacco and Firearms study found that one-fifth of the guns seized by the police in Washington, D.C., were homemade. [128]

Dixon expects the "fact that such guns are inaccurate and dangerous to the user will also act as a restraint to illegal gun production." [129] How much of a restraint may be open to doubt. While homemade guns will not win target-shooting contests, target shooters will have their own guns (kept at shooting ranges under the Dixon proposal), and homemade guns may suffice for

robbery purposes. And most homicides, like most robberies, are perpetrated at very close range where accuracy is not an issue. The risk that a homemade gun could explode in a shooter's hand may deter some otherwise law-abiding citizens who would want to own an illegal handgun for protection. On the other hand, if the person believes that the threats to his or her life and family are serious enough to commit the serious crime of buying an illegal handgun, the additional risk posed by potentially defective handgun may seem small. In addition, newfound popularity for bootleg guns might result in handguns becoming cheaper than they are now, just as in alcohol prohibition days, bootleg gin often cost less than legal alcohol had. If handguns were cheaper, they might become more available to small-time teenage criminals and other low-end miscreants; criminals might end up more widely armed than ever before.

The inevitable black market in homemade and imported illegal handguns would provide a major new revenue source to organized crime. As the black market in alcohol helped create and enrich organized crime in the United States, the new black market in handguns would fund and strengthen organized crime all the more.

Dixon also acknowledges that illegal handguns would also flow in across American borders. [130] Indeed, if small handguns were imported in the same physical volume as marijuana, 20 million would enter the country annually. (Current legal demand for new handguns is about 2.5 million a year). [131]

Responding to the argument that imported guns will render the handgun ban useless, Dixon draws an analogy to the drug war. \*319 Illegal imported drugs help to undercut a domestic ban on their possession and sale, but "This possibility would not seriously be entertained as a reason for giving up the fight against dangerous drugs made in the United States. What is called for is an assault on both domestic and imported drugs." [132] The analogy Dixon draws between the drug war and his proposed handgun war is apt, but the drawing of the analogy highlights the danger posed by the proposed handgun assault, as the next section argues.

## **B. War on Drugs and War on Guns**

Some economists argue that drug prohibition should be abandoned because no matter how much a government attempts to prohibit a commodity, the market will always produce enough of the commodity to satisfy consumer demand. [133] Swimming against the basic economic principle that the market will generate supplies of commodities to meet consumer demand, the drug prohibition laws have led to wholesale destruction of civil liberties. The War on Drugs has now become a War on the Constitution, and the American people have become, in the eyes of their government, a society of suspects.

[134]

If a Black person buys an airplane ticket with cash, he risks being stopped by police at the airport, and having his money confiscated. Persons who fit "drug courier profiles" may be detained and harassed by the police, although such profiles include getting off the plane early, late, or in the middle as an element of the profile. [135] Infrared sensors spy into people's homes, with no probable cause. [136] Except in the home, the Fourth Amendment's probable cause requirement has been mostly abolished by a "law and order" Supreme Court. [137] Under forfeiture laws, billions of dollars of private property have been seized from persons who have never been charged, let alone convicted of any crime. [138] Pre-trial detention, a gross contradiction\*320 of the presumption of innocence, has become routine. Citizens traveling on busses, on trains, or in private cars are liable to be pulled over and searched by police and drug-sniffed by police dogs for no reason at all. [139] Urinalysis has become a routine condition of initial or continued employment, and the medical privacy of many persons taking lawful prescription medication has been compromised as a result. [140] Stalinesque "Drug Abuse Resistance Education" programs in the schools encourage children to turn in their parents for illegal drug possession. [141] Attractive young police officers pretend to be high school students, and pester socially awkward teenagers into selling them drugs. [142] Punishment for crime has become grotesquely disproportionate to the offense, as teenagers in possession of \$1,500 worth of LSD are sent to prison for longer terms than kidnappers and arsonists. [143] America has a higher imprisonment rate than any other nation in the world, and yet violent criminals serve less and less time in prison as America's rapidly expanding prison industry takes in more and more young people convicted of drug offenses. [144] The United States Army is conducting domestic law enforcement operations in California and Oregon; the National Guard has been turned into a militarized drug police. [145] Wiretapping has never been more common. [146] Financial privacy has vanished as banks must report currency transactions; car dealers must report \*321 customers who buy with cash. [147]

And what has this massive loss of liberty bought? Cocaine and heroin are cheaper, purer, and more widely available than ever. [148] Marijuana use is down, and so now college students who would have quietly gotten high engage in binge drinking. [149] A magnificent legacy of civil liberties, slowly constructed over 200 years, has been squandered to attempt to prevent the American people from choosing which substances they wish to ingest.

As the malignant cancer of the Drug War eats away at the Bill of Rights, Dixon proposes more of the same, by adding handguns to the government's list of prohibited items. The damage to the Bill of Rights could be greater than that resulting from the drug war. Gun controls have always been associated with intrusive searches and seizures in violation of probable cause. Judge David Shields of Chicago's firearms court observed: "Constitutional search and seizure issues are probably more regularly argued in this court

than anywhere in America." [150] As early as 1933, one quarter of all weapons arrests in Detroit were dismissed because of illegal searches. [151] According to the American Civil Liberties Union, the St. Louis police have conducted over 25,000 illegal searches under the theory that any Black driving a late-model car must have a handgun. [152] The Chicago Police Department gives an officer a favorable notation in his record for confiscating a gun, even as the result of an illegal search. [153] As a practical matter, one cannot comply with the Fourth Amendment probable cause requirement and also effectively enforce a gun prohibition. Former D.C. Court of Appeals judge Malcolm Wilkey thus bemoaned the fact that the exclusionary rule, "has made unenforceable the gun control laws we now have and will make ineffective any stricter controls which may be devised." [154] Judge Abner Mikva, usually on the opposite side of the conservative Wilkey, joined him in identifying the abolition of the exclusionary rule as the only way to enforce gun control. [155]

**\*322** Abolishing the exclusionary rule is not the only proposal designed to facilitate searches for illegal guns. Harvard professor James Q. Wilson, the Police Foundation, and other commentators propose widespread street use of hand-held magnetometers and walk-through metal detectors to find illegal guns. [156] The Bush administration began buying magnetometers for city police departments in 1991. The city attorney of Berkeley, California, has advocated setting up "weapons checkpoints" (similar to sobriety checkpoints), where the police would search for weapons all cars passing through selected neighborhoods. [157]

The Police Foundation has also proposed that law enforcement agencies use informers to ferret out illegal gun sales and model their tactics on methods of drug law enforcement. [158] Taking this advice to heart, the Bureau of Alcohol, Tobacco and Firearms already relies heavily on paid informants and on entrapment - techniques originated during alcohol prohibition, and honed in modern drug enforcement. [159]

Gun control laws, already destructive of Bill of Rights liberties, will become considerably more destructive if the Dixon prohibition proposal is enacted. About a quarter of all American families own handguns. [160] A 1979 survey of Illinois gun owners indicated that 73 percent would not comply with a gun prohibition. [161] Thus, the number of new "handgun criminals" will become at least as large as number of drug criminals. Handgun criminals will be much harder to catch than drug criminals, since an illegal handgun owner need only make a one-time buy (or just hold on to what she already has), whereas persons disobeying drug and alcohol prohibitions must buy **\*323** new supplies as old supplies are consumed. Accordingly, an effective prohibition would likely have to be enforced with house to house searches.

The forfeiture abuses associated with the drug war could also translate easily into the handgun war, as otherwise law-abiding persons lose their homes,

automobiles, and businesses because a handgun was found therein, even if the owner of the property was not the owner of the handgun, and had no knowledge about the handgun's presence. Indeed, Chicago Mayor Richard Daley has already initiated forfeiture proceedings against automobiles which contain a handgun in violation of Chicago's prohibition. [162]

Concluded Aryeh Neier, former director of the American Civil Liberties Union:

I want the state to take away people's guns. But I don't want the state to use methods against gun owners that I deplore when used against naughty children, sexual minorities, drug users, and unsightly drinkers. Since such reprehensible police practices are probably needed to make anti-gun laws effective, my proposal to ban all guns should probably be marked a failure before it is even tried. [163]

### **III. IMPACT OF PROHIBITION ON PUBLIC SAFETY AND SELF-DEFENSE**

Having argued for the value and enforceability of handgun confiscation, Dixon devotes the second half of the article to discussion of the impact of handgun prohibition on criminals and other persons. Dixon's detailed analysis of these issues helps advance the gun control debate. While advocates of handgun prohibition often argue for the desirability of their goal, they rarely discuss in depth the results that might flow from their program, nor do they meet head-on the objections raised by opponents of prohibition. Dixon does both.

#### **A. Is Disarming Criminals Sufficient?**

Dixon begins by acknowledging that, at least in the first years that his confiscation program is in effect, the program will \*324 have little effect on criminals, but will impact mainly non-criminal citizens. [164] Here Dixon takes a more plausible position than some of the more extreme advocates of gun control, who promise that measures far milder than Dixon's (such as a waiting period) will somehow disarm professional criminals such as drug dealers.

Disarming the non-criminal population would, Dixon says, be beneficial in itself, because the non-criminals are the ones who perpetrate most of the handgun murders. He points out that 3/4 of murderers do not have prior felony convictions. Accordingly, a handgun possession ban that applied only to felons would not have a chance of taking handguns away from the 3/4 of murders without previous felony convictions. [165] Dixon notes that many of the murderers without prior felony convictions do have arrest records (two-thirds to four-fifths of homicide offenders have arrest records, frequently for violent felonies [166]), and that in households where a domestic murder takes place, the police almost always have had prior contact (and often repeated

contact) with the home because of domestic violence calls. [167] Accordingly, a handgun ban that disarmed only persons who had been arrested or who lived in homes where the police were called in for domestic violence could, theoretically, prevent the vast majority of handgun homicides. But as Dixon points out, outlawing handgun possession merely because a person has been arrested rather than convicted would violate the presumption of innocence, and banning handguns to households involved in domestic violence might raise equal protection problems. [168] If the ban could not (for reasons unrelated to the Second Amendment) be applied only to arrestees or persons living in houses with domestic disturbances, then the ban would have to be applied to the population as a whole.

Dixon's reasoning to this point is plausible, but he fails to take his inquiry one necessary step further. He concedes that criminals would not be affected by the ban in the first years, and therefore **\*325** we should not expect a quick reduction in homicides perpetrated by convicted felons. If so, it is doubtful that the handgun ban could disarm the 3/4 of the murdering population that does not have a prior felony conviction. Remember, the murderous 3/4 is not composed of persons with clean records and steady jobs who murder their wives in a fit of temporary rage because dinner was overcooked. The murderers without felony records are mostly persons with records of prior arrests, and, in domestic situations, persons with a prior record of (often repeated) domestic violence. In other words, they are criminals who have not yet received a felony conviction. Because the murderers still are criminals (albeit criminals lucky enough not to have been convicted of felony), they likely have access to much of the same social milieu and black market that criminals with felony convictions also have. Since the criminals without felony convictions would still be able to purchase handguns on the criminal black market - just as Dixon acknowledges that criminals with felony convictions would be able to - handgun prohibition would have no impact, in the short term at least, on most of the 3/4 of murderers who did not have felony convictions before their homicide.

The proposition is supported by research regarding victims of near-fatal domestic shootings and stabbings. Homicide victims tend to have sociological resemblances to homicide perpetrators (e.g. urban Black teenagers tend to be murdered by urban Black teenagers), and this is especially true in domestic homicides. In a domestic shooting and knifing victim study, 78 percent of the victims volunteered a history of hard-drug use, and 16 percent admitted using heroin the day of the incident. [169] If the victims have easy access to hard drugs, then it is reasonable to infer that the murderers, whether or not they had prior felony convictions, also have easy access to hand guns. If potential murderers can readily obtain hard drugs such as heroin, which has been strictly prohibited for nearly a century, the potential murderers would also likely be able to obtain handguns, of which there are approximately 66 million currently in private hands.



Accordingly, Dixon does not convincingly demonstrate that there would be any statistically significant reduction in handgun homicide until the day when obtaining illegal handguns became difficult for criminals, if that day ever came. The day when criminals have a hard time obtaining heroin is no closer than it was in 1911 then the Harrison Narcotics Act was enacted. Is it reasonable to expect that criminals will have trouble obtaining handguns 25 years **\*326** after the Dixon Handgun Confiscation Act is passed - the time period that Dixon proposes enacting the law to test its effectiveness? [170]

In determining whether the Dixon Handgun Confiscation Act would impact more criminals more rapidly than the Harrison Narcotics Act, it should be noted that in the countries with the handgun laws that Dixon admires, police administrators state that handguns remain easily obtainable by criminals. Australian criminologist J. David Fine conducted confidential interviews with high-ranking police administrators throughout Australia. [171] Handguns have been sternly controlled in Australia since the 1930s, and are available only to target shooters and collectors who pass a careful licensing process. [172] According to Fine, senior police officials unanimously asserted that "handguns were still readily available to criminals who wanted them." [173] One officer stated that a criminal need only walk into a certain pub in the State's capital city, "indicate that he wanted a pistol and wasn't fussy about make or calibre, and then wait about an hour." [174] Handguns have been regulated in Canada almost since the turn of the century, and subject to Australian-style laws since 1977; [175] the head of Toronto's detective unit opined that he would not have to walk more than two kilometers "to pick up a hot piece." [176]

## **B. The Substitution Effect**

If handguns were somehow removed from the hands of malfeasants, would the death toll actually increase? Some gun misusers would switch to knives (not much less deadly than small handguns), while others would switch to rifles and shotguns (much more likely to kill than handguns). If enough misusers switched from handguns to long guns, the death toll might therefore increase, or so the "substitution argument" goes. Dixon confronts the substitution argument carefully, and provides one of the most comprehensive critiques of substitution theory ever offered by a handgun prohibitionist.

**\*327** Dixon is right to take the substitution argument seriously. While handgun wounds are usually survivable, especially if the victim gets medical attention quickly, shotgun blasts at close range are much more likely to be fatal. The shotgun fires a large slug, or from six to more than sixty pellets, with one trigger squeeze. A single shotgun pellet, because it may be of a diameter equal to a small handgun bullet, can inflict nearly as much damage as a small handgun bullet. [177] Wound ballistics and firearms experts concur that at short range, a shotgun is by far the deadliest weapon. [178]

Anti-prohibition writers such as David Hardy, Gary Kleck, and Don Kates have argued that a high level of substitution of long guns for handguns would occur in the case of a hypothetical American handgun ban. Dixon offers a careful rebuttal of their arguments, and concludes that (since he has placed the burden of proof on prohibition opponents) the case for a substitution effect has not been proven convincingly enough to overcome what he considers the strong evidence for handgun prohibition. Overlooked in the discussion of a substitution effect resulting from a hypothetical American handgun ban is non-hypothetical evidence from other countries.

As Dixon showed earlier in his article, countries with more handguns per capita tend to have more handgun homicides per capita. [179] Switzerland, which has, by world standards, relatively lenient handgun laws, has more handgun homicides per capita than countries where handgun laws are tougher. [180] From the handgun density/handgun homicide correlation in Switzerland and other nations (as well as from other evidence detailed supra), Dixon concludes that handgun density strictly correlates with handgun homicide. [181] Let us \*328 assume that Dixon is right. In countries such as Australia and Canada, where handgun laws are much stricter than in Switzerland, the handgun homicide rate is lower than in Switzerland, but the total homicide rate is over 100 percent greater. [182] The reason cannot be that Australians and Canadians are more prone to want to kill somebody than the Swiss are - Dixon has explicitly assumed that human nature in developed countries is roughly similar everywhere. [183] So why then do Canada and Australia have more murders, even though they have stricter handgun laws, and fewer handgun murders? One plausible explanation is the substitution effect. A sufficiently large number of Australians and Canadians, unable to obtain handguns, do their shooting with rifles or shotguns; their victims die, whereas if they had been shot with handguns, many would have survived. Although some Australian and Canadian assailants, unable to obtain handguns, switched to less deadly weapons (such as clubs), the number of assailants who switched to rifles and shotguns was sufficiently large to increase the overall death toll. If we have plausible evidence to suggest that a substitution effect may have occurred in Australia and Canada, could a similar effect occur in the United States? [184]

\*329 Dixon quotes research developed by Don Kates and Mark Benenson that if 30% of persons attempting homicide switched from handguns to long guns, while the other 70% switched to knives, total homicide would increase substantially. If 50% switched to long guns, the homicide rate could double, even if none of the persons switching to knives killed anyone. [185] A National Institute of Justice study of felons in state prisons found that 72% of the handgun criminals said they would switch to sawed-off shotguns if handguns became unavailable. [186] A 72% substitution rate would lead to an enormous multiplication of the current homicide rate, and Kleck expects that substitution would occur at about 70%.

