

No. 08-1521

In the
Supreme Court of the United States

OTIS McDONALD, ADAM ORLOV, COLLEEN
LAWSON, DAVID LAWSON, SECOND AMENDMENT
FOUNDATION, INC., AND ILLINOIS STATE RIFLE
ASSOCIATION,

Petitioners,

v.

CITY OF CHICAGO, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

**BRIEF OF PROFESSORS OF PHILOSOPHY,
CRIMINOLOGY, LAW AND OTHER FIELDS AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

Don B. Kates
22608 N.E. 269th Ave.
Battle Ground, WA 98604
(360) 666-2688

Marc James Ayers
Counsel of Record
BRADLEY ARANT BOULT
CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
mayers@babac.com
(205) 521-8598

Counsel for Amici Curiae

November 23, 2009

TABLE OF CONTENTS

INTEREST OF THE AMICI1

SUMMARY OF THE ARGUMENT4

ARGUMENT.....5

 I. Philosophers, Both at the Time of
 the Founders and at Present, Have
 Understood that the Cardinal Right
 to Self-Defense Embodies a Right
 to Arms.5

 II. Criminological Data Undermines
 the Frequently-Cited Bases for
 Blanket Gun Prohibitions and
 Supports the Private Ownership of
 Firearms By Ordinary Citizens.9

 A. The vast majority of
 homicides and violent gun
 crimes are committed not by
 ordinary, law-abiding
 citizens, but by those with
 criminal backgrounds and
 mindsets.9

 B. Firearms uniquely give a
 victim a reliable, realistic
 advantage over an attacker.15

 C. Research makes gun ban
 advocates recant.17

D.	The highly misleading 2009 Branas study.....	28
CONCLUSION		34

TABLE OF AUTHORITIES

Cases

<i>District of Columbia v. Heller</i> 128 S. Ct. 2783 (2008)	5, 8, 28
---	----------

Journal Articles

Adler, Karl P., et al. <i>Correspondence</i> , 272 J. Am. Med. Ass’n 1409 (1994)	14
Barnett, Randy E. <i>Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?</i> , 83 Tex. L. Rev. 237 (2004)	9
Braga, Anthony A., et al. <i>Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, MA</i> , 9 Police Q. 20 (2006)	13
Branas, Charles C., et al. <i>Investigating the Link Between Gun Possession and Gun Assault</i> , 99 Am. J. Pub. Health 2034 (2009)	29
Cook, Philip, et al. <i>Criminal Records of Homicide Offenders</i> , 294 J. Am. Med. Ass’n 598 (2005)	13
Elliott, Delbert S. <i>Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention</i> , 69 Colo. L. Rev. 1081 (1998)	12

Goins, W. A., et al. <i>Recurrent Intentional Injury</i> , 84 J. Nat'l Med. Ass'n 431 (1992)	33
Gorman, Linda & Kopel, David B. <i>Self-defense: The Equalizer</i> , 15 F. Applied Res. & Pub. Pol'y 92 (2000).....	16
Hall, Timothy <i>Is there a Right to Bear Arms?</i> , 20 Pub. Affairs Q. 293 (2006)	8
Hardy, David T. <i>Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment</i> , 9 Harv. J.L. & Pub. Pol'y 559 (1986)	6
Huemer, Michael <i>Is There A Right to Own A Gun</i> , 29 Soc. Theory & Prac. 297 (2003).....	8
Hunt, Lester & Hughes, Todd C. <i>The Liberal Basis of the Right to Bear Arms</i> , 14 Pub. Affairs Q. 1 (2000).....	8
Hutson, H. Range, et al. <i>Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles</i> , 330 New Eng. J. Med. 324 (1994)	31
Ikeda, Robert M., et al. <i>Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994</i> , 12 Violence & Victims 363 (1997)	16

- Kates, Don B. & Cramer, Clayton E.
*Second Amendment Limitations and
 Criminological Considerations*, 60 *Hastings L.J.*
 1339 (2009) 12, 15
- Kates, Don B. & Mauser, Gary
*Would Banning Firearms Reduce Murder and
 Suicide: A Review of International Evidence*, 30
Harv. J.L. & Pub. Pol'y 649 (2007) 27
- Kates, Don B.
*The Second Amendment and the Ideology of
 Self-Protection*, 9 *Const. Comment.* 87 (1992) 6
- Kates, Don B., Schaffer, Henry E., et al.
*Guns and Public Health: Epidemic of Violence
 or Pandemic of Propaganda?*, 62 *Tenn. L. Rev.*
 513 (1995) 21, 29, 31
- Kennedy, David & Braga, Anthony
*Homicide in Minneapolis: Research for
 Problem Solving*, 2 *Homicide Stud.* 263 (1998) 11, 30
- Kessler, Raymond
 Book Review, 82 *J. Crim. L. & Criminology* 1187
 (1992) 21
- Kleck, Gary & Gertz, Marc
*Armed Resistance to Crime: The Prevalence and
 Nature of Self-Defense with a Gun*, 86 *J. Crim.
 L. & Criminology* 150 (1995) 25
- Kleck, Gary
*Capital Punishment, Gun Ownership and
 Homicide*, 84 *Am. J. Soc.* 882 (1979) 18

Kopel, David B. <i>The Second Amendment in the Nineteenth Century</i> , 1998 <i>BYU L. Rev.</i> 1359 (1998)	9
Kopel, David B., Gallant, Paul & Eisen, Joanne D. <i>The Human Right of Self-Defense</i> , 22 <i>BYU J. Pub. Law</i> 43 (2007)	16
Lizotte, Alan Book Review, 22 <i>Contemp. Soc.</i> 339 (May 1993)	21
Lund, Nelson <i>The Second Amendment, Political Liberty, and the Right to Self-Preservation</i> , 39 <i>Ala. L. Rev.</i> 103 (1987)	7
Marvell, Thomas B. & Moody, Carlisle E. <i>The Impact of High Out-of-State Prison Population on State Homicide Rates</i> , 36 <i>Criminology</i> 513 (1998)	11
Mauser, Gary A. <i>Armed Self-Defense: the Canadian Case</i> , 24 <i>J. Crim. Justice</i> 393 (1996)	25
Mauser, Gary A. <i>Gun Control in the United States</i> , 3 <i>Crim. L. Forum</i> 147 (1991)	21
McGonigal, Michael D., et al. <i>Urban Firearm Deaths: A Five-Year Perspective</i> , 35 <i>J. Trauma</i> 532 (1993)	30
Moody & Marvell <i>Guns and Crime</i> , 71 <i>Southern Econ. J.</i> 720 (2005)	22

- Morrissey, M.C., et al.
The Incidence of Recurrent Penetrating Wound Trauma in an Urban Trauma Center, 31 J. Trauma 1536 (1991).....33
- Mustard, David B.
Culture Affects Our Beliefs About Firearms, But Data Are Also Important, 151 U. Pa. L. Rev. 1387 (2003).....25, 26
- Myers, Wade C. & Scott, Kerrilyn
Psychotic and Conduct Disorder Symptoms in Juvenile Murderers, 2 Homicide Stud. 160, (1998)..... 12
- Poole, G. V., et al.
Trauma is a Recurrent "Disease", 113 Surgery 608 (1993).....33
- Reiner, D.S., et al.
Trauma Recidivism, 65 Am. Surg. 556 (1990).....33
- Ross, H. Laurence
 Book Review, 98 Am. J. Soc. 661 (1992).....22
- Sherman, Lawrence W.
 Book Review, 18 The Criminologist 15 (1993).....22
- Sims, D. W., et al.
Urban Trauma: A Chronic, Recurrent Disease, 29 J. Trauma 940 (1989).....33
- Smith, R. Stephen, et al.
Recidivism in an Urban Trauma Center, 127 Arch. Surg. 668 (1992).....33

