

## Gun Laws and Policies: A Dialogue

### Part I: Guns in American Culture

**EDITOR (John Paul Ryan): I would like to begin by asking you to talk about the place of guns in American culture. Are guns a special problem in our society? Do we have an exaggerated fear of guns? How have the media and popular culture formed our images and biases of guns, their uses, and public safety?**

**SAUL CORNELL** (Ohio State University/History): The history of guns in American society is a complex story. As is true for so much of our history, the gulf between myth and reality has been vast. Still, myth can be a powerful force in shaping law, politics, and public policy. The well regulated militia described by the Second Amendment is an excellent case in point. The performance of the militia in the Revolution was mixed at best. Leading military figures in the Revolutionary era urged Americans to lessen their reliance on this venerated ideal and replace it with a more modern and professional military force. After a long debate in Congress, proponents of military reform were defeated by those who continued to fear pro-

**Editor's Note:** *Eight social science, humanities, policy, and legal scholars discuss a wide range of viewpoints on the place and regulation of guns in the United States and abroad. The conversation traverses historical perspectives, the origins and meaning of the Second Amendment, federal and state laws regulating guns, the role of public opinion and interest groups in influencing legislation, and strategies to reduce the level of gun violence in the future. See this dialogue also at [www.abanet.org/publiced/focus/](http://www.abanet.org/publiced/focus/).*

fessional armies and instead supported the idea of the militia. Although willing to nod to this ideal, Congress was not willing to adequately fund the militia they created, so once again the divergence between rhetoric and reality continued.

I find it fascinating that so many gun rights groups today have chosen the image of the minuteman as their symbol. The symbolic power of this icon continues to shape how we view guns. Most people who rally behind this symbol would not welcome the kind of intrusive regulation required to recreate the militia of the founding period. Would people who rail against government regulation of firearms be willing to muster on the town green or at the local mall and allow government to regulate the storage of privately owned weapons, or consent to privately owned weapons being registered or taxed? Once again, myth trumps reality in the great American gun debate.

**ROBERT J. COTTRILL** (George Washington University/Law/History): Guns have played an important role in American history. The best evidence we have is that private gun ownership was widespread for the white population from the beginning of the English settlement of North America. Indeed, from the earliest settlement there was an effort to encourage white migration in order to ensure a population of white men capable of bearing arms. The idea of the universal militia of all free (white) men, bearing their own arms, had its origins in English law and custom. The concept was strengthened in the American context, in part because of the desire to control the black and Indian populations. This idea was further strengthened by the role of the militia in the American Revolution. If the militia's

record in the Revolution was "mixed" (as indeed was that of the Continental Army), the image of the "farmer who fired the shot heard round the world" was a powerful one to the generation that fought the Revolution, and indeed to subsequent generations. The idea that American freedom arose from a revolution started by armed citizens was powerful enough to influence the writing of the Constitution—hence, the Second Amendment.

**ROBERT SPITZER** (State University of New York at Cortland/Political Science): Regardless of whether guns were prolific or rare in American history, there is no doubt that gun presence and use coincide with America's earliest history. Guns undeniably played an identifiable role in American habits and development, yet their role was also exaggerated and romanticized even before there was a Hollywood. The best example of this is American westward expansion, where folklore, and later Hollywood, perpetuated the impression that the West was "won" by gun use. Yet the truth was the opposite. As historians have documented, the American frontier was tamed through the westward

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movement of farmers, ranchers, business-people, tradesmen, and other populations who, when towns and cities were formed, demanded and imposed strict gun controls as a necessary first step toward the establishment of public safety. The impressions that gun fights were common, or that civilian gun-carrying was key to order, are simply false. For example, in the five most violent cow towns of the old West (Abilene, Caldwell, Dodge City, Ellsworth, and Wichita), 45 killings occurred between 1870 and 1885. Of those, only six came from six-shooters; sixteen were by police. Hollywood-style gun fights were virtually unheard of. Nevertheless, this cultural imagery prevails today not only in the United States but around the world. Guns are certainly feared in modern society and rightly so. As any responsible gun owner knows, guns are dangerous implements and should be treated accordingly.

**DEBORAH HOMSHER** (Cornell University/Asian Studies—Managing Editor of Publications): Perhaps we should ask why these historical questions are so important to us. To answer that question, it's useful to focus on the more recent past—on the 1990s rather than the 1770s—and the fierce public gun debates during the Clinton years. I would argue that the most passionate advocates of Second Amendment rights and right-to-carry legislation during those years believed that certain definitive American qualities were being lost because of the cultural evolution that had begun in the 1960s, a decade they perceived as the relativistic “anti” years: anti-church, anti-marriage, anti-white-male, anti-war, and anti-gun.

Self-reliance is the key national characteristic valued by those who defend their right to own guns without interference from the local police, the Congress, intrusive medical experts, or Sarah Brady. I am a great fan of self-reliant Americans generally and of our American literature and popular culture featuring male adventurers in gigantic terrains. At the same time, I see that most American adventure narratives featuring hunts and gunfire include few women, and those females who do appear tend to be silly or in need of rescue, or they're given guns so they can play along. In short, America's politics and popular culture tend to be markedly masculine.

Public fascination with guns grows most passionate when, in fact, the actual need for guns appears to be waning. Hence the popularity of Buffalo Bill's Wild West Show in the late nineteenth century, just after America's frontier had been pacified. Hence the heat of the NRA's Web site throughout the 1990s, when fewer men were actually buying licenses to hunt deer, crime rates were dropping in the big cities, the Soviet Union

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*Strict gun control  
was a first step  
to public safety  
in the old West.*

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[ROBERT SPITZER]

had dissolved, and more people found themselves working with their fingertips at computer keyboards like secretaries, not adventurers.

**GREGG CARTER** (Bryant College/Sociology): Guns do represent a special problem in our society. The level of gun violence in the United States is much higher than in our peer nations, the industrialized democracies of Western Europe, Japan, Australia, New Zealand, and Canada.

In one respect, though, we do have an exaggerated fear of guns—gun violence is not spread equally across our social fabric. African American males in their teens and early twenties are, by far, the most likely to suffer such violence. In the 1990s, the rate of homicide due to firearms for black males in their early twenties was 140.7 per 100,000; the same rate for all individuals in their early twenties was 17.1. Similarly, the rate of homicide due to firearms for black teenagers was 105.3 compared with 14.0 for all teenagers. Although the absolute numbers of victims have fallen in recent years, the racial slants in the data remain.

These slants stand in contrast to the high media coverage of shootings involving teenage boys in the late 1990s and early 2000s. All but one of these high-profile incidents have involved white, male teens from small towns and suburbia. Except for the bloodbath at Columbine High School in Littleton, Colorado, shootings of young people in the neighborhoods

surrounding our inner-city schools are on par with these high-profile cases, though little publicized except in the local media. In short, white and minority gun violence are treated differently in the national media. This bias in media coverage is responsible for a great deal of unneeded fear of gun violence. Compared to their poor counterparts, working-class, middle-class, and upper-class Americans have little to fear.

**JAMES JACOBS** (New York University/Law School): I am not sure that guns are a special problem in our society. Lethal violence is definitely a special problem. It is often asserted that firearms' availability is the cause of America's high level of lethal violence. This assertion ought to be regarded as controversial. There are many plausible causes of America's high rate of lethal violence—e.g., the frontier tradition, the southern code of honor, pockets of extreme poverty amid great material wealth. The great majority of violent crimes (other than homicides) in the United States are not committed with firearms. And

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despite the easy availability of firearms in the United States, our suicide rate is not high in comparison to other countries. Thus, I believe that we should be primarily concerned about violence, not firearms.

In research that one of my students and I have been conducting, we have identified more than 50 “gun” magazines commonly available for sale. These magazines can be divided into at least four categories: hunting; target shooting; survivalist; and technical. For the most part, there is nothing sensationalistic or titillating about the content of these magazines, which are read by almost as many Americans as auto magazines. They present guns as a desirable and useful consumer item, like cars. Of course, gun magazines do not provide the only media images of firearms. Movies and television present constant images of guns being used to kill people. Some of these killings (by the bad guys) are offered as examples of evil, while some of these killings (by the good guys) are presented as examples of good.

**RICHARD ABORN** (The Kamber Group/Senior Counsel & Director of Public Policy): I would suggest that the “special problem in our society” is not with guns, but with gun violence. Whether or not the founders wished to arm the citizenry to ensure that excessive government power could be curtailed (unlikely in my view) or whether or not the West was settled at the end of a blazing six-shooter (equally unlikely in my view) has become largely irrelevant to the contemporary debate over guns. More relevant, the largely romanticized view of guns in American history has become accepted as fact and has been parlayed into a powerful rallying cry for those who oppose gun control legislation. After all, Charlton Heston did not hold an AK-47 over his head.

In a contemporary culture that has a very short attention span, thrives on imagery, and promotes the clash of two diametrically opposed sides as a means of discussing issues, fostering a re-examination of the true role of guns in American history is virtually impossible. It is important, therefore, that gun control advocates be quite clear that their objective is not to eliminate this icon of American culture, but rather to try to control the violence associated with guns.

Do we have an exaggerated fear of guns? I don't think so. If we did, millions of perfectly reasonable, responsible, and law-abiding Americans would not own them. On the other hand, our experience with the rapid increase in crime from the mid-1980s to the early 1990s has impressed upon us the critical need to respond to the criminality associated with illegal guns.

**JOYCE MALCOLM** (Bentley College/History): Guns may have come to be seen as a special problem in American society in the last half of the twentieth century, but for most of our history they were viewed neither as a problem nor as peculiar to the United States. As Robert Cottrol points out, the American colonists took from England the tradition of armed

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*American freedom  
and the Second  
Amendment  
arose from a  
Revolution started  
by armed citizens.*

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[ROBERT J. COTTROL]

individuals responsible for their own safety and for general peacekeeping duties in the larger community. Only one aspect of these duties was service in the militia. Common law, as practiced in both Britain and America, appreciated the need for men and women to be able to defend themselves and permitted them to do so. There was also, of course, a long philosophical tradition that a free man was a man who was armed. All this seems unusual today, not because there is no longer a need for self-defense, but because most governments, including the British government, have not trusted their people to be armed and have, instead, insisted on a monopoly over the use of force.

I think many Americans have an exaggerated fear of guns, because both the print and television media are overwhelmingly dominated by those who advocate strict controls on private firearms.

Incidents involving shootings are given intense coverage, while situations in which individuals have used firearms to protect themselves or to thwart crimes get far less attention. The result is that the public has come to believe that gun crime and gun accidents are increasing, when in fact gun accidents are greatly reduced and we have enjoyed a decade of sharply declining gun violence. But old stereotypes die hard. The image persists of the gun-toting American living in a violent “cowboy country” in contrast to the unarmed Briton, living in a peaceable land. Neither stereotype is correct. Although an increasing number of Americans own guns, the level of gun violence has been declining; the British are disarmed, and gun violence is increasing.