Dixon retorts that criminals are apt to be braggarts and liars, and might claim that nothing, including a handgun ban, could stop them from committing any crime they chose. Accordingly, the 72% substitution figure might be too high. True enough. But at the same time, at least some criminals may be highly suspicious and mistrustful of authority. Although the National Institute of Justice polling, conducted through written response to written questions, offered the respondents anonymity, some of the prisoners might have believed that their responses would not in fact be anonymous; the polling might be a "setup" to discern their plans after release, and provide a reason for denying parole. Thus, some handgun criminals might have falsely said that they would not substitute sawed-off shotguns for unavailable handguns. Do the number of braggart criminals who falsely said that they would use sawed-off shotguns outnumber the number of mistrustful criminals who falsely said they would not? It is difficult to say with certainty. But since 72% of the criminals said they would substitute, and since only 30% substitution is needed to increase substantially the homicide rate, there is a wide margin for error to assume that bragging criminals outnumber suspicious ones.

Dixon critiques the Benenson and Kates estimate of a homicide rate increase because Benenson and Kates assumed that handgun users who did not switch to long guns would switch "downward" to the next most deadly weapon, knives. Almost certainly, some handgun users would, rather than using knives, turn to even less deadly weapons, such as fists, or would not attempt murder in the first place, absent a handgun. [187] But when calculating expected deaths resulting from substitution, Kates and Benenson assumed that none of the persons who switched to knives would kill anyone; in terms of resulting deaths, therefore, Kates and Benenson underestimated the **\*330** deaths that would be caused by murderers who switched downward to less lethal weapons. Even assuming that none of the persons who switched down killed anyone, the homicide rate would double if half of the handgun-deprived criminals switched "up" to long guns. [188]

Another tack taken by Dixon is to argue that high rates of substitution are unlikely because long guns are so inferior for most criminal purposes. He notes first of all that less than 10% of murders are currently perpetrated with long guns. [189] This is true, but, as Dixon strenuously argues, handguns are widely preferred as murder weapons, and widely available. Thus, it should not be surprising that more than 6 out of 7 gun murderers chose the "best" tool, a handgun. But what people choose when the "best" option is available does not prove how they would behave if only inferior options were available. Today, virtually all hard liquor drinkers consume the "best" hard liquor available - namely legally-produced hard liquor whose production is regulated by the government to guarantee standards of safety. Probably less than 5% of American hard liquor consumers drink bathtub gin, moonshine, and other home-brewed liquors whose safety cannot be guaranteed. Does the

fact prove that very few liquor drinkers would, if legal liquor became unavailable, substitute home-brewed liquor? To the contrary, the experience of alcohol prohibition showed that a large percentage of liquor consumers, if unable to obtain safe, legal liquor, will switch to inferior, dangerous homemade liquor. [190] That murderers only rarely use long guns today does not prove that murders would eschew long guns if handguns were unavailable, any more than drinkers of legal liquor would eschew bathtub gin. [191]

As another argument against substitution, Dixon points out that long guns are less concealable than handguns. Even when sawed off, a shotgun is still about 11 inches long, making it slightly larger than big handguns, and much larger than the small, low-caliber handguns which are frequently used in crime.

Would sawed-off shotguns frequently be substituted in a **\*331** robberies? Putting an 11 inch shotgun in one's front pocket would not be very effective concealment. On the other hand, sticking the shotgun in the inner pocket of a large coat or jacket would seem reasonably effective. Accordingly, it is plausible to infer that persons who execute planned robberies would substitute concealed shotguns. At the same time, criminals who simply carried handguns with them, and spontaneously perpetrated robberies when the opportunity arose, might not be able to carry concealed shotguns so frequently. Thus, impulsive handgun robberies would suffer less of a substitution effect than would planned robberies. Since casual carrying of firearms in general might decrease, so might the shootings that result from the casual insults and provocations that can occur on the street. Hence, it is reasonable to conclude that an effective handgun ban might prevent some shootings. But again, only a 30% substitution rate would be necessary for total homicides to rise substantially.

What about in the home? It is the home, after all, rather than in robberies of stores, where the larger number of handgun homicides currently occur. Dixon argues that even in the home, the concealability of handguns is important. He asserts that substantial portion of the murders in 1989 involved "friends or acquaintances who may have been unaware that the person they are visiting is carrying a concealed weapon." [192] First of all, there is no evidence as to how many of those murderers actually were carrying a concealed weapon of which the victim was unaware. For the sake of argument, assume that all of the murders would have been prevented had handguns not been available; there is still a long way to go for the substitution ratio to be reduced below 30%, and thus not cause a net increase in homicides.

Next, Dixon writes that "the ease of pulling out the [hand]gun and shooting makes such arguments far more likely to spill over into murder. In contrast, by the time the assaulter has gone into another room to retrieve their [sic]

long gun and loaded it, the potential victim has crucial seconds in which to escape." [193] Here, Dixon assumes that the domestic handgun murderers were carrying the handgun on their body, rather than storing the handgun in another room. He likewise assumes that the substituted long gun would be stored in "another room" rather than the room in which the argument was taking place. He further assumes that the handguns used in the domestic shootings were loaded, but the substituted long guns would not be loaded. All of these assumptions may be simultaneously true some of the time, thus making Dixon's escape scenario plausible in \*332 some instances. (Although not every potential victim would know that the potential murderer was loading a long gun in the other room, and even then, some might not run away.) [194] But it is highly speculative to assume that Dixon's scenario of the unloaded long gun in the other room replacing the loaded handgun carried on the person would be the predominant scenario. Even if we speculatively assume that the unloaded long gun scenario would transpire more than 50% of the time, all that is needed for an increase in the death rate is a 30% substitution rate.

While Dixon argues convincingly that substitution would not be universal, the evidence easily supports the conclusion that substitution of long guns for handguns would occur in at least 30% of current handgun murder situations, thus leading to a substantial increase in total deaths.

## **C. Public Safety Benefits of Handguns**

As Dixon acknowledges, handguns provide, at least occasionally, protection from criminal attack. Hence, handgun prohibition would deprive some crime victims of a self-defense tool, and a realistic calculus of the benefits of handgun prohibition must therefore consider the harm to public safety that would result from leaving victims with less ability to protect themselves. Rather than simply scoffing at the idea of armed protection, Dixon carefully analyzes the data regarding self-defense handguns, to build his case that self-defense is infrequent enough as to not be a bar to handgun prohibition.

### **1. Studies of Criminals and Victims**

Dixon first of all notes the National Institute of Justice prisoner surveys, in which large percentages of prisoners personally reported being personally deterred from committing a crime because of fear that the victim might have a gun. [195] Dixon critiques the polling by noting that criminals are not particularly honest. But elsewhere Dixon suggests that criminal dishonesty will tend in the direction of "macho" bravado. [196] Accordingly, it does not seem intuitively obvious that a significant percentage of the prisoners who said that they personally had been scared off by a victim who might have a gun were lying, and claiming that they had been scared when in truth they were not.

**\*333** Dixon also points out that the felony prisoners may be different from criminals as a whole, in that the polled prisoners had all been caught, whereas non-polled criminals who have not been caught may share different characteristics, such as being shrewder. [197] True enough. But the shrewder criminals, one might expect, have not gotten caught because they are more adept than the prisoners were at avoiding risky crimes. Accordingly, it might be that the unapprehended criminals were more risk-averse than the apprehended prisoners, and were therefore more likely than their apprehended fellows to avoid crimes where there was a risk of a victim with a gun.

Moreover, to recognize that there are problems in making precise extrapolations from prisoner surveys does not undermine the fact that 34% of the prisoners personally reported being scared off by an armed victim, and 8% said that the experience had happened frequently. Even if the polled prisoners are representative only of the type of criminals who get caught and sentenced to felony time in state prisons, and even if half the prisoners who said they had been scared were (in a perverse display of anti-machismo) lying, a large percentage of criminals who abandon particular crimes because of armed victims remains. One may nibble at the edges of the percentages without changing the core reality.

A second piece of evidence regarding the frequency of armed defense is Gary Kleck's estimate of 645,000 defensive uses of handguns annually, a figure based on polling of gun owners. Dixon offers several valid critiques of simplistic reliance on gun owners' response to polling data. First of all, some gun owners may have a vested ideological interest in claiming defensive gun use. [198] In addition, some gun owners may have perceived a threat where none existed, or may have reacted with excessive force. [199] Thus, as Dixon points out, not every gun owner who told a pollster that he used a handgun for legitimate self defense may have been truthful or correct. Yet while there were some factors which may have resulted in the Kleck figures being too high, the figures are more likely too low, as a result of a number of factors inherent in the polling process, and the conservative assumptions made by Kleck. [200]

**\*334** To begin with, it is important to note where Kleck got his data: from a survey conducted on behalf of the pro-control National Alliance Against Violence. The NAAV had hired Peter Hart, a leading Democratic pollster, to survey Americans on guns. The widely-reported "interviewer effect" in polling results in some respondents attempting to match their answers to fit with the interviewer's perceived social values. As a general matter, interviewers for polling firms tend to come disproportionately from segments of the population which favor gun control. [201] And it is possible that in some cases the background biases of the organization paying for the poll, and the organization conducting it, may have been perceived by some respondents. As



a result, the "interviewer effect" could tend to depress the numbers of persons claiming to have used guns in self-**\*335** defense. In addition, the context in which questions are asked can have a significant impact on respondent behavior. If argumentative questions which make the case for gun control precede questions about gun control policies, then respondents are more likely to give pro-control responses. [202] In the case of the National Alliance Against Violence question series, the interviewer's questions included a lengthy battery of questions gauging response to the "fact" that "The Supreme Court has ruled on several occasions that the Constitution does not guarantee individual citizens a right to personally own firearms but that it does guarantee the right of each state to form a state militia or State National Guard, and that either states or the federal government could control or prohibit firearms ownership by individual citizens if they wanted to." [203] (Of course the Court has done no such thing; the Court's few rulings on the gun control issue point towards recognition of an individual right.) [204]

While question wording can further bias a sample, the actual question that Peter Hart used appeared to be written in a neutral manner: "Within the past five years, have you yourself or another member of your household used a handgun, even if it was not fired, for self-protection or protection of property at home, work, or elsewhere, excluding military service or police work?" Six percent answered "yes." Follow-up questions revealed that 3% of the defensive users has used the handgun against a person, 2% against an animal, and 1% against both. [205] (That 4% saying "yes" to defensive gun use against persons meant that about 10% of households where a handgun was owned for protection had actually used the handgun for protection.) [206]

Kleck took Hart's number of 4% "yes" for use of a gun in defense against a person in the last five years. Kleck made the conservative **\*336** assumption that each "yes" related to only one gun usage in the last five years - that no household used a firearm for self-defense two or more times in the five years. Because 4% of American homicides amounted to 3,224,880 households, Kleck divided by five (since the question had asked about usage in the last five years) to arrive at an estimate for the annual number of uses of a handgun for self-defense: 644,976. (Or roughly once every 48 seconds). The 95% confidence interval for Kleck's estimate is 468,000 to 822,000 uses per year. [207] By assuming that each "yes" answer related to only one defensive gun use per household, Kleck may have substantially underestimated the frequency of total defensive gun use.

In addition, it must be remembered that Kleck's figure of 645,000 annual defensive gun uses was based only on the 4% of respondents whose households had used a gun for protection against a person. Another 2% had used a handgun for protection against an animal; annual defensive uses against animals would amount to about 322,000, by Kleck's methodology.

Since a person who is being attacked by a pack of stray dogs has as much legitimate interest in escaping serious bodily injury as does a person who is attacked by a criminal, defensive gun uses against animals should count in the calculus of the social utility of handguns. Accordingly, we have nearly one million total defensive handgun users a year, against persons or animals. Even if we assume that many gun owners lied or misperceived their need for self-defense, Kleck's conservative assumptions have at least partly corrected for respondent misstatement. While there is room to question whether the proper estimate of defensive handgun uses should be 645,000, or 967,000, or perhaps a figure hundreds of thousands less, it still seems likely that there are, at least, several hundred thousand defensive uses of handguns in a given year. Dixon's handgun prohibition plan, if successful, would eliminate them all.

Using data from Detroit and Miami, Kleck has projected that there were about 1,427 to 2,819 self-defense killings in 1980. [208] Dixon points out that even the highest figure of 2,819 defensive killings is still less than the 13,650 murders that occurred that year with firearms, and therefore "Kleck has failed to prove that the self-defensive use of firearms outweighs their abuse in homicide." [209] \*337 First of all, as Kleck had explained, the figure of 13,650 murders is based on arrests rather than final disposition. Therefore, most of the 1,400 to 2,800 annual defensive homicides should be subtracted from the total to about 14,000 criminal homicides. Even after the defensive homicides and criminal homicides are properly weighed, there are still more criminal killings than self-defense killings. [210] But before weighing the efficacy of Dixon's handgun prohibition, we must consider whether the prohibition would eliminate all of the criminal and non-criminal homicides (thus producing a net saving of innocent lives), or if the prohibition would eliminate only some of each type of homicide. If the prohibition reduced defensive homicides by 1,000, but reduced criminal homicides by only 200, society would be worse off rather than better.

Turning to Kleck's last piece of evidence - surveys of robbery and assault victims - Dixon acknowledges the evidence that use of a handgun against a criminal attack is the option most likely to result in failure of the criminal attack, and in the victim sustaining no injury. [211] Dixon does not dispute the evidence, but he does note that many of the persons using handguns for self-defense may have been defending themselves against criminals with handguns. "A heavily-armed citizenry might be a rational response if heavily-armed criminals were inevitable; but far more rational would be a society which strives to disarm all private citizens, thus obviating the need to use firearms in self-defense." [212] Here, Dixon makes an unjustified leap in reasoning. Even if no criminals had handguns, handguns would still be useful, and often necessary for self-defense. As Dixon acknowledges in the next section, a handgun allows a person who is smaller than the attacker to protect herself. A handgun likewise allows a person attacked by several

criminals at once to keep them all at a distance. And again, Dixon fails to perform the crucial step in his utility calculus of determining whether the number of criminals who are disarmed will exceed the number of crime victims who are disarmed.

**\*338**

## **2. Women**

Dixon's treatment of the issue of armed self-defense by women is, again, remarkable for its willingness to confront serious evidence. He acknowledges the vast body of evidence that firearms are especially useful for defense by women, since they may be less likely to be able to match a male attack with sheer physical force. [213] When an abusive male who has perpetrated numerous felonious assaults against a woman living with him is shot by the woman, Dixon recognizes the shooting to be legitimate self-defense against criminal attack, rather than a "tragic domestic shooting during an argument." (Some judges are, unfortunately, not as progressive as Dixon, and too many women engaged in legitimate self-defense are convicted because standards for self-defense are still based on the context of a fist-fight between men of equal strength, rather than the special circumstances of battered women. [214])

**\*339** Dixon's response to the self-defense needs of women, particularly battered women, is two-fold. First of all, he points out that there are other ways that women can protect themselves, such as by obtaining restraining orders. [215] But these methods are not even close to sufficient to guarantee that a woman will not be confronted or cornered by an angry ex-mate ready to batter, rape, or kill her. Indeed, most of Dixon's alternative protective steps are premised on the woman being able to leave the home where she is being battered, but it is an attempt to leave that often precipitates a homicidal act by the male. [216] Before the legal system forces women to rely on the protection of the government, the government should begin to offer realistic protection - something far superior to the unenforceable protection of today's temporary restraining orders. Even California, a state noted for its strict gun laws, allows people who are the beneficiaries of restraining orders against violent individuals to carry handguns for protection without need of a permit. [217] Before implementing a handgun prohibition law, governments ought to repeal the doctrine of sovereign immunity, at least in regard to cases where a woman or man is injured or killed after the government negligently fails to protect her or him. [218]

**\*340** As to the non-governmental means of defense suggested by Dixon, chemical sprays can sometimes be effective, but not always against an enraged attacker, or one under the influence of drugs or alcohol. [219] And the martial arts may also be useful, but a woman who finds herself in a relationship in which she realizes the man may soon kill her does not have

the time to progress all the way to a black or brown belt in karate before the next attack.

In any case, suggests Dixon, most women do not own guns. Accordingly, "whatever protection would be lost by disarming the small number of women who currently own handguns is outweighed by the reduction in violence against women that would be effected by a handgun ban, which would take one of the most potent weapons out of the hands of many potential assaulters." [220] Again, the conclusion can only be true if it is assumed that the handgun ban would work comprehensively - although it is more likely (at least in the short run) that the ban would be more effective in disarming female victims than in disarming male criminals. And if everyone were disarmed, most male criminals would retain the advantage of \*341 greater size and strength over most female victims, and enjoy the added advantage of knowing that the potential victim was certain not to be carrying the one weapon which would enable the woman to defend herself against the aggressor from a distance, and cause the aggressor to face a serious risk of permanent injury to himself.

