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COMMENT

GUN CONTROL AND ECONOMIC DISCRIMINATION: THE MELTING- POINT CASE-IN-POINT

T. MARKUS FUNK*

"Setting a high minimum price for handguns would be an effective means of reducing availability to precisely those groups that account for the bulk of the violent crime problem."¹

I. INTRODUCTION

In 1992, an estimated daily average of 36 people were murdered with handguns, 32 women were raped at gunpoint, 931 people were the victims of armed robberies, and 1557 people were assaulted with a gun in the United States.² During the same year, handgun crimes accounted for approximately thirteen percent of all documented violent crimes.³ Some states have attempted to bridle such illegal firearm violence with "melting-point laws." The Illinois, South Carolina, Hawaii, and Minnesota legislatures have adopted rigid melting-point schemes designed to remove so-called Saturday Night Specials from the market.⁴

Illinois, for example, prohibits the sale of handguns having "a barrel, slide, frame or receiver which is a die casting of zinc alloy or any other nonhomogeneous metal which will melt or deform at temperatures of less than 800 degrees Fahrenheit."⁵ South Carolina and

* The author would like to thank Don B. Kates, Jr. and Daniel D. Polsby for their thoughtful comments on previous drafts, Robert J. Cottrol for discussing the issues with me early on in the writing process, and Gary Kleck for his helpful suggestions and recent data.

¹ Philip Cook, *The "Saturday Night Special": An Assessment of Alternative Definitions from a Policy Perspective*, 72 J. CRIM. L. & CRIMINOLOGY 1735, 1740 (1981).

² U.S. DEP'T OF JUSTICE, GUNS AND CRIME 1 (1994).

³ *Id.*

⁴ See 720 ILCS 5/24-3(h) (Smith-Hurd 1993); S.C. CODE ANN. § 23-31-180 (Law. Co-op. 1990); HAW. REV. STAT. § 134-16 (1985); MINN. STAT. ANN. § 624.712(4) (West 1987).

⁵ 720 ILCS 5/24-3(h) (Smith-Hurd 1993).

Hawaii have enacted laws virtually identical to Illinois, and Minnesota has enacted a similar law which has a 1000 degree melting point requirement and prohibits handguns with less than a certain "tensile strength" (resistance of the metal to longitudinal stress) and handguns that are made of a powdered metal less than a certain density.⁶

The net effect on the handgun market is hard to determine precisely, but in South Carolina, the melting-point laws, along with Bureau of Alcohol, Tobacco, and Firearms regulations, have resulted in bans on approximately ten percent of the handguns available on the retail market.⁷ It is undisputed, however, that the handguns which fail to meet the melting-point requirements are made of cheaper materials and are the least expensive.⁸ While there are manufacturers that produce handguns which both meet the melting-point standards and are less expensive than the premium makes, the sub-group of guns banned by the melting-point laws is the most affordable, and therefore the most accessible, segment of the handgun market.⁹ Thus, the net effect of the melting-point laws has been to eliminate the most affordable segment of handguns from the market.¹⁰

The primary arguments made in support of melting-point laws are threefold: (1) handguns which lack "quality materials" also often lack adequate safety and accuracy mechanisms and, thus, are not useful to sportsmen;¹¹ (2) handguns not meeting the melting-point requirements are made of softer metal, therefore making it more difficult for ballistics experts to identify these guns, and making it eas-

⁶ The Minnesota Legislature has adopted the following definition of a Saturday Night Special:

[H]aving a frame, barrel, cylinder, slide or breechblock:

(a) of any material having a melting point (liquidus) of less than 1,000 degrees Fahrenheit, or

(b) of any material having an ultimate tensile strength of less than 55,000 pounds per square inch, or

(c) of any powdered metal having density of less than 7.5 grams per cubic centimeter.

MINN. STAT. ANN. § 624.712(4) (West 1987).

⁷ Monica Fennell, *Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiates a Model State Gun Control Law*, 13 HAMLINE J. PUB. L. & POL'Y 37, 49 (1992) (arguing that more states should adopt melting-point laws to remove inexpensive handguns from the market).

⁸ *Id.* at 58. See also *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1153 n.9 (Md. 1985) (discussing widespread availability of Saturday Night Specials due to their "extremely low retail price"); *R.G. Indus., Inc. v. Askew*, 276 So. 2d 1, 2 (Fla. 1973) (characterizing Saturday Night Specials as "cheap").

⁹ See Cook, *supra* note 1, at 1740 (arguing that the cheapest of the domestically manufactured handguns would be eliminated from the market by establishing minimum standards stipulating the quality of metal and safety features of a gun).

¹⁰ See *id.*

¹¹ See Fennell, *supra* note 7, at 60. See also *Kelley*, 497 A.2d at 1154 n.10.

ier for criminals to file off the serial numbers;¹² and (3) the Saturday Night Specials which the melting-point laws target are the weapons of choice for criminals, and their removal from the marketplace will therefore reduce the criminals' access to firearms.¹³

On the other hand, a compelling argument can be made that melting-point laws (1) are arbitrary in determining which handguns they ultimately remove from the market; (2) may have a *negative* effect on the ability of the police to track down criminals through the use of ballistics tests; (3) do not contribute to crime reduction; and (4) discriminate against the poor who cannot afford to purchase more expensive handguns.

This Comment will endeavor to avoid the emotionalism which tends to permeate the gun control controversy by focusing on possible legal, factual, and policy flaws which may undermine the arguments advanced in justification of the melting-point laws.

II. THE JUSTIFICATIONS OFFERED IN SUPPORT OF MELTING-POINT LAWS

A. PREMISE 1: THE HANDGUNS TAKEN OFF THE MARKET BY MELTING- POINT LAWS ARE NOT USEFUL FOR SPORTSMEN

This argument is misleading. It erroneously assumes that the only legitimate use of handguns will be for sport. Many citizens buy handguns for self-defense, not target shooting;¹⁴ indeed, a significant percentage of the public agrees that "personal protection" is a legitimate reason for owning a gun,¹⁵ and at least one-half of all U.S. house-

¹² See Fennell, *supra* note 7, at 58 (citing Cook, *supra* note 1, at 1740). See also Kelley, 497 A.2d at 1153 n.9 ("Generally, the weapon is manufactured from soft, inexpensive metal. As a result, serial numbers are easily and sometimes completely erased by either filing or melting.").

¹³ See Cook, *supra* note 1, at 1740 ("Individuals who would not ordinarily be able to afford an expensive gun commit a disproportionate share of violent crimes. Setting a high minimum price for handguns would be an effective means of reducing availability to precisely those groups that account for the bulk of the violent crime problem.").

¹⁴ In fact, 40-50% of the existing stock was purchased primarily for self-defense purposes. See JAMES D. WRIGHT & PETER ROSSI, U.S. DEP'T OF JUSTICE, WEAPONS, CRIME AND VIOLENCE IN AMERICA 26 (1981). See also Timothy Egan, *After the Riots: Los Angeles Riots Spurring Big Rise in Sale of Guns*, N.Y. TIMES, May 14, 1992, at A1 (noting national surge in gun purchases in wake of Los Angeles riots).

¹⁵ James D. Wright, *Public Opinion and Gun Control: A Comparison of Results From Two Recent National Surveys*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 31 (1981) (stating that 49% think they need protection). See also Donald E. Santarelli & Nicholas E. Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 481 (1983) (arguing that social utility of handguns for self-defense purposes cannot be "reasonably denied, no matter what position one takes on the need for gun control").

holds keep firearms.¹⁶ Most importantly, criminologists and criminal law scholars have increasingly begun to agree that the public is right.¹⁷

But the notion that usefulness for a "sporting purpose" should be a qualifying factor in handgun regulation is not rejected only by those who own guns. Using this criterion to differentiate between acceptable and unacceptable handguns fails to recognize other legitimate purposes for acquiring a handgun. The 1968 Gun Control Act clearly recognized that sporting uses are not the only legitimate purposes for acquiring a handgun: "[I]t is not the purpose of this title to place any undue or unnecessary Federal restrictions on handguns and law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, *personal protection*, or any other lawful activity"¹⁸ Therefore, the argument that sportsmen will not find these guns useful appears to miss the mark, since it ignores the fact that the primary reason for most legal handgun purchases is legitimate self-defense—a use to which guns are put between one million and 2.5 million times a year.¹⁹

B. PREMISE 2: THE HANDGUNS TAKEN OFF THE MARKET BY MELTING-POINT LAWS ARE HARDER FOR BALLISTICS EXPERTS TO TRACE, AND IT IS EASIER TO REMOVE THEIR SERIAL NUMBERS

According to ballistics experts, cheaper guns, such as those which do not meet the melting-point law requirements, are no harder to trace ballistically than their more expensive counterparts.²⁰ A brief discussion of ballistics demonstrates the reasons for this.

"Tool marks" are impressions made to either the bullet or the cartridge case by irregularities in the handgun's barrel, firing pin, chamber, or cylinder (cuts, nicks, striations, etc.). Ballistics experts

¹⁶ GARY KLECK, POINT BLANK 102 (1991).

¹⁷ See, e.g., Don B. Kates, Jr., *The Value of Civilian Arms Possession as a Deterrent to Crime or Defense Against Crime*, 18 AM. J. CRIM. L. 113, 164 (1991) ("The evidence from surveys of both civilians and felons is that actual defensive handgun uses are enormously more frequent than has previously been realized Widespread defensive gun ownership benefits society as a whole by deterring burglars from entering occupied premises and by deterring from confrontation offenses altogether an unknown proportion of criminals"); Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, in PSYCH. AND SOC. POL'Y 223 (Peter Suedfeld & Philip E. Tetlock eds., 1992) ("[H]igh saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.").

¹⁸ HANDGUN CONTROL ACT OF 1968, Pub. L. No. 90-618 § 101, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921(a) (1993)) (emphasis added).

¹⁹ Gary Kleck (unpublished manuscript, on file with the *Journal of Criminal Law & Criminology*).

²⁰ Telephone Interview with Emanuel Kapelsohn, President of the Peregrine Corporation (Jan. 26, 1994).

use these irregularities to match a specific bullet or cartridge to a specific gun.²¹ For example, a metallurgical irregularity in the breach face, firing pin, chamber, extractor, or ejector may leave unique and ballistically traceable marks on the cartridge.²² Similar marks can be made when the bullet passes through the bore of the gun.²³

Contrary to the assertions made by advocates of melting-point laws, cheaper guns are *more* likely to be identifiable than their costlier counterparts simply because the more expensive guns have fewer irregularities, and the irregularities which do exist are more permanent due to the hardness of the alloys.²⁴ While some may contend that this is irrelevant, since the inferior metal used in the cheaper guns causes the irregularities to ultimately "wear off" after repeated use (*e.g.*, a nick in the bore of the gun may disappear after repeated firings), this argument loses its persuasive appeal when one considers that the cheaper guns will rarely, if ever, be fired, since they are not intended to be used for sport or for target practice.²⁵ Additionally, since the cheap Saturday Night Specials have a higher rate of cylinder misalignment, it is more likely that the bullet will retain a "misalignment mark" after it has exited the barrel.²⁶

Another argument that proponents of melting-point laws advance is that it is easier to file off the serial numbers on guns made of softer alloy.²⁷ This matter is scarcely worth considering. Although filing off the serial number of a "cheaper" handgun may take a few minutes less than filing the numbers off of a handgun made of a harder alloy, it does not require any additional tools, and is just as simple an undertaking.²⁸ More importantly, however, filing the serial numbers off of cheaper handguns is not common criminal procedure for two important reasons: First, it is a dead giveaway to law enforcement that the carrier of the handgun is likely involved in criminal activity, thereby calling much unwanted police attention to that individual;²⁹ second,

²¹ *Id.*

²² See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HANDBOOK OF FORENSIC SCIENCE 52 (1992).

²³ Kapelsohn, *supra* note 20.

²⁴ *Id.*

²⁵ *Id.*

²⁶ This is because, as the bullet enters the rear of the barrel, it is slightly off-center, thereby causing a part of it to be shaved off. Telephone Interview with Richard W. Chenow, Firearms Examiner for the Chicago Police Crime Laboratory (Sept. 5, 1994).

²⁷ See Fennell, *supra* note 7, at 58 (citing Cook, *supra* note 1, at 1740). See also Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153 n.9 (Md. 1985) ("Generally, the weapon is manufactured from soft, inexpensive metal. As a result, serial numbers are easily and sometimes completely erased by either filing or melting.").

²⁸ Kapelsohn, *supra* note 20.

²⁹ *Id.*

filing the serial number off of a gun is a federal offense,³⁰ and virtually every state's law criminalizes possession of a firearm without a serial number.³¹

Placing even more doubt on the premise that guns the melting-point laws might remove from the market are harder to trace ballistically, experts feel that cheaper handguns generally allow more primer residue to escape the cylinder after the handgun has been fired, thereby making it easier for forensics experts to identify this residue on the shooter's hand.³² When a person discharges a firearm, primer residue may be deposited on the person's hand in varying amounts. Forensics experts then test for the presence of antimony, barium, and lead—components of most primer mixtures.³³

The "cylinder gap," which separates the front of the handgun cylinder from the rear of the barrel, is usually anywhere from four to nine one-thousandths of an inch wide.³⁴ Poorly-made guns tend to have a longer gap, thus allowing slightly more residue to escape.³⁵ Therefore, it appears that using a cheaper handgun in a crime will actually *increase* the criminal's likelihood of being linked to a particular shooting via a forensic examination.