**GREGG CARTER:** I beg to differ with Joyce Malcolm. Guns have a longer history of being seen as a special problem in the United States. Congressional deliberations leading to the National Firearms Act of 1934 and the Federal Firearms Act of 1938 were instigated by the gun violence of the Prohibition Era, which culminated in the 1929 St. Valentine's Day Massacre in Chicago, and by the 1933 assassination attempt on President Franklin Roosevelt. Taken together, the acts banned sawed-off shotguns and placed taxes and other restrictions on the sale of machine guns and automatic weapons.

The assassinations of President Kennedy, Robert Kennedy, and Martin Luther King, Jr., motivated Congress to pass the Federal Gun Control Act of 1968, which banned mail-order purchase of firearms and regulated the interstate transportation and importation of guns and ammunition. Armed Black Panthers fueled additional fear of firearms and the need to regulate their sale, possession, and use.

John Hinckley's use of a cheap handgun in March of 1981 to shoot President Ronald Reagan and his press secretary, James Brady, helped spur the movement to control guns. Gun control proposals were introduced in Congress; by 1986 the first of these passed as part of the Firearms Owners' Protection Act. Originally intended to dismantle many gun control provisions, this act did include a prohibition on interstate pistol sales and on the sale of new machine guns. The 1988 Undetectable Firearms Act (ban-

ning plastic guns) and the 1993 Brady Handgun Violence Prevention Act (requiring a five-day waiting period and a criminal background check before an individual can purchase a handgun) were also directly traceable to the Reagan tragedy.

In response to a shooting of school children in Stockton, California, in 1989, President George Bush issued an executive order temporarily banning the importation of AK-47s and selected similar rifles. The Stockton incident also sparked the introduction of several bills in Congress to outlaw or restrict assault pistols and rifles. After the election of Bill Clinton, Congress enacted in 1994 the Violent Crime Control and Law Enforcement Act, which banned nineteen different types of assault weapons.

In sum, during the past eighty years we have seen many periods in which firearms have been viewed as out of control in the United States. Public debate on all of our major gun legislation has included reference to our peer nations, almost all of whom had much stronger firearms regulations.

**SAUL CORNELL:** Anyone who enters into this contentious issue is amazed by the power of historical arguments and symbols in contemporary public discourse on guns. It would be hard to imagine groups favoring an expansive reading of the First Amendment using an eighteenth century printing press the way Charlton Heston has used a musket at the NRA's conventions. The furor over Michael Bellesiles' *Arming America*, a book that argued that Americans in the founding era did not own many guns or have much ability with them, nicely illustrates this point. Bellesiles challenged a mythology that many people hold sacred. It turns out that *Arming America* and the myth were each caricatures of reality. There clearly was a perception that there were not enough military-style weapons to arm the militia. Americans in the Revolutionary era were more worried that government would fail to arm the people than that government would actively disarm the people. This is exactly the opposite of the contemporary debate over gun policy. The fascinating questions become: How did we move from the former to the latter situation and how do we interpret a Constitution written in the former world in our own very different world?

## Part II: Guns and the Second Amendment

**EDITOR:** What is the state of legal thinking regarding the Second Amendment and guns? In your judgment, does the Second Amendment prohibit some or all forms of gun regulation? Or, alternatively, does the Second Amendment permit unlimited government regulation of guns?

**ROBERT SPITZER:** Based on court rulings, historical interpretation, and the sense of those who drafted and debated the amendment, the meaning of the Second Amendment is clear. It provided for a citizen-based right to keep and bear arms when men were called into service in a government-regulated militia, keeping in mind that militias composed of self-armed men were the primary means of national defense in the eighteenth and early nineteenth centuries.

The national government formed under the Constitution of 1787 was granted sweeping new powers, including not only the power to create and maintain a standing army (a power denied to the national government under the old Articles of Confederation), but also the power to organize, arm, and discipline the militias. Anti-federalists already suspicious of new federal powers were deeply concerned that states would no longer retain militia authority, and so they sought this reassurance in the Bill of Rights.

The militia-based understanding of the Second Amendment has been uniformly endorsed in Supreme Court cases stretching back to the nineteenth century (*U.S. v. Cruikshank*, 1876; *Presser v. Illinois*, 1886; *Miller v. Texas*, 1894; *U.S. v. Miller*, 1939; *Lewis v. U.S.*, 1980). The age of some of these cases has prompted some critics to dismiss them, but court cases do not come with expiration dates. In addition, more than forty lower federal court cases, and law review articles published as early as 1874, all embrace this meaning.

In recent decades, efforts have been mounted to impose an individual meaning on the Second Amendment—that is, to assert that the amendment protects an individual right to own guns, *aside and apart from* militia service. The effort dates to a law journal article published in 1960. Since then, the individualist movement

has won adherents, and in 2001 a federal court (Fifth Circuit) for the first time accepted this view in *U.S. v. Emerson*. This view has now been endorsed by Attorney General John Ashcroft, representing a reversal of decades of Justice Department interpretation. But even supporters of the individualist view generally concede that it permits reasonable gun regulations.

**ROBERT J. COTTROL:** There can be little doubt that the Second Amendment was intended to protect the right of the people to have arms. The amendment should first be seen as a restatement of the principle found in the English Bill of Rights of 1689. This principle—that the people should be armed not only to participate in militia duty but also to defend themselves against a tyrannical government—was a well-recognized part of Anglo-American political and constitutional thought endorsed by, among others, English legal commentator William Blackstone.

Both Blackstone and the English Bill of Rights were part of the background of the framers as they drafted the Bill of Rights, including the Second Amendment. No one has found any statements from the late eighteenth or early nineteenth century endorsing the notion that the amendment applied only to men acting in a militia capacity. Although one of the purposes of the Second Amendment was to ensure that an armed population would be available to act in a militia capacity, there is no evidence that the right was to be restricted to that. Indeed, given what we know of the rejection of alternatives that were offered, there is a strong indication that the intent was to protect an individual right. Virtually every legal commentary in antebellum America on the Second Amendment saw the amendment in individual-rights terms, starting with St. George Tucker who, in his 1804 (first American) edition of Blackstone, contrasted the robust right in the United States with what he saw as the weaker right in England.

The history of the right to keep and bear arms in the U.S. Constitution does not end with the Second Amendment. We have to look also at the history of the Fourteenth Amendment. The framers of that amendment assumed the right to be individual, and the best reading of the debates over the amendment indicates they

intended it and the rest of the Bill of Rights to be made binding on the states through the “privileges or immunities” clause. Their motivation was simple; they wanted to stop the southern states from disarming the newly freed black population of the South.

I believe that Robert Spitzer is standing the history of individual- and collective-rights views of the Fourteenth Amendment on its head. Before 1960 there were few who would have claimed that the Second Amendment did not protect the right of individuals. The collective-rights view is a product of the 1960s and the search for a constitutional justification for gun control. Spitzer is misreading the cases that he cites in support of a militia-based understanding of the Second Amendment. *Cruikshank*, *Presser*, and *Miller v. Texas* aren’t about the individual- versus collective-right issue at all. They stand for the proposition that the Second Amendment only restricts the federal government. *Cruikshank* involved private individuals (the Ku Klux Klan) infringing on the First and Second Amendment rights of individuals (black men trying to vote). In a decision that should be infamous, the Supreme Court said that Congress could not pass civil rights legislation protecting the freedmen from Klan violence.

What does an individual-rights interpretation of the Second Amendment mean for gun control? If we define gun control as measures designed to ensure that ineligible people—those with histories of criminal activity or mental instability—are stopped from buying guns, an individual-rights reading of the Second Amendment would actually help this process. The reason that there is a mass movement opposing all gun control measures is directly related to decisions of the courts that do not protect the Second Amendment rights of the American people. Otherwise, we could begin to have a much more productive dialogue on firearms regulation.

**SAUL CORNELL:** There is tremendous ferment in the field of Second Amendment scholarship and jurisprudence. Most, but certainly not all, scholars and judges think that the controlling precedent, *U.S. v. Miller*, favors a militia-based view of the amendment. This interpretation is often described as the collective-rights view, but I don’t think it makes sense to continue to talk about two camps in this debate. There

are now at least three models for understanding the Second Amendment. Some view it as an individual right, others as a collective right, and some have rejected both of these views and have embraced a third view that might best be described as a civic right.

The individual-rights view comes in at least two radically different forms: an expansive individual-rights view and a limited individual-rights view. For supporters of the expansive individual-rights view, the Second Amendment should be treated in much the same way that we treat freedom of speech. This would subject gun laws to ‘strict scrutiny’ by courts and might undermine some, but certainly

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*The Supreme Court  
has consistently  
endorsed a militia-  
based view of the  
Second Amendment.*

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[ROBERT SPITZER]

not all, existing gun laws. For these scholars, guns and words are identical from a constitutional perspective. For those who favor the limited individual-rights model, private ownership of guns would be protected as an individual right, but would be subjected to the much less stringent “rational basis” test.

The limited collective-rights view, often described as the militia or states’ rights view, obviously poses no serious barrier to government regulation of firearms, so long as such regulation does not disarm the militia. The more expansive notion of the collective-rights view, one held by the whole people, not individuals, has not attracted much scholarly support nor has it generated coherent theory for how gun laws ought to be evaluated by judges.

For those scholars who have grown frustrated with the “either/or” quality of the debate, the concept of a civic right provides a new paradigm for thinking about the right to bear arms. To understand a civic right, one might turn to the analogy between the militia and the jury. Citizens have an obligation to serve on the jury, which both protects liberty and is an es-

sential institution of republican society. Citizens also have the right to bear arms, so that they can meet their obligation to participate in a well-regulated militia. The right protected by the Second Amendment is an odd amalgam of a right and an obligation. If citizens were properly trained and their weapons were approved by the government, properly registered, and stored safely, they would then be entitled to full Second Amendment protection.

**JAMES JACOBS:** In my judgment, the argument that the Second Amendment does not protect the individual’s right to keep and bear arms actually gets in the way of gun control. As long as gun control advocates insist that gun owners have no constitutional rights and that guns could lawfully be prohibited and confiscated, many gun owners will oppose all proposed gun controls as steps along the road to prohibition.

If, on the other hand, gun control proponents were willing to recognize that the Second Amendment does protect the law-abiding adult citizen’s right to keep and bear arms, the gun control debate could be toned down. We could then focus on what reasonable regulations are compatible with the constitutional right. If gun owners didn’t have to fear prohibition, they would be more amenable to regulations such as registration and, perhaps, licensing.

**RICHARD ABORN:** Gun control supporters must attract gun owners to the anti-gun violence movement in order to break the legislative deadlock. When I was president of Handgun Control, I actively supported establishing an organization of gun owners in favor of gun control legislation. Law-abiding gun owners generally agree with most of the legislation that has been proposed. They fully understand the concept of licensing and registration; most agree with one-gun-a-month laws; and they rarely object to requirements for a background check. The tension arises because gun owners are not convinced that gun control supporters don’t secretly harbor a ban agenda, and they wonder if the NRA is right that each step toward greater controls is, actually, a step toward a ban. Advocates must convincingly persuade them that a ban is not the goal.