### 3. "Protection or Peril?"

As a counterpoint to Kleck's evidence, Dixon discusses a study done by Arthur Kellerman and Donald Reay of gun deaths in Seattle homes. The number of murders, suicides, and accidental deaths was larger than the number of justifiable homicides by a ratio of 43: 1. The "43: 1" figure is one of the favorite statistics of the gun control lobby, although, as Dixon notes, it is mostly a factoid, since 37 of the 43 deaths were suicides. Dixon appropriately excludes the suicides from his utility calculations; international data provides little reason to believe that handgun control could reduce suicide, and some U.S. data also suggests that while gun control does reduce gun suicide, it does not reduce overall suicide. [221] Dixon is left with 53 criminal homicides and accidental deaths, compared to 18 defensive homicides, which still shows the ratio of bad gun results to good results to be 2.94: 1, supporting Dixon's point. [222] Accidents, however, like suicides, might well be excluded from the utility calculations, since gun accident victims tend to be "disproportionately involved in other accidents, violent crime and heavy drinking." [223] Without guns, many accident victims would find some other way to kill themselves "accidentally," such as by reckless driving. Indeed, they tend to have a record of reckless driving and automobile accidents. [224]

Kellerman and Reay's estimate of the number of justifiable or excusable homicides is too low, since Kellerman and Reay did not \*342 count in the self-defense total cases where a defendant was acquitted on grounds of self-defense, or cases where a conviction was reversed on appeal on grounds related to self-defense. [225]

Moreover, counting dead criminals to measure the efficacy of civilian handgun ownership in preventing crime is no more valid than counting the

numbers of criminals killed by the police in order to assess police efficacy. [226] What is more relevant than total dead criminals is how much crime is prevented by handguns. General deterrence, which is discussed below, [227] is difficult to quantify, so let us focus on actual uses of guns for protection versus wrongful woundings and killings. In response to letters to the editor to NEJM, Kellerman and Reay suggested that "non-fatal gunshot injuries outnumber homicides by a ratio of more than 3 to 1. [citation omitted] Comparable data regarding nonfatal suicide attempts with guns are unavailable, but the ratio is probably lower [citation omitted]." [228] Following Kellerman and Reay, assume that for every fatal accident or homicide in the home, there were 3.5 woundings. And because about 85% of handgun suicide attempts end in deaths, assume that there were about .18 non-fatal suicides for every handgun suicide in the home. So beginning with Kellerman and Reay's figures of 37 suicides and 6 homicides or accidents for every justifiable homicide, it is plausible to estimate that there are 44 suicides or attempted suicides (37 x 1.18) and 27 accidental or homicidal fatalities or woundings (6 fatalities + 21 woundings) for every justifiable handgun homicide in the home. So for every justifiable homicide, there were 71 (44 + 27) unjustifiable fatalities or woundings.

Now let us calculate the total defensive uses of guns in the home, rather than just the uses where a criminal ended up dead. In doing so, let us make several conservative assumptions, to avoid any **\*343** overcount of justifiable defensive uses. First, assume that Kellerman and Reay counted defensive homicides correctly, and that none of the persons who Kellerman and Reay counted as murderers were acquitted at trial on grounds of self-defense, or had a conviction reversed on grounds of self-defense. Next, let us estimate the ratio of total defensive handgun uses to defensive handgun homicides. To make this ratio as small as possible (thereby resulting a lower estimate of total defensive uses), let us begin by using the largest number of defensive homicides which researchers have offered: Kleck's figure of 2,819. [229] Although the figure is the upper bound of Kleck's range, let us assume that the upper bound is the correct figure; and although the estimate includes justifiable and excusable homicide involving any weapon or no weapon, let us assume that all 2,819 involved a handgun. (By overestimating the number of justifiable handgun homicides, we thereby lower the ratio of total defensive handgun uses to defensive handgun homicides, and thereby lower the estimate of total defensive handgun uses.)

Using polling data, Kleck had estimated that there are 645,000 defensive uses of handguns annually against the person. [230] While Kleck's figure may already be an undercount (since he assumed that no household used a handgun more than once in a five-year period), [231] let us assume that Kleck's figure is too high, and deflate it by 50%. Accordingly, we have an estimate of 322,500 total defensive handgun uses to 2,819 defensive handgun homicides, a ratio of 114: 1. The true ratio is probably closer to 300: 1, since

we have made several assumptions to artificially deflate the numerator and artificially inflate the denominator.

Taking the 114: 1 ratio and applying it to Seattle, we can estimate that for every defensive homicide involving a handgun, there were about 113 acts of self-defense not resulting in a fatality. And putting everything together, we find in Seattle that there were about 114 fatal and non-fatal defensive uses of handguns for every 71 unlawful handgun fatalities or woundings, including suicides. The numbers suggest that a handgun in the home is more likely to be used for protection than to cause an unlawful injury or death. [232]

**\*344** And the factor that is most important - which Kellerman and Reay did not analyze at all - is whose home the gun is in. The Kellerman-Reay data are strong evidence that guns should not be in certain homes, namely the homes of persons with mental illness (94% of suicide victims); [233] of persons prone to self-destructive, reckless behavior (many of the accident victims); [2#23434] the homes of persons with arrest records for violent felonies; and homes where the police have had to intervene to deal with domestic violence (most of the homicide perpetrators). [235] These are the homes from which the vast majority of handgun fatalities come. To lump these high risk-homes in with all other homes, and to claim, without regard to the behavior of the persons in the home, that possession of a handgun in the home is a serious peril is no more valid than to claim that possession of an automobile is a serious peril without regard to whether the driver is an alcoholic or habitually reckless.

#### 4. Comparative and Historical Data regarding Deterrence

Beyond the data supplied by Kleck, Kellerman, and Reay, what evidence is there that handguns in private hands protect the lives and property of innocent persons? First of all, there is the burglary data. The chart below sets forth crime and suicide rates for several nations, per 100,000 population. [236]

Country	Homicide	Suicide	Total Death	Rape	Robbery	Burglary
Japan	.8	21.1	21.9	1.6	1.8	231.2
England & Wales	1.1	8.6	9.7	2.7	44.6	1639.7
Scotland	1.7	10.2	11.9	4.4	86.9	2178.6
Canada	2.7	12.8	14.5	10.3	92.8	1420.6
Australia	2.5	11.8	14.3	13.8	83.6	1754.3
New Zealand	1.7	10.8	12.5	14.4	14.9	2243.1



Switzerland	1.1	21.4	2.5	5.8	224.2	976.8
United States	7.9	12.2	20.1	35.7	205.4	1263.7

**\*345** While the United States has much more violent crime than the other nations (including crimes such as rape, which rarely involve guns), the United States anomalously has less burglary. In terms of burglaries perpetrated against occupied residences, the American advantage is even greater.

In Canada, for example, a Toronto study found that 48% of burglaries were against occupied homes, and 21% involved a confrontation with the victim; only 13% of U.S. residential burglaries are attempted against occupied homes. Similarly, most Canadian residential burglaries occur in the nighttime, while American burglars are known to prefer daytime entry to reduce the risk of an armed confrontation. [237] After Canada's stricter 1977 controls (which generally **\*346** prohibited handgun possession for protection) [238] took effect, the Canadian overall breaking and entering rate rose 25%, and surpassed the American rate, which had been declining. [239] A 1982 British survey found 59 percent of attempted burglaries involved an occupied home (again compared to just 13 percent in the United States). [240]

Why should American criminals, who have proven that they engage in murder, rape, and robbery at such a higher rate than their counterparts in other nations, display such a curious reluctance to perpetrate burglaries, particularly against occupied residences? Could the answer be that they are afraid of getting shot? When an American burglar strikes at an occupied residence, his chance of being shot is equal to his chance of being sent to jail. [241] Accordingly, a significant **\*347** reduction in the number of Americans keeping loaded handguns in the home could lead to a sharp increase in the burglary rate, and to many more burglaries perpetrated while victim families are present in the home. [242]

Investigation of American history regarding firearms also suggests that widespread possession of handguns by citizens has a significant effect in deterring violent crime. In *Gunfighters, Highwaymen, & Vigilantes*, historian Roger McGrath looked closely at the 19th century Sierra Nevada mining towns of Aurora and Bodie. [243]

Aurora and Bodie certainly had as much potential for violence as any place in the West. The population was mainly young transient males subject to few social controls. There was one saloon for every twenty-five men; brothels and gambling houses were also common. Governmental law enforcement was ineffectual, and sometimes the sheriff was himself the head of a criminal gang. Nearly everyone carried a gun. (Aurorans usually carried a Colt Navy .

36 six-shot revolver, while Bodeites sported the Colt Double Action Model known as the "Lightning.") [244]

The homicide rate in those towns was extremely high, as the "bad men" who hung out in saloons shot each other at a fearsome rate, in some cases exceeding the rate in modern Washington, D.C. [245] The presence of guns turned many petty drunken quarrels into fatalities.

But other crime was virtually nil. The per capita annual robbery rate was 7% of modern New York City's. The burglary rate 1%. Rape was unknown. [246] "The old, the weak, the female, the innocent, \*348 and those unwilling to fight were rarely the targets of attacks," McGrath found. One resident of Bodie did "not recall ever hearing of a respectable women or girl in any manner insulted or even accosted by the hundreds of dissolute characters that were everywhere. In part this was due to the respect depravity pays to decency; in part to the knowledge that sudden death would follow any other course." [247] Everyone carried a gun and except for young men who liked to drink and fight with each other, everyone was far more secure than today's residents of cities with gun prohibitions.

The experience of Aurora and Bodie was repeated throughout the West. One study of five major cattle towns with a reputation for violence - Abilene, Ellsworth, Wichita, Dodge City, and Caldwell - found that all together the towns had less than two criminal homicides per year. [248] During the 1870s, Lincoln County, New Mexico was in a state of anarchy and civil war. Homicide was astronomical, but (as in Bodie and Aurora) confined almost exclusively to drunken males upholding their "honor." Modern big-city crimes such as rape, burglary, and mugging were virtually unknown. [249] A study of the Texas frontier from 1875-1890 found that burglaries and robberies (except for bank, train, and stage coach robberies) were essentially non-existent. People did not bother locking doors, and murder was rare, except of course for young men shooting each other in "fair fights" that they voluntarily engaged in. [250]

John Umbeck's investigation of the High Sierra gold fields in the mid- 19th century yielded similar results. After the Gold Rush, brought on by the discovery of gold at Sutter's Mill in 1848, thousands of prospectors rushed to gold fields in the California mountains. There was no police force. Indeed, there was no law at all regarding property rights, since the military governor California had just proclaimed as invalid (without offering a replacement), the Mexican land law. There was intense competitive pressure (and greed) for gold, and nearly everyone carried firearms. Yet there was hardly any violence. [251] Similarly, when much of the Indian territory of Oklahoma \*349 was opened all at once for white settlement, heavily armed settlers rushed in immediately to stake their claims, and the settlers with their guns arrived long before effective law enforcement did. Yet there was nearly no violence. [252]

In sum, historian W. Eugene Hollon found "the Western frontier was a far more civilized, more peaceful, and safer place than American society is today." [253] Frank Prassel concludes "the last great frontier left no significant heritage of offenses against the person, relative to other sections of the country." [254] Americans living under gun prevalence conditions of the Old West were far safer than Americans living in modern cities such as Washington, D.C. with handgun prohibition. And significantly, the protective value of handguns benefits all persons, not just handgun owners. To the extent that burglars are not sure which houses contain owners with loaded handguns, or to the extent that other criminals are unsure as to which potential victims may be armed, burglars and other criminals are forced to "mistakenly" avoid attacks on targets which are, unknown to the criminal, actually unarmed.

#### **D. Civilized Society**

Moving beyond the criminological issues of whether handgun prohibition makes society safer, Dixon addresses the moral issues regarding use of force for protection. He draws an analogy to nuclear defense:

The reasoning which seeks safety in the proliferation of privately owned firearms is precisely the rationale which supported nuclear proliferation under the strategy of mutual assured destruction. This policy rested the survival of the human race on the hope that mutual fear of retaliation would prevent a first strike. It has been heavily criticized on the ground that an unspeakable catastrophe could follow an accidental firing of a nuclear missile, or a deliberate attack by a fanatical nation which did not care about retaliation. These criticisms parallel those that I have leveled at the argument for handguns as self-defense, with the difference that lethal accidents with and aggressive abuse of handguns are an everyday reality, rather than a feared \*350 possibility. [255]

Whether the analogy between civilian handguns and governmental possession of nuclear weapons according to the theory of Mutual Assured Destruction is "precise" is debatable. The very critique of MAD which Dixon restates is premised on the idea that a single accidental nuclear discharge could trigger a chain of events leading to planetary destruction. Handgun discharges happen all the time, as Dixon points out, and they have not destroyed the planet. One person's accidental discharge of a handgun does not induce all other handgun owners, incorrectly fearing themselves to be under all-out attack, to shoot every bullet they own at every perceived enemy.

Beyond the precision of the analogy lies the question of whether Dixon's complaint about MAD is persuasive. After all, MAD worked. The threat of catastrophic global nuclear war was mostly removed by the collapse of the Soviet Union from its internal contradictions. While the USSR existed and had nuclear weapons, the threat of US retaliation may have convinced Soviet

leaders - who generally became Soviet leaders by having little regard for decency or human life - that nuclear warfare would have gained them nothing. [256] What would have Dixon preferred? Unilateral American disarmament? A legal prohibition on nuclear weapons would have partially disarmed nations which generally obeyed international law (such as the United States) but would have done less to disarm criminal nations such as the USSR? Would the world have been safer if the Soviet nuclear arsenal had been reduced by 25%, while the American arsenal were reduced by 90%?

Are nuclear weapons even the best analogy? Would not the better analogy be to the proliferation of arms in the United States in the 1770s and 1780s to defend against unjust act by the British Empire? Or to the proliferation of guns in the hands of the American government in the Cold War era for defense against the USSR? Or the proliferation of guns in the hands of citizens of Afghanistan to resist the 1979 Soviet invasion? In all cases the proliferation of guns had some negative consequences. But would not the consequences have been far worse if Americans of 1776, the Americans of 1950, and the Afghans of 1979 had lacked weapons with which to resist or deter attack? Would Dixon reject the possession of guns in all these cases?

Dixon's theory that arms in the hands of individuals cause personal\*351 violence, just as arms in the hands of nations cause international war, has been a long-standing one among advocates of domestic and international disarmament. [257] In international spheres, the idea that absolute level of armaments has some correlation with the risk of war has generally been discredited. What is more important than the absolute level of armaments is whether there is parity of arms. Thus, if two hostile powers are equally strong, they are less likely to engage in war than if one power believes that it is better armed than its enemy. By the theory of parity of armament, unilateral American (or Soviet) disarmament during the Cold War would have increased the chances of a shooting war between the superpowers.

Dixon writes that the idea of citizens using their own firearms to defend themselves against "increasingly heavily-armed criminals is a tenuous basis for the defense of society." [258] The criticism brings to mind the old joke by Sam Levinson; when asked how he liked his wife, he answered "Compared to what?" A society where individual citizens feel a serious need to own handguns to protect home and family is hardly ideal, but it stacks up well against other realistic futures. A society effectively defended by the American police, where women can walk dark streets without fear is nowhere near reality. If the American government could guarantee its citizens safety, then government would not so reflexively rely on the doctrine of sovereign immunity when government negligently fails to protect. [259]

In modern American society, no one would suggest that persons should be required to rely on government income for economic security, to rely only on

government media for information about public affairs, to rely only on government schools for education, to rely only on public housing for shelter, or to rely only on public food distribution for nourishment. Why then, in a society where it is conceded that government could not legitimately make itself a monopolist on fundamental issues of autonomy, should everyone be forced to rely only on the government for use of the most effective tool of personal security? [260]

More fundamentally, there is nothing about widespread citizen use of handguns for protections which is inconsistent with the rule of **\*352** law in a civilized society. Armed use of force for self-defense is not "taking the law into one's hands." Using deadly force or the threat thereof to defend against a violent felony is legal in all 50 states, and Dixon indicates no desire to change such laws. Similarly, every American state recognizes, at the least, the right of citizens to arrest a person committing a violent felony in her presence. There are many circumstances where exercising the choice to use force for self-defense or defense of another is entirely lawful. Using such force, therefore, cannot be "taking the law into one's hands" any more than exercising other lawful choices, such as signing a contract. When criminals use force, though, they are violating the law, and thereby taking the law into their own hands. When citizens use or threaten force to stop the law-breaking, they are taking the law back from the criminals, and restoring the law to its rightful owners: themselves. [261]

Lastly, it should be remembered that the core historical purpose of the Second Amendment was not self-defense against individual criminals, but collective defense against criminal governments. [262] A maniac with a handgun can kill two dozen people, especially if they are unarmed and unable to resist. A maniac with a standing army **\*353** can kill two million, especially if they are unarmed and unable to resist. [263] The fact that America has not yet experienced a dictatorship does not mean that it never could. [264] And modern advances in military weaponry have not negated the ability of guerrillas armed even with poorly-made handguns to cause a hostile army tremendous trouble. [265] Even if it were presumed that a handgun confiscation proposal could save thousands lives a year (rather than increasing the deaths of innocents), handgun confiscation could lead to millions of deaths in future decades, by depriving innocent people of the means with which to effectively resist a tyrannical government. The United States was created in a Declaration that "whenever any Form of Government becomes destructive ... it is the Right of the People to alter or abolish it ..." [266] Has human nature now been so perfected that the possibility of tyranny in America has vanished, and with it the need for Americans to maintain private arms as an insurance policy against oppression and genocide?