C. PREMISE 3: MELTING-POINT LAWS TAKE HANDGUNS OFF THE MARKET AND THEREBY REDUCE CRIMINALS' ACCESS TO FIREARMS

Some gun control advocates have argued that the mere access to guns makes people more likely to commit crimes, because the access to guns causes otherwise law-abiding people to murder in a moment of ungovernable anger or because criminals are facilitated by access to handguns or both.³⁶ Access to handguns, however, does not turn law-abiding citizens into murderers. Professors James Wright and Peter

³⁰ See 18 U.S.C. § 922(k) (1988).

³¹ See, e.g., ALASKA STAT. § 11.46.270(a) (1989); 720 ILCS 5/24-5 (Smith-Hurd 1993); IND. CODE ANN. § 35-47-2-18 (West 1994); LA. REV. STAT. ANN. § 14:95.7 (West 1943); MICH. COMP. LAWS ANN. § 750.230 (West 1991); NEV. REV. STAT. § 202.277 (1992); OKLA. STAT. ANN. tit. 21, § 1550(a) (West 1995); 18 PA. CONS. STAT. ANN. § 6117(b) (1994).

³² Kapelsohn, *supra* note 20.

³³ FEDERAL BUREAU OF INVESTIGATION, *supra* note 22, at 56.

³⁴ Kapelsohn, *supra* note 20.

³⁵ *Id.*

³⁶ See generally Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1113-23 (1991) (discussing a variety of arguments counselling against firearms ownership, including the issue of increased danger of homicides committed while the perpetrator was in a "blind rage," and the increased criminality due to accessibility of firearms); Markus Boser, Comment, *Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 318 (1992) ("There can be little doubt that widespread availability of firearms is a significant factor in explaining the prevalence of violent crime in the United States.").

Rossi from the University of Massachusetts performed what is considered the most complete empirical study on the relationship between guns and crime under a three-year grant from the United States Department of Justice.³⁷ After surveying all of the studies and criminological data that had been developed as of 1980, their conclusions were as follows:

There appear to be no strong causal connections between private gun ownership and the crime rate. . . . There is no compelling evidence that private weaponry is an important cause of . . . violent criminality. 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.³⁸

Murder rates in "gun controlled" areas, such as Mexico and South Africa, are more than twice as high as those in the United States.³⁹ Conversely, countries such as Switzerland, New Zealand, and Israel, which have household gun ownership rates comparable to those in the United States, have much lower rates of crime and violence.⁴⁰

In the case of Switzerland, for example, military service for males is compulsory, and according to the Federal Constitution of 1874, all military servicemen receive arms (most commonly "assault weapons").⁴¹ As soon as the government adopts a new infantry rifle, it sells the old ones to the public.⁴² As a result, a nation of only six million people has at least two million guns, including over 600,000 fully automatic assault rifles (more than in the United States) and 500,000 pistols.⁴³ Even without a strict registration scheme, the Swiss homicide

³⁷ WRIGHT & ROSSI, *supra*, note 14.

³⁸ *Id.* at 1-2 of the Abstract. See also Boser, *supra* note 36, at 319 ("[I]t is difficult to find proof that gun availability causes violent crime."); Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 LAW & CONTEMP. PROBS. 35, 39 (1986) ("[N]o reliable evidence indicates that guns have net assault-instigating effects, or that aggression-eliciting effects are anymore common than inhibiting effects. [G]uns cause some robbers to shift from one target-type to another, without, however, increasing the frequency with which they rob.").

³⁹ Daniel D. Polsby, *The False Promise of Gun Control*, THE ATLANTIC MONTHLY, Mar. 1994, at 60.

⁴⁰ *Id.* In New Zealand, where the number of guns has soared since the government loosened controls on gun ownership in the 1980s (there are presently approximately 1,010,000 legal handguns in the nation), there has been a significant decrease in firearms deaths and injuries (there are fewer than one hundred firearms-related robberies, homicides, and attempted homicides per year). See DAVID B. KOPPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY 241-43 (1992).

⁴¹ KOPPEL, *supra* note 40, at 282.

⁴² *Id.* at 283. Not only rifles are sold this way; the army sells anything from machine guns and anti-tank weapons to howitzers and cannons. *Id.*

⁴³ *Id.*

rate is only fifteen percent of the American rate, and to the extent that guns are used in crime, the weapon is usually a *stolen* pistol or revolver.⁴⁴ The correlation between access to a firearm and criminality does not, therefore, appear to be as tautological as gun control advocates claim.⁴⁵ In fact, studies trying to link gun ownership to violence find either no relationship or a *negative* relationship, and cities and counties with high gun ownership suffer less violence than demographically comparable areas with lower gun ownership.⁴⁶ The underlying reason for these results appears to be that criminals are fundamentally different from non-criminals. As Don B. Kates, Jr. puts it, "[murderers'] life histories are characterized by: often irrational violence . . . , felony, mental imbalance, substance abuse, firearm and car accidents. . . . 74.7% of murderers had violent felony or burglary arrests; murderers averaged four prior major felony arrests over a crime career of at least six years."⁴⁷ These data do not even begin to

⁴⁴ *Id.* at 286.

⁴⁵ Also, it is important to note that the lower rates of homicide in other countries such as Japan, Canada, Australia, Germany, and Britain are not a result of gun-control legislation, but instead are attributable to the much more pervasive social controls which underlie those societies. *Id.* In Australia, for example, the rate of robbery arrests is similar to that of the United States (20-30%). However, the conviction rate is much higher than in the United States (around 94%). *Id.* at 215. With regard to social controls, David Kopel states:

Interestingly, in the nations with the strongest social controls—Switzerland and Japan—the homicide rate is near zero, and the suicide rate is very high. . . . [S]uicide and homicide are two alternative methods of dealing with frustration. People socialized to cooperative or group-oriented behavior are more likely to choose suicide over homicide.

Id. at 409. Taking a more holistic approach, Charles Silberman notes that "American crime is an outgrowth of the greatest strengths and virtues of American society—its openness, its ethos of equality, its heterogeneity—as well as its greatest vices, such as the long heritage of racial hatred and oppression." CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE*, CRIMINAL JUSTICE 36 (1978).

⁴⁶ See, e.g., Douglas R. Murray, *Handguns, Gun Control Laws and Firearms Violence*, 23 SOC. PROBS. 81, 91-92 (1975); Gary Kleck, *The Relationship Between Gun Ownership Levels and Rates of Violence in the United States*, in FIREARMS AND VIOLENCE 99 (Don B. Kates, Jr. ed., 1984); David McDowall, *Gun Availability and Robbery Rates: A Panel Study of Large U.S. Cities, 1974-1978*, 8 LAW & POL'Y 135 (1986); Gary Kleck & E. Britt Paterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIMINOLOGY 249 (1993).

⁴⁷ Don B. Kates, Jr. et al., *A Critique of Common Justifications For Banning Handguns*, October 22, 1992 draft (on file with author) (citing CHICAGO POLICE DEP'T, MURDER ANALYSIS, 1966-1991). See also BRENDAN F.J. FURNISH & DWIGHT H. SMALL, *THE MOUNTING THREAT OF HOME INTRUDERS* 53-54 (1993) ("The typical murderer has a prior criminal history extending over at least six years."); Kates, *supra* note 17, at 127-28 (stating that murderers are aberrant individuals who show a consistent indifference to human life, including their own); David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 324 (1993) (asserting that "two-thirds to four-fifths of homicide offenders have arrest records, frequently for violent felonies.") [hereinafter *Peril or Protection?*]; Kleck, *supra* note 38, at 40-41 (70-75% of domestic homicide offenders have a previous arrest, and about half have a previous conviction); David B. Kopel, *Trust the People: The*

comprise the full extent of murderers' prior criminal careers—and thus how different murderers are from the ordinary law-abiding person. Much serious crime goes unreported. Of those crimes that are reported, a large number are never cleared by arrest; and many of those cleared by arrest are juvenile arrests that are not included in the data recounted above.⁴⁸ Therefore, the argument that the access to a gun during a time of stress or of anger will cause law-abiding persons to become murderers lacks persuasive power.

Turning to the question of whether access to guns facilitates criminal activity, melting-point laws are purportedly based on a desire to limit the access of handguns to criminals and, thereby, reduce criminality.⁴⁹ First, evidence suggests that Saturday Night Specials are not used more than other types of handguns for criminal activity,⁵⁰ since criminals, for obvious reasons, want high-quality guns.

Implicit in the melting-point legislation is the argument that regulations upon legitimate gun purchases will reduce the availability of guns for illegal purposes. This argument, however, assumes that the domestic market is the only source for guns, and that if the domestic market dried up, guns would no longer be available. Unfortunately, this assumption appears to be wrong. As an illustration of how easily criminals can access guns, regardless of governmental restrictions on gun sales, it is estimated that as many as 500,000 Chinese-made AK-47 "assault rifles" were illegally smuggled into the United States between 1986 and 1989.⁵¹ Unlike the islands of Japan and Britain, where the police forces are large in relation to the overall population,⁵² where

Case Against Gun Control, 3 J. ON FIREARMS AND PUB. POL'Y 77, 83 (1990) (discussing studies which have shown that two-thirds to four-fifths of homicide offenders have prior arrest records); Gary Kleck & David J. Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 LAW & POL'Y Q. 271 (1983) (estimating that three-fourths of domestic homicide offenders have been previously arrested for some assaultive crime, half have been convicted, and 90% have been the cause of at least one disturbance report to the police); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983) (finding that a "substantial majority" of murderers have prior felony convictions) [hereinafter *Handgun Prohibition*].

⁴⁸ Due to expungement statutes and the like. See generally T. Markus Funk & Daniel D. Polsby, *Prior Indiscretions: The Questionable Efficacy of Expunging Juvenile Records* (unpublished manuscript, on file with the author).

⁴⁹ See Cook, *supra* note 1, at 1740.

⁵⁰ Chenow, *supra* note 26; Kleck, *supra* note 16, at 44.

⁵¹ Gregory Inskip, *Our Right to Bear Arms*, 8-WTR Del. Law. 21, 24 (1991). See also Gary S. Becker, *Stiffer Jail Terms Will Make Gunmen More Gun-Shy*, BUSINESS WEEK, February 28, 1994, at 18 ("Guns continue to be smuggled onto the illegal market from abroad, from military stock, and from crooked gun dealers."); Robert Friedman & Barry Meier, *Far Beyond Law's Controls*, NEWSDAY, July 31, 1988, at 5 (arguing that if drug dealers can penetrate United States borders and reap millions of dollars in illegal profits, they will arm themselves accordingly).

⁵² See KOPEL, *supra* note 40, at 96.

the absence of long-lasting wars has eliminated a common source of illegal weapons acquisitions,⁵³ and where civil liberties are not guarded as jealously as in the United States,⁵⁴ it is implausible to expect the United States Government to effectively restrict gun ownership.

What makes it even more unlikely that the United States government will be able to control the access to handguns is the reality that even the law-abiding population resists gun control; the use of severe mandatory sentences for gun control violations is merely a reflection of the unwillingness of the citizenry to have their right to self-preservation taken away by the government.⁵⁵ A 1977 study conducted in Illinois, for example, revealed that only twenty-five percent of handgun owners complied with registration,⁵⁶ and a 1979 survey revealed that seventy-three percent would not comply with handgun prohibition.⁵⁷ Professors Brendan Furnish and Dwight Small noted that "[a]larmingly, what gun laws have accomplished is to create an entire class of new criminals—normally honest, law-abiding citizens who elect to keep a gun in full knowledge that they are in violation of certain local and state laws."⁵⁸ The reality is that even the most Draconian measures could not hope to remove guns from the hands of people who were determined to get and keep them.⁵⁹

At bottom, criminals generally obtain their guns in one of two ways: They either steal them,⁶⁰ or they buy them on the black market⁶¹—either way, the guns are untraceable.⁶² The Department of Jus-

⁵³ *Id.*

⁵⁴ *Id.* at 98-106.

⁵⁵ *Id.* at 164.

⁵⁶ Don B. Kates, Jr., *Handgun Control: Prohibition Revisited*, INQUIRY, Dec. 5, 1977, 20, n.1.

⁵⁷ *Peril or Protection?*, *supra* note 47, at 322.

⁵⁸ FURNISH & SMALL, *supra* note 47, at 216.

⁵⁹ Ted R. Gurr, *The History of Violent Crime in America: An Overview*, in 1 VIOLENCE IN AMERICA 17 (Ted R. Gurr ed., 1989). See also Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2616-17 (1994) (discussing why prohibitions on both drugs and guns will fail).

⁶⁰ See generally JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 315 (1983) (describing theft as one of the "marketing mechanisms" in the circulation of weapons).

⁶¹ See DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, PROTECTING AMERICA: THE EFFECTIVENESS OF FEDERAL ARMED CAREER CRIMINAL STATUTE 26 (1992) (estimating that 37% of firearms acquired by criminals have been bought or traded on the black market). See also KOPEL, *supra* note 40, at 416. Even in countries which have strict handgun laws such as Japan and Britain, criminals can purchase handguns on the black market with relative ease. *Id.* at 287.