Is the Second Amendment, as James Jacobs suggests, the way to do this? It's tempting, but probably not the best way to send the message. To agree to such an individual right might well create a scope of protection never intended. Should the Supreme Court make such a finding, it is unclear how it would classify the right. If the individual right to possess were considered a fundamental right, the curtailment of which is subject to "strict scrutiny," it is possible that many effective state laws would be struck down. Likewise, many of the laws that have been proposed at the national level could meet a similar fate. Similarly, even if the "rational basis" test were applied, it is unclear which cases would pass constitutional muster.

**GREGG CARTER:** The individual-rights interpretation of the intent of the Second Amendment is historically accurate. There is strong evidence of an Anglo-Saxon legal tradition that not only allowed but required all free men (nonserfs) to keep and bear arms as early as the seventh century. Every landowner was obliged to keep armor and weapons according to his rank and possessions. This right and duty was transferred to colonial America, where all the colonies individually passed militia laws that required universal gun ownership. There is undeniable historical support for the contention that the Second Amendment protects the right of *individuals* to keep and bear arms. This is a fundamental claim of the National Rifle Association. However, the examination of history also leads to the conclusion that both state and federal governments can "infringe" upon the possession and carrying of arms.

Many contemporary legislators and judges have not felt the need to be in lock-step with the full intentions of the framers of the Second Amendment. Rather, they recognize the significant changes that have occurred in the United States since 1776, when an armed population was critical to the defense of the new nation. The standing army has now become entrenched in American life, and notions that it is a threat to personal liberty have long ago been dispelled. In the eighteenth century, the protection of home and town were left to the individual or to the militia; but by the middle of the nineteenth century, local police forces were the norm, and by the middle of the twentieth century, national

law enforcement agencies were well established. In sum, eighteenth century notions of the purpose and place of the militia in the community are out of step with the twenty-first century, and so too, consequently, is the need to assure the keeping and bearing of arms in private hands.

Statements made by U.S. Solicitor General Theodore Olson in his recent filings should serve to calm gun control advocates. He observed that the *individual* right to own guns is nonetheless "subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse." The Second Amendment poses no obstacle to gun control, as it is debated in modern America.

**ROBERT SPITZER:** The British tradition supports a militia-based and highly restricted view of any claims to individual gun rights, so it is a poor prop for those seeking to promote an individualist view in the United States (e.g., see Bogus, Schworer, Wills). Beyond that, there is no direct evidence that the pertinent section in the British Bill of Rights of 1689 was the model for our Second Amendment. Britain is a different country from the United States, and this constitutes, at best, secondary evidence on American law crafted after we became an independent nation. Finally, it diverts attention from the direct evidence, including our own constitutional founding and the debates of the First Congress when the Second Amendment was drafted, debated, and passed.

All of the debate during the First Congress "applied only to men acting in a militia capacity," including debate over whether the amendment should include wording to codify the right of conscientious objectors to opt out of militia service for religious reasons; the relationship between militias, standing armies, and liberty; the need to subordinate the military to civilian authority; and the unreliability of the militia as compared with a professional army. There was no debate about the amendment serving as a basis for individual gun ownership detached from military service.

The cited Supreme Court cases do address incorporation, noting that the Second Amendment has not been applied to the states. But these cases also describe the

Second Amendment right precisely and repeatedly as one pertaining to "a well regulated militia," as for example in *Presser* (1886) when the Court said that states could not "prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government." And in 1939, the *Miller* Court said that the defendant had no Second Amendment right, because the gun in his possession that federal law barred him from transporting across state lines (a sawed-off shotgun) had no "reasonable relationship to the preservation or efficiency of a well regulated militia." It is utterly senseless to read *Miller* as saying that the Second Amendment applied to individuals according to whether or not a particular weapon was suitable for militia purposes, because such a reading would provide constitutional protection for individuals to possess weapons that have military value—everything from bazookas to tactical nuclear weapons.

**ROBERT J. COTTRILL:** *Presser* does *not* state that the Second Amendment only applies to people acting in a militia capacity. It deals instead with the question of the amendment's applicability to the states. The *Presser* opinion also endorses the notion that the whole of the citizenry constitutes the militia and that they cannot be disarmed by state governments.

The issue facing the *Miller* Court was the question of the 1934 National Firearms Act and its requirement for the registration of sawed-off shotguns. The Court was not faced with bazookas or tactical nuclear weapons. Faced with a sawed-off shotgun, the Court asked whether it was the kind of weapon regularly used for militia purposes—the same question the Tennessee Supreme Court had asked in 1849 in *Aymette v. the State* (*Miller* relies heavily on *Aymette*). In that case the question was whether or not a state statute prohibiting Bowie knives was contrary to the state constitutional guarantee protecting the right to bear arms. The *Aymette* Court made a distinction between weapons generally used by criminals and those used by law-abiding citizens for their own defense and the common defense. This was the distinction *Miller* was examining.

**ROBERT SPITZER:** *Presser* is, indeed, all about militias. The whole point about the case was that the paramilitary fringe group (headed by *Presser*) wanted to function as a private militia. The Court said that there was no such thing under the Constitution or the Second Amendment, because military organization, drill, and parade are “especially under the control of the government ... they cannot be claimed as a right independent of law.” The legitimate militia at the time, said the Court, was the 8,000 member Illinois National Guard.

**JOYCE MALCOLM:** The state of legal thinking has overwhelmingly endorsed the view that the individual has a right to possess and bear arms. Daniel Lazare had it right when he wrote in *Harpers Magazine* in 1999, “The truth about the Second Amendment is something that liberals cannot bear to admit: The right wing is right. The amendment *does* confer an individual right to bear arms.” Based on what Supreme Court Justice Thomas referred to as “an impressive array of historical evidence,” leading American constitutional experts, including Laurence Tribe, Akhil Amar, Leonard Levy, and William Van Alstyne, agree that the Second Amendment protects a right for the individual to have arms. This interpretation is not, as Robert Spitzer would have it, a product of the gun rights movement tracing back to 1960. It is the original interpretation of the Second Amendment, a legacy of the framers’ rights as Englishmen.

Although Spitzer claims that the English Bill of Rights guarantee to Protestants of “arms for their defence” is militia-based, the text never mentions the militia. Indeed, the drafters rejected the phrase that these arms were “for the common defence.” In her book on the English Bill of Rights, Lois Schwoerer placed the right to have arms among the “rights to the individual.” Parliamentary debates and judicial opinions made it clear that although the final clause, “suitable to their Condition and as allowed by Law,” would permit regulation, an individual right was intended. In 1790, a year before the ratification of the American Bill of Rights and after England’s worst riots of the century, London’s legal advisor explained: “The right of His Majesty’s Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear

and undeniable ... and that right, which every Protestant most unquestionably possesses, individually...” In the nineteenth century the guarantee was extended to those of all religions. In a landmark case in 1820, Justice Bayley found: “A man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road.” No mention of the militia here, or a collective right. It was this individual right that the American colonists inherited.

The Second Amendment provides an even broader guarantee. It makes no mention of religion or condition, or “as allowed by law.” Madison described his proposed amendments “as guards for private rights” and did not intend to place the Second Amendment in the section of the

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*The right to possess  
and bear firearms  
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Americans’ rights  
as Englishmen.*

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[JOYCE MALCOLM]

Constitution dealing with the militia. The most respected constitutional experts of the nineteenth century, Supreme Court Justice Joseph Story and Justice Thomas Cooley, refer to the Second Amendment guarantee of an individual right. Indeed, one reason Justice Taney in the infamous *Dred Scott* case was insistent blacks could not be citizens was that “It would give to persons of the Negro race ... the full liberty of speech in public and in private ... and to keep and carry arms wherever they went.”

**ROBERT SPITZER:** The individual right that Joyce Malcolm discusses actually arose in Britain a century after the 1689 British document was written, after America had established its own country, and it occurred—however the story may be told—in another country. As historian Lois Schwoerer concluded, the British Bill of Rights “did not secure to ‘ordinary citizens’ the right to possess weapons.”

Joseph Story explained the Second Amendment expressly as “the right of the

citizens to keep, and bear arms” so as to maintain “the importance of a well regulated militia,” although he fretted that “among the American people there is a growing indifference to any system of militia discipline.” Cooley also explained the Second Amendment in militia terms, noting that the right to bear arms extended “to those enrolled” as well as to those who might be needed in a full-scale emergency, because “this enables the government to have a well regulated militia.” Further, while Malcolm mentions a case that is not a Second Amendment case (*Dred Scott*), she ignores the several cases where the Court did interpret the meaning of the Second Amendment in terms of militia service—in particular, *Presser* and *Miller*.

**ROBERT J. COTTRILL:** Spitzer cannot enlist nineteenth century Michigan jurist and legal commentator Thomas Cooley into the ranks of those endorsing the “militia only” view of the Second Amendment. In his 1898 treatise *General Principles of Constitutional Law*, Cooley was arguing for a robust view of an individual right to arms that included not only the keeping of arms, but the formation of voluntary military or militia units. One of the difficulties in the Second Amendment debate is that there is an assumption that the moment the word “militia” is used, that automatically rules out the Second Amendment as a right of individuals. It does not. The framers’ vision, and the prevailing view throughout the nineteenth century and in *Miller*, was that the militia was composed of the entire citizenry, or at a minimum the entire free male citizenry. The right was safeguarded to ensure an armed population that was familiar with the use of firearms, so that they could perform militia duty if summoned. That is certainly the view Cooley was endorsing. He was emphatically not endorsing the modern gun control movement’s view that only those formally enrolled in a government-organized, regularly drilling militia had the right to keep and bear arms.

**ROBERT SPITZER:** Cooley is describing two types of militias—the organized militias that became the National Guard by act of Congress in 1903, and the unorganized or general militias (those Cottroll refers to as “all eligible males”). Cooley makes it clear that these general militias were predicated on men getting and

keeping their own weapons, should they be called up. Yet the general militias were still militias, linking personal gun ownership to government militia service. Nowhere in the passage is there any reference to private gun ownership for any private purpose.

**JOYCE MALCOLM:** There is overwhelming evidence from both federalists and anti-federalists that the Second Amendment was meant to protect the individual right to be armed. What is lacking is a single eighteenth-century statement that the Second Amendment was meant only to protect a collective right for the militia to be armed. The framers could easily have guaranteed the right of the militia to keep and bear arms; instead, they guaranteed “the right of the people.” During the drafting of the amendment, the senate specifically rejected the suggestion that after “the right of the people to keep and bear arms” they add “for the common defense.” Americans had inherited an individual right to be armed, and the framers intended to protect it.