- Soderstrom, Carl A., et al.
Psychoactive Substance Use Disorders Among Seriously Injured Trauma Patients, 277 *J. Am. Med. Ass'n* 1769 (1997) 32
- Southwick, Lawrence
Self-Defense with Guns: The Consequences, 28 *J. Crim. Just.* 351 (2000) 17, 25
- Stell, Lance
Self Defense and Handgun Rights, 2 *J.L. Econ. & Pol'y* 265 (2006) 8
- Tark, Jungyeon & Kleck, Gary
Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes, 42 *Criminology* 861 (2004) 17, 25
- Tonso, William R.
Social Science and Sagecraft in the Debate Over Gun Control, 5 *Law & Pol'y Q.* 325 (1983) 29
- Vandall, Frank J.
A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill, 38 *Akron L. Rev.* 113 (2005) 10
- Wheeler, Samuel C.
Arms as Insurance, 13 *Pub. Affairs Q.* 111 (1999) 8
- Wheeler, Samuel C.
Self-Defense Rights and Coerced Risk-Acceptance, 11 *Pub. Affairs Q.* 431 (1997) 8

Wolfgang, Marvin E. <i>A Tribute to a View I Have Opposed</i> , 86 J. Crim. L. & Criminology 188 (1995).....	24, 25
Wright, James D. <i>Second Thoughts About Gun Control</i> , 91 The Pub. Int. 23 (1988)	18
News Reports	
Dietrich, John “Before the Next Bullet Kills,” <i>Milwaukee Journal Sentinel</i> , Dec. 19, 2007	13
McGinty, Jo Craven “New York Killers, and Those Killed, by Numbers,” <i>New York Times</i> , April 28, 2006	13
Sentementes, Gus G. “Patterns persist in city killings,” <i>Baltimore Sun</i> , Jan. 1, 2007.....	13
Taylor, Adam & Porter, Ira “Growing audacity among city gunmen,” <i>The News Journal</i> , Sept. 20, 2009	14
Other Authorities	
Abstract to the Executive Summary of James D. Wright, Peter Rossi & Kathleen Daly, <i>Weapons, Crime and Violence in America: A Literature Review and Research Agenda</i> (Wash. D.C., GPO 1981)	17

Blackstone, William <i>Commentaries on the Laws of England</i> (Clarendon 1765-69)	5
Centers for Disease Control <i>First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws</i> (2003)	27
Cook, Phillip J. & Ludwig, Jens <i>Gun Violence: The Real Costs</i> (2000)	30, 31
Etzioni, Amitai & Remp, Richard <i>Technological Shortcuts To Social Change</i> (1973).....	10
FBI <i>Crime in the United States 1972</i> (1973)	11
Foster, Sir Michael <i>Crown Cases</i> (London 1776)	5
Halbrook, Stephen P. <i>A Right To Bear Arms</i> (1989)	7
Halbrook, Stephen P. <i>That Every Man Be Armed</i> (1984)	6
Hearings Before the Sub-Committee To Investigate Juvenile Delinquency of Committee of the Judiciary, U.S. Senate, 94th Congress, First Session (1975).....	10
Hobbes, Thomas <i>Leviathan</i> (1651).....	7

Hobbes, Thomas	
<i>Leviathan</i> (Collier 1962).....	5
Jacobs, James B.	
<i>Can Gun Control Work?</i> (2002)	26
John V. Lindsay	
<i>The Case for Federal Firearms Control</i> (1973)	10
Kates, Don B.	
<i>The Limits of Gun Control: A Criminological</i> <i>Perspective</i> in Timothy Lytton, ed., <i>Suing the</i> <i>Firearms Industry</i> (2005).....	16
Kent, James	
<i>Commentaries on American Law</i> (1827)	5
Kleck, Gary & Kates, Don B.	
<i>Armed: New Perspectives On Gun Control</i> (2001)	16
Kleck, Gary	
<i>Handgun-Only Control: A Policy Disaster in</i> <i>the Making</i> in Don B. Kates (ed.), <i>Firearms and</i> <i>Violence: Issues of Public Policy</i> (1984)	18
Kleck, Gary	
<i>Point Blank: Guns and Violence in America</i> (1991)	21
Kleck, Gary	
<i>Targeting Guns: Firearms and Their Control</i> (1997)	15, 22

- Locke, John
Two Treatises of Government (P. Laslett rev. ed. 1960)7
- Lott, John R., Jr.
More Guns, Less Crime: Understanding Crime and Gun Control Law (3d ed. 2010)22
- Malcolm, Joyce Lee
To Keep and Bear Arms: The Origins of an Anglo-American Right (1994)6
- Moody, Carlisle
Firearms and Homicide in Bruce Benson & Paul Zimmerman, eds., *Handbook on the Economics of Crime* (forthcoming)22
- Rojek, Dean G.
The Homicide and Drug Connection, in Paul H. Blackman, et al. (eds.), *The Varieties of Homicide and Its Research: Proceedings of the 1999 Meeting of the Homicide Research Working Group* (2000)14, 31
- Spitzer, Robert J.
The Politics of Gun Control (1995)14
- Toch, Hans & Lizotte, Alan J.
Research and Policy: The Case of Gun Control, in Peter Sutfeld & Philip Tetlock, eds. *Psychology & Social Policy* (1992)23, 24
- Tucker, St. George
Blackstone's Commentaries with Notes of Reference to the Constitution and Law of the Federal Government (1803)5

- Wellford, Charles F., Pepper, John V. & Petrie,
Carol V. (eds.)
Firearms and Violence: A Critical Review (2004).....27
- Wilson, James
*The Works of the Honourable James Wilson,
L.L.D.* (Bird Wilson ed., Philadelphia, Lorenzo
Press 1804)8
- Wolfgang, Marvin E.
Patterns in Criminal Homicide (1958)30
- Wright, James D.
*Ten Essential Observations On Guns in
America, Society* (Mar.–Apr. 1995)18
- Wright, James D., Rossi, Peter & Daly, Kathleen
*Under the Gun: Weapons, Crime and Violence
in the United States* (1983)18

INTEREST OF THE AMICI

Amici curiae are distinguished scholars from various fields who are concerned about ensuring accuracy in the scholarship advanced in important matters of public policy such as those involved in this case.¹

David Bordua is Professor Emeritus of Sociology at the University of Illinois at Champaign. He is the author or co-author of, among other works, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in J. Byrne and R. Sampson (ed.), *The Social Ecology of Crime* (1986); *Gun Control and Opinion Measurement*, 5 *Law & Pol'y Q.* 345 (1983); and *Patterns of Legal Firearms Ownership: A Situational and Cultural Analysis of Illinois Counties*, 2 *Law & Pol'y Q.* 147 (1979).

Lloyd Cohem is a professor of law at the George Mason School of Law.

Fran F. Fuller is a professor (retired) with the Department of Sociology and Criminal Justice at the University of North Carolina at Pembroke.