## **E. Gun Prohibition in Practice: The Jamaican Experience**

The discussion of handgun prohibition has up this point been mostly hypothetical. Before starting down the path of prohibition, it would seem reasonable to look at one nation which has actually implemented policies something like Dixon proposes: Jamaica. While many Western democratic nations have had strict handgun laws for years, none of the nations discussed thus far has implemented a policy of confiscation, or even prohibition. Jamaica did so in 1974. \*354 Certainly there are immense differences between the United States and Jamaica, which make it unrealistic to expect that handgun confiscation would work in the United States just the way it did in Jamaica. But Jamaica, as an English-speaking democracy, does at least offer an interesting case study.

Beginning in about 1965, the Jamaican homicide and violent crime rates began rising sharply. After the March 1974 murder of businessman Leo Henry, the national mood insisted on drastic action to curtail crime. Prime Minister Michael Manley told the Jamaican people that the nation needed "radical surgery for a grave disease," and he announced, "There is no place in this society for the gun, now or ever." [267]

The House of Representatives rapidly approved a set of strict new laws. Drug laws were drastically toughened, and the U.S. Army allowed to operate inside Jamaica; juveniles over the age of 14 were to be tried in adult courts; and the police were given broad powers to search and seize at will. The Gun Court Act and the Firearms Act outlawed private ownership of guns and ammunition, with the exception that persons who owned legal firearms were allowed to retain one gun. [268] (The gun permitting system had long been used to restrict lawful gun ownership to the upper classes.) Permit lists were used to seize guns currently in private hands. [269]

By the Gun Court Act and the Firearms Act, once a defendant was arrested for a gun offense, he was to be detained, tried, and sentenced within a seven day period, all in the same compound in Kingston. The special stockade, the "Rehabilitation Centre," was like a concentration camp, with barbed wire, watchtowers, and machine guns. Painted blood red, it was meant to be a prominent and harsh reminder of the fate of gun criminals. Kingston residents called it "Stalag 17." [270]

Gun possession trials were closed to the public, and the court had the power to keep the names of witnesses confidential and to \*355 bar publication of any news of the trial, except for the name of the accused, the charge, verdict, and sentence. [271] There were no bail and no jury except in capital cases. A person caught in the presence of another person with a gun was himself considered guilty. [272] Conviction in the Gun Court meant a sentence of indefinite detention, even for possession of a single bullet. [273] When such sentences were ruled unconstitutional, the sentence was changed to mandatory life imprisonment. [274]



While the Jamaica Rifle Association warned that the disarming of law abiding citizens would eventually create a crime wave which would make the current one pale in insignificance, newspapers scoffed at the claim. [275] The people agreed with the newspapers; as of June 1974, public opinion supported the Gun Court 86%-9%. [276]

The Firearms Act, the Gun Court Act, and the other severe measures were an immediate and spectacular success. In the year before the Gun Court there were 124 gun murders. In the year following there were 55. In the first 6 months of the Act gun murder was 78% below the previous year's rate; in the second six months it was 22% below. Non-gun murders (i.e. with machetes) rose from 99 to 144. Overall, murder of all types declined 14%. [277]

Shooting with criminal intent fell by 52% in the first 6 months, and 20% in the second 6 months, [278] but then returned to its old level and stabilized there. Robbery with a gun declined 28% over the laws' first year. Non-gun robbery fell 58% in the first 6 months, then rose 30% in the second 6 months. [279] Larceny increased slightly, while breaking and entering and assaults showed no significant \*356 change. [280] Overall, the Gun Court benefits were strongest in urban areas. [281]

But by mid-1975, violence was up, and murders of important businessmen again became sensational stories. By the end of the 1975, crime was as bad as ever, and most of the public wanted the Gun Court eliminated. Crime continued to escalate; a November 1978 poll of the Kingston area showed that one of three adults had been robbed that year. In rural areas, the robbery rate was one person in five each year. [282] Violence in 1980 reached the worst levels ever. Nine hundred and thirty-three Jamaicans were killed that year, 556 by gunmen, and 234 by security forces. Homicide per 100,000 population rose from 4.6 per 100,000 in 1954 to 13.6 in 1974, to 22.6 in 1987. [283]

By the early 1980s, the Gun Court was nearing administrative collapse due to the length of trials, the limited resources of the government ballistics expert, non-attendance by civilian and police witnesses, inefficient service of process for witnesses, frequent adjournments, lack of police transport vehicles, and shortage of defense attorneys. [284]

The gun control laws became an invitation to murder. According to the human rights group Americas Watch, about a third of Jamaican homicides in the early 1980s were perpetrated by the government. Indeed, in some years the rate of Jamaicans killed by police officers was higher than the rate of Americans killed by anyone. Although the police usually reported that the killings took place in a shoot-out with the victims, Americas Watch contends that the police were lying. Many of those killings, the human rights group said, were deliberate killings of personal enemies of particular policemen. Even the slayings of genuine criminal suspects were often not really in a shoot-out, but rather deliberate police executions; innocent bystanders or

people mistaken for the criminal suspect were frequently murdered. [285] The gun control laws provided a handy excuse for homicidal \*357 police officers. The assertion that a victim of police homicide had been killed in a shoot-out was readily accepted without investigation, even when no gun was recovered from the victim. [286] The excesses of police violence, claimed Americas Watch, drove Jamaica to new heights of violence, because the police example legitimated violence in the eyes of both criminals and ordinary citizens. [287]

Studies of the Firearms Act and the Gun Court have been nearly unanimous in their condemnation. Criminologist William Calathes writes: "The attempt to control firearms criminals through passage of mandatory firearm legislation failed." [288] Calathes continues: "Although the Act professed to deter firearm crime, it eliminated fundamental constitutional rights and sharply refocused the attention of the people from the social and economic reasons for crime to the more modest hope of deterring firearm crime." [289] "The social control functions of the Gun Court Act cannot be over-emphasized," he says. "The Act always had the potential for social control due to its oppressive legislative form since its immediate cause was the legislators, the agents of political crime, and its true purpose was not the resolution of firearm crime but, more immediately, the balance of class forces, economic necessity, and ideological pressures." [290] Calathes argues that Jamaica faced "contradictions between relatively developed political tendencies and relatively backwards economic forces." The government reconciled the contradiction "by highly developed skills of political management in propagating myths of the deterrent value of an oppressive piece of criminal legislation." [291] Similarly, C. Thomas Surridge, a former Commissioner of Corrections in Jamaica, and Paul Gendreau, a Consultant Psychologist for the Corrections Department, complain that "the Gun Court drama diverted Jamaican society from the more difficult tasks of revising the judiciary and constitutional processes to deal with some of the \*358 social problems that contribute to crime in the country." [292]

Although a long-term failure, Gun Court did cut gun crime for about a year. A Jamaican government minister opines that the reason the Gun Court had showed at least some success was that on an island (unlike in a large nation with thousands of miles of borders), a concentrated effort and psychological climate to fight a particular type of crime could be created. [293]

Another study argues that while the overall package of repressive legislation had a limited but positive short-term impact on crime, the gun laws had been ineffectual even regarding the initial drop in crime, except in changing firearms homicides into homicides with other weapons. The authors suggest that most illegal guns had remained in circulation, and that more important than the laws to reduce the absolute number of guns had been the laws

providing enhanced sentences for crimes committed with firearms, as opposed to other weapons. [294]

A United Nations criminologist asserts that the Gun Court aggravated crime, because it alienated the people from the government. The severe criminal sentencing in Jamaica, especially the life sentencing for guns, "through its punitiveness contributed more than anything to the deterioration of the crime situation." [295]

Dudley Allen, a Commissioner of Corrections for Jamaica, argues that all the criminal laws of 1974 were selectively enforced. He accuses the police of beating and torturing confessions out of defendants, and condemned police conduct for perpetuating the nation's cycle of violence. Many of the Gun Court prisoners vehemently asserted their innocence, and many of them came "from the underprivileged or disadvantaged classes or followers of the Rastafarian subculture." Allen pleads for "warm compassion and a preparedness to tolerate diversity" as the key to dealing with Jamaica's criminal offenders. [296]

Jamaican gun control had everything going for it: nearly unanimous popular support, the advantage of taking place on a small island; a draconian enforcement scheme; and the obliteration of search and seizure standards which might have prevented detection of some gun law violators. Confiscation was assisted by the prior system of permits and registration; the permit system had also assisted by preventing most people from legally obtaining guns in the years before prohibition. The shock effect of the law worked for a while, \*359 but in the long run, the law promoted homicide by the government, and served as a convenient distraction for the government to avoid dealing with true causes of crime. Could the results in the United States be similar?

## CONCLUSION

A law to confiscate handguns could become one of the most destructive pieces of legislation ever enacted in the United States. Criminological evidence, including comparative international data, suggests that handgun controls might reduce handgun homicides, but does not suggest that handgun controls reduce total homicides. A handgun confiscation law could be more effective at disarming law-abiding citizens than at disarming gun criminals. Accordingly, the risks of committing all types of violent crime, particularly burglary of occupied residences, would decrease, and crime would be expected to increase. Many of the handgun misusers who were deprived of handguns might switch to deadlier weapons such as sawed-off shotguns, and gun deaths could skyrocket. Besides causing the deaths of thousands of innocent people every year, a handgun confiscation law would threaten America's structure of individual liberty, for a handgun prohibition law could not be meaningfully enforced without severely constricting the Bill of Rights.

Handgun prohibition poses long term risks of facilitating government-sponsored murder and oppression. The prospects that handgun prohibition could reduce total homicide and so slender, the risks that handgun prohibition would increase homicide and other violent crime so great, and the devastation of Bill of Rights provisions such as the Fourth Amendment so certain, that handgun prohibition could pose a grave danger to public security and liberty.

## Footnotes

a. Director of the Firearms Research Project at the [Independence Institute](#), a Denver, Colorado think-tank. He also serves as an Associate Policy Analyst with the [Cato Institute](#) in Washington, D.C., and as a technical consultant to the International Wound Ballistics Association. J.D. 1985, University of Michigan Law School; B.A. Brown University, 1982. Kopel's book, *THE SAMURAI, THE MOUNTIE AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* was awarded the Comparative Criminology Prize by the American Society of Criminology's Division of International Criminology.

1. Among the more recent endorsements of the individual right position are Akhil Amar, [The Bill of Rights as a Constitution](#), 100 YALE L. J. 1131, 1164ff (1991); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and The Right to Bear Arms*, 139 U. PENN. L. REV. 1257 (1991); Robert J. Cottrol & Raymond T. Diamond, [The Second Amendment: Toward an Afro-Americanist Reconsideration](#), 80 GEO. L.J. 309 (1991); Don B. Kates, Jr., [The Second Amendment and the Ideology of Self-Protection](#), 9 CONST. COMMENTARY (1992); Stephen P. Halbrook, [The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment](#), 26 VAL. U. L. REV. 131 (1991).

Similar conclusions were reached in the overwhelming majority of scholarly writing in the 1980s. E.g., Sanford Levinson, [The Embarrassing Second Amendment](#), 99 YALE L. J. 637 (1989); STEPHEN HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* (1989); Stephen Halbrook, [Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment](#), 15 U. DAYTON L. REV. 91 (1989); LEONARD LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 341 (1988); David Hardy, [The Second Amendment and the Historiography of the Bill of Rights](#), 4 J.L. & POL. 1 (1987); Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Robert Shalhope, [The Armed Citizen in the Early Republic](#), 49 LAW & CONTEMP. PROBS. 125 (1986); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW &

CONTEMP. PROBS. 143 (1986); 4 Encyclopedia of the American Constitution 1639-40 (Karst & Levi eds., 1986); David Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL. 559 (1986); William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY (Don B. Kates, Jr. ed., 1984); Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L. REV. 32 (1984); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 244-52 (1983); Joyce Lee Malcolm, [\*The Right of the People to Keep and Bear Arms: The Common Law Perspective\*](#), 10 HAST. CONST. L.Q. 285 (1983); Robert Dowlut, [\*The Right to Arms: Does the Constitution or the Predilection of Judges Reign?\*](#), 36 OKLA. L. REV. 65 (1983); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., [\*The Right To Keep and Bear Arms\*](#) (1982); David Caplan, *The Right of the Individual to Bear Arms*, 1982 DET. COLL. L. REV. 789 (1982); Richard Gardiner, *To Preserve Liberty-A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Robert E. Shalhope, [\*The Ideological Origins of the Second Amendment\*](#), 69 J. AM HIST. 599 (1987).

Few articles from the last decade approximate support for the position that the Second Amendment guarantees a right of states only. Significantly, two of the articles which argue that the Second Amendment does not prevent gun prohibition acknowledge that the Second Amendment was intended to recognize an individual right. David C. Williams, [\*Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment\*](#), 101 YALE L.J 551 (1991) reasons that since state governments have neglected their duties to promote responsible gun use through drill in a "well-regulated militia," the right to arms is no longer valid. Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986) finds that the Amendment guarantees an individual right of personal security, but suggests that the right can be protected by confiscating all guns. The articles asserting that the Second Amendment confers only a right on states, and not on persons, are Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983); Lawrence Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIS. 22 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 U. DAYTON L. REV. 5 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U.L. REV. 107 (1991).

Forty-three state constitutions include their own right to bear arms provision which could prevent implementation of Dixon's proposal at the state level, and might bar state officials from assisting in enforcement of a federal



handgun prohibition. See generally, Robert Dowlut, [\*State Constitutional Rights to Bear Arms: Traditional Interpretation and Public Housing\*](#), 5 ST. THOMAS L. REV. 203 (1992); Robert Dowlut & Janet Knoop, [\*State Constitutions and the Right to Keep and Bear Arms\*](#), 7 OKLA. CITY L. REV. 177 (1982); *Robarge v. State*, 432 So. 2d 669, 672 (Fla. Dist. Ct. App. 983) (dicta that handgun ban would be unconstitutional). But see *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 279 (Ill. 1984) (upholding handgun ban).

One interesting piece of new scholarship argues that an individual right to own handguns for personal protection can be found in the federal Ninth Amendment. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

2. Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 ST. LOUIS U. PUB. L. REV. 243, 247 (1993). For an excellent analysis of the issue of police and security exemptions from handgun prohibition, see James B. Jacobs, *Exceptions to the General Prohibition on Handguns: Do They Swallow Up the Rule?* 49 LAW & CONTEMP. PROBS. 5 (1986).

3. *Id.*

4. Internal police department review of Kansas City police shootings in which a person was struck by a bullet found that for the years 1973-1978, 40.2% of the police firearms discharges were unjustifiable. William A. Geller & Michael S. Scott, *Deadly Force: What We Know* 282 (Wash.: Police Exec. Res. Forum, 1992). See also Arthur L. Kobler, *Figures (and Perhaps some Facts) on Police Killings of Civilians in the United States; 1965-1969*, 31 J. SOC. ISSUES 185 (1975).

5. Gina Goehl, *1989 Firearms Discharge Assault Report* (New York: Police Academy Firearms and Tactics Section, April 1989) (BM 369). For 1985-89, the cumulative figures are 1193 total discharges, 824 intentional and not in violation of force policy (69.1%), 112 intentional and in violation (9.4%); 135 accidental but not in violation of policy (11.3%), and 122 accidental and in violation (10.2%). (The percentages and numbers are slightly different from those in the Report itself, due to a Departmental mathematical errors in addition; the Department mistakenly totals the number of intentional lawful shootings as 836 (rather than 824), and mistakenly records the total of all incidents at 1,143, rather than 1,193. As a result, Department reports that the sum of all categories of incidents is 105.4%, rather than 100%.) In Philadelphia in 1989, accidents comprised 27% of police firearms discharges; in Dade County, Florida (Miami) that same year, accidents were 31%. GELLER & SCOTT, *supra* note 4, at 196.