**SAUL CORNELL:** While much modern scholarship has presented the Second Amendment as a choice between two opposing models, there is no reason to assume that the founders or the great commentators of the nineteenth century fit perfectly into either of these models; indeed, they would likely view the ideologies of the NRA and the modern gun control movement as alien. We need to understand these thinkers as products of their own time and not press them into service in our own modern battles. Any efforts to translate these founding era texts into contemporary terms will distort them. We need to separate the task of historical analysis from advocacy. Historical questions must yield historical answers, not answers to contemporary policy questions.

James Madison did not say that all of the rights protected in the Bill of Rights were exclusively or entirely private; in essence, he said that they were *primarily* individual rights. In the very same document Madison describes the right to have arms protected by the English Bill of Rights in terms closer to the view described by Spitzer, not Malcolm. I think Joyce Malcolm correctly notes that the English courts had expanded the understanding of that right by the middle of

the eighteenth century. Such a development, however, is quite distinct from claiming that this was the original meaning of either the English Bill of Rights or the Second Amendment.

Malcolm’s suggestion that we need to find explicit language from the eighteenth century saying that the amendment protects only the right of citizens participating in the militia seems profoundly presentist and ahistorical. The fact is that we don’t see clear evidence of people saying that the right to bear arms ought to be secured outside of the context of the militia, either. Both of these formulations are anachronistic. Neither Malcolm nor anyone else supporting the modern individual rights view of the amendment has produced a single case from the founding era in which someone claimed to be bearing

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[SAUL CORNELL]

arms in self-defense. No one would deny that the founders believed in a right of individual self-defense. I think it is a serious historical mistake to confuse this notion with bearing arms as part of a well-regulated militia, which was a form of collective self-defense.

**JOYCE MALCOLM:** The Second Amendment had a dual purpose: to protect an individual’s right to be armed and to afford the people the means, if necessary, to protect their other rights. Saul Cornell seems to be arguing that historical evidence is wrongly used if it is employed to understand the lives and views of the people of an earlier time. It is crucial to appreciate the context in which the founders lived, not to distort historical facts or ignore inconvenient evidence. Historical questions must yield historical answers. That is precisely why the lack of historical evidence for a solely collective interpretation of the Second Amendment is, indeed, a problem for those who deny that there is an individual right.

## Part III: The Brady Law and Its Impact

**EDITOR:** The Brady Law [passed by Congress in 1993] has been hailed as a major success in the effort to regulate guns. Has the Brady Law achieved its objectives? What impact has the law actually had? Which elements of the Brady Law have been the most effective? Which have been the least effective?

**JAMES JACOBS:** The Brady Law is merely symbolic legislation. It is completely ineffective because it is so easy to circumvent. The Brady Law does not regulate “secondary” sales; any person who buys a gun can immediately sell it to a spouse, lover, friend, or stranger without filling out any paperwork or putting the purchaser through a background check. The seller could even put a “Gun for Sale” ad in the newspaper or over the Internet, or the seller could walk into a gun show with a sign “Handgun for Sale—No Background Check.” Also, any potential gun buyer who knows that he will flunk the background check could just ask (using inducement or threat) his spouse, lover, sibling, friend, or fellow gang member to buy him a gun as a “present.” The Brady Law can also be circumvented by using phony identification that is readily available. Finally, the ineligible purchaser could steal, buy, or borrow a gun on the “black market.” These are a few observations about the Brady Law, which I discuss in more detail in my recent book *Can Gun Control Work?*

**ROBERT SPITZER:** In political terms, the Brady Law was a major success for gun control supporters, because it was enacted after a seven year struggle and despite the opposition of the NRA. In policy terms, its goals were very modest (even the NRA supported waiting periods for gun purchases until the mid-1970s). Brady did succeed in imposing a uniform national standard, whereas only about half of the states had background check provisions before 1993. By the government’s count, roughly 600,000 handgun purchases were stopped because of flagged background checks from 1994–2000 (about 2.5 percent of all handgun purchases). Of those, it is reasonable to assume that only a subset would have

resulted in a gun crime, and some subset would presumably obtain a gun illegally. Thus, the statistical impact on overall crime rates is probably little, but not zero. Nevertheless, as a reasonable and low-cost effort to bar or make more difficult the ability of those who should not be able to buy guns, Brady could be counted as a success.

Less widely noted, but arguably more important, was the provision in the Brady Law that significantly increased the fees for gun dealers, so as to force out individuals who obtained dealer licenses to obtain guns at discount instead of actually becoming a dealer (the number of licensed dealers declined from about 300,000 to fewer than 100,000 during this time). The idea that the government should make it more difficult for felons, or those judged mentally unstable, to purchase a handgun seems to be a “no-brainer.” That a titanic political struggle preceded Brady’s enactment speaks mostly to the charged political atmosphere that surrounds gun politics more than to inherent problems with the idea.

**GREGG CARTER:** The Brady Law’s very modest effects would rise if we enacted a system of national licensing, registration, and regulation of the secondary market where about 40 percent of gun sales occur. The Brady Campaign (the largest and most important organization promoting gun control) makes both large and modest claims about the Brady Law’s effectiveness. Its large claim is that the significant decline in gun crime in the United States since 1994 is due to the law; this is unfounded. However, its more modest claim—that the interstate flow of guns, and more particularly of guns used in crime, has declined due to the Brady Law—is more tenable. Using the firearms trace database of the Bureau of Alcohol, Tobacco and Firearms, the Brady Campaign found that gun trafficking between four source states (Ohio, Kentucky, Mississippi, and Georgia) and seven recipient states (Michigan, Illinois, New York, Pennsylvania, Missouri, Maryland, and New Jersey—these seven having had background checks before the Brady Law) was greater for guns purchased before the law than after. Implementation of the Brady Law disrupted the established flow of guns across state lines.

**DEBORAH HOMSHER:** The five-day waiting period for handgun purchases, one of the best-known provisions of the Brady Law, expired in November of 1998. At that time, the FBI implemented a mandatory, computerized National Instant Check System (NICS), which enabled licensed gun dealers to submit the name of the person seeking to buy a firearm and discover whether that person had a record disqualifying him or her from legally possessing the gun. The establishment of a computerized national check system had been mandated by the original Brady Law. Both the Brady Campaign and the National Rifle Association applauded the implementation of the NICS, though each expressed reservations. The Brady Campaign wanted to reinstate the five-day waiting period, and

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[JAMES JACOBS]

the NRA opposed a federal plan to charge a fee for every use of the NICS and filed a lawsuit to prevent the Justice Department from retaining records of those individuals who purchased guns.

In February of 1999, a bill was introduced in Congress to reinstate the mandatory waiting period, but that effort has not been successful. The Brady Campaign continues to advocate for the reinstatement of the waiting period, arguing (in a 1999 press release) that “NICS does not include some state and local police records, such as records of persons convicted of stalking, and does not include outstanding misdemeanor warrants on domestic violence or records of involuntary commitments to mental hospitals.” Furthermore, without a mandatory waiting period, “local police departments do not have time to contribute information to the background check, and gun purchasers considering crimes of passion or impulse suicides will no longer have a ‘cooling-off’ period to protect themselves or their victims.”

**ROBERT J. COTTROL:** As to whether the Brady Law reduces gun crime, I will await the verdict of the dueling econometricians. The Brady Law could have been made a more effective tool to reduce gun crime, however. Where are the prosecutions for the 600,000+ denials of purchases? It is a felony to fill out a firearms purchase form and falsify the required information. Some of the 600,000 were cases of mistaken identity, and others involved people who were unaware of the potential penalties for past offenses that would have made them firearms ineligible. People in these categories probably should not be prosecuted. But a non-trivial percentage consisted of individuals actively engaging in criminal activity. I believe that only a very tiny number of prosecutions has occurred. Why? What good is it to deny a felon a gun at the gun store and then let him proceed to the back alley dealer? Wouldn’t the Brady Law’s effectiveness be greatly enhanced if it were used as a tool to prosecute felons who are illegally trying to get guns?

**RICHARD ABORN:** The Brady Law had a number of specific goals that were clearly delineated over the many years of the struggle to pass it. To measure it against other goals is unfair to the law and wrongly casts aspersions on future gun control efforts.

Substantively, Brady was designed to accomplish three things. First, it sought to stop felons and other prohibited purchasers from entering retail gun stores and purchasing one or fifty handguns (there is no national limit, and scant few state limits, on the number of guns that can be purchased at any one time), without even a verification of the purchaser’s name, address, or background. Second, as more information came to light about the ease with which a Federal Firearms Licensee (FFL) could get federal licenses to sell guns, Brady was expanded to include a more in-depth application process and a more realistic fee structure, so that the granting of an FFL would be limited to legitimate business people.

Third, Brady was designed to be the *cornerstone* of a comprehensive national legislative agenda that would close many of the loopholes that its critics have implied Brady was intended to stop. Brady was not intended to be the comprehensive legislation. In fact, supporters were very

careful not to make exaggerated claims about its potential. We repeatedly stated that “Brady is designed to do one thing only—stop prohibited purchasers from buying guns in retail outlets.” We were concerned that opponents of gun control (especially the NRA) would criticize Brady for not stopping gun crime, and that is exactly what has occurred.

Politically, Brady was intended to show that gun control advocates could break through the chokehold that the NRA had on Congress. Without a substantial legislative victory, we knew that we would never be able to make additional legislative progress. Measured against stated goals, the outcomes show that Brady does what was intended. With more than 600,000 stops and far fewer FFLs, it is hard to say that Brady has failed. Moreover, without the passage of Brady, there is no question that we would have lost the fight over the ban on assault weapons and the ban on large-volume clips. Should Brady have done more? Of course. Could the bill have contained more? No. Any additions to the bill may well have defeated it.

Gun control advocates should not be claiming that Brady alone is responsible for the sharp decline in violent gun crime, even though gun crime has declined faster than any other category. The causes for the vast reduction in crime will be debated for many years, and it is unlikely that any one factor will be identified as the cause. Certainly, increased sophistication about the allocation and management of police resources has played a key role. But Brady has succeeded in interrupting part of the supply chain of guns at the retail level.

**JOYCE MALCOLM:** As Robert Spitzer and Gregg Carter both point out, the Brady Law has had little statistical impact on overall crime rates and at most only modest success. Some of its supporters, however, continue to claim the Brady Law was responsible for the sharp decline in violent crime over the past decade. But this decline began before the law went into effect.

Has the Brady Law achieved its objectives? It has put a background check of purchasers into operation and reduced the number of gun dealers. If, as Richard Aborn suggests, these were its objectives, it succeeded. But Aborn points out that the law was designed to be the “corner-

stone of a national policy.” Interestingly, Aborn does not mention any intended impact on the crime rate. Yet the public was led to believe that the larger objective was to prevent felons from obtaining weapons and to reduce violent gun crime. It does not seem to have accomplished either. In this respect, Robert Cottrol’s comment that there have been only a tiny number of prosecutions under the Brady Law is intriguing and regrettable.

**RICHARD ABORN:** I wish to disagree with Joyce Malcolm’s comment that my list of goals for Brady and beyond does not contain an objective of reducing violent gun crime.