Kris Kobach is a professor of law at the University of Missouri (Kansas City) School of Law.

¹ The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The NRA Civil Rights Defense Fund made financial contributions to support the preparation of this brief.

Michael I. Krauss is a professor of law at George Mason University School of Law.

Tom McAfee is a professor of law at the William S. Boyd School of Law at the University of Nevada-Las Vegas.

Jeffrey Miron is a senior lecturer and the Director of Undergraduate Studies for the Department of Economics at Harvard University.

Leonard J. Nelson III is a professor of law at the Cumberland School of Law at Samford University.

Daniel C. Palm is a professor of political science at Azusa Pacific University. He is the project coordinator of the Claremont Institute's Doctors for Responsible Gun Ownership project.

Daniel Polsby is Dean and Professor of Law at George Mason University. He has authored or co-authored, among other works: *Long Term Non-Relationship of Firearm Availability to Homicide*, 4 Homicide Studies 185 (2000); *American Homicide Exceptionalism*, 69 U. Colo. L. Rev. 969 (1998); *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. Crim. L. & Criminology 207 (1995); *Of Holocausts and Gun Control*, 75 Wash. U. L.Q. 1237 (1998); and *Reflections on Violence, Guns and the Defensive Use of Deadly Force*, 49 Law & Contemp. Probs. 89 (1986).

William A. Schroeder is a professor of law at the Southern Illinois University.

Lawrence Southwick is Professor Emeritus at

the State University of New York-Buffalo and has authored: *Self-Defense with Guns: The Consequences*, 28 J. Crim. Just. 351 (2000); *An Economic Analysis of Murder and Accident Risks for Police in the United States*, 30 Applied Econ. 593 (1998); and *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*, 25 Atlantic Econ. J. 256 (1997).

Lance Stell is the Charles A. Dana Professor and Director of Medical Humanities at Davidson College. He is the author of *Self Defense and Handgun Rights*, 2 J.L. Econ. & Pol'y 265 (2006); *Gun Control*, in *A Companion to Applied Ethics*, R.G. Frey & C.H. Wellman (eds.) 192 (2003); *The Production of Criminal Violence in America: Is Strict Gun Control the Solution?*, 32 J.L. Med. & Ethics (2001); *Gun Control and the Regulation of Fundamental Rights*, Crim. Just. Ethics (2001); and *Guns, Politics and Reason*, 9 J. Am. Culture 71 (1986).

William Tonso is a professor of sociology at the University of Evansville. He edited *The Gun Culture and Its Enemies* (1989), and authored *Social Science and Sagecraft in the Debate Over Gun Control*, 5 Law & Pol'y Q. 325 (1983).

Samuel C. Wheeler III is a professor of philosophy at the University of Connecticut, and currently serves as the Director of Graduate Studies in Philosophy. He is the author of *Self-Defense Rights and Coerced Risk-Acceptance*, 11 Pub. Affairs Q. 431 (1997), and *Arms as Insurance*, 13 Pub. Affairs Q. 111 (1999).

SUMMARY OF THE ARGUMENT

This brief represents the combined views of the *amici* professors of philosophy, criminology, social and political science, and law.

The *amici* professors of philosophy, political science, and law wish to make two points. The first is that the Founding Fathers embraced the right of self-defense as among the most fundamental of human rights, and thought that right included a right to possess firearms as the means of self-defense. The second point is that the prevailing view among contemporary philosophers is that the right of self-defense implies a right to possess firearms.

The *amici* professors of social science, criminology and law wish to make three further points. First, the vast majority of murder or serious gun crimes are committed by the deranged and by long-time criminals, two groups who are already prohibited from owning firearms to the extent legally possible. Accordingly, there is little, if any, statistically identifiable danger stemming from the possession of firearms by ordinary adults. Second, this statistical reality has now been acknowledged in the criminological world, even by many criminologists who are openly hostile to private gun ownership. Many scholars now accept the fact that, according to the data, bans on firearms for the general population are misdirected and do not control or reduce violent crime. Finally, *amici* critique as fundamentally flawed and unreliable a recently published study erroneously suggesting that gun ownership automatically increases one's chances of becoming a victim of gun crime. In reality, there is no

basis to believe that ordinary, law-abiding citizens who happen to own guns are at any greater risk of being assaulted, but there is a strong basis to believe that disarming such law-abiding citizens increases the risk of danger to them and their families.

ARGUMENT

I. Philosophers, Both at the Time of the Founders and at Present, Have Understood that the Cardinal Right to Self-Defense Embodies a Right to Arms.

As this Court correctly indicated in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Second Amendment is related to, and derives from, the natural right of self-defense. Indeed, the Founders viewed self-defense as not merely a fundamental right but as one of the most central of the fundamental rights. They and the philosophers they followed believed that man consented to join in society in order to better preserve his life. And from that notion flowed their belief that society could never abolish the right to defend life.²

² “Self-defense, therefore, as it is justly called the primary law of nature, so it is not, *neither can it be*, taken away by the law of society.” William Blackstone, *Commentaries on the Laws of England* 121, 143–44 (Clarendon 1765–69) (emphasis added). See also Sir Michael Foster, *Crown Cases* 273–74 (London 1776) (same: language tracks Blackstone’s almost identically); 2 James Kent, *Commentaries on American Law* 1 (1827) (same: language tracks Blackstone’s almost identically); St. George Tucker, *Blackstone’s Commentaries with Notes of Reference to the Constitution and Law of the Federal Government* 300 (1803) (“The right of self-defense is the first law of nature.”); Thomas Hobbes, *Leviathan* 88, 95 (Collier 1962) (the right to self-defense is inalienable—“a covenant not to defend myself with force from force is void.”). For

To religiously-oriented thinkers like Samuel Adams, self-defense was as much a duty as a right. Colonial preachers reasoned that God gives men life and, accordingly, to fail to defend life was to denigrate God's gift and to frustrate His plan. So man's duty was always to defend life as best he could. Thus, men had both right and duty of self-defense, but no right to voluntarily desist from it, thereby sacrificing life.³

To the Founders, the right of self-defense was not a linguistic triviality. Instead, it was a right to effective—in other words, *armed*⁴—self defense. This

similar quotes, see Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87, 87–104 (1992).

³ See Kates, *Ideology*, *supra* note 2, at 89–92.

⁴ See, e.g., Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 149 (1994) (quoting Sam Adams as listing among the “Natural Rights of the Colonists as Men” the rights to life, liberty and property,” “together with the right to support and defend these in the best manner they can”). See also Stephen P. Halbrook, *That Every Man Be Armed* 58 (1984) (quoting colonial newspapers justifying Sam Adams' recommendation that individuals should arm themselves in response to British enforcement of the Stamp Tax on the ground that “[i]t is a natural right [of the people] ... to keep arms for their own defence”), and at 102–04 (quoting 19th Century American legal treatises to the same effect; and Nov. 5, 1776 editorial from the *Pennsylvania Evening Post*, describing the right to arms as “a natural right”) (quoted in David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559, 596 (1986)).

Quotation of such sentiments from 18th and 19th Century Americans, and philosophers they revered, may be multiplied almost endlessly: see *Ideology*, *supra* note 2 at 90–94 (quoting Montesquieu, Blackstone, Algernon Sidney, Cesare Beccaria and

kind of effective self-defense, rather than being a mere abstraction, is what truly equalizes (at the very least) victim and attacker—for example, a 110-pound woman and her 200-pound male attacker, or one victim against many attackers.