6. Carol Ruth Silver and Donald B. Kates, *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society*, in



RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 154-55 (Don B. Kates, Jr. ed., 1979). The frequency with which police shootings are found to be improper does not necessarily imply that the police are poor shooters, or that they possess bad judgment. Official guidelines may force the police to intervene in situations that ordinary citizens could avoid and may prevent an officer from drawing his weapon at the most opportune time.

7. *The Guns of Kennesaw*, N.Y. TIMES, Mar. 28, 1982, at A26, col. 1. Some studies suggest that as many as one in four police officers may be an alcoholic. GELLER & SCOTT, *supra* note 4, at 288 n.26.

8. RICHARD NEELY, TAKE BACK YOUR NEIGHBORHOOD 74-75 (1990). Other major cities reported similar rates of substantiated allegations. *Id.*

9. Dixon, *supra* note 2, at 247.

10. *Id.*

11. "Private security guards are simply vigilantes for the rich," observes West Virginia Supreme Court Justice Richard Neely. Neely, *supra* note 8, at 51. Dixon worries about "the danger of overzealous use of firearms in response to perceived threats of robbery," and cites a case of a store owner who shot dead an intruder who had already been immobilized. Dixon, *supra* note 2, at 247. Police and security guards are certainly capable of overzealous responses as well. In Portland, Oregon, police officers on a drug raid used German MP-5 submachine guns to shoot a grandfather at least 28 times; the autopsy suggested that over 20 of the shots were fired in his back as he lay collapsed face down over a chair. The police chief predicted "the shooting was a sign of things to come as criminals become better armed and police try to match their firepower." The grandfather had been carrying an unloaded 2-shot derringer. James Crawford, Police Firepower a Cause for Concern, OREGONIAN, May 29, 1991; Letter from Hap Wong, attorney for family of shooting victim, to James Crawford (March 16, 1992)(on file with author).

In another case, a police officer, who had previously been accused of using excessive force, shot a bedridden 84-year-old Black woman during a 2 a.m. drug raid in Tyler, Texas. No drugs were found. Todd Gillman, *Kilgore Officer Not Indicted in Black Woman's Slaying*, DAL. MORN. NEWS, July 11, 1992, at 1A; Lee Hancock, *Gnawing Question: Grand Jury in East Texas will Consider Case of Officer who Killed Black Woman in Drug Raid*, DAL. MORN. NEWS, July 7, 1992, at 1A.

Or how about the Los Angeles police officer who sent this message from the computer keyboard in his squad car: "I almost got me a Mexican 1st nite but he dropped the dam gun to quick, lots of wit." [spelling errors in original]. INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPT. ("CHRISTOPHER COMM."), REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991), at 72-73, cited in GELLER & SCOTT, *supra* note 4, at 205.

The above stories are anecdotal, as is Professor Dixon's story of the store owner who over-reacted. As the material presented above suggests, police over-reaction, while often understandable, is not necessarily rare. See *supra* text at note 5.

12. *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Brandeis, J., dissenting).

13. When the national police agency was created in the late nineteenth century, many members were ex-samurai who were unemployed because of the abolition of feudalism. They believed that guns were for cowards, and that real men fought with the martial arts. In 1946, General MacArthur ordered the police to begin carrying guns; two years later, when the American occupation forces noticed that few police officers had obeyed the order, the Americans supplied the police with guns and ammunition. DAVID H. BAYLEY, *FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES* 164, 180 (1976).

14. The primary arms are Smith & Wesson or Nambu .38s. Detectives sometimes carry .22s. A. DIDRICK CASTBERG, *JAPANESE CRIMINAL JUSTICE* 38 (1990).

15. BAYLEY, *supra* note 13, at 11, 37, 64, 162-70; CASTBERG, *supra* note 14, at 38.

16. CRAIG PARKER, *THE JAPANESE POLICE SYSTEM TODAY: AN AMERICAN PERSPECTIVE* 75 (1984). Contrast the Japanese guidance of police gun use with the official firearms policies of two American cities: "Leave the gun in the holster until you intend to use it" and "It is left to the discretion of the individual officer when and how to shoot." Geller & Scott, *supra* note 4, at 252, citing CATHERINE H. MILTON, JEANNE S. HALLECK, JAMES LARDNER, & GARY ALBRECHT, *POLICE USE OF DEADLY FORCE* (Wash.: Police Foundation, 1977), at 47-48.

17. Contrast *Tennessee v. Garner*, 471 U.S. 1 (1985) (authorizing use of deadly force to prevent flight of certain fleeing felons).

18. *Tokyo Police*, Sixty Minutes (CBS television broadcast, Sept. 17, 1978) (transcript), at 10. Tokyo police fired their revolvers four times in all of 1984. *The World's Largest City is Also the Safest*, WASH. POST, Apr. 20, 1975.

19. BAYLEY, *supra* note 13, at 174-75. For a short time in the early 1970s, some demonstrators broke the informal rules by resorting to Molotov cocktails and home-made pistols similar to zip guns. The riot police augmented their armor, but continued to eschew firearms. In 1972, the radical students resumed adherence to the old code, and the firearms vanished. *Id.*

20. *Id.* at 170.

21. P.A.J. WADDINGTON, *ARMING AN UNARMED POLICE: POLICY AND PRACTICE IN THE METROPOLITAN POLICE* 4 (London: Police Foundation, 1988).

22. *Id.* at 17, 87, 108.

23. Hardly any police above the rank of sergeant have guns. *Id.* at 62.

24. *Id.* at 6, citing COLIN GREENWOOD, *POLICE TACTICS IN ARMED OPERATIONS* (1979).

25. K.D. EWING & C.A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 18 (1990).

26. *Id.* at 1.

27. *Id.* at 2.

28. *Id.* at 51.

29. *Newfoundland Police Want to Carry Guns*, *GUN WK.*, Jan. 3, 1975.

30. R.J. McCaldon, *Readers Write*, *THE AM. RIFLEMAN*, Nov. 1988, at 28.

31. DUNCAN CHAPPELL & LINDA P. GRAHAM, *POLICE USE OF DEADLY FORCE: A CANADIAN PERSPECTIVE* 5-6 (Toronto: Centre for Criminology, 1985).

32. Dixon, *supra* note 2, at 248.

33. Dixon's estimate of 440,000 Canadian handguns is based on a 1991 poll conducted for the Canadian government. The Canadian polling results may well have resulted in a substantial undercount, since they reported that there were 5.9 million privately owned firearms of all types in Canada. Angus Reid Group, *Firearms Ownership in Canada*, discussed in Kirk LaPointe, *Gun Owners' Reasons Play Down Protection*, *VANCOUVER SUN*, Aug. 6, 1991. The figure is quite divergent from a 1976 Canadian government study, which estimated that there were about 10.5 million long guns. Solicitor General of Canada, "Statistics Relating to the Gun Control Question (Statistiques Relatif au Controle, des Armes a Feu)" (Ottawa: 1976), quoted in *FIREARMS USE IN VIOLENT CRIME: A SELECTED BIBLIOGRAPHY* 14 (M. Ray ed., 1978); Solicitor General of Canada News Release PR-31, Dec. 6, 1978; "Statistics of Estimated Gun Ownership and Use," *Statistics Canada Service Bulletin*, November 1977. A late 1980s poll, by Simon Fraser University's Gary Mauser, shows a similarly high number of guns. Gary A. Mauser & Michael Margolis, *The Politics of Gun Control: Comparing Canadian and American Patterns*, 10 *GOV'T & POL'Y* 189 (1992).

If the 5.9 million figure is correct, then both the 1976 Canada study showing 10.5 million long guns, and Mauser's late 1980s study supporting comparable figures are wrong. Alternatively, all three studies could be correct, or the 1976 Canada and 1991 Angus Reid study could both be correct; if so, then approximately five million firearms-nearly half the total gun stock-wore out

or were discarded and not replaced by Canadians between the mid-1970s and 1990. Such massive unilateral disarmament has been reported nowhere by any other Canadian observer, and would be the most unprecedented, speedy, and unknown voluntary abandonment of guns by an English-speaking nation ever to occur.

The more likely explanation for the Angus Reid Group's low number was that the study was conducted after the Ecole Polytechnique massacre in Montreal, as the government was preparing legislation to toughen gun control. The Angus Reid Group study was undertaken on contract for the federal government, to help the government draft gun legislation. Since confiscation of semiautomatics and handguns or both was being widely touted, and since some voices were even calling for total gun prohibition, some firearms owners may have been reluctant to disclose their status to a stranger on the telephone, particularly a stranger whom they knew or suspected was working for the government. Accordingly, it is possible that the Angus Reid figures for Canada may substantially understate handgun density in that nation. Since the data for other nations which Professor Dixon uses does not, as far as the citations reveal, appear to have been gathered during a period of unusually intense pressure for gun control, the data for the other countries is therefore not as likely to be distorted in the way the Canadian data is.

34. See DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* (1992).

35. Dixon, *supra* note 2, at 273; Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 *SOCIAL PROBLEMS* 1, 4-7 (1988) [hereinafter Kleck, *Crime Control*].

36. The F.B.I. estimates that civilians kill 300 criminals annually. An example of the miscounting inherent in arrest-only data: in July 1990 a Bronx, New York man was held up at gun point by two robbers. Refusing to submit, the man bit a robber's arm, forcing the robber to drop a handgun. A scuffle ensued, and the victim picked up the handgun and shot the robber dead. The man was arrested and charged with murder, although a police spokesman said investigators thought the man had acted in self-defense. *Man Shoots Assailant; Murder is Charged*, N.Y. TIMES, July 22, 1990, at 20, col. 1. The shooting would be listed in F.B.I. statistics (which are based on arrests) as a murder perpetrated by a person unknown to the victim, even if a court later determined the man's actions to be justifiable self-defense.

Likewise, if a woman shoots an abusive ex-husband who has been stalking her and who breaks into her home, the odds are that she will be arrested (and end up in F.B.I. statistics) as a murderer, even though the odds are also high that a prosecutor, grand jury, or trial jury will later find that her actions were lawful self-defense.

See also Paul Blackman, *Firearms and Violence, 1983/84* (NRA/ILA, July 1985); Paul Blackman & Richard Gardiner, *Flaws in the Current and Proposed Uniform Crime Reporting Programs Regarding Homicide and Weapons Use in Violent Crime*, Paper presented at the ann. meeting of the Am. Soc'y of Criminology, Oct. 29- Nov. 1, 1986.

37. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991 22, table 2.16 (1992) [hereinafter UNIFORM CRIME REPORTS](for 1991, the FBI arrest-based data shows 327 justifiable homicides by civilians, of which 240 involved a handgun).

38. The rates are of course approximate. Kleck's estimate of the numbers of self-defense homicides was based on 1980 data, and self-defense could have become less frequent or more frequent by 1988, the year for which Dixon obtained his handgun homicide numbers. Further, the percentage of justifiable civilian homicides recorded by the FBI in which a handgun was used has in recent years ranged from 78% (1987) to 61% (1988). UNIFORM CRIME REPORTS, *supra* note 37. The 70% figure used in the calculations in the text seemed a reasonable approximation, especially considering that each year 1% to 4% of the justifiable homicides are listed under the category "Firearm type not specified," and a majority of these unclassified guns might be expected to also be handguns. *Id.*

39. The countries were the United States, England and Wales, Scotland, Northern Ireland, Canada, Australia, Switzerland, France, West Germany, Norway, Finland, Spain. JAN VAN DIJK, PAT MAYHEW & MARTIN KILLIAS, EXPERIENCES OF CRIME ACROSS THE WORLD: KEY FINDINGS OF THE 1989 INTERNATIONAL CRIME SURVEY (1990).

40. The firearms homicide rates, are in ascending order: Netherlands, England and Wales, Switzerland, Finland, Australia, Canada, Belgium, France, United States. The correlation of gun homicides with gun density appears valid only at the extremes. The Netherlands and England and Wales are the lowest by far in gun density, and the United States the highest. For the other six countries, there is no correlation at all.

Notwithstanding the data, Killias wrote an article in which he claimed to have found "a substantial impact of gun ownership on homicides committed with firearms," and hence overall higher homicide rates. His argument is simply to point out that Switzerland and the United States both have much higher firearms homicide rates than Britain. Martin Killias, *Gun Ownership and Violent Crime: The Swiss Experience in International Perspective*, 1 SECURITY J. 169, 173 (1990).

The authors found no relationship between handgun density and armed robbery. That a country was relatively high in handgun density did not mean that it would be relatively high in armed robbery. The one country that did

have a high armed robbery rate combined with plentiful handguns was the United States. Killias suggests that as long as handgun density stays at a relatively low threshold, armed robbery will be rare, regardless of whether handgun ownership is almost nil, or just fairly low. The United States having exceeded the threshold and made handguns a common item, armed robbery is common. *Id.* at 173. An alternative explanation for the relatively high American armed robbery rate would be that America has a relatively higher percentage of criminals, an issue which is discussed in more detail below.

41. F. Paul Fromm, *Canada Faces Gun Confiscation*, REV. OF THE NEWS, Jan. 22, 1975, at 35-37.

42. *E.g.*, NELSON T. SHIELDS, GUNS DON'T DIE - PEOPLE DO 63-64 (1981). The late Mr. Shields quoted with approval a newspaper report of a 1981 speech by a British police official. The official stated that only one in six British murders are committed with a gun, but seven in ten American murders are.

43. Dixon, *supra* note 2, at 252.

44. See *infra* text at notes 189-91.

45. Dixon, *supra* note 2, at 252.

46. KOPEL, *supra* note 34, at 71-78.

47. *Id.* at 78.

48. *Id.* at 76.

49. "Intercantonal Agreement Re Commerce in Weapons and Munitions," March 27, 1969, ratified by the Bundesrat on Jan. 13, 1970, articles 2-3, para. 1 (English translation by National Firearms Association of Canada, Edmonton) [hereinafter "Intercantonal Agreement"]. The handgun purchase certificate is valid for three months. Intercantonal Agreement, article 4.

50. KOPEL, *supra* note [34](#), at 283-84.

51. Carol Kalish, *International Crime Rates*, Bureau of Justice Statistics Special Report (Washington: Department of Justice, May 1988). Kalish reports the 1984 data for Switzerland, and the 1983 data for England and Wales. The 1984 Scottish rate is calculated from Telephone Interview with British Information Office (Apr. 7, 1992).

52. KILLIAS, MAYHEW, VAN DUK, *supra* note [39](#).

53. *E.g.* Cal. Penal Code, 12320-21; N.Y. Penal Law 400.

54. Dixon, *supra* note 2, at 256.

55. Kalish, *supra* note 51.

56. See GARY KLECK, POINT BLANK 22-23, 197-202 (1991) [hereinafter KLECK, POINT BLANK].



57. DONALD T. LUNDE, MURDER AND MADNESS 1 (1976).
58. KLECK, POINT BLANK, *supra* note 56, at 50 (Table 2.1); DON B. KATES, JR., WHY HANDGUN BANS CAN'T WORK 23 (1982).
59. *Contrast* Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26 (quoting Handgun Control, Inc. Founding Chair Pete Shields).
60. Dixon, *supra* note 2, at 251.
61. *Id.* at 252.
62. The fallacy of arguing that something is true because it has not been proven false is referred to as the *Argumentum ad Ignoratum* (argument from ignorance). WILLIAM L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 168 (1980).
63. Dixon, *supra* note 2, at 251.
64. *Id.* at 252.
65. *Id.*
66. FREDA ADLER, NATIONS NOT OBSESSED WITH CRIME 112-13 (1983).
67. KOPEL, *supra* note [34](#), at 291.
68. O. Kahn-Freud, *Uses and Misuses of Comparative Law*, 37 MODERN L. REV. 1 (1974).
69. H. Sandison, *A Rejected Transplant: The British Industrial Relations Act*, 3 INDUST. REL. L.J. 247 (1979).
70. Dixon, *supra* note 2, at 252.
71. The pay ratio of corporate executives to new employees averages 7:1 in Japan, and 37:1 in America. Harold. R. Kerbo & Mariko Inoue, *Japanese Social Structure and White Collar Crime: Recruit Cosmos and Beyond*, Paper presented at the ann. meeting of the Am. Soc'y of Criminology, Reno, Nov. 1990, at 20.
72. Dixon, *supra* note 2, at 252.
73. *Id.* at 253.
74. *Id.*
75. *Id.* at 256.
76. *Id.*
77. Although the American Fourth Amendment has been grievously damaged by the war on drugs and what former Chief Justice Burger termed the "drug exception" to the Fourth Amendment, Americans still retain far more legal

protection from search and seizure than do the citizens of other democratic nations. KOPEL, *supra* note [34](#), passim.