I came to the issue of gun control because of my experience as a violent crime and homicide prosecutor in the Manhattan DA’s office up until the mid-1980s. Doing that work made one painfully aware of the devastating impact that armed criminals were having on the community. The gun control movement primarily seeks to disrupt the illegal gun markets, so as to make it much more difficult for criminals to get guns. While advocates should never argue that gun control is the overall answer to violent crime, it is plausible to argue that comprehensive national controls over the distribution of firearms will have an impact on the rate of violent crime committed with guns. This is most certainly a goal; in fact, it is the most important goal.

## Part IV: Public Opinion, Interest Groups, and Gun Laws

**EDITOR:** **Is there a substantial disconnect between public opinion and gun laws? To what extent have interest groups, such as the NRA and the Brady Campaign to Prevent Gun Violence, advanced or thwarted the “popular will” regarding the regulation of guns by Congress or the states? What’s our best evidence for what the “popular will” actually is?**

**ROBERT SPITZER:** “Disconnect” aptly describes the relationship between public opinion and gun laws. Questions on gun control were among the first to be asked with the advent of modern polling in the 1930s, and the results reveal considerable

consistency. A 1938 Gallup poll found that 79 percent of respondents favored “firearms control.” Two important long-term traits are evident: overall opinion consistency over time, and variation according to the type of regulation at issue. Short-term fluctuations occur within a relatively high range of support, generally favoring stronger regulations than we have in practice. This is a remarkable degree of consistency in support of stronger laws spanning the last eight decades, a consistency rarely found among the menu of national policy issues.

Opinion polls from the 1980s and 1990s show the greatest support (about 90 percent) for handgun waiting periods. Fully 60–70 percent support the assault weapons ban, and 60–80 percent support handgun registration. Support for a ban on handguns has ranged from a low of 31 percent in 1980 to a high of 52 percent in 1993. Regionally, fluctuations are wider, with the least support for gun measures in the South and rural areas, and greatest support in urban areas and the Northeast.

Unquestionably, the popular will has been thwarted by gun-rights groups. Yet that does not end the debate, because policy questions in a republican form of governance are not normally determined by plebiscite, and interests function legally and legitimately in our political arena. The successes logged by the NRA and its allies underscore the fundamental political axiom that a well-organized and motivated minority may often carry the day politically over a large, but relatively apathetic, majority. On the other hand, gun control measures have been enacted when the public has been sufficiently aroused and attentive because of assassinations or mass shootings.

**GREGG CARTER:** I agree with Spitzer; there is a serious disconnect between public opinion and our national gun laws. Here are some further examples based upon findings from my 1997 book, *The Gun Control Movement*. First, although how a survey question is phrased can affect the responses one gets, the various wordings about gun laws result in similar responses. For example, “we should ban all handguns” and “private individuals should not be allowed to possess handguns” yield approximately the same approval rating—39 percent. Second, across the spectrum of gun control measures, the only one that

does not yield an overwhelming majority of support is the total ban of handguns. Third, gun owners are less likely to favor gun laws, but the margins between them and general population are not very large. For example, 81 percent of the general public versus 71 percent of gun owners favor the registration of all handguns. The Brady Law is favored by 87 percent of the general population and 82 percent of gun owners. Fully 64 percent of gun owners, and 69 percent of the general population, favor “one-gun-a-month limits.” Fourth, there is broad support for gun control measures across political parties, ideological views, and race.

Some pro-gun rights scholars have contended that, even though people respond for stricter gun control when asked in a poll, they do not really mean it—that is, the issue isn’t that important to them. However, polling results from the General Social Survey (conducted by NORC) dispute this contention. When asked how they feel about gun measures compared with other public issues, more than 80 percent of Americans responded between “fairly strong” and “extremely strong.”

**DEBORAH HOMSHER:** I believe that most significant legislative and legal contests concerning gun regulations now take place at the state and city, rather than the national, level. It is true that national advocacy organizations—most obviously, the National Rifle Association and the Brady Campaign to Prevent Gun Violence—shape the discourse and supply their constituencies throughout the states with information (statistics and personal stories) intended to be used as ammunition in the ongoing debates. Because public discussion about gun control has been conducted as a war, with insults, exaggerations, and caricatures deployed by both sides, often as a means to ignite passionate fundraising campaigns, sincere efforts to determine the “popular will” and to discover which laws, police practices, and/or community responses directly contributed to the marked decrease in urban crime rates in the late 1990s have been largely drowned in noise.

I trust reports of polls that find the majority of Americans have long favored gun control legislation. At the same time, I have interviewed people who find gun control campaigns and gun control advocates to be condescending and intru-

sive. Certainly, the polls that Spitzer and Carter have cited must be taken as evidence of the popular will in favor of gun regulation. But the passage of right-to-carry legislation in many states must also be viewed as evidence of pro-gun sentiments. Perhaps we might rephrase the question and ask not what the “popular will” is and whether it’s been thwarted, but what kinds of new information, questions, and options ought to be introduced into the public debates that help forge that popular will.

**JAMES JACOBS:** Toqueville observed that a remarkable feature and strength of our democracy was the tendency of Americans to band together, form groups, and participate in public life. The NRA and the Brady Campaign both reflect and help to shape public opinion. These organiza-

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*The popular will  
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by interest groups.*

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[DEBORAH HOMSHER]

tions also help to shape our laws and public policies on firearms. They do not thwart popular opinion but tend to catalyze, shape, and express it.

“Public opinion” is a slippery concept. People’s views on most public policy issues tend to be shallow and susceptible to manipulation; opinion surveys depend upon the phrasing of the question, as well as the manner and body language of the interviewer. Still, certain generalizations can be made. Americans overwhelmingly reject the idea of prohibiting all firearms or only handguns. Likewise, the overwhelming majority of Americans support severe punishment for persons who use firearms to commit crimes.

**ROBERT SPITZER:** Public opinion is not as inscrutable, shallow, or easily manipulated as James Jacobs suggests. Opinion formation is the product of long-term forces, initiated by the political socialization process that affects all of us from the time of childhood. People are not blank

slates; as the late political scientist V.O. Key noted many years ago, “Voters are not fools.” People have a reasonable understanding of basic public policy matters, including gun control. Polling results do vary according to question wording, but that does not mean that polls mean nothing. There are well-honed standards and procedures that guide and help to ensure the process of accurate opinion gathering and assessment.

**JAMES JACOBS:** Our best evidence on public opinion about firearms policy arises from the fact that 45 percent of American households own upwards of 250 million firearms, and that as many Americans engage in hunting and target shooting as in jogging and tennis, and that strong gun control has never been popular nationally. From the severe federal and state criminal sentences prescribed for individuals who use guns in crimes, we can also infer a very strong national consensus. There is probably more disagreement among Americans on such firearms regulation as banning “Saturday Night Specials” and assault weapons. Disagreement, in part, reflects the fact that these terms are essentially political, not technical; there is a great deal of ignorance and confusion about the weapons to which they refer.

**ROBERT SPITZER:** Jacobs’ estimate that 45 percent of the households in the U.S. have one or more guns is surely not right. In the early 1960s, about half of all households did have one or more guns, but this percentage has been gradually declining since then. Today, only about one-third of all households have guns, although the average number of guns per household has increased.

**JOYCE MALCOLM:** Rather than a “disconnect” between public opinion and gun laws, there seems to be a disconnect between federal and state legislative action. Even as the federal government enacts statutes that ban certain types of weapons and attempts to further control the purchase of firearms, state governments are approving “shall issue” laws that permit all law-abiding individuals to carry a concealed weapon. At last count, 35 states had passed such laws, two in 2003. These include not only southern and western states, but also Pennsylvania, Michigan, and Minnesota.

While the public wants some controls on the ownership and use of guns, polls also show that Americans overwhelmingly believe there is a right for individuals to be armed. Interest groups are not necessarily thwarting the popular will. Rather, there is an unfortunate bias in the national media that overwhelmingly promotes gun control. In so doing, the media fails to provide the balance of views that an informed public needs and deserves.

**RICHARD ABORN:** The NRA has succeeded in thwarting the popular will on this issue. The more intriguing and difficult question is how. While polls can measure attitudes, they cannot accurately measure the intensity of attitudes. It would be tempting to dismiss the power of the NRA as a function of enormous campaign contributions, but this would be a mistake. The true strength of the NRA lies in its ability to develop at the grass-roots level highly dedicated, zealous supporters, whose only concern in their political life is guns. They show up at town hall meetings; they call in to radio shows; they write letters to the editor; they constantly contact their elected officials; they contribute money; and they vote on one issue—guns. In relative terms, their numbers are quite small. Yet in a nation with a low voter turnout, the intensity of NRA supporters is very effective. The single biggest failure of the gun control movement has been our continuing inability to match this grass-roots support.

The NRA zealotry is developed and reinforced by a communications apparatus that has understood the rhetoric that will most appeal to and sustain NRA supporters—criminals, not guns, commit crime; the Second Amendment; and the slippery slope to the banning of guns. It is this last argument that is probably the most effective. By arguing consistently, and with great fervor, that the gun control movement is really a gun ban movement, the NRA has effectively enlisted even those gun owners who would otherwise support controls. How? By arguing that we really want to take away all guns, the NRA invests all gun owners with a direct stake in the outcome of the debate, regardless of how reasonable each measure may be. Not only has the gun control movement been ineffective in rebutting this ban argument, but also we have failed to invest a similar stake in those who might be in-

clined to be supportive. Of course, people support public safety, but by that measure the gun control movement will only be able to succeed during times of high violent crime, while the NRA will continue to mount a sustainable opposition. It is imperative that the gun control movement develop ways to respond to the political strength of the NRA.

**SAUL CORNELL:** The recent wave of right-to-carry laws can be attributed to a very effective effort of gun rights activists. If these proposals had been put directly on the ballot, I doubt that they would have passed in many states. The scholarly basis for these laws, John Lott and David Mustard's "more guns, less crime" theory, has been subjected to a number of challenges. In a 2003 *Stanford Law Review* article, Ian

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*In a nation with  
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[RICHARD ABORN]

Ayres and John J. Donohue III demolish this thesis. There is a large body of new scholarship emerging in the fields of public policy, history, and law that may help us chart a new middle ground in this contentious issue. The new Second Amendment Research Center that I have created here at the John Glenn Institute at Ohio State University is devoted to exploring this middle ground. We need to move beyond the stale rhetorical formulations that have made it difficult to formulate effective policy.

**GREGG CARTER:** Several contributors correctly note that the discourse on rational policies is at a gridlock, because of the intransigence of both sides of the gun control debate. This was not always the case, however; only a generation ago, the NRA was a voice of reason and moderation in the gun control debate.