Indeed, to the Founders, the right to be armed was an integral part of the right to self-defense, as is illustrated in a 1790 lecture by an original member of this Court, Justice James Wilson. Justice Wilson was a law professor, member of the Constitutional Convention, and the primary author of the Pennsylvania Constitution. He explained the right to use deadly force to repel a homicidal attacker as a natural, inalienable

Thomas Paine), and Stephen P. Halbrook, *A Right To Bear Arms* 54 (1989) (noting the same view in William Eden’s 1772 *Principles of Penal Law* and the effect of Eden and Montesquieu on Jefferson’s views). Compare Thomas Hobbes’ definitions of the Right of Nature and the Law of Nature: “THE RIGHT OF NATURE, which writers commonly call *Jus Naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, his own life.... A LAW OF NATURE (*Lex Naturalis*) is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his own life, *or taketh away the means of preserving the same*; and to omit that by which he thinketh that it may be best preserved.” Thomas Hobbes, *Leviathan* 66 (1651) (emphasis added) (quoted in Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 119 (1987). Compare also John Locke’s assertion that by the laws of nature everyone is both: a) “*bound to preserve himself* and ...”; b) “may not unless it be to do Justice on an Offender, take away, or impair the life, *or what tends to the preservation* of the Life, the Liberty, Health, Limb or Goods of another.” John Locke, Second Treatise of Government, in *Two Treatises of Government* 289 (P. Laslett rev. ed. 1960) (quoted in Lund, *Self-Preservation* at 118 n.35).

right:

[I]t is the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution. This law, however, is expressly recognized in the Constitution of Pennsylvania. “The right of the citizens to bear arms in defense of themselves shall not be questioned.”⁵

This view was held beyond the time of the Founders and has continued into the present. Indeed, in *Heller* this Court cited various 19th Century American writings equating the right to arms and the right to self-defense from which it was derived.⁶ And the dominant view among modern philosophers that have seriously addressed the issue is that the right of self-defense implies a right to possess firearms.⁷

Given their background in natural-rights

⁵ 3 James Wilson, *The Works of the Honourable James Wilson*, L.L.D. 84 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804).

⁶ 128 S. Ct. at 2793–94.

⁷ See, e.g., Michael Huemer, *Is There A Right to Own A Gun*, 29 Soc. Theory & Prac. 297, 297–99 (2003); Lester Hunt & Todd C. Hughes, *The Liberal Basis of the Right to Bear Arms*, 14 Pub. Affairs Q. 1, 1–25 (2000); Lance Stell, *Self Defense and Handgun Rights*, 2 J.L. Econ. & Pol’y 265, 267–77 (2006); Samuel C. Wheeler, *Self-Defense Rights and Coerced Risk-Acceptance*, 11 Pub. Affairs Q. 431 (1997); Samuel C. Wheeler, *Arms as Insurance*, 13 Pub. Affairs Q. 111 (1999); Timothy Hall, *Is there a Right to Bear Arms?*, 20 Pub. Affairs Q. 293 (2006).

philosophy, the understanding that the Second Amendment guarantees a right to possess the means of self-defense was universal among its authors, their contemporaries and later commentators down to the twentieth century.⁸ Only when gun control became a political issue in the twentieth century did anyone suggest that the Second Amendment did not guarantee law abiding, responsible adults a right to arms for the defense of self, home and family.

II. Criminological Data Undermines the Frequently-Cited Bases for Blanket Gun Prohibitions and Supports the Private Ownership of Firearms By Ordinary Citizens.

A. The vast majority of homicides and violent gun crimes are committed not by ordinary, law-abiding citizens, but by those with criminal backgrounds and mindsets.

For decades gun control advocates have been perpetuating a view that has great emotional affect but little actual support, namely, the view that:

⁸ See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 258–63 (2004) (noting that, in contrast to the individual right view, advocates of the states' right/collective rights theories have not produced a single example of those theories being mentioned by any eighteenth-century American). Compare David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359 (1998) (comprehensive review of a century of post-1789 references to the Amendment which finds none stating the states' right theory).

most homicides are not committed by the “hardened” criminal who would seek out a gun or other lethal weapon whether or not it was legal, but rather by ordinary, “law abiding” citizens who kill on impulse rather than by intent [because a firearm was available in a moment of ungovernable anger].⁹

As is true with this specific example, such published claims rarely have any valid reference to supporting criminological data, if any reference at all.¹⁰ The reality

⁹ Amitai Etzioni & Richard Remp, *Technological Shortcuts To Social Change* 107 (1973). See, e.g., Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 Akron L. Rev. 113, 118–19 & n.28 (2005) (citing as authoritative such unsupported claims by Professor K. Kaufer Christoffel (who heads her own gun-ban advocacy group), such as the claim that “most shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection”).

¹⁰ One exception to the general dearth of supporting references was a fraudulent citation in a pamphlet by the then-mayor of New York which attributed (without any specific page citation) to the 1972 F.B.I. Uniform Crime Report the finding that “most murders (73% in 1972) are committed by previously law abiding citizens.” John V. Lindsay, *The Case for Federal Firearms Control* 22 (1973) (reprinted at pp. 1549 et seq. in Hearings Before the Subcommittee To Investigate Juvenile Delinquency of Committee of the Judiciary, U.S. Senate, 94th Congress, First Session, v. II (1975)).

However, the F.B.I.’s 1972 Uniform Crime Report (UCR) did not even exist when the Lindsay pamphlet purported to cite it; and when the 1972 UCR eventually was released its section titled “Careers in Crime” showed that 74.7% of murder arrestees that year had prior arrest(s) for a violent felony or burglary, exclusive

is that this view simply does not comport with the available data.

What perpetrator data dating back to the 19th Century shows is that murderers were not previously law abiding, responsible adults; rather, “most murderers differ little from other major *criminals*.”¹¹ So invariably have perpetrator studies dating back to the 19th Century found that murderers are overwhelmingly persons with life histories of prior crime that this is now counted as one of the standard criminological axioms.¹² The data supporting this now-axiom was summarized by one noted criminologist as follows:

the use of life-threatening violence in this country is, in fact, embedded in a general pattern of criminal behavior and largely restricted to a criminal class...virtually all individuals who become involved in life-threatening violent crime have prior involvement in many types of minor (and not so minor) offenses. ... The frequency, seriousness and variety of offending are all

of their arrests for other offenses. See FBI, *Crime in the United States 1972*, 35–38 (1973).

¹¹ Thomas B. Marvell & Carlisle E. Moody, *The Impact of High Out-of-State Prison Population on State Homicide Rates*, 36 *Criminology* 513, 517 (1998) (emphasis added); see *id.* at 518 n.5 (defining “major criminal” as “similar to what others call professional criminals, career criminals, or violent predators”).