⁶² Telephone Interview with Sergeant David Lindman, Minneapolis Police Department Identification Unit, Minneapolis, Minn. (Nov. 11, 1993). There are also studies which show that felons generally obtain their weapons through unlicensed and unregulated

tice and the Bureau of Alcohol, Tobacco, and Firearms have estimated that ninety percent of violent crimes are committed without handguns, but of those crimes which are committed with handguns, *ninety-three percent* of the guns used in those crimes are obtained through unlawful purchases.⁶³

Even given the hypothetical situation where the United States borders are effectively closed off to gun smugglers and there are no legal gun sales, criminals would still make guns and purchase them on the black market. During the wars in Southeast and Southwest Asia, for example, local artisans produced, from scratch, AK-47 replicas in their "makeshift backyard foundries."⁶⁴ But it is not necessary to go to Asia to find people capable of developing a gun-manufacturing cottage industry; Americans are clearly able to produce their own arms. "Investment casting," for one, is a low-cost method of producing parts which have complex shapes, and it is presently widely used by hobbyists.⁶⁵ Moreover, a lathe, milling-machine, grinder, drill press, and a complement of hand tools are the only requirements for opening a modest gun-manufacturing shop.⁶⁶ Pakistani and Afghan peasants, for example, have manufactured firearms capable of firing Russian AK-47 cartridges with the aid of wood fires and the simplest hand tools, so it should come as no surprise that a 1986 government study revealed that a full one-fifth of all guns seized by the police in Washington D.C. were homemade.⁶⁷ Of course, policing such a cottage industry would be impossible—even in the highly supervised environment of a prison, crude but effective firearms are continually produced and are readily available.⁶⁸

Further, criminals with guns are often less dangerous to their victims than criminals with alternative weapons. Robbers with guns are less likely to physically attack their victims than are robbers armed with other weapons or no weapons at all.⁶⁹ Also, the availability of handguns appears to have no measurable effect upon the robbery rates in the larger cities, except that the criminals tend to shift their

channels (i.e., from "friends" and "from family members"), and not necessarily from those engaged in illegal gun selling. KLECK, *supra* note 16, at 46.

⁶³ Jeffrey R. Snyder, *A Nation of Cowards*, 113 PUB. INTEREST 40, 46 (1993).

⁶⁴ See Polsby, *supra* note 39, at 64.

⁶⁵ John G. Frey, *Tooling for Economical Investment Casting*, TOOL AND MANUFACTURING ENGINEER, February 1969, at 47.

⁶⁶ Charles H. Chandler, *Gun-Making as a Cottage Industry*, 3 J. ON FIREARMS & PUB. POL'Y 155, 160 (1990).

⁶⁷ David B. Kopel, *Trust the People: The Case Against Gun Control*, 3 J. ON FIREARMS & PUB. POL'Y 77, 81 (1990).

⁶⁸ *Id.* See also Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions*, in THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch eds., 1982).

⁶⁹ See Kleck, *supra* note 38, at 37. See also *infra* notes 194 to 195 and accompanying text.

interest from weaker and more vulnerable targets (including women and the elderly) to stronger and more lucrative targets (such as banks, other commercial institutions, and men) once they obtain a gun.⁷⁰ In argument, from a criminal's standpoint, buying a gun legally would be unwise because the criminal has little interest in later being traced to the gun.

The law enforcement community is acutely aware of this state of affairs. In 1995, the National Association of Chiefs of Police polled the nation's 18,000+ police agencies.⁷¹ Of the respondents, 88.7% believed that banning all firearms would not reduce the ability of criminals to obtain firearms and 90.4% felt that law-abiding citizens should be able to purchase any legal firearm for either sport or self-defense; and 97.4% of the responding Chiefs of Police agreed that even if Congress approved a ban on all rifles, shotguns, and handguns, criminals would still be able to obtain "illegal weapons."⁷² Two of the nation's most distinguished law enforcement organizations also share these views—both the American Federation of Police and the National Police Officers Association of America are on record favoring private gun ownership.⁷³ Therefore, one of the prime justifications for melting-point laws—that limiting the legal access to guns will significantly reduce crime committed for personal financial gain—appears to be undermined.

Having heard the arguments for and against melting-point laws, it is now fitting to conduct a brief examination of the much-debated historical, legal, and philosophical foundation of the right to bear arms in the United States. This will provide an understanding for why Americans seem to profoundly resist gun control measures such as the melting-point laws,⁷⁴ and will shed some light on why this resistance may, historically at least, be justified.

⁷⁰ Kleck, *supra* note 38, at 37.

⁷¹ NATIONAL ASS'N OF CHIEFS OF POLICE, 7TH NATIONAL SURVEY OF LAW ENFORCEMENT OFFICERS IN THE UNITED STATES 2 (1995).

⁷² *Id.*

⁷³ FURNISH & SMALL, *supra* note 47, at 60.

⁷⁴ See, e.g., WRIGHT ET AL., *supra* note 60, at 1-2 ("The Gun may not constitute the very heart of American culture and civilization, but it is assuredly an important component."); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 68-69 (1987) ("It would be idle to deny that firearms ownership in the United States has been a feature of the American tradition."); Richard Hofstadter, *America as a Gun Culture*, 21 AM. HERITAGE 4 (1970) ("[T]he United States is the only modern industrial urban nation that persists in maintaining a gun culture. It is the only industrial nation in which the possession of rifles, shotguns, and handguns is lawfully prevalent among large numbers of its population."); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 10 (1992) (discussing Americans' "almost spiritual attachment" to firearms).

III. THE SECOND AMENDMENT, THE RIGHT TO BEAR ARMS, AND THE USE OF THE TERM "MILITIA"

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁷⁵ Heated exchanges have arisen concerning the meaning of these words. Examinations of the original meaning of the Amendment have focused primarily on the implication of the phrase "[a] well regulated Militia, being necessary to the security of a free State" Some commentators view the phrase as a statement of purpose and maintain that the Second Amendment provides individual citizens the right to keep and bear arms;⁷⁶ others regard the Second Amendment as creating an exclusively collective right for the states to maintain organized military forces.⁷⁷

Those who favor the collective rights approach focus almost solely on the textual reference to a "well regulated Militia," which they view as a linguistic preamble that restricts the right to keep and bear arms.⁷⁸ Their contention, therefore, is that the right to keep and bear arms is restricted to officially recognized military units.⁷⁹ This interpretation arguably ignores the plain language of the Constitution.⁸⁰

⁷⁵ U.S. CONST. amend. II.

⁷⁶ The view is known as the "individual right" interpretation. See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* (1994); David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789; *Handgun Prohibition*, *supra* note 47, at 206; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); William W. Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994).

⁷⁷ This view is known as the "collective right" interpretation. See, e.g., ZIMRING & HAWKINS, *supra* note 74, at 139-47; Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 42 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen your Militia Lately*, 15 U. DAYTON L. REV. 5 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975).

⁷⁸ See, e.g., Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 67-70 (1966) ("[T]he ideal of the supremacy of state militia over federal military power is a fading echo. The second amendment as the embodiment of that ideal is therefore obsolete."); M. Truman Hunt, Note, *The Individual Right to Bear Arms: An Illusory Public Pacifier?*, 1986 UTAH L. REV. 751, 757 (stressing Court's emphasis on well-regulated militia as lending support to collective rights interpretation of Second Amendment).

⁷⁹ See, e.g., Maynard H. Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189, 196 (1977). See also *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988) (interpreting the Second Amendment purely in terms of protecting state militia, rather than individual rights); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) ("[T]he Second Amendment only confers a collective right of keeping and bearing arms.").

⁸⁰ For a historically-based analysis, see Levinson, *supra* note 76, at 649-51; David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1

In the eighteenth century, the term "militia" rarely referred to organized military units, but instead was a term which included all citizens who qualified for military service.⁸¹ Since the militia was comprised of "the able-bodied men in the township or county" who elected their own officers,⁸² the government did not tax the populace to buy guns. Instead, the states required the citizens to own and carry their own guns for militia duty.⁸³ Even today, the definition that is included in the United States Code states that:

The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made declaration of intention to become, citizens of the United States and female citizens of the United States who are members of the National Guard.⁸⁴

The Bill of Rights, which naturally includes the Second Amendment, was added due to "anti-federalist protests."⁸⁵ In particular, the anti-federalists were concerned that the government would use its control over the militia to "prevent popular rebellion against tyranny."⁸⁶ At the Virginia ratifying convention, George Mason warned that the government could "gradually increase its power 'by totally disusing and neglecting the militia,'"⁸⁷ and Patrick Henry repeated this fear, stating that "[t]he militia, sir, is our ultimate safety. . . . The great object is that every man be armed . . . everyone who is able may have a gun."⁸⁸ Thus, the collectivist reading of the Second Amendment seems to ignore the historical context of the amendment's enactment.

Further casting doubt upon the collective rights contention that "militia" refers only to governmentally organized military units, the Second Amendment does not mention the right of the states to regu-

(1987); *Handgun Prohibition*, *supra* note 47, at 211-43.

⁸¹ In defining the "militia" after the passage of the Second Amendment, Congress referred to the "whole militarily qualified citizenry and required that every member of this group possess his own firearm." Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 106 n.6 (1987) (citing First Militia Act, 1 Stat. 271 (1792)).

⁸² See KOPEL, *supra* note 40, at 311. In fact, the whole Prussian notion of military duty was absolutely foreign to the American militiamen. The English commander at Louisburg complained that the American militiamen "have the highest notions of the Rights, and Libertys . . . and indeed are almost Levellers, they must know when, how, and what service they are going upon, and be treated in a manner that few Military Bred Gentlemen would condescend to. . . ." DOUGLAS EDWARD LEACH, *ROOTS OF CONFLICT: BRITISH ARMED FORCES AND COLONIAL AMERICANS, 1677-1763*, at 69 (1986).

⁸³ KOPEL, *supra* note 40, at 311-12.

⁸⁴ 10 U.S.C. § 311(a) (1993).

⁸⁵ See KOPEL, *supra* note 40, at 319.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

late the militia.⁸⁹ Instead, it expressly protects the "right of the people" to keep and bear arms.⁹⁰ As with the First and Fourth Amendments, the phrase "right of the people" arguably protects the people from the government and not *visa versa*.⁹¹

As Michigan Supreme Court Justice Thomas McIntyre Cooley wrote in his *General Principles of Constitutional Law* in 1898:

[I]f the right were limited to those enrolled [by the government in the militia], the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.⁹²

In striking down a gun control law, the Supreme Court of North Carolina, in *State v. Kerner*, described the right to keep and bear arms as "a sacred right, based upon the experience of the ages in order that the people may be accustomed to bear arms and ready to use them for protection of their liberties or their country when occasion serves."⁹³ The court considered the right to bear arms a right of "[t]he ordinary private citizen" as it was "the common people, . . . accustomed to the use of arms," who had fought and won the revolution.⁹⁴

Therefore, *Kerner* appears to support the proposition that the right to bear arms does not depend on the organized militia but, instead, exists in large part to provide people a *defense* against such organized militias: "In our own State, in 1870, when Kirk's militia was turned loose and the writ of *habeas corpus* was suspended, it would have been fatal if our people had been deprived of the right to bear arms, and had been unable to oppose an effective front to the usurpation."⁹⁵ Defense by the militia means civil defense, not defense by

⁸⁹ See *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("[Since] all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States, . . . ; States cannot . . . prohibit the people from keeping and bearing arms . . .").

⁹⁰ U.S. CONST. amend. II.

⁹¹ See EARL R. KRUSCHKE, *THE RIGHT TO KEEP AND BEAR ARMS, A CONTINUING AMERICAN DILEMMA* 12 (1985) (considering possibility that Second Amendment was intended to protect individual right to bear arms); MALCOLM, *supra* note 76, at 162 ("[The] idiosyncratic definition [advanced by the collectivists] flounders because it cannot be reasonably applied to the First, Fourth, Ninth, and Tenth Amendments, where reference is also made to the right of 'the people.'"); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1522 (1992) (arguing that spheres protected by Bill of Rights "should not be the subject of majoritarian definition"). See also Levinson, *supra* note 76, at 652-54.

⁹² THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW* 298 (1898).

⁹³ 107 S.E. 222, 223 (N.C. 1921), cited in Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L. J. 67, 89 (1991).

⁹⁴ *Id.* at 224, cited in Tahmassebi, *supra* note 93, at 93.

⁹⁵ *Id.* See also Tahmassebi, *supra* note 93, at 90 (discussing disarming of citizens by gov-

organized military units under the control of the State,⁹⁶ and the collectivist assertion that the term "militia" refers purely to military units, therefore, appears to lack foundation. As English History Professor Joyce Malcolm points out:

The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation. . . . This is . . . plain from American colonial practice, the debates over the Constitution, and state proposals for what was to become the Second Amendment. . . . The second and related objective concerned the militia The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation.⁹⁷

It therefore seems that equating "right of the people" with "right of the state" would require considerable stretching of the Constitution's meaning.⁹⁸ While the Second Amendment apparently protects the citizens' right to keep and bear arms, its language indicates that this is a private right protected for the sake of the public good.⁹⁹

IV. THE SUPREME COURT AND THE RIGHT TO BEAR ARMS

The Supreme Court did not have an occasion to render a thorough interpretation of the Second Amendment until the twentieth century.¹⁰⁰ Until then, the federal government did not regulate firearms, the Bill of Rights was not yet applied to the states, and the Court only occasionally made reference to the Second Amendment.¹⁰¹

It was during the Prohibition Era that the Court first took a closer look at the Second Amendment.¹⁰² Certain weapons, such as "tommy

ernments of both Nazi Germany and South Africa); *Letter from the Federal Farmer to the Republican No. XVIII* (Jan. 25, 1788), in *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* 124 (William H. Bennett ed., 1978) (the Federal Farmer believed that the general populace needed to possess arms to avoid the formation of a select body of military men, against which the populace would be defenseless).

⁹⁶ Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to Keep and Bear Arms?*, 37 *VILL. L. REV.* 1407, 1426 (1992).

⁹⁷ MALCOLM, *supra* note 76, at 162-63.

⁹⁸ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 ("[T]he people' protected by the . . . Second Amendment[] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."), *reh'g denied*, 494 U.S. 1092 (1990); Lund, *supra* note 81, at 107.

⁹⁹ See Lund, *supra* note 81, at 111.