After World War II, nine million veterans re-entered civilian life with a new interest in firearms. Tens of thousands of them joined the NRA, giving it a potential to wield power over public policy greater than ever. However, the membership was

little interested in gun control issues *per se*, but rather in hunting and recreational shooting. Until the mid-1970s, the NRA's stand on gun control was moderate. During congressional testimony over the proposed Gun Control Act of 1968, for example, NRA Executive Vice President Franklin Orth proclaimed, "We do not think that any sane American can object to placing into this bill the instrument which killed the president of the United States [John F. Kennedy]." At the same time, the NRA endorsed the banning of "Saturday Night Specials" because "they have no sporting purpose and are frequently poorly made."

Although some of the NRA's membership and leadership had always opposed any form of gun regulation, they were in the minority. In the mid-1970s, however, this minority began an all-out—and eventually successful—effort to redefine the meaning and the mission of the organization. Executive committeeman Harlon B. Carter led the revolt. He argued that the NRA's then-moderate viewpoint on gun control was wrongheaded and needed to be replaced by absolute resistance to all forms of gun regulation. He argued that every gun had a legitimate purpose and that every law-abiding person, no matter what age, should have the right to choose his or her own weapon. The redefinition culminated in 1977 in what historians call the "revolt at Cincinnati." At that year's NRA Annual Meeting, Carter and his associates used their knowledge of parliamentary procedure to replace the moderate leadership with themselves. Upon coming to power, they labeled their organization the "new NRA." It would become the modern gun lobby.

**DEBORAH HOMSHER:** There are hidden assumptions about race at play in these debates. When pro-gun interest groups passionately contend that their members are all responsible gun owners, they obviously make reference to the "criminals." When that happens, urban drug dealers, often Hispanic or black, quietly figure in the background as the typical criminals. This generalized background portrait of irresponsible, and potentially dangerous, gun owners is not entirely unfounded. African American males were not only dying by gunfire at a high rate throughout the late 1980s and early 1990s, as Gregg Carter notes; they were

also shooting. According to the Bureau of Justice Statistics, the majority of homicides during these years were intra-racial; 94 percent of black homicide victims were killed by blacks. Homicides were most often committed with guns, especially handguns. Significantly, however, both the homicide victimization and offending rates for black men in this age group began to decrease during the later 1990s. Why? What happened? Was it due to widespread incarceration? The economy? The end of the crack epidemic? There are lessons to be learned, but advocacy organizations are not well-equipped to conduct objective studies.

I interviewed African-American women living in Camden, New Jersey, who had witnessed the effects of widespread gun use in their communities. Two of them had sons who had been wounded by gunfire; one had a son who had been killed; one of these young men was serving time for dealing drugs. The women acknowledged that gun deaths and drug trafficking plagued their neighborhoods, and they wanted to find ways to stop it. The standard prescriptions offered by anti-gun and pro-gun advocacy organizations did not address their problems. The NRA recommended that all the criminals be sent to jail and that the law-abiding citizens consider purchasing guns for self-defense, but plenty of the young men these women knew (and loved) were already in jail, and experience had proven that owning and carrying a gun on the street was as likely to attract bullets as to repel them. Alternately, proposals to decrease gun violence by increasing gun regulation didn't carry much force in Camden, since a lot of control had already been imposed there. What did these women imagine might help reduce gun crime in their neighborhood? They wanted more interesting things for their kids to do. They wanted a more civil community.

Yes, laws ought to reflect the popular will. But what if the popular will has been divided and made stubborn by interest groups? Then, we should focus on a larger goal: to facilitate more cooperative investigations, negotiations, and discussions to inform the voting populace about effective means to reduce gun crimes and deaths in the United States. To do this, we must be honest and responsible in public debates. We must choose the right questions and focus on them.

## Part V: Guns in Cross-National Perspective

**EDITOR: What legal, policy, or cultural lessons might we learn from the experiences of other countries in regulating guns and/or reducing crimes committed with firearms?**

**GREGG CARTER:** The April 25, 2002, mass shooting in Erfurt, Germany, in which a former student killed 16 people at school before killing himself, was a lightning rod for the current debate over gun control in the United States. European gun laws are much more stringent than those in the U.S., and there is widespread belief that such gun laws are a deterrent to violence. Tragedies like Erfurt are relatively rare in Europe. But when they occur, gun-rights advocates in the United States are quick to use them as evidence that gun control doesn't work. Taken as a whole, however, the data speak otherwise.

It is important not to oversimplify when making cross-national comparisons. Pro-gun writers and groups have their favorite examples—Finland and Norway have high numbers of firearms but low rates of violence. On the other hand, Mexico and Russia have low numbers of firearms but high rates of violence. There are forces beyond gun availability that influence the level of violence in any particular country. Most importantly, varying combinations of social heterogeneity and economic development have been linked to violence. For this reason, when countries are compared, they should be socioeconomically similar, and simplistic pair-wise comparisons (e.g., the U.S. versus Mexico) are rarely useful.

Recent studies (see, e.g., Krug, Powell, and Dahlberg, 1998) reveal that the United States has a murder rate six times higher than the average economically developed, democratic nation (i.e., Western European nations, along with Australia, Canada, Japan, and New Zealand). Comparisons of murder-by-gun rates reveal an even more dramatic ratio: the U.S. rate of 7.07 per 100,000 people is more than twelve times higher than the 0.58 average rate of its peer nations. This huge disparity in the murder rate is accompanied by huge differences in gun prevalence. In the United States the percentage of households

with any type of gun (about 36 percent) is two to three times greater than for our peer nations. For *handguns*, the differences are even more dramatic. In the United States, 22 percent of households have handguns, compared with 0.1 percent in the United Kingdom, 0.2 percent in the Netherlands, 2 percent in Australia, 2.5 percent in Spain, and 7 percent or less in Belgium, Canada, Finland, France, and Norway.

To gun control advocates, these two sets of facts are causally related: the more firearms circulating in a society, the more likely it is to suffer large numbers of violent crimes, suicides, and accidental deaths. Guns are not just another weapon. Assault with a gun is many times more likely to result in death or serious injury than with any other weapon. Because the U.S. has so many more firearms in circulation, gun control advocates argue that we need to have stricter national guns laws than Germany, France, or Great Britain. But we don't.

Most importantly, Germany and most other European nations require that guns be registered, that gun owners be licensed, and that guns be stored and transported with utmost security. To get a license, a potential gun owner must typically pass an exam on gun safety. Also required are comprehensive background checks of individuals seeking to purchase guns, including any histories of criminality or mental incapacity. Although background checks in the U.S. are required by federally licensed firearms dealers when selling guns to their customers, sales between private individuals (including those at gun shows and flea markets) are not regulated by federal law in the U.S., but they are regulated in our peer nations.

**ROBERT SPITZER:** I concur with Gregg Carter's trenchant analysis but would approach the issue in a slightly different way. In other countries, more limited gun availability surely saves lives and reduces the overall degree of injury that accompanies crime, especially in the realm of gun suicides, facts often noted when gun crime rates between the U.S. and other developed nations are compared. Many have pointed to America's frontier tradition as an important reason for its unique contemporary gun problems among the developed nations of the world. But the cases of Australia and Canada, which have comparable traditions, suggest that the frontier

tradition is not decisive in driving contemporary American gun problems.

In legal and policy terms, some conclude that the United States would be better off if it adopted the legal remedies found in other nations. Yet such transplants are unrealistic and surely not viable, because national institutions and practices evolve over many decades and are shaped by distinctive cultures, and these predicates must be taken into account in any effort to apply the lessons of one nation to another. This is why gun control supporters make a mistake when they urge such a transplant, and why gun control foes are similarly mistaken when they warn of imminent gun confiscations such as those that have occurred in other nations. Confiscation would be incompatible with American values, habits, and practices.

**ROBERT J. COTTROL:** The question of cross-national comparisons is a very tricky one. Gregg Carter is certainly correct when he says cross-national comparisons with obviously different cultures like the United States and Mexico are suspect. I would disagree, however, with easy comparisons between the United States and other western nations that are only superficially similar. In a 1998 *University of Colorado Law Review* article, I argue that the U.S. is different from most other western nations because of three population groups and their historic experiences. The first is the white Southern population, which has had a long history of extra-legal violence. The second is the African American population, which has also had a long history of violence, a reaction to a history of discrimination and often minimal police protection. The third population is our disproportionately large number of immigrants, which can also increase rates of violence. While the number of people in these communities participating in criminal violence, particularly lethal violence, is miniscule when measured against the total populations in these groups, they play a major role in creating the higher levels of violence in the United States.

The higher rates of homicide in the United States are due to cultural differences rather than the availability of firearms. Even within the United States, we find profound differences in homicide rates, differences that are greater than the differences between the U.S. and other western nations. Contrast the differences in African

American and Asian American homicides, for example. Both groups have the same access to firearms. Similarly, Minnesota and Mississippi have significantly different homicide rates, although their firearms laws are not radically different.

Even the question of availability of firearms is in part a cultural question. Let's take the case of Canada. The argument is made that, because Canadian laws on firearms ownership are stricter than those of the U.S., there is consequently less gun violence in Canada. The enactment of stricter firearms laws in Canada indicates one significant cultural difference between the two nations. The cultural difference doesn't end there. We are frequently told by gun control advocates that the reason we have high rates of gun violence in places like Washington, D.C., Chicago, and New York City, despite very strict gun laws in those jurisdictions, is that guns are brought from states with lax gun laws into jurisdictions with tight gun laws. Why does that process stop at the Canadian border? Americans and Canadians have long boasted (justifiably) of the world's longest undefended border. There are myriad opportunities to smuggle from one country to the other. Why aren't illegal guns from Virginia or South Carolina coming into Montreal and Toronto, as they are into Washington and New York? The reason is that the demand is not there; there is a cultural difference.

Finally, contrasting gun suicides is highly problematic. What we should be doing is contrasting overall suicide rates and seeing if guns contribute to a higher suicide rate in the United States; my understanding is that they do not. Presumably, our interest is in preventing all suicides, not simply gun suicides.

**JAMES JACOBS:** I think the main lesson is that there is no obvious connection between a nation's firearm policies and its patterns of violence. Take Japan, for example. It has very stringent gun controls and very few citizens possess guns. The homicide rate is low, but the suicide rate is very high. Does this mean that the absence of widespread civilian ownership of firearms prevents homicide but not suicide? There are so many cultural variables that distinguish Japan from the U.S. that it would not be fruitful to draw conclusions about the differences between Japanese and U.S. homicide and suicide patterns

by looking at one difference between the countries—their legal policies on civilian ownership of firearms.

In Great Britain, the gun control laws are very strict, indeed. Since the late 1990s, that country makes it practically impossible for a private citizen to possess a firearm. Few citizens own firearms. Does that mean that the law prevents people from obtaining firearms? Maybe. Nevertheless, while homicide is very low in Britain, the number of gun crimes has continued to increase, even since the most stringent laws were put in place. Criminals do not seem to have difficulty obtaining firearms.

**SAUL CORNELL:** In her 2002 book, *Guns and Violence: The English Experience*, Joyce Malcolm argues that the United Kingdom has higher crime than the United States, which she attributes to the nature of their gun laws. David Hemenway challenges this claim in a review of Joyce's recent book. He argues that levels of crime in the two countries in the last two decades are comparable, apart from our much higher homicide rate. Who is correct—Malcolm or Hemenway?