¹² See, e.g., David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 *Homicide Stud.* 263, 267ff (1998).

strongly predictive of life-threatening violent offending. Even in the case of life-threatening domestic violence, most of those violent offenders have a history of prior involvement in criminal behavior and serious violent crimes.¹³

And this axiom continues to be valid. Earlier this year the Hastings Law Journal published an article detailing studies subsequent to those Prof. Elliott summarizes.¹⁴ Like the prior studies, the later ones continue to demonstrate his point that “virtually all” murderers have prior criminal records or are deranged. Examples of the studies noted in the Hastings article:

- Psychological studies summarized as finding that 80-100% of juvenile murderers are psychotic or have psychotic symptoms.¹⁵
- *New York City*: From a New York Times study of the 1,662 murders in that city in the years 2003-2005: “More than ninety percent of the killers had

¹³ Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 Colo. L. Rev. 1081, 1098 (1998) (emphasis added).

¹⁴ Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339, 1342-43 (2009).

¹⁵ Wade C. Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 Homicide Stud. 160, 170-73 (1998).

criminal records.”¹⁶

- *Massachusetts*: “Some 95% of homicide offenders ... [in a Kennedy School study had been] arraigned at least once in Massachusetts courts before they [murdered].... On average ... homicide offenders had been arraigned for 9 prior offenses....”¹⁷
- *Illinois*: Of that state’s murderers over the years 1991-2000, the great majority had prior felony records.¹⁸
- *Baltimore*: Police records show that 92% of 2006 murder suspects had criminal records.¹⁹
- *Milwaukee*: From a police compilation of data on 2007 and past years’ murders: “Most suspects had criminal records, and a quarter of them were on probation or parole.”²⁰

¹⁶ Jo Craven McGinty, “New York Killers, and Those Killed, by Numbers,” *New York Times*, April 28, 2006, at A1.

¹⁷ Anthony A. Braga, et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, MA*, 9 Police Q. 20, 29–31 (2006).

¹⁸ Philip Cook, et al., *Criminal Records of Homicide Offenders*, 294 J. Am. Med. Ass’n 598, 599–600 (2005).

¹⁹ Gus G. Sentementes, “Patterns persist in city killings,” *Baltimore Sun*, Jan. 1, 2007 at A1.

²⁰ John Dietrich, “Before the Next Bullet Kills,” *Milwaukee Journal Sentinel*, Dec. 19, 2007, at A1.

- *Atlanta*: 80% of 1997 Atlanta murder arrestees had previously been arrested at least once for a drug offense, and 70% had three or more prior drug arrests, in addition to all their arrests for other crimes.²¹

And, even more recently:

- *Delaware*: Reporting on shootings prior to 2009, including many where victims had only been wounded rather than killed, 80% of shooters had arrest records going all the way back to their juvenile years; 57% had been charged at least twice with drug offenses.²²

To the extent that counter-arguments are published, oftentimes such arguments merely note the fact that murders often involve people who knew each other and arise from arguments and/or occur in homes.²³ But such facts are not particularly instructive because criminals—even killers—certainly have acquaintances, arguments and homes. In fact, the broadest study of national data on gun murders that occurred in homes

²¹ Dean G. Rojek, *The Homicide and Drug Connection*, in Paul H. Blackman, et al. (eds.), *The Varieties of Homicide and Its Research: Proceedings of the 1999 Meeting of the Homicide Research Working Group* 124, 128 (2000).

²² Adam Taylor & Ira Porter, “Growing audacity among city gunmen,” *The News Journal*, <http://www.delawareonline.com/article/20090920/NEWS01/909200364/1006/NEWS>, Sept. 20, 2009.

²³ See, e.g., Robert J. Spitzer, *The Politics of Gun Control* 186ff. (1995), and Karl P. Adler, et al., *Correspondence*, 272 *J. Am. Med. Ass’n* 1409 (1994).

between acquaintances found that “the most common victim-offender relationship” was “where both parties knew one another because of prior illegal transactions.”²⁴

In sum, the best and most comprehensive studies show that the overwhelming majority of murderers are individuals with criminal backgrounds, and not ordinary, law abiding, responsible adults. Accordingly, it is not only irrational to seek to disarm such responsible adults in order to avoid homicides and violent gun crimes, it is in fact counter-productive and dangerous because it strips the innocent of the most effective and efficient means of defending themselves against violent predators.

B. Firearms uniquely give a victim a reliable, realistic advantage over an attacker.

Firearms are unique among weapons; only firearms allow weaker people to most easily and effectively resist predation by stronger ones. As one evaluation puts it:

Reliable, durable, and easy to operate, modern firearms are the most effective means of self-defense ever devised. They require minimal maintenance and, unlike knives and other weapons, do not depend on an individual’s physical strength for their effectiveness. Only a gun can allow a

²⁴ Kates & Cramer, *Criminological Considerations*, *supra* note 14 at 1344 (quoting Gary Kleck, *Targeting Guns: Firearms and Their Control* 236 (1997)).

110 pound woman to defend herself against
a 200 pound man.²⁵

The available empirical evidence establishes that: (1) America’s “firearms are used over half a million times in a typical year against home invasion burglars; usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired”²⁶; (2) annually, 3-6 times as many victims use handguns to defend against criminals as criminals use handguns to commit crimes²⁷—so guns do up to six times more good than harm; and (3) “[r]esistance with a gun appears to be most effective in preventing serious injury [to victims, and] ... for preventing property loss....”²⁸

²⁵ Linda Gorman & David B. Kopel, *Self-defense: The Equalizer*, 15 F. Applied Res. & Pub. Pol’y 92, 92 (2000). Compare Don B. Kates, *The Limits of Gun Control: A Criminological Perspective* in Timothy Lytton, ed., *Swing the Firearms Industry* 70 (2005): “A gun is the only mechanism that gives a weaker victim parity with an attacker (even if the attacker also has a gun). *The next best alternative, a chemical spray, is ineffective against precisely those who are most likely to engage in violent attacks: people who are under the influence of drugs or alcohol or who are extremely angry.*” (emphasis added).

²⁶ David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. Pub. Law 43, 166 (2007) (citing Robert M. Ikeda, et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 *Violence & Victims* 363 (1997) (reporting results of a study conducted by the CDC)).

²⁷ Kates in Lytton, *supra* note 25 at 68–69 (collecting studies); see also Gary Kleck & Don B. Kates, *Armed: New Perspectives On Gun Control* at Ch. 6 (2001) (detailed review of evidence).

²⁸ Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes*, 42 *Criminology* 861,

C. *Research makes gun ban advocates recant.*

In the late 1970s, the U.S. Justice Department funded the University of Massachusetts Social and Demographic Research Institute to review and evaluate the entire extant literature on gun control in the U.S. and elsewhere. The Institute's resulting report observed:

It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. *There is no persuasive evidence that supports this view.*²⁹

That evaluation's authors, Professors Wright, Rossi, and Daly, subsequently published a commercial version of their report to which they added their personal recantation: "The progressive's indictment of American firearms policy is well known and is one that both the senior authors of this study *once shared*. This indictment [suggests that only] the gun lobby prevents us from embarking on the road to a safer and more

902 (2004). *See also* Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. Crim. Just. 351, 362 (2000) ("The use of a gun by the victim significantly reduces her chance of being injured.").