¹⁰⁰ See *id.* at 108; Michael J. Quinlan, *Is there a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy"?*, 22 *CAP. U. L. REV.* 641, 677 (1993).

¹⁰¹ Lund, *supra* note 81, at 108.

¹⁰² *Id.* at 109.

guns" and sawed-off shotguns, became associated with "gangsters" during this time, and therefore became the targets of legislative action.¹⁰³ In part to combat the use of these weapons, Congress passed the National Firearms Act of 1934, which prohibited the private possession of specified weapons.¹⁰⁴

After a district court dismissed an indictment under the Act for violating the Second Amendment,¹⁰⁵ the Supreme Court for the first time rendered a detailed interpretation of the Second Amendment in *United States v. Miller*.¹⁰⁶ The defendants in *Miller* were charged under the Act for possessing a sawed-off shotgun. After the Supreme Court reviewed the lower court's decision, the Court decided to reinstate the indictments and pointed out that the weapon involved in this case lacked "[s]ome reasonable relationship to the preservation or efficiency of a well regulated militia"¹⁰⁷ and that "its use could [not] contribute to the common defense."¹⁰⁸ On its face, this holding appears to support the collectivist argument that the Second Amendment creates an exclusive collection of rights for states to maintain organized military forces.¹⁰⁹ The Court's decision in *Miller* is subject to several

¹⁰³ See LEE KENNETT & JAMES L. ANDERSON, *THE GUN IN AMERICA; THE ORIGINS OF A NATIONAL DILEMMA* 202-04 (1975).

¹⁰⁴ 26 U.S.C. § 5801 (1988). The National Firearms Act of 1934 states in pertinent part that:

(a) The term "firearm" means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

Sec. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of \$200 for each firearm

Sec. 5. (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment

Id. § 5845.

¹⁰⁵ *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939) (holding that the demurrer should be sustained because the National Firearms Act of 1934 provision prohibiting delivery of firearms in interstate commerce without a stamp-affixed order was a violation of the constitutional amendment providing the right of the people to keep and bear arms).

¹⁰⁶ 307 U.S. 174 (1939). The Supreme Court, in dicta, twice has cited the holding in *Miller* with approval. See *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *Adams v. Williams*, 407 U.S. 143, 150-51 (1972).

¹⁰⁷ *Miller*, 307 U.S. at 178.

¹⁰⁸ *Id.*

¹⁰⁹ See Jackson, *supra* note 79, at 196 (pointing to Court's reasoning in prohibiting the use of a sawed-off shotgun because the weapon does not contribute to effectiveness of militia as support for collective rights interpretation). See also Wagner, *supra* note 96, at 1412 n.30 ("The Court apparently felt that the purpose of the militia was limited to defense [sic] of the nation against insurrection and foreign invasion.").

criticisms, however, and in the end it arguably lends support to the individual rights argument.¹¹⁰

One of this holding's infirmities is that the defendants disappeared following the dismissal of their indictments and, therefore, did not brief their side of the argument before the Court.¹¹¹ Some commentators contend that this deprived the Court of the opportunity to thoroughly examine both sides of the issue and, therefore, may have influenced the outcome of the case.¹¹² Further, certain commentators interpret the holding in *Miller* to merely stand for the proposition that "it is not within judicial notice that [a sawed-off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense."¹¹³ This proposition is empirically incorrect, however, as it has been demonstrated that sawed-off shotguns were (and are) commonly used military weapons.¹¹⁴

Moreover, the reasoning in *Miller* appears to be incomplete in light of the strange results that would follow adherence to it. The Court in *Miller* seemed to be saying that precisely those weapons considered most superfluous for self-defense purposes (military weaponry) deserve constitutional protection.¹¹⁵ But the Court could not have intended to outlaw all non-military firearms, while allowing private citizens to own weapons designed solely for military application.¹¹⁶ Few weapons, after all, could be more useful in a military context than a bazooka or a portable rocket-launcher, but these surely could not have been the types of weapons the Court intended to sanction for private use.¹¹⁷

¹¹⁰ Lund, *supra* note 81, at 110.

¹¹¹ *Id.* at 109.

¹¹² See *id.* (emphasizing lack of evidence, defendant's failure to brief the other side of the argument, and defendant's disappearance following trial court's decision to dismiss as contributing to defendant's loss); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 73-88 (1989) (arguing that *Miller* was defective because the Court only considered Government's view).

¹¹³ Lund, *supra* note 81, at 109 (quoting *Miller*, 307 U.S. at 178).

¹¹⁴ See *id.* (citing *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) ("[I]n the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon. In view of this, if the rule of the *Miller* case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus."), *cert. denied*, 319 U.S. 770 (1943)).

¹¹⁵ See *id.*

¹¹⁶ See *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.) ("If the logical extension of the defendant's argument for the holding of *Miller* was inconceivable in 1942, it is completely irrational in this time of nuclear weapons."), *cert. denied*, 426 U.S. 948 (1976).

¹¹⁷ *Id.* See also *Cases*, 131 F.2d at 922. The Court in *Cases* noted that

[a]nother objection to the rule of the *Miller* case as a full and general statement is that according to it Congress would be prevented by the Second Amendment from regulating the possession or use by private persons not present or prospective mem-

Lastly, if the Court's holding in *Miller* did protect only the guns of the National Guard or organized state militias, as many advocates of the states' right theory claim, then the Court would have disposed of the appeal on *standing* alone. The Court, in effect, would have held that, since the accused were not protected by the Amendment, they did not have standing to challenge the law. Instead, the Court in *Miller* recognized that the accused, as individuals, *did* have standing to invoke the Amendment, and the Court dealt with the challenge on its merits. Moreover, nothing in the holding on the merits focuses on whether *the accused* were within the Amendment; the holding instead focused on whether *the weapon* was within the Amendment. Noting that the Second Amendment's stated purpose is the militia,¹¹⁸ the Court held that only military-type and militarily useful weapons were within the Amendment. Having set out these general guidelines, the Court found itself unable to apply them to determine whether the specific weapon type involved in *Miller* was within the Amendment.

Even with all its shortcomings, the holding in *Miller* does, in the end, seem to support the proposition that the Second Amendment protects an *individual's* right to keep and bear arms.¹¹⁹

[The historical sources] show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. . . . And further, that ordinarily when called for service these men were expected to appear *bearing arms supplied by themselves* and of the kind in common use at the time.¹²⁰

In 1990, the constitutional argument against laws that restrict gun ownership was strengthened by the Supreme Court's decision in *United States v. Verdugo-Urquidez*.¹²¹ Chief Justice Rehnquist, writing for the majority, observed that the phrase "the people" occurs several times in the Bill of Rights, specifically the Second Amendment's "right of the people to keep and bear Arms," the First Amendment's "right of the people peaceably to assemble," and the Fourth Amendment's "right of the people to be secure in their persons, houses, papers and

bers of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns

Id. See also Jacob Sullum, *Devaluing the 2d Amendment*, CHI. TRIB., May 7, 1991, at 23 (claiming that under the *Miller* test, weapons such as assault rifles and machine guns are clearly covered by the Second Amendment).

¹¹⁸ *Miller*, 307 U.S. at 178.

¹¹⁹ Lund, *supra* note 81, at 110.

¹²⁰ *Miller*, 307 U.S. at 179 (emphasis added), cited in Lund, *supra* note 81, at 110. See also Wagner, *supra* note 96, at 1414 (arguing that the collectivist position is not supported by the *Miller* opinion, which states that civilians themselves, and not the states, would supply arms used by the militia).

¹²¹ 494 U.S. 259, *reh'g denied*, 494 U.S. 1092 (1990).

effects against unreasonable searches and seizures."¹²² In each of these instances, the Court said, the phrase "the people" was used as a "term of art" in select parts of the Constitution that referred to *individual* Americans.¹²³

Miller and *Verdugo* dealt with only federal law, and the Supreme Court has never ruled on any of the roughly twenty-thousand state and local gun laws.¹²⁴ Even though the collective rights theory arguably has neither strong historical support, nor precedential authority, the lower courts for the most part have upheld gun control laws against Second Amendment challenges.¹²⁵

V. THE RIGHT TO BEAR ARMS FOR SELF-PRESERVATION

While the foregoing Second Amendment analysis suggests that the right to keep and bear arms is designed at least in part to offer protection against potential political oppression, few seriously argue that this is the primary reason that the modern civilian wants to own a handgun or rifle. The real reason that people want handguns is undoubtedly for self-defense.¹²⁶ And given that people are committing crimes against other persons with a violence that is unprecedented in modern world history,¹²⁷ this appears understandable.

Each day, approximately 16,000 United States citizens are victims of violent crimes.¹²⁸ In response to this high rate of crime, every forty-eight seconds an American uses a handgun for defense against an attacker.¹²⁹ In fact, studies indicate that seventy-eight percent of Americans declared themselves willing to use a gun for self-defense.¹³⁰ Thus, the fundamental reason many Americans (non-criminals, at least) desire access to firearms seems to be to protect themselves

¹²² *Id.* at 264-65.

¹²³ *See id.* at 265.

¹²⁴ *See* Lund, *supra* note 81, at 110. *See also* GEORGE D. NEWTON, JR. & FRANKLIN E. ZIMRING, *FIREARMS & VIOLENCE IN AMERICAN LIFE* 113, 253-62 (1969); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 226 n.6 (1978).

¹²⁵ *See, e.g.,* *Burton v. Sills*, 240 A.2d 432 (N.J. Super. Ct. App. Div. 1968) (holding that gun control law requiring issuance of identification cards was proper and reasonable exercise of state's police powers).

¹²⁶ The surge in gun sales following the riots in the aftermath of the Rodney King beating case seems to confirm this. *See* Egan, *supra* note 14, at A1. *See also* NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1992, at 244 (1993) (estimating that one-half of the existing stock of handguns are owned *purely* for self-defense purposes).

¹²⁷ FURNISH & SMALL, *supra* note 47, at 7.

¹²⁸ BUREAU OF JUSTICE STATISTICS, *supra* note 126, at 244.

¹²⁹ David B. Kopel, *Hold Your Fire: Gun Control Won't Stop Rising Violence*, *POL'Y REV.*, Winter 1993, at 58, 60.

¹³⁰ Don B. Kates, Jr., *Bigotry, Symbolism and Ideology in the Battle over Gun Control*, 1992 *PUB. INTEREST L. REV.* 31, 44; Kleck, *supra* note 16, at 111.

against criminal violence—violence which the government appears unable to control.¹³¹

Consider that a twelve-year-old child has an eighty-three percent chance of being the victim of a violent crime in his or her lifetime and a fifty-two percent chance of being victimized twice.¹³² How does the criminal justice system respond to such startling figures? In cities such as New York, a person arrested for committing a felony has a mere *one percent* chance of serving time in state prison.¹³³ Thus, it should come as no surprise that police chiefs admit that they are unable to protect the citizens all of the time and that, as a result, they support civilian firearms possession.¹³⁴ Department of Justice Statistics for 1991 show that, for all crimes of violence, the police are able to respond within five minutes only twenty-eight percent of the time.¹³⁵ Thus, it is unreasonable to expect citizens to rely on law enforcement to protect them when they are confronted with a violent offender.

The Second Amendment guarantees the people the right to protect themselves from a criminal threat.¹³⁶ Unfortunately, the Framers did not distinguish between crimes committed by apolitical criminals and those committed by political oppressors (whom they deemed just another variety of criminal).¹³⁷ The most likely explanation for this is that, given the frontier ethos and the rural culture that shaped the society during those times, it did not occur to the Framers that the government would ever question the citizens' right to defend themselves against the various dangers which awaited them.¹³⁸

¹³¹ See JONATHAN SIMON, *POOR DISCIPLINE* 2 (1993) ("Scholars of penalty from the right and the left concur in the conclusion that public fear of crime is a genuine and massive feature of our present political landscape."); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES*, 1992, at 12, 28 (1993) (violent crime up 23% and robberies up 24% since 1988). See also KOPEL, *supra* note 40, at 374 ("The failure or inability of the modern American state to control crime makes it particularly unlikely that Americans could be persuaded by statute to give up their guns.").

¹³² KOPEL, *supra* note 40, at 375.

¹³³ *Id.*

¹³⁴ See *supra* notes 71 to 73 and accompanying text.

¹³⁵ See Snyder, *supra* note 63, at 43.

¹³⁶ Without explicitly referring to the Second Amendment, Justice Holmes, in *Patsone v. Pennsylvania*, 232 U.S. 138, 143 (1914), seemed to accept the notion that the Framers considered the individual right to repel immediate and proximate threats as basic. He summarized that a ban on aliens' possession of long arms was permissible as a hunting control measure, because the ban did not extend to handguns, which he said might be needed "occasionally for self-defense." *Id.* See also Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Wagner, *supra* note 96, at 1449.

¹³⁷ See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 90, 93 (1992).

¹³⁸ *Id.* See also Johnson, *supra* note 74, at 7-10. Whether this frontier ethos is accountable for contemporary America's attraction for guns is questionable, however. Historian W. Eugene Hollon argues that the Western frontier was actually much more peaceful and safe

The European emigrants who settled the United States necessarily had to learn how to use guns not only for hunting, but also for defending against attacks from indigenous Indians, upset by the encroachment upon their land.¹³⁹ After the colonists secured independence from England in 1783, there was rapid expansion westward. Since the pioneers moved faster than the government could provide law and order, the Settlers had to protect themselves.¹⁴⁰ Thus, the Framers may have failed to distinguish between political and personal safety rationales for enacting the Second Amendment because they never envisioned a need for such a distinction.