**JOYCE MALCOLM:** Hemenway is wrong when he argues that levels of crime in England and the U.S. in the last two decades are quite close, apart from the homicide rate. Since 1995, the English rate for every type of violent crime, with the exception of murder and rape, has been far higher than in the U.S. For example, based on a U.S. Department of Justice study, in 1995 there were 8.8 assaults per 1,000 persons in the United States, compared with 20 assaults per 1,000 in England and Wales (their statistics are grouped). Robberies in England and Wales were 1.4 times higher, and burglary was nearly double the U.S. rate. Since then, British figures for violent crime have climbed, while ours have dropped. You are now six times more likely to be mugged in London than in New York. A U.N. study of 18 industrialized countries, including the U.S., published in July 2002, found the rate of crime, including the most serious crime, in England and Wales to be the highest. A survey published in July 2003 found an astounding one in five Britons had been a victim of crime in the past year. While for two centuries our homicide rate has been much higher

than the English rate, the two are now converging. In 1981 the U.S. rate was 8.7 times the English rate; last year it was only 3.5 times the English rate. Furthermore, the way the police count murder is inflated in the U.S., where the FBI encourages the police to count every suspicious death as murder; by contrast, the English police “massage down” the murder rate by removing cases where there is a final judgment that it was self-defense or accidental.

**GREGG CARTER:** Much of the rise in U.K. crime was due to the increasing heterogeneity of the nation during the past 25 years. Had the U.K. had the huge number of guns floating around uncontrolled, as we have had in the U.S., deaths from assaults would have been much higher.

**JOYCE MALCOLM:** It is true that much of the increase in U.K. crime has been due to increasing heterogeneity. Such heterogeneity is one of the reasons the U.S. has had a higher crime rate over the years. Although England was more racially homogeneous before 1920, when there were a large number of guns “floating around uncontrolled,” other causes of crime abounded—extreme social inequities, rapid urbanization, dire poverty, and no social safety net. Nevertheless, England had an enviably low rate of armed and violent crime. Switzerland has a very large number of guns and a heterogeneous population, but a very low level of violent and armed crime. The number of guns available is not directly related to the amount of violent crime. Other factors are key.

**GREGG CARTER:** Yes, the striking exception in Europe is Switzerland, which has a laxity in its gun laws comparable to that of the United States and a relatively high percentage of households where guns are present. Switzerland is the NRA’s favorite example of the maxim “guns don’t kill, people do,” because it has low murder rates, both overall and by gun. However, gun control advocates are quick to point out that Switzerland’s population is generally better trained than that of the United States in the safe use of firearms, as most adult Swiss men are members of the national militia.

**SAUL CORNELL:** According to the British Home Office, the relevant statistics

for crime in the U.K. are as follows. Overall, crime has been stable over the last year, consolidating a period of consistent *decline*, which has seen crime fall by 22 percent since 1997. Between 1999 and 2002, all crime fell by 14 percent, which is a statistically significant reduction. This figure includes statistically significant declines in domestic burglary (down 23 percent), vehicle thefts (down 14 percent), and common assaults (down 28 percent). These figures do not seem to support Joyce’s claims.

**JOYCE MALCOLM:** I appreciate Saul Cornell’s confusion, particularly since the British government produces two different sets of statistics and regularly changes the way it calculates these. In addition to a 91 percent increase in contact crime in inner cities between 1991 and 1995, Scotland

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*Cross-nationally,  
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and violence.*

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[GREGG CARTER]

Yard reported that violent crime more than doubled from 1997 to 2001. For the first time, some police are now armed. But the most relevant statistics for this dialogue are *gun crimes*, and there is no doubt about the great increase in these. In the five years after the 1997 handgun ban, handgun crime in Britain doubled. In 2002 alone, gun crime rose by 35 percent, and handgun crime rose by 46 percent. English efforts to reduce the number of privately owned guns have succeeded only in disarming law-abiding people, but they have failed to disarm those inclined to misuse weapons.

**GREGG CARTER:** Comparing crime rates of two nations can be misleading for many of the reasons already cited. When we compare a large number of nations having similar political and economic development to the United States, we find a strong correlation between gun possession and violence.

## Part VI: Reducing Gun Violence

**EDITOR:** As we look to the future, what new or modified laws, civil litigation, social policies, technologies, police practices, and/or other strategies would you recommend to reduce the level of gun violence in the United States?

**JAMES JACOBS:** I think it important that we *not* regard gun control as the number one approach to attacking violent crime. We ought to focus on the fact that violent crime, including crime with firearms, has decreased dramatically in the U.S. over the last decade. This extraordinary decrease cannot be attributed to gun control, so it is imperative that we continue to work at identifying to what it can be attributed. We must take a broad view of violence and address it through mental health and domestic violence interventions, anti-gang strategies, smarter policing, severe punishment for gun criminals, and conflict resolution programs.

We should continue to emphasize severe punishment of individuals who use guns to commit crimes; this includes special police priority, special prosecutorial units, and sentence enhancements. “Hot-spot policing” makes a lot of sense. Every community should identify the places and circumstances of gun crime and attempt to focus preventive police resources on them. I also support the development of gun-detecting technologies that would make it possible to determine whether an individual in public is carrying a firearm. I oppose right-to-carry laws and advocate repealing those that now exist. But even if right-to-carry laws remain in place, I think the police ought to be able to stop a person who appears (visually or through detecting technology) to be carrying a firearm and ask to see the person’s license. Finally, I believe that gun shows should be prohibited. They present an all-too-convenient venue for fencing stolen firearms and for ineligible people to buy them.

**ROBERT SPITZER:** A broad menu of laws, practices, and strategies are available to reduce gun violence. From my perspective as a political scientist, the chief obstacle to more effective policy is not the policy itself, but the politics surrounding it. Rational policy discourse on gun control has been mostly short-circuited by the

furious, nearly apocalyptic politics that has produced, with a few exceptions, a pattern of gridlock. Political compromise, the hallmark of American politics, is mostly out of reach on this issue, where both sides are deeply suspicious and mistrustful.

In the final chapter of my book, *The Politics of Gun Control*, I address this issue and recommend that we approach the matter in the way negotiations between hostile nations occur in international relations, where suspicion, hostility, and mistrust are also prevalent. Each side must be prepared to make concessions, while receiving ironclad assertions that their core values will be protected. The gun control side must first give an absolute assurance that it will forswear gun confiscation, the primal fear of the anti-gun control side. In exchange, however, the anti-control side will need to accept regulations and restrictions regarding certain types of weapons, especially those that are highly destructive, that involve new, more threatening technologies, or that are uniquely appealing to criminals. There should also be more uniform and higher-quality gun-related training for those wishing to own guns. In a political concession, gun groups such as the NRA could be granted exclusive, potentially lucrative rights to provide such training, which would need to occur on a much broader scale.

**GREGG CARTER:** I endorse Spitzer's recommendations. I also like the strategy proposed by David Hemenway at Harvard University's School of Public Health. To the NRA, "gun control" equals "crime control"—throw felons who use firearms in prison for a very long time; leave everyone else alone. This was essentially the attitude of the automobile industry in the 1950s ("cars don't kill, drivers do"); thus, controlling car deaths and injuries meant training drivers better and throwing drunk drivers in jail. However, in the 1950s a new paradigm emerged—pay more attention to "what caused the injury" and less attention to "who caused the injury." The research showed that poor road designs and poor vehicle designs caused injury and death. In Hemenway's words, "the goal became to build a traffic-safety system that made it less likely for people to make errors, yet one that was also more forgiving when errors were made or people behaved inappropriately."

The end result, effected largely through the National Highway Traffic Safety Administration, was a set of enforced car and road standards that brought the U.S. fatality rate per motor vehicle down 80 percent between 1952 and 1999.

Using the motor vehicle paradigm as a guide for gun control, we should create a federal agency (or direct a current one) to mandate the production of safe guns and the recall of unsafe guns, to require background checks for all gun sales—including those in the secondary market, and to create a comprehensive data system to track firearms (sale, possession, and use in an accident, crime, injury, or fatality). These data could then be used by health policy analysts to determine the effectiveness of these mandates and to suggest improvements.

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*A comprehensive  
national system  
of gun control  
can help prevent  
violent crimes.*

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[RICHARD ABORN]

**RICHARD ABORN:** Violent crimes committed with guns, like all violent crime, must be attacked through a broad range of interventions. The four "Ps" of criminal justice—prevention, policing, process, and punishment—must all be applied.

Prevention can be achieved by adopting a comprehensive national system of controls over the distribution of guns in the United States. This system must focus on breaking the illegal market in guns, while not interfering with the ability of law-abiding individuals to lawfully purchase firearms. Given the experience of states that have strict gun control laws, it is reasonable to argue that the national result would be similar. Prevention can also be achieved by applying a wide range of non-legislative interventions designed to attack the culture of gun violence. Conflict-resolution training, anger management, the media, public health professionals, pediatricians, educators, and design changes to firearms all have a role to play. Ballistic fingerprinting, one of the best new investigative tools, should be mandated nation-

ally. This mandate must include a requirement that new guns be fired and that a bullet and casing be submitted for fingerprinting prior to sale.

Policing must continue to find constitutionally sanctioned but innovative ways to remove illegal guns from the street. Post-*Miranda* debriefing of all felony arrestees to develop intelligence about gun trafficking and possession patterns, full investigation of the linkages between guns and gangs and between guns and drugs, geographic-based enforcement of gun laws in places where gun crimes are rampant, joint city-state-federal task forces to focus on intrastate and interstate trafficking, and arrests for low-level violations to deter gun carrying must all be employed.

Process—the judicial process—should devote resources to gun courts as a means of reducing the amount of time between arrest and prosecution and to eliminate unnecessary plea bargaining brought about by overburdened court calendars. Judicially sanctioned plea offers should be made to defendants for reduced sentences in exchange for specific information on gun trafficking. Otherwise, significant prison sentences should be administered for crimes committed with guns.

**JOYCE MALCOLM:** We all want to reduce the level of gun violence in the United States and ensure the safety of law-abiding citizens. Thoughtful examination of the experience of this country and other countries can help us select the most effective policies.

It is clear from the evidence that permitting people to defend themselves is a more effective deterrent than stringent gun regulations and gun bans. England's gun regulations, the strictest of any democracy, have failed to enhance public safety. Handgun crime rose to new levels after imposition of a ban on handguns. Rather than cracking down on criminal violence, England has used resources to disarm the public. This approach has failed to stop or even reduce violence and has had a high social cost. Citizens are less able to protect themselves, less able to deter crime, and now live in fear. The gun regulations waste police time. The restrictions that England imposed on shotguns alone now require more than half a million police hours each year to enforce.