78. See Morgan Reynolds, *Why Does Crime Pay?* NATIONAL CENTER FOR POLICY ANALYSIS, Policy Backgrounder No. 123, Dec. 8, 1992; Bruce L. Benson & David W. Rasmussen, *Illinois' War on Drugs: Some Unintended Consequences*, HEARTLAND POLICY Study no. 48 (1992).

79. DAVID E. KAPLAN & ALEC DUBRO, *YAKUZA* 162 (1986).

80. *Canada on Brink of War with Indians*, ROCKY MTN. NEWS, Sept. 21, 1990, at 4.

81. See *infra* text at notes 243-54.

82. Dixon, *supra* note 2, at 251. As a logical matter, there is no reason why Dixon's gun restrictions could not be pursued in tandem with measures to address problems such as poverty and racism. As a practical political matter, Dixon's proposals would pose a major impediment to governmental action dealing with the root causes of crime. Gun control serves as a convenient distraction for politicians unwilling to address genuine crime control issues. *Cf. infra* text at notes 291-293 (gun prohibition as distraction in Jamaica).

83. Dixon, *supra* note 2, at 251.

84. *Id.*

85. The rates for 1991 are: Washington, D.C. (80.6), New York City (29.3), Los Angeles (28.9); Memphis (27.3); Denver (18.8); and Salt Lake City (8.5). The rates are calculated from the raw figures for city population and for murder and non-negligent manslaughter contained in UNIFORM CRIME REPORTS 1991, *supra* note [37](#), at table 8.

86. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, STATE LAW AND PUBLISHED ORDINANCES - FIREARMS (1986).

87. Dixon, *supra* note 2, at 252.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Although the cities have many differences, it is likely that people in Salt Lake City are more like people in New York City than people in the United States are like people in Sweden.

93. Officers are issued pistols, rather than assault rifles. The rifles are Sturmgewehr 541 (.223); SG 510-0 (7.5 mm); or SG 550 (5.56 x 45 mm). The pistols are SIG-Sauer 9 mm. The current pistol was adopted in 1975, replacing the Sig P210, which had been adopted in 1949, and is still available

for civilian sales. News About 5.56MM Small Arms, 1 NEWS FROM THE INST. FOR RES. ON SMALL ARMS IN INT'L SECURITY 6 (February 1990); Don B. Kates, Jr., *Gun Rights*, PETERSON'S HANDGUNS, Oct. 1989, at 8; DUNCAN LONG, AUTOMATICS: FAST FIREPOWER, TACTICAL SUPERIORITY 74 (1986). ("SIG" is an acronym for Schweizerische Industrie Gesellschaft.)

94. Dixon, *supra* note 2, at 256.

95. *Id.*

96. See *supra* text at note 39.

97. Dixon, *supra* note 2, at 256.

98. See *supra* text at notes 39, 51.

99. KOPEL, *supra* note [34](#), at 289-93.

100. *Id.*

101. J.H. Sloan, A.L. Kellerman, D.I. Reay, J.A. Fenis, T. Koepsell, F.P. Rivara, C. Rice, L. Gray, & J. Logerfo, *Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities*, 319 NEW ENG. J. MED. 1256 (1988).

102. Dixon, *supra* note 2, at 258-59.

103. Canadian House of Commons, Bill C-51: An Act to amend the Criminal Code, the Customs Tariff, the Parole Act, the Penitentiary Act and the Prisons and Reformatories Act. 30th Parl., 2d session. First reading April 20, 1977, passed in the House of Commons July 18, 1977 (Ottawa: Supply and Services Canada, 1977).

104. ELISABETH SCARFF, DECISION DYNAMICS CORPORATION, EVALUATION OF THE CANADIAN GUN CONTROL LEGISLATION 4 (1983) (prepared for the Solicitor General of Canada).

Evidence from other sources indicates that the armed crime problem in Vancouver has gotten worse since 1977. In 1982 the Vancouver Police Union demanded a shotgun in every patrol car, more powerful handguns, and increased weapons training to cope with a huge surge in armed robberies. Chappell & Graham, *supra* note [31](#), at 193.

105. Brandon S. Centerwall, *Homicide and the Prevalence of Handguns: Canada and the United States, 1976-1980*, 134 AM. J. EPIDEMIOLOGY 1245, 1245-46 (1991).

106. Indian populations exist in both cities, but in numbers too low to draw meaningful global conclusions.

107. Blackman, *Firearms and Violence, 1983/84*, *supra* note [36](#).

108. Centerwall, *supra* note 105, at 1251, table 4. The homicide rates for New Brunswick (2.9 per 100,000 population per year) and Quebec (3.0) were

higher than Maine (2.7), New Hampshire (2.6) and Vermont (2.8). Ontario (2.1) was much lower than New York (11.3) and Michigan (10.1). [Excluding the large metropolitan centers of New York City, Detroit, and Toronto, the rates were Ontario (2.0), New York State (3.4) and Michigan (5.0).] The rate in Manitoba (3.7) was higher than in Minnesota (2.4) and North Dakota (1.2). Saskatchewan (3.8), Alberta (3.4), and British Columbia (3.6) were lower than Montana (4.7), Idaho (4.9), and Washington (4.7). Yukon (16.9) was higher than Alaska (11.6). Id.

109. Robert J. Mundt, *The Effect of National Differences in Political Structure and Culture on Urban Violent Crime in Canada and the United States*, Paper presented at the 1990 meeting of the Urban Aff. Commission, Charlotte, N.C., Apr. 20, 1990.

110. The American cities had far higher violent crime rates than their Canadian counterparts, and much, although not all, of the increased crime was due to increased gun crime. (The major exception was that Thunder Bay had a higher robbery and armed robbery rate than Duluth.) After factoring out the variables of race and city size, Mundt found that there was still a substantial gap in the American and Canadian gun crime rates. Accordingly, stricter Canadian gun laws could not be ruled out as an explanation for Canada's relatively crime-free status. Robert J. Mundt, *A Tale of Four Cities: Firearms and Violence in the U.S. and Canada*, Paper presented at the 1991 Ann. Meeting of the Am. Pol. Sci. Assoc., Wash., D.C., Aug. 19, 1991.

111. Dixon cites Mundt's paper for the proposition that "the homicide rate among whites alone is almost three times higher in the U.S. than in Canada." Dixon concludes that the "racial differences" hypothesis "is of no use in explaining this disparity." Dixon, *supra* note 2, at 261. The "disparity" may simply be caused by the American government's decisions on racial classifications for statistical purposes. Mundt's source for the American whites is the Statistical Abstract of the United States 83 (1987). The Statistical Abstract includes Hispanic homicides in the category "white." When only non-Hispanic whites are considered, Canadian and American whites have equivalent homicide rates. See *supra* text at note 109. Since Canadian Hispanics are such a small percent of the Canadian population, their inclusion in the category "white" would not be expected to have a major effect on the Canadian "white" homicide rate.

112. As one scholar notes, the Founders believed "that if a population were actually unfit to possess arms, it was only because of the degradation induced by subjection to the oppression and exploitation" of authoritarian government. KATES, *supra* note 1, at 233. Could some people within the racial minorities who many gun control advocates are most intent on disarming be said to fit the Founders' expectation?

113. Dixon, *supra* note 2, at 262.

114. *Id.*
115. See *infra* Section III.
116. Dixon, *supra* note 2, at 247.
117. Paul H. Blackman, *Effects of Restrictive Handgun Laws* (Correspondence) 326 NEW ENG. J. MED. 1157 (1992).
118. *Id.*
119. Jules Loh, *A Tale of Two Cities: Morton Grove, Illinois; Kennesaw, Georgia; What Happens When Towns Take an All-Or-Nothing Approach to Guns?* CHI. TRIB., Jan. 7, 1992, at 3. Morton Grove is a suburb of Chicago.
120. LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 185 (1975).
121. KOPEL, *supra* note 34, at 88-9, 151-56.
122. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, *PROJECT IDENTIFICATION: A SURVEY OF HANDGUNS CONFISCATED IN CRIMES IN NEW YORK, DETROIT, ATLANTA AND NEW ORLEANS FROM JULY 1, 1973 THROUGH DECEMBER 1973* (1976).
123. S. BRILL, *FIREARMS ABUSE: A RESEARCH AND POLICY REPORT* (1977).
124. *Id.*
125. *Id.*
126. The only stolen guns which were counted separately were guns which had been stolen during shipment to a retail or wholesale dealer, or stolen directly from a dealer. BATF, *PROJECT IDENTIFICATION*, *supra* note 122, at 7.
127. Bootleg gun manufacture requires no more than the tools that most Americans have in their garages. A zip gun can be made from tubing, tape, a pin, a key, whittle wood, and rubber bands. In fact, using wood fires and tools inferior to those in the Sears & Roebuck catalogue, Pakistani and Afghan peasants have been making firearms capable of firing the Russian AK-47 cartridge. Bootleg ammunition is no harder to make than bootleg liquor. Although modern smokeless gunpowder is too complex for backyard production, conventional black powder is simple to manufacture. John Kaplan, *Controlling Firearms*, 28 CLEV. ST. L. REV. 1, 20 (1979). See also Charles H. Chandler, *Gun-Making as a Cottage Industry*, 3 J. FIREARMS & PUB. POL'Y 155, 161 (1990) ("The supply is virtually infinite ...").
128. Bureau of Alcohol, Tobacco, and Firearms, *Analysis of Operation CUE (Concentrated Urban Enforcement)*, interim report 133-34 (February 15, 1977).
129. Dixon, *supra* note 2, at 264.

130. Id.

131. JAMES D. WRIGHT, PETER ROSSI, & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 321 (1983).

132. Dixon, *supra* note 2, at 264.

133. SAM STALEY, DRUG POLICY AND THE DECLINE OF AMERICAN CITIES (1992).

134. Steven Wisotsky, [\*A Society of Suspects: The War on Drugs and Civil Liberties\*](#), Cato Institute Policy Analysis no. 180 (1992).

135. United States v. Montoya, 473 U.S. 531 (1985); Florida v. Rodriguez, 469 U.S. 1, 5 (1984); Florida v. Royer, 460 U.S. 491, 498 (1983).

136. Eric Sterling, *Trashing the Bill of Rights*, PROGRESSIVE, July 1991, 34, 35.

137. *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

138. Andrew Schneider & Mary Pat Flaherty, [\*Presumed Guilty: The Law's Victims in the War on Drugs\*](#), PITT. PRESS, Aug. 11-16, 1991; JUDY OSBURN, SPECTRE OF FORFEITURE (1991); WISOTSKY, *supra* note 134 at 22-23; [21 U.S.C. 881](#).

139. [Florida v. Bostick](#), 111 S.Ct. 2382 (1991); Michigan v. Sitz, 496 U.S. 444 (1990); United States v. Sharpe, 470 U.S. 675 (1985); Texas v. Brown, 460 U.S. 730 (1983); Wisotsky, *supra* note 136, at 16-17.

140. Wisotsky, *supra* note 134, at 5, 12-14; National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting).

141. John C. Enslin, *Boy, 10 Spots Marijuana in House, Turns in His Parents*, ROCKY MTN. NEWS, Sept. 24, 1991; *Two Families Pull Children from DARE Programs at School*, NEWS BRIEFS (Criminal Justice Policy Found.), Dec. 1992, at 23-24.

142. *See From Precinct to Playground*, POLICE, May 1991, at 73; *Schools Limit Undercover Work*, ROCKY MTN. NEWS, Apr. 12, 1993 (In Pinedale, Wyoming, an "undercover informant placed in Pinedale High School has ... been charged with having sex with a minor.")

143. Drug Enforcement Agency, U.S. Sentencing Guidelines Manual; Dennis Cauchon, *Attack on Deadheads is no Hallucination*, USA TODAY, Dec. 17, 1992.

144. Wisotsky, *supra* note [134](#), at 3. See also Reynolds, *supra* note [78](#).

145. Ed Vaughn, *National Guard Involvement in the Drug War*, JUSTICIA, Dec. 1992, reprinted in NEWS BRIEFS (Criminal Justice Policy Foundation), Dec. 1992, at 6-10; Stephen Halbrook, *Military Enforcement of Drug Laws*



- under the Posse Comitatus Act*, 1 DRUG L. REP. 1 (Sept.-Oct. 1984); Wisotsky, *supra* note [134](#), at 18-19.
146. Wisotsky, *supra* note [134](#), at 16.
147. 31 U.S.C. [5312](#), [5313](#) (Supp. 1992).
148. Wisotsky, *supra* note [134](#), at 3.
149. Peter Passell, *Less Marijuana, More Alcohol?* N.Y. TIMES, June 17, 1992, at C2.
150. David J. Shields, *Two Judges Look at Gun Control*, CHI. BAR REC., Jan./ Feb. 1976, at 182.
151. J. B. Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 764 (1933).
152. A.C.L.U. estimate cited in Don B. Kates, Jr., *Handgun Control: Prohibition Revisited*, INQUIRY, Dec. 5, 1977, at 23.
153. BRILL, *supra* note [123](#), at 34.
154. Malcolm Wilkey, *Why Suppress Valid Evidence?*, WALL ST. J., Oct. 10, 1977.
155. Paul Blackman, *Civil Liberties and Gun-Law Enforcement: Some Implications of Expanding the Powers of the Police to Enforce a "Liberal" Victimless Crime*, at 27, paper presented at ann. meeting of Am. Soc. of Criminology, Cinn., Nov. 7-11, 1984.
156. James Q. Wilson, *Again, The Gun Question*, WASH. POST, Apr. 1, 1986; Police Foundation quoted in *Whether It Sharply Reduces Crime or Not, Is a Federal Ban Worth Trying?* N.Y. TIMES, Apr. 5, 1981, at IV:3.
157. *Berkeley City Attorney Mulls Car Searches for Weapons*, ASSOC. PR., Dec. 19, 1987, available in NEXIS, Wires Library).
158. BRILL, *supra* note [123](#), at 134 ff. See also Lawrence Sherman, *Equity Against Truth: Value Choices in Deceptive Investigations*, in POLICE ETHICS 117-32 (1985) (Police Foundation head arguing that random selection of undercover investigation targets is fairer than probable cause selection).
159. DAVID HARDY, THE B.A.T.F.'S WAR ON CIVIL LIBERTIES 11-41, 75-86 (1979).
160. DECISION-MAKING INFORMATION, INC., ATTITUDES OF THE AMERICAN ELECTORATE TOWARDS GUN CONTROL (Santa Ana, 1978), discussed in WRIGHT, ROSSI, & DALY, *supra* note [131](#), at 6 (23%).
161. DAVID BORDUA, ALAN LIZOTTE, AND GARY KLECK, PATTERNS OF FIREARMS OWNERSHIP, USE, AND REGISTRATION IN ILLINOIS 253 (1979).

162. Jim Schneider, *Chicago Semi-Auto Ban Effective Aug. 14*, GUN WEEK, July 24, 1992 ("Yet another provision of the law gives the police authority to confiscate any vehicle in which any unregistered firearm [any handgun or so-called "assault weapon"] or firearm not properly broken down is discovered. The owner of the vehicle then has 24 hours to pay a \$500 fine plus a \$105 towing fee.")

163. ARYEH NEIER, CRIME AND PUNISHMENT: A RADICAL SOLUTION 76 (1976).

164. Dixon, *supra* note 2, at 264.

165. *Id.* at 266.

166. KATES, *supra* note 58, at 25-26. See also Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 J. LAW & CONTEMP. PROBS. 35, 40-41 (1986) (70-75% of domestic homicide offenders have a previous arrest, and about half have a previous conviction).

167. Dixon, *supra* note 2, at 266.

168. If Dixon's handgun prohibition were challenged on Constitutional grounds under the federal Second Amendment or under the many state constitutions with a right to bear arms, the court's analysis might proceed under the "strict scrutiny" test which is applied to infringements of individual Constitutional rights. Since, as Dixon concedes, a prohibition aimed at persons with records of felony arrests or of domestic violence would arguably accomplish most of what the handgun ban aims to achieve, a ban which applied to the population as a whole might be struck down as not "narrowly tailored."