The above explanation, however, may seem unsatisfactory to many modern students of the issue. Since objective social conditions have changed in most parts of the country since the time of the Framers, it is necessary to analyze how the general purpose for the Second Amendment includes self-defense.¹⁴¹ The Framers and their philosophical contemporaries already recognized the right to personal self-defense in their conception of the "common defense."¹⁴² John Locke wrote that

[e]very one . . . is bound to preserve himself, and not to quit his Station willfully; so by the like reason when his won Preservation comes not in competition ought he, as much as he can, to preserve the rest of Mankind, and 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.¹⁴³

As heirs to an Anglo-Norman legal tradition which required free men to keep arms for the defense of the realm and the suppression of

than contemporary society. See W. EUGENE HOLLON, *FRONTIER VIOLENCE: ANOTHER LOOK* (1974). See also Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 10-12 (Don B. Kates, Jr. ed., 1979); Roger D. McGrath, *Treat Them to a Good Dose of Lead*, *CHRONICLES*, January 1994, at 16.

¹³⁹ See generally ROBERT J. COTTROL, *GUN CONTROL AND THE CONSTITUTION* xv (1994).

¹⁴⁰ KOPEL, *supra* note 40, at 323.

¹⁴¹ Lund, *supra* note 81, at 117-18. For an argument that the Framers' intent must be liberally construed, and that inherent in the right to bear arms to secure a well-regulated militia was the right to self-defense, see Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 100-01 (1983).

¹⁴² See Lund, *supra* note 81, at 118. See also *Wingfield v. Stratford*, 96 Eng. Rep. 787 (K.B. 1752) (upholding right to bear arms for diverse lawful purposes, explicitly including self-defense).

¹⁴³ JOHN LOCKE, *Second Treatise on Government*, in *TWO TREATISES OF GOVERNMENT* 289 (P. Laslett rev. ed., 1960), cited in Lund, *supra* note 81, at 118 n.8. See generally THOMAS HOBES, *LEVIATHAN* 66 (Crawford B. Macpherson ed., 1968) (1651) ("A Law of Nature, (Lex Naturalis) is a Precept or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same . . ."), cited in Lund, *supra* note 81, at 119.

crime,¹⁴⁴ the Founding Fathers were upholding the same philosophical tradition that had passed from Aristotle through Machiavelli to Locke and Harrington—a tradition which deemed the possession of arms as what distinguished a free man from a slave and which viewed the disarming of the people as an essential device of tyranny.¹⁴⁵ Arguing that natural law could be enforced by the armed law-abiding citizen, Cicero stated:

And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; . . . I refer to the law which lays down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. . . . Indeed, even the wisdom of the law itself by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill.¹⁴⁶

At the time of the founding there were no organized police forces or standing armies in the colonies. Therefore, private citizens had to protect themselves and their families.¹⁴⁷ Not only were firearms commonplace, but they were, as was the case throughout much of English history,¹⁴⁸ often required to be kept.¹⁴⁹ A 1639 Newport law, for example, required that "noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall

¹⁴⁴ See HALBROOK, *supra* note 76, at 37-76. See also WALTER BERNIS, IN DEFENSE OF LIBERAL DEMOCRACY 37-59 (1984) (emphasizing Framers' reliance on theories of natural right and self-interest developed by Hobbes, Locke, and Montesquieu); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 562-71 (1986) ("The concept that there is a relationship between individual ownership of weaponry and a unique status as 'free Englishmen' antedates not only the invention of firearms but also the Norman-English legal system. . . .").

¹⁴⁵ *Handgun Prohibition*, *supra* note 47, at 230-35; HALBROOK, *supra* note 76, at 7-35. See also Kates, *supra* note 17, at 129 ("[L]ater thinkers from Grotius, Locke, Montesquieu, Beccaria, and the Founding Fathers on through Bishop, Pollock, Brandeis, Perkins, and beyond have deemed self defense unqualifiedly beneficial to society. It is only the unnecessary or excessive use of force that is harmful or illegal."). See also F.A. HAYEK, THE ROAD TO SERFDOM 17 (1944) (discussing the basic individualism "inherited . . . from Erasmus and Montaigne, from Cicero and Tacitus, Pericles and Thucydides" in the context of the need to respect an individual's "tastes as supreme in his own sphere").

¹⁴⁶ Quoted in Lance K. Stell, *Guns, Politics and Reason*, 3 J. ON FIREARMS & PUB. POL'Y 125, 136 (1990).

¹⁴⁷ See *Handgun Prohibition*, *supra* note 47, at 215 n.46; Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991).

¹⁴⁸ For a discussion of the historical roots of the Second Amendment, see MALCOLM, *supra* note 76, at 4.

¹⁴⁹ See Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 388 (1960). See also *Handgun Prohibition*, *supra* note 47, at 214 (noting that colonial America required every male to keep and maintain his own arms); *United States v. Miller*, 307 U.S. 174, 180-81 (1939) (discussing Massachusetts' organized militia, which in 1784 required every man to be responsible for providing his own firearm).

come to any public Meeting without his weapon," and in 1770 the colony of Georgia deemed it necessary "for the better security of the inhabitants" to require every white male resident "to carry firearms to places of public worship."¹⁵⁰ These examples are not surprising, given that self-defense is at the basis of liberal theory; perhaps more basic than the guarantees of free speech, freedom of religion, trial by jury, and due process of law.¹⁵¹ As Thomas Hobbes wrote:

The right of nature, which writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his won Life; and consequently, of doing any thing, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto . . .¹⁵²

Liberal theorists' differing political interpretations of this right to self-preservation notwithstanding, it seems axiomatic that the government was (and is) instituted primarily to secure individuals from threats to their personal safety and well-being.¹⁵³ Social contract theory is based upon the notion that individuals agree to give up certain natural rights to liberty in return for political rights to better protect their interest in self-preservation and personal prosperity through benefits which only the state can provide.¹⁵⁴ In creating a national government of enumerated powers subject to numerous express limitations, the Constitution outlined the specific exchange of rights and powers.¹⁵⁵ The primary question, therefore, becomes whether the government has been able to sufficiently protect the citizens of the United States from crime, making the possession of firearms for self-defense unnecessary.

Given the nationally skyrocketing crime rates,¹⁵⁶ it seems clear that the government is not able to protect the citizenry from criminals, and, thus, social contract theory indicates that the government cannot justify taking away the citizens' right to defend themselves. This notion echoes Blackstone, who viewed the right to have suitable arms for self-defense "when the sanctions of society and laws are found insufficient to restrain the violence of oppression" among the five "absolute rights of individuals,"¹⁵⁷ and Federalist No. 28,

¹⁵⁰ MALCOLM, *supra* note 76, at 139.

¹⁵¹ See LUND, *supra* note 81, at 118.

¹⁵² HOBBS, *supra* note 143, at 189.

¹⁵³ See generally THOMAS AQUINAS, ON KINGSHIP 9-10 (Ian Eschmann ed., 1949).

¹⁵⁴ See generally RICHARD EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-18 (1985); HOBBS, *supra* note 143, at 228-39; JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT AND END OF CIVIL GOVERNMENT ch. 8 (1690); LOCKE, *supra* note 143, at 367.

¹⁵⁵ See LUND, *supra* note 81, at 119-20.

¹⁵⁶ See FEDERAL BUREAU OF INVESTIGATION, *supra* note 22, at 12.

¹⁵⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 144 (William Ca-

which discussed an "original right to self-defense which is paramount to all positive forms of legal government."¹⁵⁸

Given this historical backdrop, the government would have to justify any interference with an individual's right to self-preservation by showing that the regulation significantly contributes to the individual's safety.¹⁵⁹ The historical and textual support for the right to bear arms indicates that the right to self-preservation deserves at least as much protection as the general rights of privacy and self-expression.¹⁶⁰ In the words of Nelson Lund, "[t]his would be as true as a matter of common sense even if it could not be asserted as a matter of constitutional law."¹⁶¹

Some commentators argue that the benefit to society from bringing handguns under tight control through the use of legislative mechanisms such as the melting-point laws would, in terms of net benefits to public safety, outweigh the cost of losing the ability to rely on a handgun for personal protection.¹⁶² However, empirical evidence suggests that the prospect of facing an armed victim is more of a deterrent to contemporary violent offenders than the impact of facing the justice system.¹⁶³ One reason for this may be that as punishment increases in certainty, severity, and promptness, its deterrent value increases accordingly.¹⁶⁴ For example, the FBI estimated that only forty percent of all crimes are reported, and of every 100 reported, only four criminals are apprehended, convicted, and sent to prison.¹⁶⁵

rey Jones ed., 1916) (contending that the right to have arms for self-defense is based on the "natural right of resistance and self-preservation."). Consider, however, that the Canadian legal authorities reject the very idea of armed self-defense in any form, including the use of Mace, tear-gas canisters, and electric stun-guns. See KOPEL, *supra* note 40, at 148. As the father of Canada's modern gun-control legislation, University of Toronto Professor M. Friedland, puts it, "[a] person who wishes to possess a handgun should have to give a legitimate reason. . . . To protect life or property . . . should not be a valid reason. . . . Citizens should rely on the police, security guards, and alarm systems for protection." *Id.* at 384.

¹⁵⁸ THE FEDERALIST NO. 28, at 127 (Alexander Hamilton) (George Macy Co. ed., 1945).

¹⁵⁹ Lund, *supra* note 81, at 120.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See, e.g., Robert F. Drinan, *Gun Control: The Good Outweighs the Evil*, in THE GREAT GUN CONTROL DEBATE 12-14 (1976). But see Michael I. Krauss, *Americans and their Guns; Canadians and their Government* 1 (1995) (unpublished manuscript, on file with author) ("The individual right to keep and bear arms is, like all natural rights, deontological. It emphatically does not depend for its existence on the maximization of some social utility function. Even if prohibiting private possession of guns would lower the overall crime rate, private possession of guns should not be outlawed.") (emphasis omitted).

¹⁶³ Lund, *supra* note 81, at n.45.

¹⁶⁴ See generally Kleck, *supra* note 16, at 132. See also Becker, *supra* note 51, at 18 ("[G]reater certainty of apprehension and conviction is an effective deterrent to robbery and most other serious crimes.").

¹⁶⁵ FURNISH & SMALL, *supra* note 47, at 15.

Moreover, of every 100 prisoners serving life sentences, twenty-five are released before their third year, forty-two by their seventh year.¹⁶⁶

Based on an extensive review of the empirical evidence, James Wilson and Richard Herrnstein argue that criminals are less able than the general populace to conceptualize the results of their acts beyond the present.¹⁶⁷ Unlike most people involved in academe, who are used to thinking in terms of the future and are willing to make relatively great sacrifices today for rather speculative returns later, criminals are more worried about the present consequences of their actions rather than future consequences.¹⁶⁸ The possibility of being shot and killed for breaking and entering a premises in which a gun-owner resides has greater and more definite costs than a round in the United States justice system,¹⁶⁹ and using melting-point schemes to eliminate a subset of legally owned handguns would likely leave many citizens at the mercy of the relatively small segment of the populace which commits the overwhelming majority of the violent crimes.

The personal safety rationale, thus, seems to provide a reasonable basis for protecting the citizens' access to handguns. Combining the fundamental right to self-preservation with the basic postulate of liberal theory, which states that people surrender their natural rights only to the extent that they are recompensed with more effective political rights,¹⁷⁰ leads to the conclusion that every gun control law must be justified in terms of the law's contribution to the personal security of the citizenry.¹⁷¹

VI. DOES HANDGUN OWNERSHIP HAVE SOCIAL UTILITY?

Although for many commentators the more speculative and academic legal, historical, and philosophical justifications for firearm ownership are of great import, others contend that the focus should really be on the tangible net effect of gun-ownership on society—*i.e.*, its social utility.¹⁷² Northwestern University School of Law Professor

¹⁶⁶ *Id.*

¹⁶⁷ JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 173-209, 389-96 (1985).

¹⁶⁸ *See id.*

¹⁶⁹ *See* FURNISH & SMALL, *supra* note 47, at 57 (finding that only 20 persons were legally executed, all for murders, between mid-1967 and mid-1984, whereas thousands of criminals are killed by gun-wielding private citizens every year. "Compared to the murder rate, the probability of being executed for murder is almost statistically insignificant."); KLECK, *supra* note 16, at 132 ("Being threatened or shot at by a gun-wielding victim is about as probable as arrest and substantially more probable than conviction or incarceration.").

¹⁷⁰ *See generally* LOCKE, *supra* note 143, at 53.

¹⁷¹ Lund, *supra* note 81, at 123.

¹⁷² *See* Polsby, *supra* note 39, at 58-59. *Cf.* Lund, *supra* note 81, at 112 (arguing that the Second Amendment is not an "anachronism").

Daniel Polsby states that

[o]pponents of gun control have traditionally wrapped their arguments in the Second Amendment of the Constitution. . . . But most people are not dedicated antiquarians, and would not be impressed by the argument "I admit that my behavior is very dangerous to public safety, but the Second Amendment says I have a right to do it anyway." That would be a case for repealing the Second Amendment, not respecting it.¹⁷³

In the end, the social utility of handgun ownership in the United States may prove to be the most significant justification for opposing legislation such as the melting-point laws.