²⁹ From the Abstract to the Executive Summary of James D. Wright, Peter Rossi & Kathleen Daly, *Weapons, Crime and Violence in America: A Literature Review and Research Agenda* at 2 (Wash. D.C., GPO 1981) (emphasis added).

civilized society. *The more deeply we have explored the empirical implications of this indictment, the less plausible it has become.*³⁰ In fact, Prof. Wright later published even more adverse evaluations of gun prohibition.³¹

In 1979, the criminologist who would become the premier analyst of gun control, Florida State University's Gary Kleck, published his earliest paper on the subject, suggesting that widespread firearms ownership may contribute to overall levels of criminal homicide.³² Five years later however, Prof. Kleck repudiated this suggestion because his own and others' research demonstrated that widespread firearms ownership does not increase homicide levels.³³

Prof. Kleck later summarized the state of modern knowledge in a presentation to the National Academy of Sciences. His comments are so particularly illustrative of an initially-hostile mind changed by an honest evaluation of the data as to be worthy of extended quotation:

³⁰ Wright, Rossi & Daly, *Under the Gun: Weapons, Crime and Violence in the United States* 319–20 (1983) (emphasis added).

³¹ James D. Wright, *Ten Essential Observations On Guns in America*, *Society* 63 (Mar.–Apr. 1995), and *Second Thoughts About Gun Control*, 91 *The Pub. Int.* 23 (1988).

³² Gary Kleck, *Capital Punishment, Gun Ownership and Homicide*, 84 *Am. J. Soc.* 882 (1979).

³³ Gary Kleck, *Handgun-Only Control: A Policy Disaster in the Making* in Don B. Kates (ed.), *Firearms and Violence: Issues of Public Policy* at 167–199 (1984).

Up until about 1976 or so, there was little reliable scholarly information on the link between violence and weaponry. Consequently, everyone, scholars included, was free to believe whatever they liked about guns and gun control. There was no scientific evidence to interfere with the free play of personal bias. It was easy to be a “true believer” in the advisability of gun control and the uniformly detrimental effects of gun availability (or the opposite positions) because there was so little relevant information to shake one’s faith. When I began my research on guns in 1976, like most academics, *I was a believer in the “anti-gun” thesis, i.e. the idea the gun availability has a net positive effect on the frequency and/or seriousness of violent acts.* It seemed then like self-evident common sense which hardly needed to be empirically tested. However, as a modest body of reliable evidence (and an enormous body of not-so-reliable evidence) accumulated, many of the most able specialists in this area shifted from the “anti-gun” position to a more skeptical stance, in which it was negatively argued that the best available evidence does not convincingly or consistently support the anti-gun position. This is not the same as saying we know the anti-gun position to be wrong, but rather that there is no strong case for it being correct. The most prominent representatives of the skeptic

position would be James Wright and Peter Rossi, authors of the best scholarly review of the literature [citing the commercially published version of the Wright, Rossi and Daly comprehensive evaluation footnoted here at note 30].

[Subsequent research] has caused me to move beyond even the skeptic position. I now believe that the best currently available evidence, imperfect though it is (and must always be), indicates that general gun availability has no measurable net positive effect on rates of homicide, suicide, robbery, assault, rape, or burglary in the U.S. This is not the same as saying gun availability has no effects on violence—it has many effects on the likelihood of attack, injury, death, and crime completion, but these effects work in both violence-increasing and violence-decreasing directions, with the effects largely canceling out. For example, when aggressors have guns, they are (1) *less* likely to physically attack their victims, (2) *less* likely to injure the victim given an attack, but (3) *more* likely to kill the victim, given an injury. Further, when *victims* have guns, it is less likely aggressors will attack or injure them and less likely they will lose property in a robbery. At the aggregate level, in both the best available time series and cross-sectional studies, the overall net effect of gun availability on total rates of violence

is not significantly different from zero. The positive associations often found between aggregate levels of violence and gun ownership appear to be primarily due to violence increasing gun ownership, rather than the reverse. Gun availability does affect the rates of *gun* violence (e.g. the gun homicide rate, gun suicide rate, gun robbery rate) and the fraction of violent acts which involve guns (e.g. the percent of homicides, suicides or robberies committed with guns); it just does not affect total rates of violence (total homicide rate, total suicide rate, total robbery rate, etc.).³⁴

In 1991, Prof. Kleck reiterated these views in his comprehensive evaluation of the evidence which was acclaimed by the American Society of Criminology, and even by critics, as the definitive work on the criminology of firearms.³⁵ (It was succeeded in 1997 by a revised and

³⁴ Prof. Kleck's remarks to the National Academy of Sciences were initially unpublished. He graciously allowed them to be quoted them in Don B. Kates, Henry E. Schaffer, et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 Tenn. L. Rev. 513, 525–26 (1995) (emphasis added).

³⁵ Gary Kleck, *Point Blank: Guns and Violence in America* (1991). The book received the ASC's Hindelang award as the most important contribution to criminology in recent years. See other reviews in: Raymond Kessler, Book Review, 82 J. Crim. L. & Criminology 1187 (1992); Alan Lizotte, Book Review, 22 Contemp. Soc. 339–40 (May 1993); and Gary A. Mauser, *Gun Control in the United States*, 3 Crim. L. Forum 147, 148–49 (1991).

Reviews of the book by anti-gun advocates include Lawrence W. Sherman, Book Review, 18 The Criminologist 15

enlarged paperback edition which remains the definitive treatment of the area.³⁶).

Kleck's two books remain virtually unchallenged as the dispositive and comprehensive summaries of the state of criminological learning about the relation between firearms and violent crime. Kleck's views are confirmed by later studies such as Moody & Marvell's exhaustive 2005 statistical analysis: "The estimated net effect of guns on crime ... is generally very small and insignificantly different from zero."³⁷

The high water mark of anti-gun thought among academics was the 1968-69 Eisenhower Commission's call for handgun prohibition. One of the Commission's advisors, Professor Hans Toch of the School of Criminology at the State University of New York (Albany), has noted that he fully endorsed the

(1993) (describing Prof. Kleck's work as "thorough scholarship and detailed critiques of the literature. As a comprehensive reference, there is nothing like it. It will stand for years as indispensable reading for anyone concerned about guns and violence"); and H. Laurence Ross, Book Review, 98 *Am. J. Soc.* 661, 662 (1992) (stating that "if only as a resource concerning the gun control literature, this book is a necessary acquisition for [libraries] ... and for any serious scholar working in the area").

³⁶ Gary Kleck, *Targeting Guns: Firearms and Their Control* (1997).

³⁷ Carlisle Moody & Thomas Marvell, *Guns and Crime*, 71 *Southern Econ. J.* 720, 735 (2005). See also Carlisle E. Moody, *Firearms and Homicide* in Bruce Benson & Paul Zimmerman, eds., *Handbook on the Economics of Crime* (forthcoming); and John R. Lott Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Law* (3d ed. 2010) (forthcoming).