169. Kirkpatrick and Walt, *The High Cost of Gunshot and Stab Wounds*, 14 J. SURGICAL RES. 261 (1973).

170. Dixon, *supra* note 2, at 282.

171. J. David Fine, AN AGENDA FOR THE REFORM OF FIREARMS LAWS: RECOMMENDATIONS TO THE CRIMINOLOGY RESEARCH COUNCIL FOR PRACTICAL REFORMS TO AND THE HARMONIZATION OF AUSTRALIA'S STATE AND TERRITORIAL FIREARMS LAWS (1988).

172. KOPEL, *supra* note 34, at 195, 197.

173. FINE, *supra* note 171, at 78.

174. *Id.*

175. KOPEL, *supra* note 34, at 141, 144-47.

176. Kashmeri, *Illegal Firearms Easily Bought*, THE GLOBE AND MAIL, Sept. 26, 1984, at 1.

177. TONY LESCE, THE SHOTGUN IN COMBAT (1984).

178. "At close range, the shotgun is the most formidable and destructive of all arms .... Unlike bullets, shotgun pellets rarely exit the body. Therefore, the kinetic energy of wounding in shotguns is usually equal to the striking energy ... all the kinetic energy is transferred to the body as wounding effects." VINCENT J.M. DIMAIO, GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS, AND FORENSIC TECHNIQUES 182-83 (1985).

"The wound created when the charge of a standard shotgun strikes a victim within a range of 6 meters is characterized by tissue destruction not unlike that caused by high-velocity missiles. Massive soft-tissue loss, bone and vessel disruption, and a high infection rate result." Gary Ordog, *Wound Ballistics*, in MANAGEMENT OF GUNSHOT WOUNDS 45 (1988).

"Shotgun injuries have not been compared with other bullet wounds of the abdomen as they are a thing apart ... at close range, they are as deadly as a cannon." R. Taylor, *Gunshot Wounds of the Abdomen*, 177 ANNALS OF SURGERY 174- 75 (1973).

179. Dixon, *supra* note 2, at 257.

180. *Id.* at 256.

181. *Id.* at 257.

182. See *supra* text at notes 51, 52.

183. Dixon, *supra* note 2, at 248-52.

184. Besides discussing the substitution effect, Dixon also looks into the implications of the "devolved substitution effect." Since handguns are effective at securing victim compliance, victims of a handgun robbery are, strangely enough, less likely to be injured than are victims of robbery with other weapons. Dixon, *supra* note 2, at 269. In addition, possession of a handgun allows a robber to attack harder, more lucrative targets, such as retail stores, thus benefiting less lucrative, but more fragile targets, such as elderly pedestrians.

Dixon dismisses the "devolved substitution effect" as an objection to handgun prohibition since, if followed to its logical conclusion, the argument would militate in favor of giving robbers machine guns, with which they could perpetrate "rare, but highly efficient and relatively bloodless heists." *Id.* Dixon is right to dismiss the "devolved substitution effect," but not for the reason he gives. If criminals behaved as Dixon's *reductio ad absurdum* implies, society might be considerably better off with a few bloodless bank robberies every month, as opposed to thousands of street muggings involving injury and death. But of course there would be little guarantee that robbers, having been supplied with donated machine guns, would confine use of the machine guns to a small number of lucrative and bloodless robberies.

More fundamentally, there is an intuitive moral objection to any policy which aims to improve the welfare of criminals, particularly by making crime less risky and more lucrative. But at the same time, a policy which benefits victims cannot be rejected simply because criminals would also benefit. For example, an educational rehabilitation program for prison inmates which reduced recidivism for prisoners after release would be legitimate in part because it would enhance public safety; the fact that the prisoners received the benefit of education which they would not have obtained but for their perpetration of a crime does not by itself invalidate the rehabilitative program.

185. *Id.*

186. *Id.*

187. *Id.* at 270.

188. Mark Benenson & Don B. Kates, Jr., *Handgun Prohibition and Homicide: A Plausible Theory Meets the Intractable Facts*, 91, 111 in *RESTRICTING HANDGUNS*, *supra* note [6](#).

189. Dixon, *supra* note 2, at 270 n.94.

190. MARK THORNTON, [ALCOHOL PROHIBITION WAS A FAILURE](#), 4-7, Cato Institute Policy Analysis no. 157 (1991).

191. The same point applies to Dixon's argument that since 71% of crime handguns (by one estimate) have a barrel length of three inches or less (and hence a total length of less than 5 or 6 inches), substitution of long guns would not occur. Dixon, *supra* note 2, at 271. That criminals currently use 5 inch guns does not mean that they would avoid 11 inch guns, if only 11 inch guns were available. The 71% figure is based on BATF traces.

192. *Id.* at 270.

193. *Id.* at 271.

194. Because long guns have longer ranges than handguns, some of the fleeing victims could still be shot even with several seconds' head start.

195. Dixon, *supra* note 2, at 272.

196. *Id.* at 271.

197. *Id.* at 273.

198. *Id.*

199. *Id.*

200. Dixon also takes issue with Kleck's use of the Bernhard Goetz story as evidence of the deterrent effect of civilian gun ownership. Dixon first points to a street incident where Goetz drew a gun for protection against what Goetz called "a crazy kid on drugs" who was harassing him. Dixon, *supra* note 2, at 274. Whether Goetz acted improperly in this single incident tells us nothing

of the general anti-crime value of gun ownership, nor does it prove anything about the general population's ability or inability to carry and use defensive firearms responsibly. Pointing to a single incident where a police officer acted in a "trigger-happy" manner would not show that police officers as a whole are incapable of carrying firearms responsibly.

As evidence of the deterrent value of gun ownership, Kleck points to the sharp drop in subway crime that followed an incident where Goetz shot four teenagers he said were attempting to rob him. Dixon replies that "unjustifiable uses of firearms" may not be counted among the defensive benefits of gun ownership. *Id.* Dixon is wrong on two counts here. First, Goetz was tried and acquitted on charges of misusing his gun. The only charge of which he was convicted was of possessing the gun in violation of New York City's stringent permit system. (Goetz had previously applied for a license to carry a gun after a criminal threw him face-first through a plate-glass window. The application was rejected, since the New York City police do not consider status as a crime victim, or even status as a recipient of murder threats, to be justification for the issuance of a carry permit. Carry permits are issued almost entirely to persons who carry large sums of cash, and to insiders with political clout. Susan Hall, *Nice People Who Carry Guns*, NEW YORK, Dec. 12, 1977; Carol Ruth Silver and Don B. Kates, Jr., *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society*, in RESTRICTING HANDGUNS, *supra* note 6, 139, 153; William Bastone, *Born to Gun: 65 Big Shots With Licenses to Carry*, VILLAGE VOICE, Sept. 29, 1987, at 11. Indeed, Goetz was only brought to trial after one grand jury refused to indict Goetz, and the Manhattan District Attorney's office impaneled a second grand jury. *See generally*, GEORGE FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988).

Second, if it is assumed that Goetz's use of force against the robbers was unjustifiable, Goetz's actions would be totaled in the column of gun crimes, rather than in the category of crimes prevented with guns. Even so, the subsequent drop in subway crime remains a good consequence of Goetz's (arguably) unjustified act. Whether or not Goetz was justified has little to do with Kleck's observation that in response to Goetz's actions, New York City's endemic packs of subway criminals apparently decided to take a vacation when they perceived a risk that they might get shot while going about their business.

201. Gary Mauser & David B. Kopel, [\*Sorry, Wrong Number: Why Media Polls on Gun Control are Often Unreliable\*](#), 9 POLIT. COMM. 69, 81-82 (1992).

202. *Id.* at 72-77.

203. Peter D. Hart Research Associates, question list for NAAV poll., Question 26C and card L.

204. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-65 (1990) ("the people" is used as a "term of art" in the First, Second, and Fourth amendments to refer to individual members of the American community); [United States v. Miller](#), 307 U.S. 174, 179 (1939) (the Second Amendment's militia "comprised all males physically capable of acting in concert for the common defense ...ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."); *Presser v. Illinois*, 116 U.S. 252, 265 (1885)("It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States ..."); *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1875)(right to arms, like right to peaceable assembly, is "found wherever civilization exists").

205. Kleck, *Crime Control*, *supra* note [35](#), at 2.

206. KLECK, POINT BLANK, *supra* note [56](#), at 106.

207. KLECK, *Crime Control*, *supra* note [35](#), at 2 n.2.

208. *Id.* at 5.

209. Dixon, *supra* note 2, at 274. Dixon apparently believes that defensive killings are legitimate only if they prevent killings. While it is certainly possible to construct a moral system based solely on the net preservation of human life, American legal codes are quite different. It is lawful in every state for a person to use deadly force (if the person reasonably believes that no lesser force will suffice), if the person reasonably fears criminal attack which could cause serious bodily injury, or which would involve a rape or other sexual assault. Current law reflects the social judgment that it is better for a rapist to be shot, and risk death, than for a woman to risk being raped. E.g., Don B. Kates, Jr. & Nancy Jean Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873 (1982).

210. See *supra* text at notes 36, 38.

211. Dixon, *supra* note 2, at 274.

212. *Id.* at 275.

213. Dixon, *supra* note 2, at 278. Guns are called "equalizers" precisely because they enable smaller persons to defend themselves against larger persons. As the Winchester company used to inscribe on its rifles:

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

*Quoted in* Kennett & Anderson, *supra* note [120](#), at 108.



214. Among the features of self-defense law which discriminate against women, particularly battered women, are:

\* The requirement that force be only met with equal force. It is legitimate to require a man who is punched in the nose to respond with no more than a punch in the nose. A woman who is being pummeled with a man's fists does not have realistic option of punching back at her larger assailant. Her realistic choices are to endure the beating, or to grab "an equalizer" and threaten to shoot the man if he moves closer.

\* As a general rule, the attack for which self-defense is invoked must be "imminent." For a man who is exchanging harsh words in a bar with a stranger, it makes sense not to allow force to legally be used until an attack actually begins. But when a man tells a woman that he is going to beat her to a pulp, or perhaps kill her, the woman cannot wait until the attack is in progress. By that point, he will be in control and she will no longer be able to defend herself.

\* About half of all American states impose a duty to retreat before self-defense is allowed. Pursuant to the "castle doctrine," no state demands that a person retreat from his own home. To require a person to leave a bar to avoid a brawl rather than to use deadly force in self-defense is appropriate. But many states create an exception to the castle doctrine, requiring that a woman leave her own home rather than use force in self-defense against a husband or boyfriend. Since abandoning the home will usually mean abandoning children to abuse by the husband/boyfriend, and since the husband/boyfriend often tracks down the woman to kill her after she does leave, the exception to the castle doctrine is improper.

\* The test of reasonableness for self-defense is usually an objective test for what a reasonable person under the circumstances would do. The "reasonable prudent person" who is the norm for the test, is, in essence, the reasonable white male whose norms dominate society. What might seem reasonable to a white male who has, perhaps, been mugged once or twice, would not be reasonable to a woman who has been battered over and over. Gillespie asserts that the test for reasonableness should be a subjective one, based on what a reasonable person in the woman's circumstances (including the history of abuse) would do. CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989).

215. Dixon, *supra* note 2, at 281.

216. GILLESPIE, *supra* note 214, at 151, 164.

217. Cal. Penal Code 12031 (Deering 1993).

218. Consider the case of Linda Riss, in which a young woman telephoned the police and begged for help because her ex-boyfriend had repeatedly threatened "If I can't have you no one else will have you, and when I get

through with you, no-one else will want you." The day after she had pleaded for police protection, the ex-boyfriend threw lye in her face, blinding her in one eye, severely damaging the other, and permanently scarring her features. "What makes the City's position particularly difficult to understand," wrote a dissenting opinion in her tort suit against the City, "is that, in conformity to the dictates of the law, Linda did not carry any weapon for self-defense. Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her." *Riss v. New York*, 240 N.E.2d 860 (N.Y. 1968).

Ruth Brunell called the police on 20 different occasions to plead for protection from her husband. He was arrested only one time. One evening Mr. Brunell telephoned his wife and told her he was coming over to kill her. When she called the police, they refused her request that they come to protect her. They told her to call back when he got there. Mr. Brunell stabbed his wife to death before she could call the police to tell them that he was there. The court held that the San Jose police were not liable for ignoring Mrs. Brunell's pleas for help. *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6 (1st Dist. 1975).

For other cases and statutes affirming the doctrine of sovereign immunity as a bar to recovery by crime victims negligently denied government protection, see *Bowers v. DeVito* 686 F.2d 616 (7th Cir. 1982) (no federal Constitutional requirement that police provide protection); *Calogrides v. Mobile*, 475 So. 2d 560 (Ala. 1985); Cal. Govt. Code 845 (no liability for failure to provide police protection) and 846 (no liability for failure to arrest or to retain arrested person in custody); *Davidson v. Westminster*, 649 P.2d 894 (Cal. 1982); *Stone v. State*, 106 Cal.App.3d 924 (1980); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C.App. 1983); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App 1981); *Sapp v. Tallahassee*, 348 So.2d 363 (Fla. Dist. Ct. 1977), cert. denied 354 So.2d 985 (Fla. 1977); Ill. Rev. Stat. 4-102; *Keane v. Chicago*, 240 N.E.2d 321 (Ill. App. Ct. 1968); *Jamison v. Chicago*, 363 N.E.2d 87 (Ill. App. Ct. 1977); *Simpson's Food Fair v. Evansville*, 272 N.E.2d 871 (Ind. App. 1971); *Silver v. Minneapolis*, 170 N.W.2d 206 (Minn. 1969); *Wuethrich v. Delia*, 382 A.2d 929, 930, (N.J. Super. 1978) cert. denied, 391 A.2d 500 (1978); *Chapman v. Philadelphia*, 434 A.2d 753 (Pa. Super. Ct. 1981); *Morris v. Musser*, 478 A.2d 937 (Pa. Commw. Ct. 1984).

219. Mace fires a pin-point stream, not a spray, and the challenge of using it to score a bull's-eye right on a rapist's cornea in a dark night is rather daunting. According to a Kansas City Police Department report: "Mace is not effective against all suspects and can have no effect at all on crazed or extremely intoxicated persons." KANSAS CITY POLICE DEPT., RECOMMENDATIONS OF THE TASK FORCE ON THE USE OF FORCE BY THE KANSAS CITY, MISSOURI, POLICE DEPARTMENT 41 (1991), *quoted in* GELLER & SCOTT, *supra* note 4, at 377.

220. Dixon, *supra* note 2, at 282.

221. Charles L. Rich, James G. Young, Richard C. Fowler, John Wagner, Nancy A. Black, *Guns and Suicide: Possible Effects of Some Specific Legislation*, 147 AM. J. PSYCHIATRY 342 (1990). Kleck's analysis of suicide rates in every American city with a population over 100,000 found that cities with stricter gun controls tended to have lower gun suicide rates, but not lower overall suicide rates. KLECK, *supra* note [56](#), at 223-68.

222. Dixon, *supra* note 2, at 276.

223. Philip J. Cook, *The Role of Firearms in Violent Crime: An Interpretative Review of the Literature*, in CRIMINAL VIOLENCE 236, 269 (1982). See also, Roger Lane, *On the Social Meaning of Homicide Trends in America*, in 1 VIOLENCE IN AMERICA 59 (1989) ("[T]he psychological profile of the accident-prone suggests the same kind of aggressiveness shown by most murderers."); Kleck, Point Blank, *supra* note [56](#), at 282-87.

224. See *supra* note 223.

225. Forty percent of women who appeal their murder convictions have the conviction reversed on appeal. *Fighting Back*, TIME, Jan. 18, 1993. In July 1989, Time magazine did a cover story analyzing every death by gun that had occurred in a particular week. Only 3% of the homicides were recorded as self-defense. In a follow-up story the next year, Time found that the percent of cases which had been determined to self-defense had risen to 12%. TIME, July 17, 1989; TIME, May 14, 1990.

226. If dead body counts are the proper measure of anti-crime utility, then armed citizens are nearly as effective at crime control as the police. For 1991, the FBI Uniform Crime Reports state that police officers with handguns justifiably killed 360 persons, while private citizens justifiably killed 292 persons. UNIFORM CRIME REPORTS, *supra* note [37](#), at 22. For an argument that Uniform Crime Reports substantially undercount justifiable homicides by civilians, see *supra* text at notes 36, 38.

227. See *supra* text accompanying notes 101.

228. Arthur L. Kellerman & Donald T. Reay, *Correspondence*, 315 NEW ENG. J. MED. 1484 (1986).

229. See *supra* text accompanying note 37.

230. See *supra* text accompanying note 196-200.

231. KLECK, Crime Control, *supra* note [35](#), at 2.

232. In a reply to letters to the editor, Kellerman and Reay wrote:

In 1978, both the National Rifle Association and the National Center for the Study and Prevention of Handgun Violence sponsored door-to-door surveys. Both included questions regarding firearms and violence in the home. Despite the conflicting political views of the sponsoring organizations, both polls agreed remarkably on similarly worded questions. Taken together, these two

polls suggest that guns kept in the homes are involved in unintentional deaths or injuries at least as often as they are fired in self-defense.