Data reveals that criminals have a tendency to avoid occupied premises out of fear that the occupants may have a weapon.¹⁷⁴ This actually shows a great deal of insight by the criminals, considering that they are statistically more likely to be shot, detained, or scared away by an armed citizen than by the police.¹⁷⁵ Since the average criminal has no way of knowing which households are armed and which ones are unarmed, the benefits of the deterrent effect of gun-ownership are shared by the community as a whole.¹⁷⁶ Criminals who try to enter an occupied home are twice as likely to be shot or killed as they are to be caught, convicted, and imprisoned by the U.S. criminal justice system.¹⁷⁷ According to a study conducted by constitutional lawyer and criminologist Don B. Kates, Jr., only two percent of civilian shootings involve an innocent civilian mistakenly identified as a criminal, whereas the police have an "error rate" of almost eleven percent—almost five times as high.¹⁷⁸

In 1980, there were between approximately 8700 and 16,600 non-fatal justifiable or excusable woundings of criminals by armed civilians.¹⁷⁹ Moreover, in 1981 there were an estimated 1266 excusable self-defense or justifiable homicides by civilians using guns against criminals.¹⁸⁰ By comparison, police officers nationwide killed only 388 felons in 1981.¹⁸¹ Indeed, estimates reveal that in America a fire-

¹⁷³ *Id.*

¹⁷⁴ See KLECK, *supra* note 16, at 138-39.

¹⁷⁵ *Id.* at 43-45.

¹⁷⁶ *Id.* at 104. Cf. Kates *supra* note 17, at 155 ("[S]ociety only benefits from deterrence if criminals react by totally eschewing crime, or at least confrontation crime. If the effect when particular individuals or neighborhoods or communities are perceived as well armed is only to displace the same crime elsewhere, the benefit to one set of potential victims comes at the expense of others who are, or are perceived as being, less capable of self-protection.").

¹⁷⁷ Kleck & Bordua, *supra* note 47, at 282-84.

¹⁷⁸ See Snyder, *supra* note 63, at 50.

¹⁷⁹ KLECK, *supra* note 16, at 116 (estimating that these figures are equal to less than 2% of all defensive gun uses).

¹⁸⁰ Kleck, *supra* note 38, at 44.

¹⁸¹ *Id.*

arm is used every 16 seconds in self-defense against a criminal, women use handguns 416 times each day to defend against rapists (which is, incidentally, twelve times more often than rapists use firearms during the commission of their crime), and a gun kept in an American home is 216 times more likely to see use in defense against a criminal than against an innocent victim.¹⁸² These figures have not passed the criminals by unnoticed. In an oft-cited series of interviews with convicted felons in prisons across the United States, fifty-seven percent stated that they were scared off or shot at by a citizen, fifty-seven percent feared an armed citizen more than the police, and thirty-seven percent encountered armed citizens during their "careers."¹⁸³

Fortunately, killing or wounding criminals represents only a small minority of defensive uses of firearms by civilians. Most civilians use their weapons to threaten criminals, or, at worst, to fire warning-shots.¹⁸⁴ In fact, of the estimated 2.5 million instances where gun owners use their weapons for self-defense each year, over ninety-eight percent involve neither killings nor woundings. The owners either fire warning shots or threaten perpetrators by pointing or referring to their guns.¹⁸⁵ Moreover, the rate of accidental shooting of persons mistakenly believed to be intruders, a danger which is often emphasized in the gun control debate, is quite low—1 in 26,000.¹⁸⁶ Although the chances that an intruder will be shot are relatively small, the consequences of a gunshot wound are severe, and the mere possibility will deter many people from attempting confrontation crimes.¹⁸⁷

Testimonials from convicted felons further supports the deterrent effect of gun ownership.¹⁸⁸ Fifty-six percent of those questioned agreed that "a criminal is not going to mess around with a victim he knows is armed with a gun;" seventy-four percent agreed that "one reason why burglars avoid houses when people are at home is that they fear being shot;"¹⁸⁹ and fifty-eight percent agreed that "a store owner who is known to keep a gun on the premises is not going to get robbed very often."¹⁹⁰ Moreover, forty-three percent of the felons in-

¹⁸² Krauss, *supra* note 162, at 2.

¹⁸³ *Id.* at 46.

¹⁸⁴ *Id.* at 44.

¹⁸⁵ See KLECK, *supra* note 16, at 111-17.

¹⁸⁶ FURNISH & SMALL, *supra* note 47, at 50.

¹⁸⁷ Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1915 (1984).

¹⁸⁸ JAMES WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 145-46 (1986).

¹⁸⁹ This fear of being shot is also the reason why burglary is the one category of violent crime where the American rate does not exceed the British rate. A 1982 survey showed that only 13% of U.S. burglars try to enter occupied homes, whereas 59% of British burglars enter homes that are not empty targets. KOPPEL, *supra* note 40, at 92.

¹⁹⁰ *Id.*

interviewed admitted that they had decided not to commit a crime because they knew or believed that the intended civilian victim carried a gun.¹⁹¹

Intriguingly, gun ownership appears to have other positive externalities as well; gun owners are more likely than non-gun owners to aid a person being victimized. Of the "good Samaritans" that come to a victim's aid, one study indicates that eighty-one percent are gun owners.¹⁹² Thus, Thomas Jefferson may have been correct when he gave the following advice to his nephew, Peter Carr:

A strong body makes the mind strong. As to the species of exercise. I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise and independence to the mind. Games played with the ball and others of that nature, are too violent for the body and stamp no character on the mind.¹⁹³

Jeffrey Snyder sees similar value in gun ownership when he argues that:

[o]ne who values his life and takes seriously his responsibilities to his family and community will possess and cultivate the means of fighting back, and will retaliate when threatened with death or grievous bodily injury to himself or a loved one. He will never be content to rely solely on others for his safety . . .¹⁹⁴

The extent to which the knowledge or belief that a civilian carries a gun can affect felons' perception of risk and alter their criminal behavior is illustrated by a highly publicized Orlando Police Department gun training program for women which took place in 1966. Orlando, Florida, as well as the entire United States, was experiencing a rapid increase in rapes, so the Orlando Police Department set up training seminars to familiarize women with the use of a handgun and, thereby, reduce future victimization.¹⁹⁵ Within a year, Orlando experienced an eighty-eight percent drop in the rape rate, whereas the surrounding area and the United States as a whole experienced no such decrease.¹⁹⁶ Moreover, this drop in the rate of rapes was much greater than had occurred in Orlando during any previous year.¹⁹⁷

Other areas, such as Highland Park, Michigan; New Orleans, Louisiana; and Detroit, Michigan instituted similar programs and

¹⁹¹ KLECK, *supra* note 16, at 133.

¹⁹² *Id.*

¹⁹³ *Letter from Thomas Jefferson to Peter Carr in 8 THE PAPERS OF THOMAS JEFFERSON, 1943-1826, at 407 (Julian Boyd ed., 1953).*

¹⁹⁴ Snyder, *supra* note 63, at 44.

¹⁹⁵ KLECK, *supra* note 16, at 134.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

achieved similar results.¹⁹⁸ Kennesaw, Georgia, for example, introduced a city ordinance requiring every household to have a gun, and after seven months, the burglary rate had dropped eighty-nine percent when compared to the previous year.¹⁹⁹

The lesson from these examples is simply that, to the extent that citizens are known to be well-armed, the presence of firearms will deter criminal activity.²⁰⁰

As police officers realize, handguns are useful in deterring criminal conduct and stopping such conduct once it has occurred. But this is not the only advantage of handgun ownership—it also reduces the likelihood of injury to the victim once the confrontation is in progress. Victimization surveys show that for both robbery and assault, the victim was less likely to be injured, and the crime was less likely to be completed, when the victim resisted with a gun as opposed to not resisting at all.²⁰¹ In fact, robbery and assault victims who used firearms for protection were less susceptible to attack or injury than victims who responded in any other manner (with knives, physical force, threats, other weapons, or without any self-protection). Only seventeen percent of those using guns to resist attempted robbery, and twelve percent using guns to resist assault, suffered injury, whereas twenty-five percent of robbery victims and twenty-seven percent of assault victims who did not resist were injured regardless.²⁰²

It, therefore, appears that handgun ownership is beneficial to law-abiding citizens,²⁰³ and melting-point laws will not only fail in their goal of reducing violent crime involving the use of handguns, but they will also make it easier for the criminals to prey on the poor citizens rendered defenseless to the extent that their legal access to a handgun is blocked. Moreover, the fact that, despite the growing, media-fueled anti-gun movement in the United States, there has not been a single state legislature that has banned or severely restricted handgun ownership strongly suggests a general legislative agreement

¹⁹⁸ Tahmassebi, *supra* note 93, at 87.

¹⁹⁹ *Id.* Cf. *Handgun Prohibition*, *supra* note 47, at 155 ("Again, it is debatable exactly why this ordinance had such an effect. . . . However, once again the publicized passage of the ordinance may have served to remind potential burglars in the area of the fact of widespread gun ownership, thereby heightening their perception of the risks of burglary.").

²⁰⁰ Kleck & Bordua, *supra* note 47, at 282-83. This conclusion is also supported by the low rate of crime in Switzerland, where criminals know that their potential victims are likely to be armed (the Swiss society's strong social controls also contribute to their low crime rate). See KOPEL, *supra* note 40, at 286-90.

²⁰¹ KOPEL, *supra* note 40, at 289-91.

²⁰² *Id.*

²⁰³ In many instances, handguns will be safer than other firearms when used for self-defense purposes, because the various potential side effects of firing a rifle or shotgun in an urban environment make their use problematic. See Kates, *supra* note 47, at 245.

that handguns do have social utility.²⁰⁴

VII. GUN CONTROL IN AMERICA: A HISTORY OF DISCRIMINATION AGAINST THE POOR AND MINORITIES

One undeniable aspect of the history of gun control in the United States has been the conception that the poor, especially the non-white poor, cannot be trusted with firearms.²⁰⁵ Keeping arms away from blacks had always been an issue; in fact, the first ever mention of blacks in Virginia's laws was a 1644 provision barring free blacks from owning firearms.²⁰⁶ Similar to the English attitudes towards gun ownership by Catholics, who were considered to be potential subversives, black slaves and Native Americans were the suspect populations of the New World.²⁰⁷

Considering that the effect of melting-point laws is the removal of the least expensive guns from the market, and that the discussion thus far has pointed to the apparent ineffectiveness of current crime control measures, one could persuasively argue that the legislatures have a desire to keep guns out of the hands of the poor and minorities. Acceptance of the preceding arguments that melting-point laws (1) do not reduce crime, (2) actually *decrease* the likelihood of criminals being caught on the basis of their use of a handgun which passes the melting-point requirements, and (3) prevent citizens from deterring criminal activity and protecting themselves from criminals leaves few alternative explanations for the legislators' motivations. A National Institute of Justice Study found that:

The people most likely to be deterred from acquiring a handgun by exceptionally high prices or by the nonavailability of certain kinds of handguns are not felons intent on arming themselves for criminal purposes (who can, if all else fails, steal the handgun they want), but rather poor people who have decided they need a gun to protect themselves against the felons but who find that the cheapest gun in the market costs more than they can afford to pay.²⁰⁸

²⁰⁴ See *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 202 (E.D. La. 1983) ("[T]he social utility of an activity that . . . enables some people to defend themselves cannot be denied.").

²⁰⁵ See Tahmassebi, *supra* note 93, at 67.

²⁰⁶ See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 78 (1968). See also Comment, *Carrying Concealed Weapons*, 15 VA. L. REG. 391-92 (1909) ("It is a matter of common knowledge that in this state and several others, the more especially in the Southern states, where the negro population is so large, that this cowardly practice of 'toting' guns has been one of the most fruitful sources of crime. . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.").

²⁰⁷ See MALCOLM, *supra* note 76, at 140.

²⁰⁸ WRIGHT AND ROSSI, *supra* note 188, at 238.

As David Kopel points out, "[t]he point of banning 'cheap' guns is that people who can only afford cheap guns should not have guns. The prohibitively high price that some firearms licenses carry (\$500 in Miami until recently) suggests a contemporary intent to keep guns away from lower socioeconomic groups."²⁰⁹

Melting-point laws take less expensive guns off the market, and while there is no shortage of expensive guns, poorer citizens may not be able to afford them and must make due with what they can afford. A closer look at the historical relationship between gun control and the poor in America reveals that a charge of discrimination on the part of the legislators who enacted the melting-point laws might not be too far-fetched.

An undisguised admission of the discriminatory motive underlying attempts to make handguns more expensive appears in an article on Saturday Night Specials written by gun control advocate Philip Cook:

Individuals who would not ordinarily be able to afford an expensive gun commit a disproportionate share of violent crimes. Setting a high minimum price for handguns would be an effective means of reducing availability to precisely those groups that account for the bulk of the violent crime problem. . . . The major normative argument against a high tax is that it is *overt economic discrimination and thus unethical, or at least politically unpalatable*. . . . A high tax is not the only method of *increasing the minimum price for handguns and subtle approaches may be more acceptable politically*. One method would establish minimum standards stipulating the quality of metal and safety features of a gun. The effect of this approach would be the same as the minimum tax: to eliminate the cheapest of the domestically manufactured handguns. Unlike minimum tax, however, quality and safety standards could be justified on grounds other than economic discrimination. . . . If sufficiently high standards on safety and metal quality were adopted, the cost to manufacturers of meeting these standards would ensure a high minimum price.²¹⁰

Early firearm laws were often enacted for the sole purpose of preventing immigrants, blacks, and other ethnic minorities from obtaining a gun.²¹¹ Even today, police departments have a wide range of latitude in granting gun permits, yet they rarely issue them to the poor or to minority citizens.²¹²

The poor are often prevented from possessing a firearm even

²⁰⁹ KOPEL, *supra* note 40, at 344.

²¹⁰ See Cook, *supra* note 1, at 1740 (emphasis added) (citations omitted).

²¹¹ Tahmassebi, *supra* note 93, at 67. See also Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. WASH. L. REV. 1, 21-24 (1981); Raymond G. Kessler, *Gun Control and Political Power*, 5 LAW & POL'Y Q. 381 (1983).