Commission's official conclusion "that the heart of any effective national firearms policy for the United States must be to reduce the availability of the [handgun, the] firearm that contributes most to violence.... [R]educing the availability of the handgun *will* reduce firearms violence." But, Prof. Toch continues, subsequent research has progressively impacted this: "rates of male firearms ownership tend to be inversely correlated with violent crime rates, a curious fact if firearms stimulate aggression. *It is hard to explain that where firearms are most dense, violent crime rates are lowest, and where guns are least dense violent crime rates are highest.*"³⁸

Toch further notes that in contrast to male ownership, women's gun ownership is very low where crime rates are low, but high where crime is prevalent. But "[t]his does not imply that urban women are responsible for the urban crime problem" writes Professor Toch; rather "it demonstrates that when violent crimes are high, women arm themselves for protection." Moreover, Professor Toch sees women arming themselves as rational and successful because armed self-defense works:

[W]hen used for protection, firearms can seriously inhibit aggression and can provide a psychological buffer against the fear of crime. Furthermore, the fact that national patterns show little violent crime

³⁸ All of Professor Toch's comments cited here appear in his paper (co-authored with his colleague Alan J. Lizotte), *Research and Policy: The Case of Gun Control*, in Peter Sutfield & Philip Tetlock, eds. *Psychology & Social Policy*, at 232ff (1992).

where guns are most dense implies that guns do not elicit aggression in any meaningful way.... Quite the contrary, these findings suggest that *high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.*³⁹

Perhaps the most dramatic recantation came from Professor Marvin E. Wolfgang who, until his death, was generally deemed the doyen of American criminologists. He himself wrote of his antagonism toward firearms,

I am as strong a gun-control advocate as can be found among the criminologists in this country. If I were Mustapha Mond of Brave New World, I would eliminate all guns from the civilian population and maybe even from the police. *I hate guns....*⁴⁰

Nevertheless, asked by the Journal of Criminal Law and Criminology to evaluate a Kleck/Gertz paper on defensive firearms use, Prof. Wolfgang confessed that he was thoroughly impressed. "I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly

³⁹ *Id.* at 234 & n.10 (emphasis added).

⁴⁰ Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. Crim. L. & Criminology 188, 188 (1995) (emphasis added).

well.”⁴¹ (Incidentally, Prof. Kleck’s endorsement of the viability and value of armed self-defense has subsequently received confirmation in publications by Professors Lawrence Southwick and John Lott, and by the Canadian work of Prof. Gary Mauser.⁴² Summarizing his research, Prof. Southwick writes: “The use of a gun by the victim significantly reduces her chance of being injured” or victimized.⁴³)

Most recent is the recantation of Professor David Mustard, who admitted that, when he began his research at the University of Chicago in 1995, he “passionately disliked firearms and fully accepted the conventional wisdom that increasing the gun-ownership rate would necessarily raise violent crime and accidental deaths.”⁴⁴ After researching the actual data, Prof. Mustard concluded the opposite:

My views on this subject were formed primarily by media accounts of firearms, which unknowingly to me systematically emphasized the costs of firearms while virtually ignoring their benefits. I thought

⁴¹ *Id.* at 192 (evaluating Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150 (1995)).

⁴² Gary A. Mauser, *Armed Self-Defense: the Canadian Case*, 24 J. Crim. Justice 393, 404 (1996); Southwick, *supra* note 28 at 362. *See also* Tark & Kleck, *supra* note 28 at 902.

⁴³ Southwick, *supra* note 28 at 362.

⁴⁴ David B. Mustard, *Culture Affects Our Beliefs About Firearms, But Data Are Also Important*, 151 U. Pa. L. Rev. 1387, 1390 (2003).

it obvious that passing laws that permitted law-abiding citizens to carry concealed weapons would create many problems. It is now over six years since I became convinced otherwise and concluded that shall-issue laws—laws that require permits to be granted unless the applicant has a criminal record or a history of significant mental illness—reduce violent crime and have no impact on accidental deaths.⁴⁵

These recantations correspond with the now-dominant trend of modern criminological thought on the relation between firearms and crime. In 2002, Oxford University Press published *Can Gun Control Work?* by Professor James Jacobs, director of NYU's Center for Research on Crime and Justice. Answering his title question, Prof. Jacobs concluded that, while certain controls can have modestly positive effects, no gun laws “work” in the sense of greatly reducing violent crime. As to banning handguns, or all guns, to the general public, he views such measures as disastrously counter-productive.⁴⁶

In 2004, the National Academy of Sciences released its evaluation based on review of 253 journal articles, 99 books, 43 government publications and some empirical research of its own. *It could not identify any gun control that had ever reduced violent crime, suicide*

⁴⁵ *Id.* at 1390–91.

⁴⁶ James B. Jacobs, *Can Gun Control Work?* 153ff (2002).

*or gun accidents.*⁴⁷ The same conclusion was reached in a 2003 evaluation by the Centers for Disease Control of then-extant studies.⁴⁸

In 2007, Professor Gary Mauser, a Canadian criminologist, and an author of this brief (Kates) published a study reviewing gun ownership and controls over various nations and eras dating back to the invention of firearms in the 14th Century.⁴⁹ We concluded that gun bans on the general populace had never reduced violent crime anywhere and that there appears to be a *negative* correlation between such violence and the widespread availability of firearms. Among other things, we found that European nations with very strict gun control and very low gun ownership had murder rates three times *higher* than less restrictive European nations with three times higher gun ownership per capita. We suggested that nations plagued with high violent crime tend to respond with severe gun controls but that these just do not solve the

⁴⁷ Charles F. Wellford, John V. Pepper, & Carol V. Petrie (eds.), *Firearms and Violence: A Critical Review* (2004).

⁴⁸ Centers for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, (2003), www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm. It should be noted that the CDC has again and again reiterated its political position that gun ownership should be gradually eliminated. It is in this context that one must view this report's literal conclusion that none of the hundreds of studies it reviewed were done well enough to justify the authors' conclusion that the controls studied do not reduce violent crime.

⁴⁹ Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 Harv. J.L. & Pub. Pol'y 649, 651–94 (2007).

violent crime problem. In fact, this subject was addressed in great detail in an *amici curiae* brief cited several times by Justice Breyer in *Heller*.⁵⁰

In sum, the findings of modern criminological research strongly support the right of ordinary, law abiding citizens to effectively defend themselves—a policy underlying the Second Amendment as construed in *Heller*.⁵¹

D. The highly misleading 2009 Branas study.

Fifteen years ago three professors from Harvard and Columbia Medical Schools, a criminologist, and a University of North Carolina bio-statistician published a critique of the entire “public health” literature against guns. Noting that public health journals and lobbyists had committed themselves to lobbying for the banning and confiscation of guns, the article appraised the public health literature on firearms as follows:

[T]he anti-gun health advocacy literature is a “sagecraft” literature in which partisan academic “sages” prostitute scholarship, systematically inventing, misinterpreting, selecting or otherwise manipulating data to validate preordained political conclusions.

⁵⁰ See 128 S. Ct. at 2857–60 (Breyer, J., dissenting) (citing Brief of Criminologists, Social Scientists, Other Distinguished Scholars and the Claremont Institute as *Amici Curiae* in Support of Respondent).

⁵¹ Of course, these data equally supports laws—which *Heller* endorsed—against possession of guns by convicted violent felons and the mentally unbalanced. See 128 S. Ct. at 2816–17.

Consciousness that one represents the forces of light against those of darkness can overwhelm not only the canons of scholarship but even the ordinary demands of personal honesty and integrity: Given the urgent needs of political advocacy, all too often academic health “sages” feel no compunction about asserting falsehoods, fabricating statistics and falsifying references to counterfeit support for them.⁵²

If the study published by Dr. Charles C. Branas in 2009⁵³ was not driven by such political (rather than scientific) methodology, it nonetheless suffers from the same end result: The study is fundamentally flawed and simply unreliable. In the event that the Branas study is cited with approval in any briefing in this case, *amici* provide the following critique.

Based on a study of Philadelphia shootings, what the Branas article claims is that ordinary people who possess guns are 4.5 times more likely to be assaulted and shot than are similarly situated non-gun owners. Even a cursory audit reveals that this conclusion is not supported by the data.