Gun regulations also waste money. The Canadian law to register firearms will

likely cost Canada at least one billion dollars by next year, the largest cost overrun in that nation's history, and there are still an estimated 2 million guns not accounted for. Ontario's public safety minister called the law a "colossal disaster," arguing that the millions of dollars annually spent should be directed into crime prevention.

Gun restrictions are based on the premise that people do not need to protect themselves because society will protect them. But no police force, however large, can protect everyone. Public safety is not enhanced by depriving individuals of their right to personal safety.

**DEBORAH HOMSHER:** Not long after the school shootings at Columbine High School in April of 1999, the "Gun Show Accountability Act," sponsored by New Jersey Senator Frank Lautenberg as an amendment to the Juvenile Justice Act, came up for a vote in Congress. This bill would have required that unlicensed gun dealers conduct background checks before completing any sale of firearms in the secondary market. This legislation passed in the Senate, but died in the House. The failure to close the gun-show loophole at that time, when emotions in favor of gun control were running so high, indicates that the prospects for introducing new federal gun control legislation over the next five years are dim. Therefore, I believe that most of the strategies employed in the near future to reduce gun violence in the United States will be implemented at the state and local levels, and as a result we will find it difficult to assess which of these various strategies was most or least effective in saving lives. I do not expect that many of the recommendations offered by Spitzer, Carter, and Aborn will be implemented, given the current political climate and growing state and federal deficits, all of which would make it difficult, for instance, to establish a new federal regulatory agency of the kind Carter recommends.

Policymakers ought to study their potential constituencies as often as possible, from the bottom up rather than from the top down. I am most concerned about policymakers at the local, state, and national levels who are pressing for various sorts of gun control, because these are the people whose efforts I support. Gender and class influence our political discourse, including about guns; they influence the electorate and ought to be considered by

anyone hoping to plan a strategy for stronger regulation of guns. I believe that gun control advocacy organizations are perceived as generally female and upper-middle class. This may well be a political weakness that should be addressed.

One of the strategies adopted by gun control advocacy groups since the late 1990s has been lawsuits. Individuals and city governments have filed "public nuisance" and "unsafe product" lawsuits against gun dealers and manufacturers; the opposition has responded with legislation to block such suits. In early April of 2003, the House passed HR-1036, which seeks to make such liability actions illegal; the Senate is considering its own version of that bill. I find many aspects of the lawsuit strategy illogical and unconvincing. If gun manufacturers made products that met legal standards at the time of sale, and if gun dealers obeyed the relevant laws in force at the time, then they ought not to be sued. If they broke laws, then they ought to be arrested, an action that involves law enforcement, not litigation. If the laws regulating gun manufacture and sale are too weak, then the laws ought to be made stronger. Apparently, gun control advocacy groups have turned to lawsuits in order to avoid Second Amendment battles, but I do not trust this will work over the long run.

**ROBERT J. COTTROL:** The gun control debate, at its heart, is not really a debate over constitutional history and interpretation, nor is it a debate over the criminological impacts of tightening gun regulation in one jurisdiction or loosening gun regulation in another. The debate is not even about the putative dangers of one type of firearm or the greater safeties that may be gained with possible alternative firearms designs. We have not yet discussed what should be the central issue of this debate: firearms and self-defense.

The gun control movement is hostile to the notion of ordinary citizens arming for self-defense. This point has been made by James and Sarah Brady, by Garry Wills, and by many other gun control advocates and organizations. It has also been the basic premise of the British, Canadian, and other governments who have instituted national gun control and who are seen as models by the American gun control movement. Some have argued that arming

for self-defense is "an insult to the state"; others have claimed that it is "preparing to wage war against one's fellow citizens." Leading members of the gun control movement vary in their hostility to private firearms ownership. Some are totally opposed; others are genuinely tolerant of sport and recreational shooting. Some are even gun owners for these purposes. What unites them is the belief that gun ownership for self defense is, at best, morally suspect and certainly unwise as a matter of policy.

I can't speak for all supporters of a robust view of the right to have arms, but I suspect that it is this view that is the major point of conflict between gun control advocates and those of us who are their opponents. No matter how willing gun control advocates are to concede a certain legitimacy to duck hunting and target shooting, these concessions are trivial at best. The important issue is: Are we to be allowed to possess the means of self-defense, or are we to be forced to rely on the state to defend us? The state should, of course, defend us—that is one of its primary purposes. But should we grant the state a monopoly, essentially agreeing to be defenseless if the state does not come to our rescue? That is a dangerous doctrine. In part, I began thinking and writing about the Second Amendment by looking at it from the perspective of African American history, asking the question: What does granting the state a monopoly of force mean to a people who have not been able to depend on the state for protection? If in the "bad old days" the sheriff was a member of the Klan, of what use was it to rely on the sheriff to protect you from the lynch mob? Didn't you need the means to protect yourself? This is a question that need not be limited to the issue of black people during the Jim Crow era. Instead, we should ask more generally: What happens when the state is less likely to protect a disfavored group? Shouldn't that group have the means of self-protection?

The right to self-protection is probably the most fundamental of the natural rights. I believe that the opposition to the gun control movement is a resistance to those who would make that right difficult, if not impossible, to exercise. Any discussion of whether some grand compromise over the policy and politics of gun control can be achieved must start with this issue.

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**ABA & Gun Violence**

Since 1965, the American Bar Association has sought to address the problem of gun violence and to articulate policy regarding the regulation of firearms in our society. Over the decades, the ABA has addressed the issue in the context of an overall strategy to combat violent crime in our system of justice and, increasingly, as a critical part of public health strategies to reduce violent injuries and death.

In 1994, the ABA Special Committee on Gun Violence was created to coordinate the Association's efforts to implement policy goals aimed at reducing gun violence. The Committee serves as a source of information on public policy issues and program activities, particularly for lawyers and bar associations. Its Web site may be found at [www.abanet.org/gunviol](http://www.abanet.org/gunviol).

## Books &amp; Articles

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- Ayres, Ian, and John J. Donohue III. "Shooting Down the 'More Guns, Less Crime' Hypothesis." 55 *Stanford Law Review* 1193 (2003).
- Bellesiles, Michael A. *Arming America: The Origins of a National Gun Culture*. New York: Knopf, 2000.  
*Argues that Americans rarely owned or used guns prior to the Civil War, drawing upon legal, probate, military, and business records; fiction and personal letters; hunting magazines; and legislation. Concludes that the "gun-wielding frontiersman" was a myth.*
- Bogus, Carl T. (ed.). *The Second Amendment in Law and History*. New York: The New Press, 2001.
- Bruce, John M., and Clyde Wilcox (eds.). *The Changing Politics of Gun Control*. Lanham, Maryland: Rowman and Littlefield, 1998.
- Carter, Gregg Lee (ed.). *Guns in American Society: An Encyclopedia of History, Politics, Culture, and the Law*. Santa Barbara, California: ABC-CLIO, 2002.  
*The most comprehensive and balanced reference work on guns and their various roles in the U.S. society. Pro-gun control and gun rights scholars are equally represented.*
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*Carter uses historical and sociological data in this book, which is a useful study for social movement analysts and for those concerned with the issues of guns and their control in America.*
- Cook, Philip J., and Jens Ludwig. *Gun Violence: The Real Costs*. New York: Oxford University Press, 2000.  
*Two economists show that the total human cost of gun violence in the U.S. (from injuries, deaths, lost work) total \$100 billion per year.*
- Cooley, Thomas M. *General Principles of Constitutional Law*. 1891. Reprinted by Weisman Publications. 1998.
- Cornell, Saul (ed.). *Whose Right to Bear Arms Did the Second Amendment Protect?* New York: Bedford/St. Martin's, 2000.  
*Explores how colonial Americans understood the right to bear arms, providing a view of the controversy over republicanism and liberalism, the tension between states' rights and individual rights, and the place of rights and revolution in the American constitutional experience.*
- Cornell, Saul. "Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory." 16 *Constitutional Commentary* 221 (1999).
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- DeConde, Alexander. *Gun Violence in America: The Struggle for Control*. Boston: Northeastern University Press, 2001.  
*A balanced examination of the rise of the gun control movement, showing how the movement gained momentum as an increasingly industrialized and urbanized country expanded westward and as small firearms became more numerous and deadly.*
- Hemenway, David. *Private Guns and Public Health*. Ann Arbor, Michigan: The University of Michigan Press, 2004 (forthcoming).  
*Summarizes the literature on the relationship between guns and injuries; describes the public health approach to reducing firearm-related violence.*
- Hemenway, David. "The Smoking Barrel: A Review of Joyce Lee Malcolm's *Guns and Violence: The English Experience*" *Psychology Today*, Jan/Feb 2003. <http://www.psychologytoday.com/htdocs/prod/ptoarticle/pto-20030409-000001.asp>.
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- Homsher, Deborah. *Women and Guns: Politics and the Culture of Firearms in America*. Armonk, New York: M.E. Sharpe, 2001.  
*Through interviews with women hunters, women who use guns for self-defense, and women who live in crime-plagued neighborhoods, Homsher explores perspectives not covered in the traditional gun control debate.*
- Jacobs, James. *Can Gun Control Work?* New York: Oxford University Press, 2002.  
*Jacobs explores the nature of gun violence in the U.S., the provisions, weaknesses and impact of the Brady Law, and policy options for reducing gun violence.*
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- Kleck, Gary. *Targeting Guns: Firearms and Their Control*. New York: Aldine de Gruyter, 1997.
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*See, in particular, Chapter 6: "The Right to Keep and Bear Arms," pp. 133-149.*
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Wills, Garry. *A Necessary Evil: A History of American Distrust of Government*. New York: Simon and Schuster, 1999.

*Explores the roots of anti-government sentiments in the U.S., with a special look at the term-limits movement, abortion-clinic bombings, and the National Rifle Association.*

## Web Sites

Brady Campaign to Prevent Gun Violence  
[www.bradycampaign.org](http://www.bradycampaign.org)

National Rifle Association  
[www.nra.org](http://www.nra.org)

Firearms Law Center  
[a comprehensive inventory of state and local firearms policies]  
[www.firearmslawcenter.org](http://www.firearmslawcenter.org)

Jurist: The Legal Education Network  
[Gun Laws, Gun Control & Gun Rights]  
[www.jurist.law.pitt.edu/gunlaw.htm](http://www.jurist.law.pitt.edu/gunlaw.htm)

## List of Cases

*Dred Scott v. Sandford* 60 U.S. 393 (1857)

*Lewis v. United States* 445 U.S. 55 (1980)

*Miller v. Texas* 153 U.S. 535 (1894)

*Presser v. Illinois* 116 U.S. 252 (1896)

*U.S. v. Cruikshank* 92 U.S. 542 (1876)

*U.S. v. Miller* 307 U.S. 174 (1939)

*Aymette v. The State, 2 Humphreys* 154 (Tenn. 1840)

*Haney v. United States* 264 F. 3d 1161. 2002 (10th Cir.)

*U.S. v. Emerson* 99-10331. November 2, 2001 (5th Cir.)



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