²¹² See Tahmassebi, *supra* note 93, at 67.

though the poor are disproportionately victims of crime.²¹³ Compounding this situation is the fact that the poorer areas of cities (where most of the crime occurs) rarely get the same police protection that the more affluent areas get (where the least crime occurs).²¹⁴ As Gary Kleck puts it:

Gun ownership costs more money than simple measures such as locking doors, having neighbors watch one's house, or avoidance behaviors such as not going out at night, but it costs less than buying and maintaining a dog, paying a security guard, or buying a burglar alarm system. Consequently, it is a self-protection measure available to many low-income people who *cannot afford more expensive alternatives*.²¹⁵

Therefore, any gun control measure which takes cheaper guns off the market and prevents the poor from obtaining a handgun for self-defense is arguably doubly unfair. In *Delahanty v. Hinckley*, a federal district court in Washington, D.C. found that Saturday Night Special laws selectively disarm minorities.²¹⁶ The court stated that:

The fact is, of course, that while blighted areas may be some of the breeding places of crime, not all residents of [sic] are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or employment, it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense.²¹⁷

Although bans on particular types of firearms have been enacted under the guise of controlling crime throughout American history, the actual effect they have often had was to disarm poor people and minorities.²¹⁸ In 1640, Virginia set up the first recorded restrictive legislation which prevented blacks from owning a firearm, and the Virginia law was said to set blacks apart from all other groups by deny-

²¹³ *Id.* at 68. See also CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 119-20 (1984).

²¹⁴ See Tahmassebi, *supra* note 93, at 68.

²¹⁵ KLECK, *supra* note 16, at 104 (emphasis added).

²¹⁶ *Delahanty v. Hinckley*, 686 F. Supp. 920 (D.D.C. 1986).

²¹⁷ *Id.* at 928.

²¹⁸ See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-American Reconsideration*, 80 GEO. L.J. 309, 354-55 (1991). The notion of restricting gun ownership to the rich is nothing new, however. The English Game Act of 1609, for example, required a would-be hunter to have income from land of at least £40 a year, or a life estate of £80, or personal property worth at least £400. See MALCOLM, *supra* note 76, at 71-75 ("The use of an act for the preservation of game was a customary means to curb lower-class violence.").

ing them the important right and obligation of carrying a gun.²¹⁹ Legislators in the southern states not only restricted the rights of slaves, but also the rights of free blacks to bear arms. The intention was to restrict the availability of arms to both free blacks and slaves to the extent that the restrictions were consistent with the regional ideas of safety.²²⁰

Reflecting this attitude, Chief Justice Taney, writing for the majority in the 1856 *Dred Scott* decision, stated that if blacks were

entitled to the privileges and immunities of citizens, . . . [i]t would give persons of the negro race, who were recognized as citizens in any one state of the union, the right . . . to keep and bear arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. . . .²²¹

Tennessee was the first state to utilize creative melting-point style draftsmanship to prevent gun ownership by blacks in the 1870s. Tennessee barred the sale of all handguns except the "Army and Navy" guns which were already owned by ex-confederate soldiers.²²² Since the poor freedmen could not afford these expensive firearms, the "Army and Navy Law" is considered the predecessor of today's melting-point laws.²²³

After the Civil War, southerners were fearful of race war and retribution, and the mere sight of a black person with a gun was terrifying to southern whites.²²⁴ As a result, several southern legislatures adopted comprehensive regulations which were known as the "Black Codes."²²⁵ These codes denied the newly freed men many of the

²¹⁹ JORDAN, *supra* note 206, at 78, cited in Tahmassebi, *supra* note 93, at 69-70.

²²⁰ See, e.g., An Act Concerning Slaves, § 6, 1840 Laws of Tex. 171, 172, ch. 58 of the Texas Acts of 1850 (prohibiting slaves from using firearms altogether from 1842-1850); Act of Mar. 15, 1852, ch. 206, 1852 Laws of Miss. 328 (forbade ownership of firearms to both free blacks and slaves after 1852); Kentucky Acts of 1818, ch. 448 (providing that, should free blacks or slaves "willfully or maliciously" shoot a white person, or otherwise wound a free white person while attempting to kill another person, the slave or free black should suffer the death penalty).

²²¹ *Dred Scott v. Sandford*, 60 U.S. 393, 416-17 (1856).

²²² See KOPEL, *supra* note 40, at 336. See also KATES, *supra* note 138, at 14 ("Klansmen were not inconvenienced [by the legislation], having long since acquired their guns . . ., nor were the company goons, professional strike-breakers, etc., whose weapons were supplied by their corporate employers. By 1881 white supremacists were in power in the neighboring state of Arkansas and had enacted a virtually identical 'Saturday Night Special' law with virtually identical effect.").

²²³ Kates, *supra* note 138, at 14 ("The 'Army and Navy Law' is the ancestor of today's 'Saturday Night Special' laws.").

²²⁴ See KOPEL, *supra* note 40, at 333.

²²⁵ See generally CONG. GLOBE, 39th Cong., 1st Sess. 588-891 (statement by Sen. Donnelly giving examples of enacted codes).

rights that whites enjoyed. In 1867, the Special Report of the Anti-Slavery Conference noted that under the Black Codes, blacks were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults."²²⁶ As an illustration of such legislation, the Mississippi Black Code contained the following provision:

Be it enacted . . . [t]hat no freedman, free negro or mulatto, not in the military . . . and not licensed to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, . . . and all such arms or ammunition shall be forfeited to the former . . .²²⁷

In *United States v. Cruikshank*,²²⁸ a case which is often cited as authoritative by Handgun Control, Incorporated and many other gun-control organizations,²²⁹ the United States Supreme Court upheld the Ku Klux Klan's repressive actions against blacks who wanted to own guns, thus allowing the Klan and other racist groups to forcibly disarm the freedmen and impose white supremacy.²³⁰ "Firearms in the Reconstruction South provided a means of political power for many. They were the symbols of the new freedom for blacks In the end, white southerners triumphed and the blacks were effectually disarmed."²³¹ The legislators' intent to disarm blacks also appears in the voiding of a 1941 conviction of a white man, where Florida Supreme Court Justice Buford, in his concurring opinion, stated that "[t]he Act was passed for the purpose of disarming the negro laborers [It] was never intended to be applied to the white population and in practice has never been so applied."²³²

But blacks were not the only ones whom legislators wanted to disarm; in the nineteenth century, southern states also placed restrictions on gun-ownership for certain "undesirable" whites.²³³ For

²²⁶ Reprinted in HAROLD HYMAN, *THE RADICAL REPUBLICANS AND RECONSTRUCTION* 219 (1967), cited in Tahmassebi, *supra* note 93, at 71. For compelling anecdotal evidence showing the necessity for blacks to defend themselves through the use of firearms during the civil rights era, see Don B. Kates, Jr., *The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect*, in *RESTRICTING HANDGUNS* (1979); John R. Slater, Jr., *Civil Rights and Self-Defense, AGAINST THE CURRENT*, July/August 1988, at 23.

²²⁷ 1866 Miss. Laws ch. 23, § 1, at 165 (1865), cited in Tahmassebi, *supra* note 93, at 71.

²²⁸ 92 U.S. 542 (1875) (holding that the right to assemble and the right to bear arms were natural rights predating the Constitution, and that the Constitution merely gave validity to these rights. "[B]earing arms for a lawful purpose . . . is not a right granted by the Constitution."). Many feel that this decision essentially ruined the Fourteenth Amendment as a check on state abuses of human rights until its resurrection in the 1920s. See, e.g., KOPEL, *supra* note 40, at 335.

²²⁹ Tahmassebi, *supra* note 93, at 75.

²³⁰ See KOPEL, *supra* note 40, at 335.

²³¹ LAURENCE KENNET & JAMES L. ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 50 (1975), cited in Tahmassebi, *supra* note 93, at 69.

²³² *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941), cited in Tahmassebi, *supra* note 93, at 69.

²³³ See KATES, *supra* note 138, at 14; Tahmassebi, *supra* note 93, at 77.

example, the 1911 Sullivan Law²³⁴ was passed to keep guns out of the hands of immigrants (chiefly Italians—"[i]n the first three years of the Sullivan Law, [roughly] 70 percent of those arrested had Italian surnames"²³⁵). Two New York newspapers reveal the mind-set which gave rise to the Sullivan Law: the *New York Tribune* grumbled about pistols found "'chiefly in the pockets of ignorant and quarrelsome immigrants of law-breaking propensities,'"²³⁶ and the *New York Times* pointed out the "affinity of 'low-browed foreigners' for handguns."²³⁷

Tennessee Senator John K. Shields introduced a bill in the United States Congress to prohibit the shipment of pistols through the mails and by common carrier in interstate commerce.²³⁸ The report supporting the bill that Senator Shields inserted into the Congressional Record asked: "Can not we, the dominant race, upon whom depends the enforcement of the law, so enforce the law that we will prevent the colored people from preying upon each other?"²³⁹ In addition to blacks and foreigners, the legislators in the southern states also targeted agrarian agitators and labor organizers at the end of the nineteenth century (particularly in Alabama, in 1893, and Texas, in 1907).²⁴⁰ Furthermore, heavy transaction and business taxes were imposed "on handgun sales in order to resurrect the economic barriers to [gun] ownership."²⁴¹

Similarly, today's melting-point laws arguably reflect the old American prejudice that lower classes and minorities cannot be trusted with weapons. While the legislative bias which originated in the South may have changed in form, it apparently still exists.²⁴² But pro-gun groups are not the only ones to acknowledge this unfortunate reality. Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control blacks,"²⁴³ and Barry Bruce-Briggs stated in no

²³⁴ N.Y. PENAL LAW § 1897 (Consol. 1909) (amended 1911).

²³⁵ KOPEL, *supra* note 40, at 343. See also Kates, *supra* note 138, at 15 ("Across the land, legislators in conservative states were importuned by business lobbyists bearing glowing endorsements of the Sullivan Law concept from such (then) arch-conservative institutions as the *New York Times* and the American Bar Association.").

²³⁶ KOPEL, *supra* note 40, at 342-43 (quoting *New York Tribune*, Nov. 19, 1903, at 6).

²³⁷ *Id.* at 343.

²³⁸ 65 CONG. REC. S3945 (daily ed. Mar. 11, 1924).

²³⁹ *Id.* § 3946.

²⁴⁰ See Tahmassebi, *supra* note 93, at 76.

²⁴¹ Kates, *supra* note 138, at 15. "Moreover, in ensuing years those who ruled the South found that there were challengers other than the blacks against whom the forces of social control might have to be exerted. Agrarian agitators arose to inform poor whites that they were trading their political and economic group identity for a fraudulent racial solidarity with a false imperative of preserving white supremacy." *Id.* at 13.

²⁴² Tahmassebi, *supra* note 93, at 80.

²⁴³ ROBERT SHERRILL, *THE SATURDAY NIGHT SPECIAL* 280 (1973), cited in Tahmassebi,

uncertain terms that "[i]t is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and is being sold to a particular class of people."²⁴⁴ The names given to Saturday Night Specials and provisions aimed at limiting their availability provide ample evidence—the name of this gun type derived from the racist phrase "nigger-town Saturday night,"²⁴⁵ and the reference is to "ghetto control" rather than gun control.²⁴⁶

As noted, poor blacks are disproportionately the victims of crime,²⁴⁷ and in 1992, black males between the ages of twenty and twenty-four were four times more likely to be victimized in a handgun crime than white males in the same age group.²⁴⁸ As Stefan Tahmassebi points out:

[Although blacks are disproportionately victimized], these citizens are often not afforded the same police protections that other more affluent and less crime ridden neighborhoods or communities enjoy. This lack of protection is especially so in the inner city urban ghettos. Firearms prohibitions discriminate against those poor and minority citizens who must rely on such arms to defend themselves from criminal activity to a much greater degree than affluent citizens living in safer and better protected communities.²⁴⁹

Victims must be able to defend themselves and their families against criminals as soon as crime strikes, and the ability to defend oneself, family, and property is more critical in the poor and minority neighborhoods, which are ravaged by crime and do not have adequate police protection.²⁵⁰ Since the courts have consistently ruled that the police have no duty to protect the individual citizen,²⁵¹ and that there

supra note 93, at 80.

²⁴⁴ Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 50 (1976).

²⁴⁵ *Id.*

²⁴⁶ See KLECK, *supra* note 16, at 89.

²⁴⁷ See MURRAY, *supra* note 213, at 120.

²⁴⁸ See U.S. DEP'T OF JUSTICE, *supra* note 2, at 1.

²⁴⁹ Tahmassebi, *supra* note 93, at 68.

²⁵⁰ Don B. Kates, Jr., *Handgun Control: Prohibition Revisited*, INQUIRY, Dec. 5, 1977, at 21. See also KLECK, *supra* note 16, at 86-87 ("Effective [Saturday Night Special] measures would disproportionately affect the law-abiding poor, since it is they who are most likely to own [Saturday Night Specials] and obey the laws, and who are least likely to have the money to buy better quality, and therefore higher-priced, weapons. . . . Whereas it might not be easy for the law-abiding poor to buy a more expensive gun, few career criminals willing to assault and rob would lack the additional \$50-100 it would take to purchase a gun not falling into the [Saturday Night Special] category."). The reality that criminals do not utilize the less expensive variety of handguns is underscored by the dramatic increase in the use of high quality (and high capacity) handguns during criminal episodes. Chenow, *supra* note 26.