KELLERMAN & REAY, Correspondence, *supra* note [228](#). Kellerman and Reay's assertion could be true, although the data they cite offer no reason to so conclude. The NRA poll had not asked anything about accidents, and the Center's poll did not ask where the accidents took place. DECISION MAKING INFORMATION, ATTITUDES OF THE AMERICAN ELECTORATE TOWARDS GUN CONTROL (1978) (pollster hired by NRA); CAMBRIDGE REPORTS, AN ANALYSIS OF PUBLIC ATTITUDES TOWARDS HANDGUN CONTROL (1978)(Pat Caddell's firm, hired by the CSPHV).

In any case, the question is not how often a gun is fired for defensive purposes; the issue is how often it is used. If drawing a gun is sufficient to frighten away an attacker, firing the gun would be unjustifiable. Kleck estimates that 95% of defensive handgun uses do not involve firing the gun.

233. Eli Robins, George E. Murphy, Robert H. Wilkinson Jr., Seymour Gassner, & Jack Kayes, Some Clinical Considerations in the Prevention of Suicide Based on a Study of 134 Successful Suicides, 49 AM. J. PUB. HEALTH 888, 890 (1959); B. Barraclough, J. Bunch, B. Nelson, P. Sainsbury, A Hundred Cases of Suicide: Clinical Aspects, 125 BRIT. J. PSYCHIATRY 355 (1974).

234. See *supra* text accompanying notes 223-24.

235. See *supra* text accompanying note 167.

236. Crime rates are for 1984, using Interpol statistics, and reported in Kalish, *supra* note [51](#). When 1984 data is not available, the most recent preceding year is used. Accordingly, the Australian homicide rate is for 1981; England and Wales is 1983. For rape, Canada's data is from 1983, England and Wales from 1983 also. For robbery and burglary, England and Wales is 1983. The homicide rate for Britain does not include "political" homicides. See *supra* note [51](#) for the source of the Scottish homicide rate.

Suicides are for the year 1985, and recorded in STATISTICAL ABSTRACT OF THE UNITED STATES, 820 (1989) and in UNITED NATIONS DEMOGRAPHICS YEARBOOK 1985 (1987).

(The table is taken from the author's book *The Samurai, the Mountie, and the Cowboy*, *supra* note [34](#), at 407. In the book, the Japanese burglary figure is incorrectly reported as "2351.2." The error occurred because the author's draft listed the figure as "251.2," and when the author marked page proofs to substitute a "3" for the "5" in the burglary figure, a production error resulted in the "3" being inserted but the "5" not being deleted. The author regrets any confusion caused by the error.)

237. Norman Okihiro, BURGLARY: THE VICTIM AND THE POLICE 31 (1978) (1978 Toronto study); U.S. Bureau of Justice Statistics, Household Burglary, January 1985, at 4; Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 1, 16 (1988). For American burglars and daytime entry, see GEORGE RENGERT & JOHN WASILCHICK, SUBURBAN BURGLARY: A TIME AND A PLACE FOR EVERYTHING 30, 62 (1985); J. CONKLIN, ROBBERY AND THE CRIMINAL JUSTICE SYSTEM 85 (1972).

A study of an unnamed "northern city" in Ontario for the years 1965-70 also appears to show a relatively high level of burglary against occupied residences. The study reported that 12.2% of burglaries were daytime, 69.5% were nighttime, and 18.3% were unknown. It is certain that no person was home for the "unknown burglaries" since if someone had been home, the time of entry would be known. A large percentage of the nighttime burglaries may have involved a person at home, since most people are at home at night. Peter Chimbros, A Study of Breaking and Entering Offenses in "Northern City" Ontario, in CRIME IN CANADIAN SOCIETY 325-26 (1975).

238. Canadian Criminal Code 109(3).

239. Blackman, *Firearms and Violence*, *supra* note [36](#) (data through early 1980s). The post-1977 burglary increase was part of a general crime escalation. Hence, it might be that the 1977 gun restrictions had nothing to do with the burglary surge. The pattern of burglary against occupied residences in Canada had been established long before the 1977 gun law went into effect. The high burglary rate (if it has any relation at all to gun issues) may be attributed less to the particulars of Canadian law than to Canadian gun culture, which has never emphasized the ownership of guns for armed home defense. By Canadians' choice, Canadian homes have always been protected by loaded guns much less often than American homes.

240. PAT MAYHEW, RESIDENTIAL BURGLARY: A COMPARISON OF THE UNITED STATES, CANADA AND ENGLAND AND WALES (1987) (citing 1982 British Crime Survey).

In the Republic of Ireland, where gun control is also severe, burglars have little reluctance about attacking an occupied residence. Claire Nee and Maxwell Taylor, Residential Burglary in the Republic of Ireland: Some Support of the Situational Approach, in WHOSE LAW AND ORDER? ASPECTS OF CRIME AND SOCIAL CONTROL IN IRISH SOCIETY 143 (1988).

241. The risk of either outcome for a burglar is about 1-2%. WRIGHT, ROSSI, & DALY, *supra* note [131](#), at 139-40 (study for National Institute of Justice); Kleck, CRIME CONTROL, *supra* note [35](#), at 12, 15-16. In a survey of felony convicts in state prisons, 73 percent of the convicts who had committed a burglary or violent crime agreed "one reason burglars avoid houses when

people are at home is that they fear being shot." *Id.* at 16, citing INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, CODEBOOK FOR ICPSR STUDY 8437, ARMED CRIMINALS IN AMERICA: A SURVEY OF INCARCERATED FELONS (1986).

242. Shotguns and rifles can also be used for home defense, but their greater length makes them harder to maneuver in confined settings, and easier for an attacker to take away. Some rifle rounds also create a serious risk of overpenetration - of entering and exiting the target burglar's body, and continuing forward to pass through a wall, and perhaps kill someone in the next room.

243. ROGER D. MCGRATH, GUNFIGHTERS, HIGHWAYMEN, & VIGILANTES: VIOLENCE ON THE FRONTIER (1984).

244. The Lightning was a double action version of the famous Peacemaker or Frontier revolver. IAN V. HOGG, THE ILLUSTRATED ENCYCLOPEDIA OF FIREARMS 121 (1978).

245. The homicide rate in Aurora was approximately 64 per 100,000, and in Bodie was 116. For the Washington, D.C. rate, see *supra* note [85](#).

246. Bodie had a robbery rate of 84 per 100,000 persons per year. The rate in 1980 New York City was 1,140; in San Francisco-Oakland, 521, and the United States as a whole, 243. The Bodie burglary rate was 6.4 per 100,000 population per year. The 1980 New York City rate as 2,661; the San Francisco-Oakland rate was 2,267. The overall American rate was 1,668. The Bodie theft rate was 180, in contrast to New York's 3,369 and San Francisco-Oakland's 4,571. The American rate was 3,156. All data from MCGRATH, *supra* note 243, at 247-54.

247. Grant Smith, *Bodie, Last of the Old Time Mining Camps*, 4 CALIF. HIST. SOC'Y Q. at 78 (1925) quoted in McGrath, *supra* note 243, at 157.

248. ROBERT R. DYKSTRA, THE CATTLE TOWNS 144-47 (1968).

249. ROBERT M. UTLEY, HIGH NOON IN LINCOLN: VIOLENCE ON THE WESTERN FRONTIER 173-79 (1987). Again, as in Aurora and Bodie, the ubiquity of firearms turned many drunken quarrels into homicides. *Id.*

250. William C. Holden, *Law and Lawlessness on the Texas Frontier 1875-1890*, 44 SW. HIST. Q. 188 (1940).

251. John Umbeck, *Might Makes Right: A Theory of Formation and Distribution of Property Rights*, 9 ECON. INQUIRY 38 (1981).

In other parts of the West, citizens also successfully used a variety of private mechanisms to protect property rights in the absence of effective government. Terry L. Anderson & P.J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9 (1979).



252. Day, *"Sooners" or "Goners," They Were Hell Bent on Grabbing Free Land*, 20 SMITHSONIAN, Nov. 1989, at 192.

253. W. EUGENE HOLLON, *FRONTIER VIOLENCE: ANOTHER LOOK* (1974).

254. FRANK RICHARD PRASSEL, *THE WESTERN PEACE OFFICER: A LEGACY OF LAW AND ORDER* 17 (1972).

255. Dixon, *supra* note 2, at 275.

256. The American nuclear option may also have played a role in deterring conventional war in Europe, a theater where Soviet forces possessed a large quantitative superiority.

257. As Rep. James Tawney, Chair of the U.S. House Appropriations Committee, stated in 1911, "great armaments are a continual menace to peace. They tend to hasten the event which it is claimed elaborate preparation for war is intended to prevent." *Oppose Canal Forts at Peace Meeting*, N.Y. TIMES, Jan. 14, 1911, at 7, col. 1.

258. Dixon, *supra* note 2, at 275.

259. See *supra* text at notes 5-8.

260. Johnson, *supra* note [1](#), at 19-20.

261. *Cf.* Mandel v. Mitchell, 325 F. Supp. 620, 629 (E.D.N.Y., 1971)("[T]he people, not the government, possess the sovereignty").

262. See sources discussed at *supra* note [1](#). The Second Amendment was built on the recognition that collective defense against tyranny was possible only if individuals had their own guns.

James Madison predicted that no federal government could become tyrannical, because if the government did, it "would be opposed [by] a militia amounting to near half a million ... citizens with arms in their hands ..." Exalting "... the advantage of being armed, which the Americans possess over the people of almost every other nation ...," Madison contrasted the American government with the European dictatorships, which "... are afraid to trust the people with arms." THE FEDERALIST, [NO. 46](#) (J. Madison). At the time Madison was writing, "half a million citizens" amounted to almost the entire adult white male population.

Elaine Scarry writes:

[T]he second amendment is a very great amendment, and coming to know it through criminals and the endlessly disputed claims of gun clubs seems equivalent to coming to know the first amendment only through pornography. Freedom of speech may or may not protect pornography; but it would be difficult, probably impossible, to infer the monumental scale and solidity of that amendment from this one solitary inflection on its surface. The same is true of the right to bear arms. The history of its formulation and

invocation makes clear that whatever its relation to the realm of individuals and the private uses they have devised for guns, the amendment came into being primarily as a way of dispersing military power across the entire population. Like voting, like reapportionment, like taxation, what is at stake in the right to bear arms is a just distribution of political power.

Scarry, *supra* note [1](#), at 1268-69.

263. Hitler, Stalin, and Mao all enforced rigorous gun control policies, as they understood the validity of Mao's dictum "Political power grows out the barrel of a gun." For the Nazi weapons laws, see JAY SIMKIN & AARON ZELMAN, "GUN CONTROL": GATEWAY TO TYRANNY (1992).

264. As the late vice president Hubert Humphrey explained: "The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible." Quoted in David Hardy, *The Second Amendment as a Restraint on State and Federal Firearm Restrictions*, in RESTRICTING HANDGUNS, 171, 184-85 (1990).

265. In Europe during World War II, the U.S. government supplied anti-Nazi partisans with a \$1.75 analogue to the zip gun (a very low quality handgun). JULIAN HATCHER, FRANK JURY, AND JOE WELLER, FIREARMS INVESTIGATION IDENTIFICATION AND EVIDENCE 59 (1957).

As one author put it: "Anyone who claims that popular struggles are inevitably doomed to defeat by the military technology of our century must find it literally incredible that France and the United States suffered defeat in Viet Nam ... that Portugal was expelled from Angola and Mozambique; and France from Algeria." Alan Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113, 139 (1982).

266. [THE DECLARATION OF INDEPENDENCE](#) para. 2 (U.S. 1776).

267. *Stalag in Kingston*, TIME, Sept. 23, 1974, at 55.

268. Gun Court Act 1974, enacted April 1, 1974.

269. Paul Gendreau & C. Thomas SurrIDGE, *Controlling Gun Crimes: The Jamaican Experience*, 6 INT'L J. CRIMINOLOGY & PENOLOGY 43, 47 (1978); Letter from William Calathes to author (Nov. 1989).

270. Edward Diener & Rick Crandall, *An Evaluation of the Jamaican Anticrime Program*, 9 J. APPLIED SOC. PSYCHOL. 2, 135, 136 (1979); *Stalag in Kingston*, *supra* note 267, at 55; Colin Greenwood, Comparative Cross-Cultural Statistics in WHY HANDGUN BANS CAN'T WORK, *supra* note 58, at 38; Hanley, Gun Control Laws Vary, POUGHKEEPSIE J., Apr. 19, 1981, at 9A; William Calathes, Criminal Justice and Underdevelopment: A Case Study of the Jamaican Gun Court Act, 6 J. CARIBBEAN STUD. 323, 328 (1988)(hereinafter cited as "Calathes, Criminal Justice".)

271. Gun Court Act 13(1); Dudley Allen, *Urban Crime and Violence in Jamaica*, in CRIME AND PUNISHMENT IN THE CARIBBEAN 31 (Rosemary & Gary Brana- Shute eds., 1980).

272. William Calathes, *Gun Control in a Developing Nation: The Gun Court Act*, 14 INT'L J. COMP. & APPLIED CRIM. JUST. 317, 335 (1990) (hereinafter cited as "Calathes, Gun Control,"); Calathes, *Criminal Justice*, *supra* note 270, at 327.

273. Gun Court Act, 8(2), 22(1)&(2).

274. Hinds & Others v. The Queen [1976] 1 All E.R. 353, [1976] 2 W.L.R. 366 (Privy Council)(declaring the indefinite sentence aspect of the law unconstitutional because it vested authority to terminate the sentence in non-judicial officers, rather than committing sentencing decisions to the judiciary); L.G. BARNETT, THE CONSTITUTIONAL LAW OF JAMAICA 313 (1977), cited in Calathes, *Gun Control*, *supra* note 272, at 330. See also Gendreau & Surridge, *supra* note 269, at 56, 59, n. 22.

275. Gendreau & Surridge, *supra* note 269, at 46-47.

276. *Id.* at 48.

277. *Id.* at 50. Gendreau and Surridge argue that the increase in non-gun murders, which partially offset the decline in gun murders, was not statistically significant.

278. *Id.* at 50-51.

279. *Id.* at 51.

280. *Id.* at 55.

281. *Id.* at 55.

282. Carl Stone, THE POLITICAL OPINIONS OF THE JAMAICAN PEOPLE (1976-1981) 68 (Kingston: Blackett Pub., 1982) (pamphlet), *cited in* MICHAEL KAUFMAN, JAMAICA UNDER MANLEY: DILEMMAS OF SOCIALISM AND DEMOCRACY 178 (1985).

283. Jamaica: *Tributes to Peter Tosh, Concern Over Violence*, INTER PRESS SVC., Sept. 14, 1987.

284. Calathes, *Gun Control*, *supra* note [272](#), at 332.

The New York State prison commissioner has stated that if 1% of the illegal handgun owners in New York City were caught, tried, and sent to prison for a year, the state prison system would collapse. DON B. KATES, JR., GUNS, MURDERS, AND THE CONSTITUTION 59 (1990).

285. Americas Watch Committee, HUMAN RIGHTS IN JAMAICA (1986). See also Paul G. Chevigny, *Police Deadly Force as Social Control: Jamaica, Argentina, and Brazil*, 1 CRIM. L. FORUM: AN INT'L J. 389, 406, 419 (1990) (from 1980 to 1989, Jamaican police perpetrated one third of the nation's

homicides; "some police homicides in Brazil, as in Jamaica, are summary executions of suspects, many of whom are black youths. The [police] tend to dispose of criminals in this way not in major cases but in fairly routine ones involving drugs or theft, in which the victims are anonymous.") Reggae singer Bob Marley's song *I Shot the Sheriff* told the story of a young man on the run after shooting a sheriff in self-defense. THE WAILERS, *I Shot the Sheriff*, on BURNIN' (Island Records 1973).

286. *Id.*

287. *Id.*

288. Calathes, *Gun Control*, *supra* note [272](#), at 333.

289. *Id.* at 338.

290. *Id.*

291. Calathes, *Criminal Justice*, *supra* note [270](#), at 354.

292. Gendreau & SurrIDGE, *supra* note [269](#), at 55.

293. *Id.* at 60 n.43.

294. Diener & Crandall, *supra* note [270](#), at 141-42.

295. Quoted in Calathes, *Criminal Justice*, *supra* note [270](#), at 344.

296. Allen, *supra* note [271](#), at 56-57.