The victims were “shot in an assault,” not shot in

⁵² Kates, et al., *Guns and Public Health*, *supra* note 34 at 522 (citing William R. Tonso, *Social Science and Sagecraft in the Debate Over Gun Control*, 5 *Law & Pol’y Q.* 325 (1983)).

⁵³ Charles C. Branas, et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 *Am. J. Pub. Health* 2034 (2009).

accidents with their own guns. Nor were those victims studied shot in any connection with their own guns. As the “study” was designed, it included anyone shot within a quarter-mile of their house if there was a gun in the house or a quarter-mile from their vehicle if it had a hunting rifle in it. This methodology raises various obvious questions, including: How did attackers know that their victims were gun owners, and what would cause an attacker be drawn to attack a gun owner? Branäs’ conclusion that gun possession (or mere ownership, apparently) itself somehow “causes” the gun possessor to be 4.5 times more likely to be assaulted is clearly based on a defective understanding of causation.

Fortunately there is a more plausible explanation: Branäs’ own article reveals that 53% of the shooting victims confessed to having a criminal record.⁵⁴ How many more had such records but did not reveal them is unknowable since Branäs and his team apparently did no background check. We do know, however, that 93% of those murdered by gunshot in Philadelphia had criminal records as of 1993.⁵⁵

We also know—indeed it is a “criminological axiom” from more than 50 years of studies—that criminals associate with each other and prey on each other.⁵⁶ Data from the Virginia Department of Justice

⁵⁴ *Id.* at 2036.

⁵⁵ See Phillip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* ch. 2 (2000); see also McGonigal, Michael D., et al., *Urban Firearm Deaths: A Five-Year Perspective*, 35 *J. Trauma* 532, 532–36 (1993).

⁵⁶ Kennedy & Braga, *Homicide in Minneapolis*, *supra* note 12 at 269 (citing Marvin E. Wolfgang, *Patterns in Criminal Homicide* (1958), and discussing how “Wolfgang documented basic

showed that the risk of gunshot injury is *22 times higher*—not *22 percent higher*, but *22 times higher*—for males who are involved in crime than [for] those who are not.⁵⁷

Various studies reveal the predation of criminals on each other:

- *Los Angeles*: 71% of minors injured in drive-by shootings were documented members of violent street gangs.⁵⁸
- *Charlotte*: Of 545 adult gunshot victims over a one year period, 71% had criminal records.⁵⁹
- *Atlanta*: 60% of homicide victims had a criminal record of drug violation.⁶⁰
- *Chicago*: The Chicago Police Department's

characteristics of homicide which have now become criminological axioms [including that] a relatively high proportion of [both homicide] offenders and victims have a prior criminal record").

⁵⁷ Cook & Ludwig, *Real Costs*, *supra* note 55 at 21) (citing unpublished Virginia Department of Justice study) (emphasis added).

⁵⁸ H. Range Hutson, et al., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 *New Eng. J. Med.* 324, 325 (1994).

⁵⁹ Unpublished study by University of North Carolina-Charlotte professors Richard C. Lumb and Paul C. Friday, cited in Kates, et al., *Guns and Public Health*, *supra* note 34 at 587, n.325.

⁶⁰ Rojek in Blackman, *supra* note 21.

murder analyses dating back to the mid-1960s consistently show upwards of two-thirds of homicide victims with criminal records and/or other indicia of criminal behavior.⁶¹

- *New Orleans*: 85% of autopsied murder victims in the years 1992-1993 were positive for metabolites of cocaine.⁶²
- *Baltimore*: Of 211 patients who came to a major urban trauma center for treatment of gunshot or knife wounds or other violent trauma, 61.9% tested positive for narcotics with another 8.6% testing positive for alcohol; 11.7% had had both alcohol and narcotics.⁶³

The most intensive local study of which we are aware is from San Francisco where, of gunshot victims in 1999, two-thirds had a prior criminal history. Three further findings of this 1999 study are indicative: By 2001, 63% of the gunshot victims who recovered had been re-arrested in San Francisco for some other crime.

⁶¹ Personal review of yearly Chicago Police Department reports. See, e.g., <https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Homicide%20Reports/2008%20Homicide%20Reports/MA08.pdf> at 42-43 (showing percentage of murderers with prior arrest records from 1991 to 2008 fluctuating between a low of 71.3% in 1994 and a high of 93.8% in 2002).

⁶² Personal communication from Tulane University sociologist James D. Wright, Jan. 9, 1998, based on his conversation with the chief medical examiner.

⁶³ Carl A. Soderstrom, et al., *Psychoactive Substance Use Disorders Among Seriously Injured Trauma Patients*, 277 *J. Am. Med. Ass'n* 1769, 1769-74 (1997).

And, among all the gunshot victims, those with prior criminal histories were twice as likely to have suffered multiple gunshot wounds as those without such a history—and were seven times more likely to have been wounded in connection with a drug transaction.⁶⁴

Likewise, studies in major trauma care centers report the same people (i.e., criminals) come in time after time with successive bullet or knife wounds or other intentional trauma. So frequently is this the case that some studies actually describe such trauma as a chronic recurrent *disease* peculiar to unemployed, uninsured law breakers.⁶⁵

These facts provide indispensable perspective on the erroneous conclusions of the Branas article. If, as the Virginia Department of Justice found, those gun-toting individuals involved in a criminal milieu are *22 times* (or even close to that number) more likely to end up with a gun-crime injury than are law-abiding people, then Branas' conclusions—which do not properly

⁶⁴ Study by the San Francisco Health Department from its Firearm Injury Reporting System reported at <http://www.sfdph.org/dph/files/reports/StudiesData/Firearms/CvrTitleTblContLinks.pdf> at 111ff.

⁶⁵ R. Stephen Smith, et al., *Recidivism in an Urban Trauma Center*, 127 *Arch. Surg.* 668, 670 (1992) (describing the conclusions in D. W. Sims, et al., *Urban Trauma: A Chronic, Recurrent Disease*, 29 *J. Trauma* 940 (1989) and M.C. Morrissey, et al., *The Incidence of Recurrent Penetrating Wound Trauma in an Urban Trauma Center*, 31 *J. Trauma* 1536 (1991)). See also G. V. Poole, et al., *Trauma is a Recurrent "Disease"*, 113 *Surgery* 608 (1993); W.A. Goins, et al., *Recurrent Intentional Injury*, 84 *J. Nat'l Med. Ass'n* 431 (1992); and D.S. Reiner, et al., *Trauma Recidivism*, 65 *Am. Surg.* 556 (1990).

separate criminal gun owners from law abiding gun owners—are simply not reliable.

CONCLUSION

Defending one's own life and the lives of others is an inherent, natural right—a right which entails the ability to do so *effectively*. Firearms provide the most effective and efficient means to defend life from attack, and, given the actual historical data, there is no sound support for blanket prohibitions against the ability for ordinary, law-abiding citizens to keep and bear arms.

Amici respectfully submit that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Don B. Kates
22608 N.E. 269th Ave.
Battle Ground, WA 98604
(360) 666-2688

s/ Marc James Ayers

Marc James Ayers
Counsel of Record
BRADLEY ARANT BOULT
CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
mayers@babc.com
(205) 521-8598

Counsel for Amici Curiae

November 23, 2009