²⁵¹ See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) ("[T]he Due Process Clause generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests . . ."); *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) ("[The] government and

is "no constitutional right to be protected by the state against being murdered by criminals or madmen,"²⁵² citizens, regrettably, are in the position of having to defend themselves. While the deterrent effect of the police surely wards off many would-be criminals (particularly in areas where the police patrol more frequently—*i.e.*, more affluent areas), the many citizens who need *personal* protection must face the reality that the police do not and cannot function as bodyguards for ordinary people.²⁵³ Therefore, individuals must remain responsible for their own personal protection, with the police providing only an auxiliary general deterrent.

Far from being an implement of destruction, a handgun can inspire a feeling of security and safety in a person living in this crime-ridden society.²⁵⁴ And inexpensive handguns provide affordable protection to lower income individuals who are the most frequent victims of crime.²⁵⁵ People who accept the preceding analysis with regard to the deterrent value of handguns and the lack of justification for melting-point laws must face the troubling prospect that melting-point laws purposefully reduce poor citizens' access to handguns, significantly impairing their ability to survive in the harsh environments in which they must subsist.

VIII. DO MELTING-POINT LAWS VIOLATE THE EQUAL PROTECTION CLAUSE?

As discussed in Section VII, it is reasonable to suspect that covert discriminatory purposes underlie the passage of the melting-point laws and similar gun-control legislation.²⁵⁶ While it is unrealistic to expect the Supreme Court, given its present composition, to rule that melting-point laws are constitutionally impermissible in the near future, it is possible to argue that the case of *Village of Arlington Heights v.*

its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen."'). See also *Everton v. Willard*, 468 So. 2d 936 (Fla. 1985); *South v. Maryland*, 59 U.S. 396 (1855).

²⁵² *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

²⁵³ *Kates*, *supra* note 17, at 124 ("If the circumstances permit, the police will protect a citizen in distress. But they are not legally duty bound to do even that, nor to provide any direct protection A fortiori the police have no responsibility to, and generally do not, provide personal protection to private citizens who have been threatened.").

²⁵⁴ See Note, *supra* note 187, at 1915 ("[H]andguns provide their owners with a psychic security that cannot be easily measured.").

²⁵⁵ See KLECK, *supra* note 16, at 86.

²⁵⁶ Senator Daniel P. Moynihan's proposed tax on gun sales and on the purchase of ammunition is one example. See Becker, *supra* note 51, at 18 (arguing that such a tax would increase the number of guns in the hands of criminals and raise the incidence of crime).

*Metropolitan Housing Development Corp.*²⁵⁷ provides a possible framework for invalidating the legislation on the basis of racial discrimination in violation of the Fourteenth Amendment.

Arlington Heights concerned the refusal by a local zoning board to change the classification of a tract of land from single-family to multi-family. While the Seventh Circuit Court of Appeals held that the "ultimate effect" of the rezoning denial, in light of its "historical context,"²⁵⁸ was racially discriminatory and, therefore, a violation of equal protection,²⁵⁹ Justice Powell, writing for the majority, overturned this verdict. The Court held that "[o]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.'"²⁶⁰ A racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decision-makers must be shown.²⁶¹ While proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause, the plaintiff is not required to "prove that the challenged action rested *solely* on racially discriminatory purposes."²⁶² The Court held that "[w]hen there is a proof that a discriminatory purpose has been a *motivating factor* in the decision, this judicial deference is no longer justified."²⁶³

To determine whether "invidious" discriminatory purpose was a motivating factor, the court must engage in a "sensitive inquiry" into such circumstantial and direct evidence of intent as may be available, and the Court has held that the "impact of the official action[—]whether it 'bears more heavily on one race than another'[—]may provide an important starting point."²⁶⁴ The Court stated that the "historical background of the decision is one evidentiary source."²⁶⁵ Given the history of racist gun control legislation in the United States,²⁶⁶ a case can be made that the historical background of legisla-

²⁵⁷ 429 U.S. 252 (1977).

²⁵⁸ *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409, 413 (7th Cir. 1975).

²⁵⁹ *Id.*

²⁶⁰ *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (citation omitted).

²⁶¹ *Id.* at 253. See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973) (holding that mere disproportionate impact on the poor is legal).

²⁶² *Arlington Heights*, 429 U.S. at 265 (emphasis added).

²⁶³ *Id.* at 265-66 (emphasis added).

²⁶⁴ *Id.* at 266.

²⁶⁵ *Id.* at 267.

²⁶⁶ See *supra* notes 204 to 284 and accompanying text.

tion such as the melting-point laws, the apparent lack of rational justification for the laws, and the laws' ultimate effect of making handguns less accessible to the poor lends some potency to the argument that the passage of the melting-point laws was motivated at least in part by the legislators' improper discriminatory considerations.

Of course, proof that an official decision was racially motivated does not necessarily invalidate a statute, but instead shifts the burden to the defendant to show that the "same decision would have resulted even had the impermissible purpose not been considered."²⁶⁷ While it may be possible to argue that, given the apparent lack of justification for melting-point laws, the legislators would not have enacted melting-point laws in the absence of a discriminatory motive, this argument is unlikely to succeed as a practical matter, given the difficulty of proving discriminatory intent, particularly through direct evidence, on the part of the politically astute legislators.²⁶⁸

In the absence of an avowed racial motive, disproportionate impact does not trigger strict scrutiny (thus, the melting point law is tested only under the *rational relationship* test, under which it likely will stand).²⁶⁹ However, if the activity at issue implicates a fundamental right,²⁷⁰ courts will apply a strict scrutiny test, requiring a showing that a *compelling* need for the different treatment exists and that the means chosen are *necessary*.²⁷¹ If strict scrutiny applies, the law cannot be substantially overinclusive or underinclusive or both.²⁷² To find strict scrutiny applicable in the absence of a clearly racial motive or effect, however, the classification must touch on a substantive constitutional right.²⁷³ Considering that the Second Amendment guarantees individuals the right to own arms, courts should apply strict scrutiny. And in light of the language in *Arlington* and the previous discussion of the apparent counter-productiveness of melting-point laws, the legislation appears unconstitutional.²⁷⁴

²⁶⁷ *Arlington Heights*, 429 U.S. at 271.

²⁶⁸ See, e.g., Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 939 (1993) (arguing that legislators will rarely include racist reasoning in the public record and that plaintiff is unlikely to have access to other evidentiary sources).

²⁶⁹ See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.3, at 576 (4th ed. 1991).

²⁷⁰ See generally *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

²⁷¹ NOWAK & ROTUNDA, *supra* note 269, at 575-76 (describing the strict scrutiny test).

²⁷² See Troy R. Holroyd, Comment, *Homosexuals and the Military: Integration or Discrimination?*, 8 J. CONTEMP. HEALTH L. & POL'Y 429, 441-42 (1992).

²⁷³ See *Shapiro*, 394 U.S. at 638; *Skinner*, 316 U.S. at 541. See also Holroyd, *supra* note 272, at 441-42.

²⁷⁴ This raises a question similar to whether the First Amendment could void a building

X. CONCLUSION

The justifications for melting-point laws appear to lack merit: they do not prevent ballistics and forensics experts from tracing a particular gun to a particular shooter; they do not contribute to crime reduction; they are arbitrary; and they may be motivated by discriminatory intentions. Melting-point laws, therefore, should be abandoned and legislative action should instead be aimed at reducing gun possession among persons with prior records of violence. While melting-point legislation prevents many of the nation's poorer citizens from legally protecting themselves from their dangerous environment, no convincing factual, public policy, or legal arguments justify this outcome. Although handgun violence undeniably is a serious problem in American society, preventing those who have a legal right to protect themselves with a handgun from doing so on the basis of socioeconomic considerations simply cannot be the solution. Blaming the instrument for its misuse by a minority of criminals itself seems perverse. As criminologist Gary Kleck pointed out:

Fixating on guns seems to be, for many people, a fetish which allows [gun-control advocates] to ignore the more intransigent causes of American violence, including its dying cities, inequality, deteriorating family structure, and the all-pervasive economic and social consequences of a history of slavery and racism All parties to the crime debate would do well to give more concentrated attention to more difficult, but far more relevant, issues like how to generate more good-paying jobs for the underclass, an issue which is at the heart of the violence problem.²⁷⁵

Legislators should consider methods such as mandatory penalties for the misuse of guns in violent crimes and for the possession of stolen guns.²⁷⁶ After adopting mandatory penalties for the use of a firearm in the commission of a violent crime in 1975, the murder rate in Virginia dropped thirty-six percent and the robbery rate dropped twenty-four percent in twelve years.²⁷⁷ South Carolina recorded a

code which applies to all buildings, including churches and newspapers, and which results in higher costs which may mean that poor people cannot afford to build a church or operate a newspaper. Analogy raised in letter from Don B. Kates, Jr. (Oct. 9, 1994) (on file with author).

²⁷⁵ Gary Kleck, *Guns and Violence: A Summary of the Field*, Paper Presented at the American Political Science Association 18 (Aug. 29, 1991), cited in KOPEL, *supra* note 40, at 391.

²⁷⁶ See Robert A. O'Hare, Jr. & Jorge Pedreira, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHNS L. REV. 179, 204-05 (1992) (arguing that as long as "dealers can penetrate U.S. borders and reap millions of dollars in illegal profits," they will be able to arm themselves accordingly—therefore, it is not the criminal, but the law-abiding citizen who will be affected most by gun control). It follows that those who misuse firearms should be severely penalized and those who merely possess them should not. Becker, *supra* note 51, at 18 ("[A] state mandatory term sends a clear signal about the risk of using guns to perpetrate crimes.").

²⁷⁷ NRA INST. FOR LEGISLATIVE ACTION, TEN MYTHS ABOUT GUN CONTROL 21 (1989).

thirty-seven percent murder rate decline between 1975 and 1987 with a similar law.²⁷⁸ Other notable declines in states using mandatory penalties occurred in Arkansas (homicide rate down thirty-two percent in thirteen years), Delaware (homicide rate down twenty-six percent in fifteen years), and Montana (homicide rate down eighteen percent in eleven years).²⁷⁹

Mandatory gun-training seminars are also effective.²⁸⁰ Describing the differences between rural and urban gun owners, criminologist Gary Kleck stated:

Most gun ownership is culturally patterned, linked with a rural hunting sub-culture. The culture is transmitted across generations, with gun owners being socialized by their parents into gun ownership and use from childhood. Defensive handgun owners, on the other hand, are more likely to be disconnected from any gun subcultural roots, and their gun ownership is usually not accompanied by association with other gun owners by the training in the safe handling of guns.²⁸¹

Mandatory gun-safety training, therefore, may go far in preventing firearm accidents by training those who have no background in hunting or shooting how to use a firearm properly.

Legislators should also seriously consider proposals calling for the appointment of at least one Assistant U.S. Attorney per District who is charged with prosecuting felon-in-possession cases which involve violent offenses under 18 U.S.C. § 924.²⁸² Moreover, the reform and streamlining of probation revocation in such a way that those persons eligible for probation who commit violent armed felonies will have their probation revoked immediately, the creation of prison facilities that are designed solely for the purpose of ensuring that violent repeat offenders actually serve their full sentences,²⁸³ and the establishment of a task force which can informally pressure the entertainment industry to put an end to the incessant and reckless portrayal of

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ See *Peril or Protection?*, *supra* note 47, at 290. ("[C]itizens willing to invest some time can be schooled in defensive firearms use to at least the same level of competence as the average police officer.")

²⁸¹ See KLECK, *supra* note 16, at 47. See also FURNISH & SMALL, *supra* note 47, at 51 ("[F]irearms need not be a source of accidents if the householder and other occupants of the home are adequately trained in their proper use and care, and especially in the manner in which they are kept inaccessible to others besides the owner . . .").

²⁸² ERIC C. MORGAN & DAVID B. KOPEL, THE 'ASSAULT WEAPON' PANIC 67 (1993) (Independence Institute issue paper) ("More consistent enforcement of existing statutes would directly target criminal misuse of all firearms. State and localities could also assign prosecutors to felons perpetrating violent crimes with firearms.")

²⁸³ *Id.* ("This reform would have prevented a career criminal named Eugene Thompson from perpetrating a murder spree in the suburbs south of Denver in March 1989.")

criminal misuse of firearms²⁸⁴ are all policy proposals that present realistic alternatives to the troubling movement towards handgun prohibition.²⁸⁵

Both the Constitution and the history of the United States grant citizens the right to own a handgun. All of the states and several territories of the United States, as well as the federal government itself, recognize the sale of firearms as a lawful activity,²⁸⁶ and both practical experience and empirical evidence appear to indicate that the right to own a handgun benefits society as a whole.

Some legislators, apparently due to either misinformation or personal biases (both racial and socioeconomic), have enacted melting-point laws that remove many of the lower-cost guns from the market as a method of crime prevention. Melting-point laws, however, merely bar those of lesser economic means from having a way to protect themselves against the criminals that prey on them, and such an outcome is neither fair, nor is it criminologically sound.

²⁸⁴ *Id.* ("While a direct link between [the glamorizing of 'assault weapon' misuse in prime-time television shows such as *Riptide*, *21 Jump Street*, and *Miami Vice*] and criminal violence may be difficult to establish, at least one study has linked television and movie depictions of 'assault weapons' to increased sales of those weapons.").

²⁸⁵ *Id.*

²⁸⁶ See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, U.S. DEP'T OF THE TREASURY, STATE LAWS AND PUBLISHED ORDINANCES—FIREARMS (1989); Gun Control Act of 1968, 18 U.S.C. §§ 921-28 (1988). The Act allows persons to engage in firearm trade upon compliance with applicable licensing procedures. *Id.* § 923. Additionally, the Act delineates exemptions from the prohibition of firearm ownership or control. *Id.* § 925.